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PUCT PROJECT NO. 54999

TEXAS ENERGY FUND	**§**	**PUBLIC UTILITY COMMISSION**
	§	**OF TEXAS**

NRG ENERGY, INC.'S COMMENTS IN RESPONSE TO THE STAFF'S QUESTIONS FOR THE SEPTEMBER 21, 2023, TEXAS ENERGY FUND WORKSHOP

NRG Energy, Inc. (NRG) appreciates the opportunity to provide comments in response to the Staff's questions below to help guide productive feedback and ensure the successful implementation of the Texas Energy Fund (TEF) created by Senate Bill 2627 in the 88th Texas Legislature.[1] NRG's recommendations relate primarily to TEF loans and completion bonus grants for new dispatchable capacity in the Electric Reliability Council of Texas, Inc. (ERCOT) region,[2] with additional brief comments regarding the "Texas Power Promise: Backup Power." NRG has attached, as Attachment A, a proposed rule relating to TEF loans and completion bonus grants for ERCOT facilities.[3]

As an initial matter, the financing, siting, permitting, and construction of new or expanded thermal generation resources is a complex endeavor with many moving and interrelated parts. Over the past 25 years, project finance for developing new generation resources in restructured, competitive wholesale power markets has evolved into an established industry, which the Commission should leverage when designing and implementing the TEF loan program. As a first step to ensure the timely and efficient roll out of the program, NRG strongly recommends the Commission consider engaging an experienced consultant or advisor with extensive knowledge of power generation development and project finance to act as the program administrator and a qualified professional engineer (or firm) to aid in the review of loan and grant applications (or alternatively, designating internal Commission staff to perform these roles if the Commission has

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[1] Project No. 54999, Staff Memo regarding September 21, 2023 Texas Energy Fund Public Workshop Agenda (Sept. 19, 2023), and Staff Memo regarding Texas Energy Fund Workshop Comments (Oct. 5, 2023).

[2] Public Utility Regulatory Act (PURA), Tex. Util. Code §§ 34.0104, 34.0105.

[3] Implementation of a rule on the TEF loan and grant programs will, of course, be contingent on the voters approving the accompanying proposed constitutional amendment to create the TEF, which will be submitted to voters at the election to be held on November 7, 2023. However, given the necessary expedited timelines to implement the TEF programs, as described in further detail above, NRG suggests a proposed rule framework for the Staff to begin considering now. *See* 88th Tex. Leg., R.S., S.J.R. No. 93 (proposing a constitutional amendment to Article III, Texas Constitution, to add Sec. 49-q).

the requisite expertise in-house), as well an experienced administrative agent (commercial bank) to service the loans after they have been approved. Successful implementation of the TEF loan program will require an expedited review and processing of applications and ongoing management of loan disbursements, and thus, reliance on an experienced program administrator, independent engineer, and administrative agent to assist in this effort will be critical to success.

I. RESPONSE TO QUESTIONS FROM THE STAFF WORKSHOP AGENDA

A. Loans for Facilities Inside the ERCOT Power Region - PURA § 34.0104

Unlike a traditional commercial or institutional lender whose main objective is profit, the TEF's primary goal is to increase the reliability of the electric grid by facilitating the addition of new dispatchable generating capacity through both sizeable upgrades to existing facilities and new construction. Accordingly, the Commission should develop rules for the loan and grant program that will encourage viable proposals from a wide array of qualified developers. However, this will also require the Commission to undertake, for the first-time in its history, an evaluation of multiple independent power producer (IPP) project proposals involving different project sponsors, technologies, project sizes, and locations, and to do so on an expedited timeframe that will enable the Commission to begin disbursing loan funds to successful applicants in the latter part of 2024—which the Commission should endeavor to do, both because the statute imposes a hard deadline for disbursement of initial funds to loan recipients by the end of 2025[4] and, more importantly, because the TEF program ties the higher cap for completion bonus grants (i.e., $120,000 per megawatt (MW) as compared to $80,000/MW) to achieving commercial operation before June 1, 2026.[5] To provide a meaningful opportunity for loan applicants to be eligible for the higher grant option, the loan program should be set up in a manner that allows loan funding to begin in the second half of 2024.

As noted at the outset, given the extensive and potentially unfamiliar nature of this work for the Commission and its staff, we recommend that the Commission consider retaining experienced third-party consultants (or designating existing Commission Staff if available) with demonstrated expertise in IPP project finance and professional engineering related to the

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[4] PURA § 34.0104(l).

[5] PURA § 34.0105(f).

development, construction, operation, and maintenance of electric generating facilities located in restructured competitive energy markets, to aid in the review and processing of loan and grant applications and that the Commission retain a commercial bank to act as administrative agent to administer the loans throughout their term.

- *What are the essential components of a rule to implement a loan program?*

NRG has attached, as Attachment A, a proposed rule that addresses the essential components of a rule to implement the loan (as well as completion bonus grant) program for new dispatchable capacity in the ERCOT region. Generally speaking, the rule for the loan should provide relevant definitions and detail the required contents for the loan application, the timing and process for review and approval of loan applications, and the key terms of the necessary loan agreements. Each of these rule components is addressed in more detail below. In addition, the Commission should adopt standard form agreements, with input from interested persons, to use as the basis for awarding loans to successful loan applicants. NRG supports the Commission's proposal (as conveyed at the October 12 open meeting) to engage outside counsel, and NRG recommends such counsel should have expertise in IPP project financing to prepare the credit agreement and other loan documentation (e.g., a depositary, security, and pledge agreement).

  - *What are the key materials that applicants will need to provide applicant information for the categories described in PURA § 34.0104(c)?*

Under PURA § 34.0104(c), the Commission must consider the following criteria in reviewing loan applications under this section (and may consider "any other factors" the Commission "considers appropriate"):

(1) Quality of services and management;

(2) Efficiency of operations;

(3) History of electricity generation operations in Texas and the United States;

(4) Resource operation attributes;

(5) Ability to address regional and reliability needs;

(6) Access to essential resources for operating the facility, such as land, water, and reliable infrastructure;

(7) Evidence of creditworthiness and ability to repay the loan; and

(8) The generation capacity and estimated costs of the project for which the loan is requested.

As an initial matter, the loan application should include documentation demonstrating that the project satisfies the basic statutory eligibility requirements (e.g., will add at least 100 megawatts (MW) of dispatchable capacity to the grid through either new construction or an upgrade to an existing facility and did not meet the requirements for inclusion in ERCOT's Report on the Capacity, Demand, and Reserves (CDR) before June 1, 2023[6]). In addition, the application should include the following components to address the eight statutory criteria detailed above:

- A project narrative with an overview of the proposed project, which should detail how the proposed project will contribute to reliably meeting peak winter and summer ERCOT load, including the project's plans for ensuring adequate fuel supplies and deliverability of the project to major ERCOT load centers [see #5 above];
- Amount of the loan requested, which must not exceed 60 percent of the estimated cost of construction; [see #8 above]
- Evidence of the applicant's prior experience with siting, permitting, financing, constructing, commissioning, operating, and maintaining dispatchable electric generating facilities to provide reliable electricity service in restructured competitive energy markets [see #1 and #3 above];
- Project-specific information allowing the Commission to evaluate operational attributes and confirm project viability including:
    - A table with resource operational attributes—e.g., seasonal net maximum capabilities for summer and winter, cold and hot weather start times, and an industry-standard measure of expected availability rates such as the Equivalent Availability Factor (EAF) calculation in the Generation Availability Data System (GADS) of the North American Electric Reliability Corporation (NERC); [see #4 and #8 above]
    - Economic models showing revenue projections; [see #7 above]
    - Detailed capital cost estimates, including all projected costs and an appropriate contingency, for development, permitting, construction, commissioning, and capital spare parts, with detailed supporting documentation including executed fixed price Engineering, Procurement and Construction (EPC) contracts with liquidated damages for performance shortfalls and schedule delays; [see #8 above]
    - Evidence of site control; a phase 1 environmental site assessment; all required environmental, construction, and operating permit approvals (or a plan for obtaining the same); air emissions compliance plan; electric

[6] PURA § 34.0104.

interconnection agreement and associated studies (or timeline for receiving same); and fuel and water supply arrangements; [see #6 above]

- An operating and maintenance (O&M) contract with proposed staffing plan, organizational structure, and established O&M programs and procedures for the proposed project [see #1, 2, and 8 above]; and

- Demonstrated ability and identified funding for the necessary capital contribution by the project sponsor (minimum 40 percent of estimated remaining costs of construction) plus the 3 percent required deposit for construction. [see #7 above]

In addition to the above, the application should include a detailed timeline with major project milestones and anticipated dates when those will be (or have been) achieved.

- *How should the PUC evaluate creditworthiness?*

The TEF statutory program already has a built-in capital contribution requirement, which should form the basis for the Commission's creditworthiness evaluation. Specifically, under PURA § 34.0104(b)(2), a loan applicant cannot request a loan for more than 60 percent of the estimated cost to construct the project, meaning that the loan applicant will be responsible for funding at least 40 percent of the estimated project costs.

In order to ensure that a proposed project is backed by adequate capital commitments for the loan applicant to commence and complete construction, NRG recommends that the Commission require the applicant to demonstrate, with appropriate documentation including an affidavit, that the project is backed by an equity commitment letter from the project sponsor demonstrating the ability to fund the remaining capital contribution required by the project sponsor (plus the 3 percent required deposit by the loan applicant[7]).

Further, the statute requires that the loan will be senior debt to be collateralized by the project assets.[8] Thus, in addition to demonstrating adequate capital commitments, the applicant should be required to provide detailed project economic models confirming that the project will produce adequate revenue, net of fixed operations and maintenance costs, to enable the applicant to repay the loan over its 20-year term. Requiring a detailed economic model for the project is important to enable the qualified professional engineer to confirm that the applicant has a valid

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[7] PURA § 34.0104(g).

[8] PURA § 34.0104(b)(3).

and reliable methodology for evaluating the project's projected revenues and to thereby help the Commission ensure that it is not lending the state's funds to speculative investors.

Finally, the applicant should include evidence of the project sponsor's general creditworthiness, such as financial statements, along with an explanation regarding the legal relationship between the project sponsor and the applicant.

- *How should the PUC determine "estimated cost" for the purpose of determining loan caps and the deposit amount?*

The application should include detailed cost estimates for all development, permitting, construction, commissioning, and capital spare parts costs with detailed backup including executed fixed price EPC contracts with schedule and performance liquidated damages to minimize the probability of any cost overruns or schedule delays. Any loan fees and interest due on the loan during construction should be included in the total cost estimate, along with reasonable allowances for project contingencies (at least 5 percent) and to cover the project sponsor's internal engineering, legal, general, and administrative costs (up to 3 percent).

Evaluation of the applicant's documentation of "estimated cost" should be undertaken by a program administrator with IPP project finance experience, as well as a qualified professional engineer. As proposed in Attachment A and noted above, the program administrator and qualified professional engineer could be selected from among the Commission's existing staff, if the Commission has personnel with the requisite expertise, or the Commission could engage third parties to serve these roles.

- *How should the PUC evaluate an applicant's ability to address regional and reliability needs?*

NRG recommends that the Commission require applicants to detail in their application how their projects will contribute to reliably meeting peak winter and summer ERCOT load, including the project's plans for ensuring adequate fuel supplies and deliverability of the project to major ERCOT load centers. As a minimum, NRG recommends each loan application include a completed ERCOT interconnection process Security Screening Study to confirm such deliverability. NRG also recommends that applicants be required to include a standard industry measure of availability for the project, such as the estimated EAF. With this information, the program administrator, with the assistance of the qualified professional engineer, can evaluate the project's potential to address regional and reliability needs.

- *Is it necessary for the PUC to adopt reliability performance standards described in PURA § 34.0106(c) as part of the loan rule? Or is it sufficient for these performance standards to be in place when the borrower executes a loan agreement?*

Under PURA § 34.0106(c), the Commission must include in the loan agreement a debt covenant requiring the recipient to meet "facility performance standards" that are "appropriate for the types of facilities for which loans may be provided." PURA § 34.0108 provides that the failure to perform a term of the loan is a default that can result in the Commission instituting a proceeding, through the Attorney General's office, to effectively take control of the project assets via a receivership and pursue a number of remedies to cure a default, up to and including a sale of the asset.

Given these potentially severe consequences of failing to meet a performance standard in the loan agreement, any debt covenant addressing reliability performance should be communicated prior to loan application submittals (i.e., in the rule and form loan agreements) to ensure proper project design and should be reasonably achievable with diligent operation and maintenance of the asset. In addition, the performance standard should provide for exclusions for force majeure events and reasonable opportunities for the borrower to cure defaults.

NRG suggests that the Commission consider adopting a performance standard based on an industry-standard equivalent availability factor, e.g., EAF, for the project, such as requiring that the project achieve some reasonable availability over a reasonable timeframe during the term of the loan agreement, with exceptions based on force majeure events and the allowance for reasonable cure periods. Specifically, NRG suggests that a project should be considered to remain in good standing under the loan if it can maintain a 50 percent availability (i.e., EAF) on a 24-month rolling average basis.

A reasonable standard based on something like EAF, if set at a reasonably attainable percentage and if measured over a reasonable timeframe with provisions for force majeure events and cure opportunities, will ensure project availability as expected, without placing undue risk that projects will go into default and be subject to effective seizure by the state based on unexpected higher than average forced outages in a particular year that occur notwithstanding the reasonable diligence of the resource operator.

In addition, every debt covenant in the credit agreement, including (but not limited to) the performance covenant required by the statute, should provide for customary exclusions such as force majeure and materiality thresholds, as well as cure periods. PURA § 34.0108 provides that a failure to perform <u>any term</u> of the agreement could put the borrower in default. Because these

are large, complex machines that will likely experience forced outages during the term of the loan, notwithstanding the resource operator's diligent efforts to maintain the machines in a way that minimizes such outages, it is critical that the contract terms be drafted in a way that includes exclusions for force majeure, materiality thresholds, and cure periods, so that a reasonably diligent operator does not inadvertently default on the loan due to unexpected circumstances.

- *How should the PUC interpret the term "primarily" in PURA § 34.0106(b)(1) when considering generation associated with private use networks and industrial loads?*

NRG suggests that a straight-forward and objective way to interpret "primarily" in this context would be to exclude projects from eligibility for which greater than 50 percent (i.e., the majority) of the annual kilowatt-hours produced by the generating resource associated with a private use network or industrial load is used by that internal load, in any given year. Private use networks already track their expected and actual net production to the ERCOT grid in an annual attestation filed with ERCOT each year,[9] so this measure should be easily verifiable by ERCOT (and, by proxy, the Commission).

- *By what date does the PUC need to have a loan rule adopted for this program?*

As noted above, under PURA § 34.0104, the Commission cannot disburse initial loan funds for a loan under this program after December 31, 2025, and in order to be eligible for the higher completion bonus grant of $120,000 per MW—for which loan applicants presumably will also want to apply—a project must achieve commercial operation before June 1, 2026 (after which time the bonus cap drops to $80,000 per MW and then expires altogether after June 1, 2029). Thus, time is of the essence to finalize the rules and form agreements for the TEF loan program, in order to allow any chance for loan applicants to be eligible for the $120,000/MW completion bonus grant and to ensure that loan funds can be disbursed before the loan program expires.

In light of the above considerations, and given how long it takes to construct and commission a new generating resource (or sizeable upgrade) in ERCOT, NRG recommends that the Commission adopt a rule on a timeline that allows for loan applications to be submitted by June 1, 2024 and approved over the summer months of 2024, with a target for initial loan disbursements to begin in September 2024. That timeline suggests that the final rule should be

[9] *See* ERCOT Protocols § 10.3.2.4.

adopted no later than March of 2024, with form loan agreements to be finalized shortly thereafter. As indicated, NRG recommends that the Commission consider adopting, after an opportunity for review and comment, form loan agreements that include the material terms that will apply to all successful loan applicants, subject to finalizing those agreements following approval of a loan application. Experienced legal counsel with expertise in project financing, which NRG understands the Commission will be seeking via a Request for Proposal as early as next week, will be critical to assist with the drafting of form loan agreements. NRG recommends that drafting of the form loan agreements should occur on a parallel path to this rulemaking process.

Specifically, NRG suggests the following timeline as a starting point for discussion:

1. Consider/approve proposed rule for publication in the *Texas Register* – November 30, 2023 and December 15, 2023 open meetings
2. Deadline for comments by interested persons on proposed rule – January 15, 2024
3. Consider/adopt final rule – March 2024 open meeting(s) (currently scheduled for the 7th and 21st)
4. Consider/approve publication of proposed loan agreements for comment by interested persons –March 2024 open meetings
5. Deadline for comments by interested persons on draft loan agreements – April 21, 2024
6. Consider/approve final form loan documents – May 23, 2024 open meeting

This timeline would allow for applications to be filed beginning June 1, 2024 (assuming that loan applicants would begin work on their applications following adoption of the final rule and filing of draft loan agreements in March). In addition, as proposed in Attachment A, the rule could allow for applicants to schedule a pre-filing meeting with Commission Staff and the program administrator (if a third-party is engaged for this purpose) to ensure that applications have all the requisite components and to enable a swifter and more efficient review of applications once filed.

- *What timing challenges will applicants encounter when applying for a loan under this program?*

Project sponsors will be required to self-fund their development costs prior to the loan funding (up to 60 percent of which should be recoverable upon the initial loan funding). Project sponsors may have difficulty securing firm pricing for construction costs if the loan funding timeline is uncertain. Thus, the rule should set clear expectations for when applications can be submitted and how long the review and approval process will take. In addition, the rule should

clearly define the loan application requirements so that potential applicants can begin putting their applications together as quickly as possible following the rule adoption.

- *How will an applicant's need to finance at least 40% of its project impact timing considerations for program loans?*

As noted, initially, project sponsors will be required to self-fund 100 percent of their development costs prior to loan funding, but should be able to recover up to 60 percent of those actually incurred costs at the initial funding for the loan. However, with respect to the minimum 40 percent of remaining permanent equity contribution required by the project sponsor, an applicant should be able to demonstrate that it has secured that contribution at the time the application is filed—thus, this capital contribution requirement should not generally impact "timing considerations" for the program loans.

- *Is it necessary for the PUC adopt a completion bonus grant rule concurrently with a loan application rule?*

Yes. While a project will be required to demonstrate compliance with specified performance metrics in order to actually receive a completion bonus grant in a given year, and while that bonus amount can be discounted year to year depending on performance, loan applicants will factor in some amount of completion bonus grant in evaluating their overall project economics. Thus, it will be critical for a loan applicant to understand what the performance metrics surrounding the receipt and potential discount of a completion bonus grant will be, at the time the loan applicant is preparing the revenue projections that will accompany its loan application. The rule should also allow (but not require) a loan applicant to submit an application for conditional approval of a completion bonus grant at the same time as the loan application, since the statute provides for many of the same criteria to apply to the evaluation of applications for both the loan and grant programs; approval of the grant application and requested grant amount would, of course, be conditioned on the project later achieving commercial operation by a specified date (e.g., before June 1, 2026 if the higher bonus amount is sought), and the distribution amount in a given year would depend on meeting the specified performance standards each year of the 10-year grant period. But a loan applicant could otherwise secure its conditional approval for the completion bonus grant at the time the loan application is submitted, which would provide more certainty to the loan applicant regarding the expected revenues during the loan term.

In Attachment A, NRG has included proposed language for both the loan and grant program.

- *What program functionality is necessary to administer this program?*
    - *What application guidance will potential applicants require?*

The rule should be finalized as soon as possible and should set out detailed loan application requirements to facilitate timely submittal of loan applications. In addition, as noted, applicants should be able to schedule a pre-filing meeting with the Commission Staff and a program administrator to ensure that applications are complete in advance of filing.

- *How should the PUC disburse loan funds? How might the PUC implement phased disbursement of loan funds?*

NRG recommends that the Commission engage an experienced administrative agent (e.g., a financial institution), separate from the "program administrator" that will assist with the review and processing of loan applications, to handle any necessary reporting, loan compliance, and disbursement requests on behalf of the Commission. Also, at the time the loan closes, a one-time distribution should be made to the loan recipient (i.e., the borrower) to reimburse the borrower for up to 60 percent of documented, previously incurred project construction and commissioning costs. Going forward, the borrower should be able to request loan disbursements for up to 60 percent of documented project construction and commissioning costs.

- *What type of system should the PUC implement to facilitate borrower communication with the PUC for any necessary reporting?*

As noted, NRG recommends that the Commission engage an experienced administrative agent (e.g., a financial institution) for this purpose.

B. Completion Bonus Grants – PURA § 34.0105

- *What are the essential components of a rule to implement the completion bonus grant program?*

As an initial matter, the requirements for a completion bonus grant application largely mirror the requirements for the loan application for facilities in the ERCOT region (minus the requirements that are specific to demonstrating the ability to repay a loan)—i.e., quality of services and management, efficiency of operations, history of electricity generation operations in Texas and the U.S., resource operation attributes, ability to address regional and reliability needs, and

generation capacity and estimated construction costs.[10] Thus, the components of the application for the completion bonus grant should largely mirror the application for the loan, minus the obviously inapplicable criteria related to creditworthiness and requested loan amount. The process for review and approval of a completion bonus grant application should also be able to generally match the process applicable to loans, and as noted above, applicants should be able to submit the applications together (even though approval of the grant application would have to be made contingent on the project interconnecting with the ERCOT grid by the relevant deadline in the statute). Eligible projects should also be able to apply for a completion bonus grant, regardless of whether they also applied for and received a loan, presuming they meet the other eligibility criteria in the statute (e.g., dispatchable, at least 100 MW, not eligible for inclusion in the CDR before June 1, 2023). Some project developers could be interested in applying for the grant, without wanting to also take out a loan from the state, and there is nothing in the statute that suggests the two programs are contingent on one another.

- *How should the PUC develop optimal and median performance standards as described in PURA § 34.0105(i) to measure facility performance?*

NRG suggests that the Commission use the EAF as defined by NERC in its GADS document as the standard of performance for the completion bonus grant program, because that standard accounts for both availability and capacity factor and thus represents a robust measure of performance. The EAF could be determined during the critical 100 hour operating period referenced in the statute, which, in turn, could be based on the 100 hours with the lowest physical responsive capability (PRC) as determined by ERCOT during the relevant 12-month period (which would vary for each grant recipient, as the statute provides for grant funds to be disbursed beginning with the first anniversary of the grant recipient's specific commercial operations date). Since the median performance level sets the floor for receiving any completion bonus grant award, NRG recommends setting the median level at an EAF of 50 percent. For the optimum performance standard, which sets the level for the full completion bonus, NRG recommends setting the standard at 92 percent of EAF for the first 18 months of operation (to account for typical issues associated with the beginning of commercial operations of a resource) and then at 95 percent in each year thereafter. If a particular grant recipient exceeded the median threshold but was below the

[10] PURA § 34.0105(d).

applicable optimum threshold, the amount of their grant could be discounted based on the percentage EAF achieved (e.g., an 80 percent EAF would equate to an 80 percent payment of the applicable completion bonus amount for that year).

- *What reliability metrics should the PUC consider when evaluating facility performance? Should different facility types have different reliability metrics?*

For the completion bonus grant, the EAF should be the only measure used for evaluating facility performance, and the same metric (EAF) should apply to all facility types. As noted earlier, for simplicity, the same standard should also be used to evaluate performance under the loan program, and that standard should be relatively easy to satisfy by a reasonably diligent operator, since the consequences of failing to meet that standard are potentially dire (i.e., loan default).

- *Should upgrades to existing facilities be eligible for the completion bonus grants or does PURA § 34.0105 limit bonuses to construction of new facilities?*

NRG does not have an opinion on this question and has proposed alternative rule language in Attachment A depending on the Commission's decision on this issue.

- *What circumstances should the PUC consider when determining extenuating circumstances that justify an extension of the deadlines in PURA § 34.0105(f)?*

Such extensions should be limited to circumstances beyond the reasonable control of the project sponsor, such as force majeure events, delays caused by the transmission operator or ERCOT, and global supply chain issues.

- *What program functionality is necessary to administer this program?*
  - *What is the earliest date a facility should be able to apply for a bonus grant?*

Completion bonus grants cannot be disbursed until a project has been verifiably interconnected to the ERCOT power system and has reached its first anniversary following commercial operation, but applications for conditional approval should be accepted beginning on the date the Commission accepts loan applications and could be conditionally approved, contingent on demonstrating interconnection to the ERCOT power grid.

- *How will applicants provide annual performance information necessary for the PUC to evaluate performance?*

Projects should submit certified operating data (i.e., to calculate their EAF) for the 100 hours of lowest operating reserves within 60 days of the end of the 12-month period coinciding with their commercial operations date (as that is the date on which the grant funds are eligible to be disbursed, under the statute, to a particular applicant).

- *What information will ERCOT need to supply to allow bonus grant applicants to provide information about the performance of their facilities?*

ERCOT should be served with a copy of the certified operating data submitted to the Commission and be provided a 30-day period to verify and file any objection to such data.

C. The Texas Backup Power Package Program - PURA § 34.0201 -.0205

NRG takes no position on the specific questions posed by Staff regarding the Texas Power Promise, but requests that the rule be clear regarding which types of facilities and arrangements will be eligible for compensation under the program and whether and what type of load management programs (such as peak load shaving) will be allowed at the backup power sites without running afoul of the prohibitions against these backup facilities participating in the sale of energy or ancillary services. Specifically, to the extent certain facilities could automatically be deemed ones "on which communities rely for health, safety and well-being" (e.g., hospital, fire station), it would be helpful to define those in the Commission's grant and loan applications.[11] Also, to reasonably set expectations about permissible use, it would be beneficial to clarify whether the owner or host facility could use these backup facilities for purposes other than solely to serve their needs during an outage provided those uses did not involve the sale of energy or ancillary services.[12]

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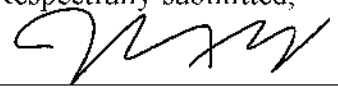
[11] PURA § 34.0202 (setting forth purposes of the Texas Power Promise); *see also id.* § 34.0205(c)(1) (setting forth entities not eligible to receive grants or loans under the Texas Power Promise program).

[12] *Id.* § 34.0204(6).

II. CONCLUSION

NRG recognizes the critical role the TEF will play in supporting the timely construction of new dispatchable generation resources in the state and appreciates the Commission's leadership on the development and implementation of these programs, as well as the opportunity to provide early feedback of core design elements to ensure its success.

Respectfully submitted,



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PUCT PROJECT NO. 54999

TEXAS ENERGY FUND	§	**PUBLIC UTILITY COMMISSION**
	§	**OF TEXAS**

EXECUTIVE SUMMARY NRG ENERGY, INC.'S COMMENTS IN RESPONSE TO THE STAFF'S QUESTIONS FOR THE SEPTEMBER 21, 2023, TEXAS ENERGY FUND WORKSHOP

- The Commission should act expeditiously to implement the rules for the Texas Energy Fund (TEF) loan and completion bonus grant program for new dispatchable capacity in the Electric Reliability Council of Texas, Inc. (ERCOT) region and to adopt form loan agreements, with input from interested persons and with the assistance of experienced legal counsel for the Commission, with a goal of enabling initial applications for both programs to be submitted no later than June 1, 2024. NRG has attached a proposed rule for both programs in Attachment A.

- The Commission should engage an experienced consultant or advisor with extensive knowledge of power generation development and project finance to act as the program administrator, as well as a qualified professional engineer to aid in the review of loan and grant applications (or alternatively, could designate internal Commission staff to perform these roles if the Commission has the requisite expertise in-house).

- The Commission should also engage an administrative agent (commercial bank) to act on its behalf and serve as the primary contact for borrowers during the term of the loan and to administer disbursements and repayments under the loan, as well as the deposit account for the required 3 percent deposit by the borrower.

- The loan application should include documentation and a detailed timeline to show that proposed projects are eligible for the loan, are on track to achieve commercial operation on a timely basis and perform reliably in the ERCOT region, and have the necessary equity commitments for the 40 percent capital contribution required for loans under the TEF. The equity commitments, along with a detailed revenue projection (to be evaluated by the program administrator and qualified professional engineer), should form the basis of the Commission's creditworthiness evaluation.

- The Commission should allow for loan and grant applicants to schedule a pre-application meeting with the program administrator and Commission Staff to ensure the completeness of the application. The process for review and approval of applications should be as efficient and streamlined as possible, which will be aided by the pre-application meeting and reliance on experienced advisors (i.e., the program administrator and independent engineer) to evaluate and make recommendations on applications.

- The total cost of construction, as estimated in the application, should be confirmed for reasonableness by the qualified professional engineer and should include reasonable project contingencies (up to 5 percent), and a reasonable development fee to cover the borrower's internal engineering, legal, general, and administrative costs during the construction and commissioning process.

- Once a loan application is approved, the Commission and the loan recipient should finalize the loan agreements using the form loan documents suggested above. When the loan funds, there should be an initial loan disbursement of up to 60 percent of documented previously incurred construction and commissioning costs; going forward, the loan recipient should be able to request disbursements of up to 60 percent of documented construction and commissioning costs.

- The completion bonus grant application should be able to be submitted at the same time as the loan application, but should not be contingent on the applicant having sought or received a loan. The award of the application, if submitted in advance of interconnection, should be contingent on the project interconnecting with the ERCOT grid, and disbursement would depend on satisfying performance standards.

- For both the loan and completion bonus grant, the performance standard should be based on an availability metric, such as the Equivalent Availability Factor (EAF) standard used by the North American Electric Reliability Corporation (NERC).

    a. For the loan, performance should be set at a reasonably achievable metric, such as a rolling 24-month EAF of 50 percent. All debt covenants (including the performance covenant) should include customary exclusions such as force majeure, materiality thresholds, and cure periods.

    b. For the completion bonus grant, median performance (for purposes of determining whether any amount will be paid in a given year of the 10-year disbursement period) should be based on achieving a 50 percent EAF during the 100 critical operating hours (which should be calculated based on ERCOT's physical responsive capability metric). Optimum performance should be based on 92 percent EAF for the first 18 months of operation (to account for standard issues that arise during that timeframe) and 95 percent EAF going forward. For an EAF between the median and optimum levels, the completion bonus could be discounted by the achieved EAF percentage.

- The rule regarding the Texas Power Promise should be clear regarding which types of facilities and arrangements will be eligible for compensation under the program and whether and what type of load management programs (such as peak load shaving) will be allowed at the backup power sites without running afoul of the prohibitions against these backup facilities participating in the sale of energy or ancillary services.

ATTACHMENT A

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

Subchapter T Facility Funding[1]

§ 25.514 Texas Energy Fund Loans and Grants for ERCOT generation resources

(a) **Purpose and applicability.** This section establishes the process for the commission's award and administration of loans and completion bonus grants from the Texas Energy Fund [established by Section 49-q, Article III of the Texas Constitution], to eligible projects operating within the Electric Reliability Council of Texas, Inc. (ERCOT) region.

(b) **Definitions**. The following terms, when used in this section, have the following meanings, unless otherwise stated in this section:

(1) **Administrative agent** – the entity responsible for administering the loans awarded under this section, in accordance with subsection (h) of this section.

(2) **Borrower** – an entity awarded a loan under this section that executes loan agreements with the commission in accordance with subsection (f). An electric utility other than a river authority may not be a borrower under this section.

(3) **Commercial operations date** – the date on which the project completes ERCOT's commissioning process and is approved for participation in the ERCOT market, as identified by ERCOT in the applicable monthly generator interconnection status report.

(4) **Completion bonus grant** – a grant awarded under subsection (i) of this section.

(5) **Critical operating hours** – the 100 hours with the lowest operating reserves in a twelve-month period beginning on the month and day of the commercial operations date for an eligible project of a completion bonus grant recipient.

[1] As a starting point for consideration, NRG suggests that the rules related to new Chapter 34 of PURA could be organized into a new subchapter (e.g., Subchapter T), which appears consistent with Staff's proposal to adopt a new § 25.515 for the Texas Backup Power Package Advisory Committee related to the Texas Backup Power Promise, which is in another section of Chapter 34 of the Public Utility Regulatory Act (PURA). The proposed rule above would be the rule applicable to the application and award of loans and grants under the Texas Energy Fund for facilities in ERCOT. The new subchapter could also include rules applicable to grants for facilities outside of ERCOT and for the Texas Backup Power Promise; NRG does not offer any rule language regarding those programs. NRG has proposed § 25.514 as a possible section number for this rule, immediately preceding the Staff's proposed rule relating to the Texas Backup Power Package Advisory Committee.

(6) **Dispatchable electric generating facility** – an electric generating facility for which the output can be controlled primarily by forces under human control. For purposes of this section, a dispatchable electric generating facility does not include an electric energy storage facility.

(7) **Eligible project** – an upgrade to an existing dispatchable electric generating facility that will result in a net increase of at least 100 megawatts (MW) of capacity, or the construction of a new dispatchable electric generating facility with a capacity of at least 100 MW, which, in either case, will provide power for the ERCOT power region and participate in the ERCOT wholesale market. An eligible project does not include:

(A) A private use network for which, in any year in which loan or completion bonus grant funds will be disbursed, greater than 50 percent of the annual kilowatt-hours (kWh) produced by the generation facility(ies) within the private use network is or will be consumed by load within the private use network;

(B) A natural gas transmission pipeline;

(C) A new facility or upgrade to an existing facility that, prior to June 1, 2023, met the requirements in applicable ERCOT protocols and other binding documents for inclusion in ERCOT's Report on the Capacity, Demand, and Reserves in the ERCOT region (CDR); or

(D) A facility owned or operated by an electric utility other than a river authority.

(8) **ERCOT Screening Study** – the security screening study detailed in Section 5 of ERCOT's planning guides.

(9) **Lender** – the commission in its role as lender under the loan program described in this section.

(10) **Loan** – a loan awarded under subsection (d) of this section.

(11) **Operating reserves** – the physical responsive capability as defined in the ERCOT protocols and as determined by ERCOT for a given operating hour.

(12) **Private use network** – An electric network connected to the ERCOT transmission grid that contains load that is not directly metered by ERCOT (i.e., load that is typically netted with internal generation). For this section, a private use network includes a facility that serves an industrial load behind the ERCOT-polled settlement meter, regardless of whether the arrangement is registered with ERCOT as a private use network.

(12) **Program administrator** – the internal commission staff member(s) or third-party entity, as applicable, that will perform the responsibilities of the program administrator as outlined in this section. The program administrator will be a person or person(s) with experience related to project financing for electric generating facilities located in restructured competitive energy markets.

(13) **Qualified professional engineer** – an independent professional engineer engaged by the commission under subsection (e) or a commission staff professional engineer that will perform the responsibilities of the qualified professional engineer outlined in this section. The qualified professional engineer will be a person or person(s) with experience advising commercial lenders related to the development, construction, operation, and maintenance of electric generating facilities located in restructured competitive energy markets.

(c) **Loan application contents**. An application for a loan for an eligible project must contain the following:

(1) A project narrative with an overview of the proposed project that details how the project will contribute to reliably meeting peak winter and summer load in the ERCOT region, including the project's plans for ensuring adequate fuel supplies and deliverability of the project to ERCOT load centers.

(2) Amount of the loan requested, which must not exceed 60 percent of the proposed project's estimated cost of construction.

(3) Evidence of the applicant's prior experience with siting, permitting, financing, constructing, commissioning, operating, and maintaining dispatchable electric generating facilities to provide reliable electricity service in restructured competitive energy markets.

(4) Additional project-specific information that will allow the commission to confirm project viability and evaluate the project's attributes, including:

(A) A table with the resource's operational attributes, including seasonal net maximum sustainable ratings during winter and summer, cold and hot temperature start times, and the Original Equipment Manufacturer's (OEM's) estimated Equivalent Availability Factor (EAF) calculation in the Generation Availability Data System (GADS) of the North American Electric Reliability Corporation (NERC);

(B) One-line diagram of the proposed project, if available;

(C) Evidence of site control, consistent with applicable ERCOT planning guide requirements;

(D) A current phase 1 environmental site assessment;

(E) Description of electrical interconnection plan, including (i) evidence that the proposed project is in the interconnection queue with ERCOT and has completed the ERCOT screening study, (ii) copy of the full interconnection study with the interconnecting transmission service provider, if completed, and (iii) copy of the executed standard generation interconnection agreement, if completed;

(F) Description of fuel and water supply arrangements, including copies of applicable fuel and water supply agreements, if available, and evidence of receipt of necessary water rights and applicable permits;

(G) Description of operations and maintenance staffing plan, organizational structure, and operating programs and procedures for the proposed project, including copies of operations and maintenance agreements, if available;

(H) A list of all required environmental, construction, and operating permits with current approval status;

(I) Description of air emissions compliance plan, including evidence of receipt of any required air emission credits if required;

(J) A detailed capital cost estimate, including all qualifying costs for development, permitting, construction, commissioning, capital spare parts,

and an appropriate project contingency, with detailed supporting documentation including executed fixed price Engineering, Procurement and Construction (EPC) contracts with schedule and performance liquidated damages to minimize the probability of any cost overruns, schedule delays, or performance shortfalls, if available;

(K) A detailed financial forecast of cash available for debt service covering a period equal to the repayment period of the loan including sources of revenue and an annual operating and maintenance budget; and

(L) A proposed project schedule with anticipated dates for the following milestones:

(i) Execution of the standard generation interconnect agreement (if not already complete at the time the application is submitted);

(ii) Completion of the full interconnection study (if not already complete at the time the application is submitted);

(ii) Start date for the engineering of the project, including execution of fixed price EPC contracts (if not already executed at the time the application is submitted);

(iii) Start date for the construction of the project;

(iv) Submission of applicable registration documents with ERCOT and the commission;

(v) Energization (backfeed date);

(vi) Initial synchronization with the ERCOT grid; and

(vii) Commercial operations date.

(5) Evidence of the applicant`s creditworthiness, including:

(A) An equity commitment letter from the project sponsor demonstrating the ability to fund the necessary project equity (i.e., 40 percent of the estimated remaining cost of construction) plus the 3 percent construction escrow deposit amount addressed in subsection (g) of this section;

(B) Affidavit from the project sponsor confirming the existence and source of the funding identified in the equity commitment letter; and

(C) Documentation supporting the applicant's creditworthiness including financial statements of the project sponsor along with an explanation of the legal relationship among the project sponsor(s) and the project company.

(d) **Loan application process.** Eligible projects may apply for a loan as follows:

(1) The commission will begin accepting applications no later than June 1, 2024.

(2) A developer of an eligible project may submit an application containing the requisite contents as outlined in subsection (c) of this section. The applicant may file its application under seal and must follow the procedures in the commission's procedural rules for submitting confidential information. Information submitted in the application for a loan is confidential and not subject to disclosure by the commission under Chapter 552, Government Code.

(3) The program administrator generally shall review applications in the order filed. In the event multiple applications are submitted on the same date (regardless of the time of day the applications are submitted), the program administrator will prioritize the review of applications for those projects by taking into consideration the target date for commencement of construction and evidence that the project is at a more advanced stage of development (e.g., with an executed standard generation interconnection agreement, site control, air permits, and an EPC contract). In the event that the program administrator is a third-party entity, engaged pursuant to subsection (e)(1) of this section, the program administrator shall work with and receive input from commission staff in its review and recommendations regarding loan applications.

(A) Upon request, applicants may schedule a pre-application meeting with the program administrator to review the application submission and ensure completeness. If the program administrator is a third-party entity, commission staff will be included in any pre-application meeting with an applicant.

(B) Within 20 days of the submittal of the loan application, the program administrator shall make a recommendation regarding the sufficiency of the

application to the presiding officer. Within 5 working days of receipt of the program administrator's recommendation, the presiding officer will issue an order regarding sufficiency of the application. If the presiding officer finds that the application is deficient, the presiding officer must notify the applicant. The applicant must cure any deficiencies within 15 working days of notice, and if it does not do so, the presiding officer may notify the applicant that the application is rejected without prejudice to refiling.

(C) Absent good cause to extend the time for review, the program administrator will make a recommendation on whether to approve, approve with modifications, or reject the application, within 45 days of the issuance of the order finding the application sufficient. Within 5 working days of receipt of the program administrator's recommendation, the presiding officer will issue an order approving, approving with modifications, or rejecting the application, based on the recommendation of the program administrator.

(D) Following approval of an application, the program administrator will work with the applicant to execute the necessary loan agreements, as detailed in subsection (f).

(e) **Loan application review.**

(1) To assist with the processing and review of loan applications, the commission will designate a program administrator. The commission may designate internal commission staff to perform this role or may engage a third-party program administrator. The program administrator will be responsible for:

(A) Evaluating the loan application;

(B) Making a recommendation on sufficiency of the application to the presiding officer;

(C) Prioritizing the review of loan applications according to the criteria set out in subsection (d)(3) of this section;

(D) Serving as the primary contact for communications with loan applicants;

(E) Evaluating the project's financial forecast, with input from the qualified professional engineer, to confirm adequate projected revenue to support the debt service; and

(F) Making a recommendation to the presiding officer on whether to approve, approve with modifications, or reject the application.

The program administrator's role will be limited to the loan application submission and review process. Once a loan is approved, responsibilities for administering the loan and communicating with the borrower will transfer to the administrative agent designated under subsection (h) of this section.

(2) In reviewing the application, the program administrator will consider the following criteria and will work with a qualified professional engineer to assist in the evaluation. At the commission's option, the qualified professional engineer may be an employee of the commission or an independent engineer or engineering firm engaged by the commission. The program administrator, in conjunction with the qualified professional engineer, will evaluate:

(A) Whether the project site is suitable to support the construction, operation, and maintenance of the proposed project and provide sufficient access to utilities;

(B) Whether the various construction and equipment supply contracts provide for the equipment, materials, and services necessary to construct the project;

(C) Whether the proposed project has necessary interconnections and access to fuel, electricity, water supply, and wastewater disposal;

(D) Whether planned tests of the resource's operating capabilities are typical of other similar projects and will adequately demonstrate the ability of the proposed project to reliably meet the performance standards in the loan agreement;

(E) Whether the project schedule is achievable and within previously demonstrated capabilities of the EPC contractor using generally accepted construction and project management practices and adhering to a detailed work plan;

(F) Whether the project is capable of meeting the requirements specified in its environmental permits if operated and maintained as proposed;

(G) Whether the project will have a useful life of at least the repayment period of the loan;

(H) Whether the staffing plan, organizational structure, and operating programs and procedures proposed for the project are consistent with generally accepted practices in the industry;

(I) Whether the methodology used by the applicant to prepare a forecast of non-fuel operating and maintenance costs for the proposed project is reasonable and whether the forecast should be sufficient to operate and maintain the project consistent with the performance standards in the loan agreement;

(J) Whether the project's financial forecast of projected net revenues is based on a reasonable and objective methodology and will be adequate to support the debt service;

(K) Whether the project is capable of achieving the long-term EAF projected by the applicant in the application; and

(L) Whether the cost estimates that serve as the basis for the total projected construction costs, including project contingencies, as identified in the application, were developed in accordance with generally accepted engineering practices and methods of estimation.

(3) In addition, the program administrator will evaluate the creditworthiness of the applicant, based on the equity commitment letter from the sponsor, as required under subsection (c), and any additional documentation of creditworthiness submitted with the application as identified under subsection (c).

(4) To validate the estimated cost identified in the application and confirm that the requested loan amount does not exceed 60 percent of the estimated cost of the facility to be constructed, the program administrator, with the support of the qualified professional engineer, will:

(A) Evaluate the applicant's detailed cost estimate as submitted in the loan application;

(B) Allow any expenses related to the loan and the interest accrued during construction to be included in the cost estimate;

(C) Require applicants to include a reasonable allowance in the cost estimate for project contingencies of at least 5 percent of the project's estimated cost; and

(D) Allow inclusion in the cost estimate of a reasonable development fee to offset the sponsor's internal engineering, legal, general, and administrative costs, not to exceed 3 percent of the project's estimated cost.

(5) The program administrator will base its recommendation under subsection (d)(3)(C) of this section on the criteria and evaluation outlined in this subsection (e).

(f) **Loan agreement documentation and terms.**

(1) Loans awarded under this section will have a term of 20 years, will be payable ratably starting on the third anniversary of the commercial operations date, and be structured as senior debt secured by a first lien security interest in the assets and revenues of the project.

(2) Loan agreements will include the following material documents, substantially in the form approved by the commission:

(A) **Credit Agreement** – the primary agreement between the borrower and commission that will govern the terms and conditions under which the commission will loan funds to the borrower.

(B) **Depositary Agreement** – an agreement between the borrower and commission that will provide the commission, as lender, with control over the borrower's deposit accounts and securities accounts in order to perfect the commission's security interest in those accounts.

(C) **Security Agreement** – an agreement between the borrower and commission that will give the commission, as lender, the right to take control of and transfer all material projects assets in the event of a default on the Credit Agreement, subject to the applicable procedures and approvals identified in Public Utility Regulatory Act (PURA) § 34.0108.

(D) **Pledge Agreement** – an agreement between the borrower and commission that will create a security interest in the equity interests of the project in favor of the commission as the senior secured party.

(3) The Credit Agreement will include the following key terms:

(A) **Construction and Term Loan Facility** – A senior secured first lien construction and term loan facility (Construction Loan) will be advanced to the borrower in one or more drawings upon the closing date of the Credit Agreement and will continue until the project achieves commercial operation and the Construction Loan is converted to a term loan as detailed in subparagraph (f)(3)(A)(iv). Amounts repaid during the term of the Construction Loan, if any, may not be re-borrowed by the borrower following the Construction Loan's conversion to a term loan.

(i) Upon initial closing of the Credit Agreement, the borrower may request an initial loan disbursement for up to 60 percent of qualifying and documented incurred expenses that are part of the total estimated cost of construction for the project, as verified by the program administrator with the assistance of the qualified professional engineer, pursuant to subparagraph (e)(4) of this section.

(ii) During the term of the Construction Loan, the borrower may request loan disbursements for up to 60 percent of the documented incurred project construction and commissioning costs. The borrower shall contribute the required equity commitment of no less than 40 percent to such construction and commissioning costs as the borrower makes draws during the Construction Loan period.

(iii) For all loan disbursements, the borrower will be required to submit a construction drawdown certificate in the form that is attached as an exhibit to the Credit Agreement. A qualified professional engineer will review the construction drawdown certificate and will deliver the certificate to the administrative agent, in the form attached as an exhibit to the Credit Agreement.

(iv) Upon the commercial operations date of the project, to be confirmed with the assistance of a qualified professional engineer, and fulfillment of any other conditions precedent, the Construction Loan shall convert to an amortizing term loan (Term Loan) applicable to the total disbursements to the borrower.

(B) **Equity capital contributions** – The required equity capital contributions (Equity Commitment) shall be calculated as no less than 40 percent of the estimated capital cost of the project, as verified by the program administrator with the assistance of the qualified professional engineer, pursuant to subparagraph (e)(4) of this section.

(C) **Interest** – Interest on the loan amounts disbursed under the Credit Agreement shall accrue at a fixed rate per annum equal to three percent.

(D) **Scheduled repayment** – The Term Loan shall be repaid via scheduled payments, beginning on the third anniversary date of the commercial operations date.

(E) **Voluntary prepayment** - The total loan amount under the Credit Agreement may be voluntarily prepaid in whole or in part without premium or penalty at any time.

(F) **Collateral** – To secure the indebtedness under the Credit Agreement, the borrower shall grant the lender a first priority security interest in all of its existing and after-acquired real and personal property related to the project and in all of the outstanding equity interests of the borrower in the project, with customary exclusions.

(G) **Priority of Payments** - All project revenues shall be deposited in an account (Revenue Account) and will be applied in the following priority: (i) payment of operating and maintenance expenses, (ii) payment of fees and expenses related to the Term Loan facility, (iii) payment of interest due and payable under the Term Loan facility, (iv) payment of scheduled principal repayments under the Term Loan facility, (v) permitted tax distributions, and (vi) the remainder to a distribution account of the project sponsor (Distribution Account).

(H) **Distributions** – Amounts in the Distribution Account shall be available for distribution, so long as no default or event of default has occurred and is continuing.

(I) **Change of control** – A change of control will occur if greater than 50 percent of the equity interest in the project is sold to a third party. A change of control may require consent by the lender, not to be unreasonably withheld, under the terms set out in the Credit Agreement.

(J) **Performance covenant** – the Credit Agreement will include a debt covenant with reasonable performance standards for the borrower. Such standard will be set at 50 percent of the EAF, as calculated on an average basis over a rolling 24-month period. The performance standard also will allow for cure periods for the borrower and exceptions if the performance shortfall is due to force majeure events.

(K) **Events of default** – The events of default will be those customarily found in loan agreements for electric generating facilities and, in each case, will be subject to customary exceptions such as force majeure events; materiality thresholds (including material adverse effect); reasonableness; monetary thresholds; replacement rights; knowledge and other qualifiers; and cure rights and cure periods. Events of default will include:

(i) Failure to pay principal, interest, or other amounts due;

(ii) Breach of covenants in the Credit Agreement;

(iii) Inaccuracy of representations in the Credit Agreement;

(iv) Bankruptcy or insolvency of the borrower;

(v) Default by the borrower under a material project document that gives rise to a right of termination under such material project document, subject to cure periods and a right to enter a satisfactory replacement agreement; and

(vi) Event of abandonment.

(L) **Remedies for events of default** – the commission will follow the process outlined in PURA § 34.0108 following an event of default under the Credit Agreement.

(g) **Deposits**

(1) The borrower shall deposit in an escrow account held by the comptroller an amount equal to three percent of the estimated cost of the project for which the loan is provided, as verified by the program administrator with the assistance of the qualified professional engineer, pursuant to subparagraph (e)(4) of this section. The borrower must deposit the required funds before the initial loan amount is disbursed.

(2) The borrower may not withdraw the deposit from the escrow account unless authorized by the commission:

(A) For deposits related to the construction of new facilities, the commission will authorize the borrower to withdraw the deposit funds from the escrow account if the project for which the loan was provided is interconnected in the ERCOT region and reaches its commercial operations date:

(i) Before the fourth anniversary of the date the initial loan funds were disbursed; or

(ii) By the fifth anniversary of the date the initial loan funds were disbursed, if the commission finds, with consultation with the program administrator and qualified professional engineer, that extenuating circumstances such as global supply chain delays or force majeure events caused the delay.

(B) For deposits related to upgrades to existing facilities, the commission will authorize the borrower to withdraw the deposit funds from the escrow account if the project for which the loan was provided is interconnected in the ERCOT region and reaches its commercial operations date:

(i) Before the third anniversary of the date the initial loan funds were disbursed; or

(ii) By the fourth anniversary of the date the initial loan funds were disbursed, if the commission finds, with consultation with the program administrator and qualified professional engineer, that extenuating circumstances beyond the reasonable control of the borrower, such as global supply chain delays or force majeure events, caused the delay.

(h) **Administrative agent**

(1) The commission will hire a single administrative agent to oversee the loans awarded under this section. The administrative agent will be responsible for loan administration and communication with the borrower upon the closing date of the loan agreements.

(2) The general purpose of the administrative agent is to provide the project with a single point of contact for the day-to-day operation of the project and for borrowing and repaying loans.

(3) The administrative agent, on behalf of the commission, will be responsible for monitoring loan compliance, including reporting, and will manage borrowers' disbursement requests.

(4) The administrative agent will also facilitate deposits and withdrawals from the escrow account held by the comptroller for the deposit referenced in subsection (g) of this section.

(5) The commission will grant the administrative agent the necessary authority to act on behalf of the commission and to exercise the powers expressly set forth in the Credit Agreement and associated loan agreements.

(6) The administrative agent will have no duties not expressly set forth in the Credit Agreement or associated loan agreements, and the administrative agent will not act in a fiduciary capacity or on behalf of any third parties.

(7) The administrative agent will have no liability to the commission or borrower in the absence of its own gross negligence or willful misconduct.

(i) **Completion bonus grant program.**

(1) An eligible project may apply for a completion bonus grant under this subsection (i). [*If the commission determines that grants should be limited to new construction, add:* "For purposes of subsection (i) of this section, eligible project includes only new construction and does not include upgrades to existing facilities."].

(2) An eligible project may submit an application for a completion bonus grant beginning on June 1, 2024. However, no grant payments will be disbursed until the first anniversary of the commercial operations date of the eligible project, and an application that is approved before the project interconnects with the ERCOT grid will be conditional on the resource interconnecting with the ERCOT grid. The application may, but is not required to, be made concurrently with an application under subsection (c) of this section. An eligible project may apply for a completion bonus grant regardless of whether it has also applied for a loan under subsection (c).

(3) An application must establish that the project is an eligible project as defined in subsection (b) of this section. An application made concurrently with or following approval of a loan application does not need to duplicate any information or documentation already submitted with the loan application, but must specify that the applicant seeks a completion bonus grant. If made independently from a loan application under subsection (c), a grant application under this subsection (i) must include the portions of the loan application detailed in subparagraph (c)(1), (3), and (4)(A)-(J), (L), except that an eligible project that submits its application after having interconnected with the ERCOT grid, as evidenced by supporting documentation, can exclude the portions of the application detailed in subparagraph (c)(4)(B)-(I) and can omit the milestones in (c)(4)(L) that have already been achieved.

(4) Applications for completion bonus grants will be reviewed under the process and timelines outlined in subparagraph (d)(3)(A)-(C) and under the applicable criteria in subparagraph (e)(2)—i.e., excluding criteria in subparagraph (e)(2)(G) and (J) related to ability to repay the loan and in (e)(2)(D) regarding performance standards under the loan agreement and, for projects that have interconnected with the ERCOT grid at the time the application is made, also excluding criteria in subparagraph (e)(2)(A)-(E). Applications that are approved before an eligible

project has interconnected with the ERCOT grid will be approved contingent on interconnection, to be verified by the qualified professional engineer.

(5) Unless the commission determines that extenuating circumstances justify extending the deadlines provided, the commission may provide a grant under this section of up to:

(A) $120,000 per megawatt of capacity provided by a facility that is interconnected in the ERCOT power region before June 1, 2026; or

(B) $80,000 per megawatt of capacity provided by a facility that is interconnected in the ERCOT power region on or after June 1, 2026, and before June 1, 2029.

Absent extenuating circumstances, no grants may be provided to a facility that is interconnected in the ERCOT power region on or after June 1, 2029. For the purpose of evaluating potential extensions to the deadlines provided, extenuating circumstances may include, but will not be limited to, delays to the project schedule that are outside of the developers reasonable control (e.g., delays caused by the transmission operator, delays caused by ERCOT, other force majeure events, and widespread supply chain disruptions).

(6) The proceeds of the grant awarded will be disbursed to the grant recipient by equal payments over a 10-year period that begins on the first anniversary of the commercial operations date of the facility. The annual payments are subject to being withheld or discounted in accordance with subparagraph (i)(7). The total amount of the annual payments may not exceed the applicable cap set out in subparagraph (i)(5).

(7) Annual payments will be awarded and discounted each year, beginning on the first anniversary following the commercial operations date and following submission of documentation to support performance in the preceding 12 months, based on the following performance criteria:

(A) Performance will be measured based on the EAF.

(B) For purposes of demonstrating both median and optimum performance, grant recipients will be required to calculate an EAF during the critical

operating hours of the applicable twelve-month period. The EAF calculation must be submitted to the Commission, with notice to ERCOT, within 60 days of the end of each 12-month period coinciding with the commercial operations date. ERCOT will have 30 days from the date of submission to verify or object to the submitted data. Once the data has been verified by ERCOT, the administrative agent will coordinate the distribution of the completion bonus grant according to the methodology in subparagraph (i)(7)(C).

(C) Median performance is equal to a 50 percent EAF, and optimum performance is equal to a 92 percent EAF during the first 18 months following the commercial operations date and a 95 percent EAF thereafter:

(i) To receive any amount of the completion bonus grant for a given year, a grant recipient must demonstrate that it exceeded the median performance standard.

(ii) To receive the full potential completion bonus grant for a given year, a grant recipient must demonstrate optimum performance.

(iii) For a grant recipient that exceeds the median performance standard but does not reach the optimum performance standard for a given year, the completion bonus grant amount awarded for that year will be discounted by multiplying the EAF by the total potential completion bonus grant amount for the year.

(j) The total loans and grants awarded under this section, in the aggregate, must not exceed, $7.2 billion.