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PROJECT NO. 55826

TEXAS ENERGY FUND IN-ERCOT	§	BEFORE THE
	§	PUBLIC UTILITY COMMISSION
GENERATION LOAN PROGRAM	§	OF TEXAS

COMMENTS OF VISTRA CORP.

Vistra Corp. (Vistra), on behalf of its jurisdictional subsidiaries, files these comments concerning the proposed repeal and replacement of 16 Tex. Admin. Code (TAC) § 25.510 relating to the Texas Energy Fund In-ERCOT Generation Loan Program (TEF or loan program). This proposed rule will implement Public Utility Regulatory Act (PURA) § 34.0104 as enacted by Senate Bill (SB) 2627 during the 88th Regular Texas Legislative Session and was approved for publication by the Public Utility Commission of Texas (Commission) at its November 30, 2023 open meeting and published in the *Texas Register* on December 15, 2023 (the Proposal).¹ The Proposal will establish terms and procedures for loan applications for construction of dispatchable electric generation facilities within the ERCOT region. The Proposal also specifies a performance standard that an electric generation facility must achieve to obtain loan proceeds.

I. Specific Comments

A. A copy of the executed SGIA should not be required.

The Proposal requires that a TEF loan applicant provide: a copy of its standard generation interconnection agreement (SGIA) executed by the applicant and the transmission service provider (TSP); demonstration that water and fuel-supply arrangements are complete; evidence of completion of the ERCOT transmission screening study; and evidence of placement in the ERCOT

¹ 48 Tex. Reg. 7267 (to be codified at 16 TEX. ADMIN. CODE § 25.510) (proposed Dec. 15, 2023).

interconnection queue.² These proposed requirements put the cart before the horse and undermine the TEF's policy intent. They effectively require that the applicant be fully committed to a project before the applicant can apply for a TEF loan. But the purpose of SB 2627 is to provide financing to encourage project development, not to provide funding for projects that a developer has already committed to build regardless of availability of a TEF program loan.

Requiring a signed SGIA is a step too far at the application stage. Prior to executing an SGIA, an interconnecting entity must complete a Security Screening Study³ and a full interconnection study (FIS) with the TSP.⁴ Completing a Security Screening Study regularly takes 45-90 days,⁵ and completing a FIS often takes more than 180 days. For most projects, these studies will consume at least six months. And these are required *before* signing the SGIA. The interconnecting entity and the TSP have up to 180 days to negotiate the SGIA,⁶ so this entire process will typically take more than a year to complete.

While a generator takes six to twelve months to leap these regulatory hurdles, it is paying administrative fees and incurring engineering, legal, and other costs. Nothing in SB 2627 requires these steps be complete prior to applying for a TEF loan. The Commission should adopt application criteria that ensure applicants are serious about constructing dispatchable generation facilities if awarded a loan. But requiring a signed SGIA before an application can be filed will impede the TEF program's ability to meet the statutory deadline of disbursing all initial funds before December 31, 2025 and should be deleted.⁷ Removing this requirement will also serve ERCOT's

² § 25.510(e)(5)(C)(vi), (vii); Proposal at 12.

³ ERCOT Planning Guide, § 5.3.1(3).

⁴ ERCOT Planning Guide, § 5.3.2.5(6).

⁵ ERCOT Resource Interconnection Handbook at 18.

⁶ ERCOT Planning Guide, § 5.3.2.5(7).

⁷ PURA § 34.0104(l).

stated goal of having the first submissions into the Commission by June 1, 2024. The rule should require completion only of the screening study as an application prerequisite, which is a reasonable screen to show applicants are serious about their proposed projects.

B. The parent entity should be able to provide notice of intent and apply on behalf of the applicant, and the parent’s creditworthiness and qualifications should be considered.

To operate efficiently, the TEF program should allow a corporate parent of a subsidiary applicant to submit (1) the notice of intent to apply and (2) the application on behalf of its subsidiary. The Proposal requires the applicant itself submit these filings.⁸ At the time of application, the project company might not be formed, capitalized, or have sufficient stand-alone resources. Further, some projects might not be economically viable without a TEF loan. The program will be more efficient and effective if a corporate parent may apply for a subsidiary.

Similarly, the creditworthiness and qualifications of the corporate parent should be considered with the applicant’s creditworthiness for determining eligibility.⁹ An early-stage project might not yet be fully capitalized. Allowing the parent’s creditworthiness to be considered at the initial stages will recognize the realities of project development timelines. An early-stage project might not have prior history that demonstrates the qualifications set forth in the rule, but its parent will be able to demonstrate qualities that will benefit the new entity.

C. All decisions by the Commission are either contested cases or rulemakings, and in any event, must be subject to judicial appeal.

The Proposal states that “neither an application for a loan nor a request for withdrawal of a deposit is a contested case.”¹⁰ While it will understandably be resource-intensive for the Commission to individually review every application as a full contested case, it would also depart

⁸ § 25.510(d)(1), (2) & (f)(1)(A).

⁹ See § 25.510(c)(4)(C) (requiring that the application contain evidence of the applicant’s creditworthiness).

¹⁰ § 25.510(j); Proposal at 22.

from the Commission's normal procedures and could open the entire program to legal challenge, which could delay realizing the benefits of SB 2627.

Instead, the Commission should delegate authority to the Commission's Administrative Law Judge (ALJ) under 16 TAC § 22.32, and process applications under 16 TAC § 22.35, Informal Disposition. To be efficient, the Commission could limit the case parties to the applicant and Staff.¹¹ If there are no questions of fact that warrant a hearing (e.g., for a distribution on an already-approved loan) then the ALJ can approve an application. If fact questions warrant a hearing, the ALJ will review the evidence and issue a proposal to the Commission. This approach would balance administrative efficiency and protecting applicants' due process rights.

Proceedings under this rule should be contested cases. As a regulatory agency subject to the Texas Administrative Procedures Act (APA),¹² all of the Commission's actions are either a rulemaking or a contested case. The APA defines "contested case" as "a proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing."¹³ This definition states that all proceedings that are not rulemakings are contested cases.¹⁴

¹¹ Parties have standing to intervene in Commission proceedings if standing is expressly conferred by statute, commission rule or order or other law, or if such party has a justiciable interest which may be adversely affected by the proceeding. 16 TAC § 22.103(b). TEF program funding is provided by the state (not market participants), so market participants do not have a justiciable interest in another party's application proceeding.

¹² Government Code, Chapter 2001.

¹³ *Id.* § 2001.003(a).

¹⁴ This conclusion is strengthened by the organization of the APA. Within the APA, there are subchapters, and the subject matter of each is as follows: Subchapter A (General Provisions); Subchapter B (Rulemaking); Subchapters C – G (various aspects of Contested Cases); Subchapter H (Court Enforcement); Subchapter I (Exceptions); and Subchapter Z (Miscellaneous). Other than the express exemptions in Subchapter I, there is no subchapter of the APA that contemplates any action that is not either a rulemaking or contested case. The current exceptions set forth in Subchapter I do not include any Commission proceeding. *See* Government Code, §§ 2001.221–223 (setting forth proceedings that are exempt from the contested case provisions of the APA). Notably, the Legislature expanded the scope of proceedings exempt from the APA provisions during the most recent legislative session. However, even with that expansion, except as noted in footnote 15, *infra.*, no Commission proceedings are carved out from the requirements in the APA.

Additionally, the Legislature has carved out only specific Commission actions from the APA's contested case requirements.¹⁵ If the Commission has authority to declare certain actions are not contested cases, then the Legislature would not need to expressly carve out cease and desist orders from the requirements of the APA, for example. Reading the APA and PURA together, only the Legislature can exclude a regulatory action from the APA requirements, and a process by which a party's legal rights, duties, and privileges are determined is a contested case.

Further, the Proposal states that "Commission decisions on a loan application or request for withdrawal of deposit are not subject to motions for rehearing or appeal."¹⁶ But nothing in SB 2627 gives the Commission power to preclude judicial review. The Legislature has already declared that "any party to a proceeding before the commission is entitled to judicial review."¹⁷ And "proceeding" includes "a hearing, investigation, inquiry, or other procedure for finding facts or making a decision under this title."¹⁸ The Legislature has guaranteed the right to judicial review of a Commission procedure that finds facts or makes a decision under PURA, and this guarantee of judicial review flows from the Texas Constitution.¹⁹ Thus, the Commission asserting that its determinations in a "proceeding" are not subject to judicial review violates PURA and puts the entire loan program at risk of being invalidated by a legal challenge. The desired efficiency can be legally achieved by (1) delegating administrative review to an ALJ, (2) processing applications under informal disposition, and (3) expressly limiting parties to the applicant and Commission Staff.

¹⁵ See PURA § 15.106(a) ("Chapter 2001, Government Code, does not apply to the issuance of a cease and desist order under this subchapter without a hearing.").

¹⁶ Proposal at 22 (proposed 25.510(j)).

¹⁷ PURA § 15.001.

¹⁸ *Id.* at 11.003(15).

¹⁹ See Texas Constitution, Art. 1, Sec. 13 ("All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.").

D. The requirement that each borrower execute a security agreement, pledge agreement, and depository agreement conflicts with SB 2627.

Vistra agrees with the spirit of §§ 25.510(h)(3) and (4) of the Proposal (protecting the State's resources), but the Legislature has prohibited the proposed mechanisms. The Legislature foresaw the need to protect taxpayer funds and specifically provided one remedy—a petition for appointment of a receiver. The Legislature then went a step further and forbade the State or the Commission from obtaining an ownership interest in the project. The remedies in the Proposal's security agreement and pledge agreement provisions facilitate state ownership upon an event of default, conflicting with SB 2627, which says that the "state, including the commission, the advisory committee, and the trust company, may not retain an ownership interest in a project or facility for which a loan is provided under this chapter."²⁰ If the Commission were to exercise its remedies under the Proposal for those agreements, or if the Commission were to foreclose on the "collateral" specified in proposed 25.510(h)(1)(F), the Commission would own the equity of the project company, the assets of the project, or both. The Legislature specifically forbade that.

The Legislature expressly provided an appropriate remedy—in the event of a default under the loan agreement, the Attorney General shall bring suit in a district court in Travis County for the appointment of a receiver to operate the assets.²¹ Thus, the Proposal should be modified to conform to the statute and provide a process by which the Commission may request that the Attorney General bring suit for receivership to remedy a borrower default.

Similarly, the Proposal's requirement in § 25.510(h)(2) that a borrower execute a depository agreement, giving the Commission control over its deposit accounts and securities accounts, is not an appropriate requirement or remedy. It is not consistent with SB 2627, adding

²⁰ PURA § 34.0108(b).

²¹ *Id.* at § 34.0108(c).

an extra-statutory requirement for borrowers. SB 2627 says that “in the event of default,” the appropriate remedy (and the only remedy the Legislature authorized) is a suit by the AG for appointment of a receiver. At the time a receiver is appointed and bonded, the defaulting borrower’s accounts will be under the receiver’s control.²² Granting the Commission a duplicative security interest in a borrower’s accounts is unnecessary and beyond the statutory remedy. Thus, the Commission should delete § 25.510(h)(2) or modify it to conform to the statute.

E. The term “new construction” is undefined and injects uncertainty into determinations of eligibility.

The Proposal states that “*new* construction of an electric generation facility capable of generating least 100 megawatts” of capacity is eligible if its output is controlled primarily by forces under human control and meets other eligibility criteria (emphasis added).²³ However, the word “new” is not used by the statute, and it creates unhelpful uncertainty as to what projects are eligible.²⁴ This concept of “new” as it relates to generation facilities is already addressed in the statute, limiting the loans only to facilities that were not included in ERCOT’s Capacity Demand and Reserves Report (CDR) before June 1, 2023.²⁵ It is better to track the statute rather than introduce the term “new” in the rule. Lack of inclusion in the CDR prior to June 1, 2023 is the only required time metric for eligibility. Thus, the word “new” in proposed § 25.510(c)(2)(A) should be replaced with a cross reference to § 25.510(c)(4)(C) or simply deleted.

²² *Id.* at § 34.0108(f).

²³ Proposal at 7.

²⁴ PURA § 34.0104(a) (“The commission may use money in the fund . . . to provide loans to finance . . . the *construction* of dispatchable electric generation facilities. . .”).

²⁵ *Id.* at § 34.0104(b)(1).

F. The Commission should choose a performance metric other than Equivalent Availability Factor; alternatively, more clarity is needed regarding the EAF performance standard.

The Proposal requires that all facilities receiving a TEF loan “must meet an EAF performance of 50 for all hours during the term of the loan.”²⁶ It defines EAF as “the fraction of a given operating period in which a generating unit is available to produce electricity without any outages or equipment deratings.”²⁷ SB 2627 directs the Commission to adopt performance standards, but it is unclear that EAF is the proper standard, and regardless of the standard chosen, performance should be measured over at least a one-year period.

The proposed definition of EAF is too blunt an instrument to serve as the performance standard. The Commission should adopt a performance standard that accounts for planned outages and planned derates, such as the Equivalent Unplanned Outage Factor (EUOF) defined by the North American Electric Reliability Corporation (NERC). EUOF and EAF use many of the same inputs, but EUOF is based on unavailability instead of availability (and can be converted to an availability metric as 100% - EUOF). Unlike EAF, EUOF does not penalize a generator for planned maintenance, which must be periodically performed to ensure reliability, or seasonal derates due to thermal efficiency impacts of ambient air conditions outside the generator’s control.

A dispatchable generation facility is a complicated system that requires periodic planned outages to ensure safe, efficient facility operation and to maintain equipment warranties. For example, a facility will typically have an annual planned outage of a few days to a week, and every three to five years a longer outage for significant maintenance. Including planned outage hours in

²⁶ § 25.510(h)(1)(A).

²⁷ *Id.*

the performance calculations might unhelpfully incentivize generators to plan their actions around the program's performance metric, not around safe, efficient operations.

No matter the standard chosen, the performance target must be set at a reasonable number that recognizes the reality that no unit can operate around the clock, 100% of the time. For example, if EUOF is chosen, setting the performance covenant threshold at 15% (or 85% if setting as 100% - EUOF) adequately accounts for the operational realities of dispatchable generation at sustainably high performance levels over the life of the loan.²⁸ If EAF is chosen, however, the Proposal's 50% threshold is difficult to evaluate given the year-to-year variation a generator may experience. New gas-fired generation (gas turbines and CCGTs) have industry-wide average EAFs of 85.4 and 83.8 (respectively) and average EUOFs of 7.4 and 5.5 (respectively) – meaning some perform better than that and some perform worse.²⁹ To accurately capture reliability benefits while remaining achievable by dispatchable generation facilities over the life of the loan, the performance covenant target should be 15% (EUOF) (or 85% if expressed as 100% - EUOF).

If EAF is retained as the performance metric, NERC's definition better accounts for a facility's derate impacts.³⁰ NERC's definition accounts for the relative size of a derate. The Proposal's definition appears to treat *any* derate as an absolute failure for that hour. For example, a 5 MW derate on a 60 MW unit would count as fully unavailable under the Proposal but would count as unavailable for only 5 minutes under NERC's definition. If any form of EAF is used,

²⁸ See NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION, Generating Unit Statistical Brochures, available at <https://www.nerc.com/pa/RAPA/gads/Pages/Reports.aspx>. See EAF averages in column AN and EUOF averages in column AU in Brochure 3 (2018-2022 data). Average EAFs for gas turbines and combined cycle gas generators range from 83.8 to 86.3 and average EUOFs range from 5.5 to 9.9.

²⁹ *Id.* Averages do not provide information about the distribution of individual unit performance across multiple years, so are unreasonable to use for the performance covenant standard, as the performance standard should not risk default of a loan recipient facility from normal variations over 20 years' time.

³⁰ See NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION, Appendix F: Performance Indexes and Equations, at F-7, https://www.nerc.com/pa/RAPA/gads/DataReportingInstructions/Appendix_F_Equations_2023_DRI.pdf.

seasonal derates (due to ambient air conditions beyond a generator's control) and planned derate hours (which reflect deliberate efforts to avoid tight conditions) should not be counted. Additionally, the Proposal ambiguously states that the EAF of 50 must be met for "all hours during the term of the loan."³¹ EAF should be measured on an annual basis; that will provide the best picture of a facility's reliability performance.

If used, EAF should also exclude forced outages outside management control and disregard non-material equipment derates (e.g., seasonal derates). The EAF (or any other performance standard chosen) determination should exclude mechanical equipment failures beyond the generator's control, as the current rule regarding compliance with ERCOT instructions does.³² The performance standard should recognize that if, due to mechanical failure, a unit must enter a forced outage to protect "public health and safety or the reliability of the ERCOT transmission grid, or [to avoid] risk of bodily harm or damage to equipment," the generator should not be penalized.

Similarly, non-material derates commonly occur for reasons that do not compromise reliability. Those non-material derates should not be counted against the generator's performance (which EAF does, and even more so as the Proposal appears to have defined it). If the Commission retains EAF as its performance standard, it would also be wise to allow for a good cause exception to account for circumstances beyond the generator's control.

Regardless of the performance metric chosen, the rule should include a good cause exception clause for the first three years of a unit's operation. Newly operational facilities can experience more outages in their first years as unique operational issues are identified and addressed. This practical approach could take the form of a good-cause exception, where the

³¹ *Id.*

³² See 16 TAC § 25.503(f)(2)(C) (excusing noncompliance with ERCOT instructions if such noncompliance is due to equipment failures beyond the control of the generator).

generator can show why noncompliance should be excused. Alternatively, the Commission could adopt a phased-in approach to compliance, where in the first three years of operation, facilities are held to a lower performance standard that scales up over time.

G. Miscellaneous matters.

The Proposal (or another Commission rule) should expressly state that ERCOT and TSPs are obligated to prioritize interconnection of projects awarded TEF loans. SB 2627 requires ERCOT to prioritize these interconnections.³³ The Commission should mirror that requirement.

Loan disbursements under § 25.510(h)(1)(B)(i)–(ii) should not be limited to 60% of incurred costs. SB 2627 includes one limitation on the size of the loan—the total loan amount shall not exceed 60% of the facility’s estimated cost.³⁴ There is no requirement in the statute analogous to the disbursement limitations in the Proposal and including this extra-statutory requirement will impair the loan program’s effectiveness.

The definition of “commercial operations date” should not rely solely on the ERCOT generator interconnection status (GIS) report; the GIS report will show both projected commercial operations dates in the Project Details tabs and actual approval dates for commercial operations by ERCOT in the Commissioning Update tab. This could create confusion. Rather, the Commission should accept any ERCOT record demonstrating the commercial operations date.

Registration with ERCOT as a generation entity should be required of all facilities receiving a TEF loan. Notably, this will ensure the Commission’s weatherization rules will apply.³⁵ SB 2627’s goal is to improve reliability; hence, compliance with weatherization requirements should apply to any unit that receives state funds.

³³ PURA § 35.005(d).

³⁴ PURA § 34.0104(b)(2).

³⁵ See 16 TAC §§ 25.55(a); (b)(2)–(3).

The Commission should not evaluate proposed projects that serve an industrial load or a private use network on the limited grounds of whether they will be available during an Energy Emergency Alert; rather, the Commission should examine how much output they will provide to the bulk power system holistically (which necessarily includes during tight grid conditions).

II. Conclusion

Vistra appreciates the opportunity to provide these comments for the Commission's consideration. Vistra has provided, in Attachment A, suggested revisions to the rule, in redline form, and looks forward to continued participation in this Project.

Dated: January 5, 2024

Respectfully submitted,

/s/ Ned Bonskowski

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PROJECT NO. 55826

TEXAS ENERGY FUND IN-ERCOT
GENERATION LOAN PROGRAM

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BEFORE THE
PUBLIC UTILITY COMMISSION
OF TEXAS

EXECUTIVE SUMMARY OF VISTRA CORP.'S COMMENTS

- **A copy of the executed SGIA should not be required.**
 - A project should not have to meet all the CDR-inclusion requirements before being allowed to simply apply for a loan.
- **Because applicants might be in the early project development stage, a parent entity should be able to provide the notice of intent and to apply on behalf of a subsidiary applicant, and the parent's creditworthiness and qualifications should be considered.**
- **Per the APA, all decisions by the Commission are either contested cases or rulemakings, and in any event, must be subject to judicial appeal.**
 - Proceedings that find facts and affect a party's rights or obligations are contested cases.
 - Judicial review of PUC proceedings is guaranteed by PURA §15.001.
 - The desired administrative efficiency can be legally achieved by (1) delegating administrative review to an ALJ, (2) processing the applications under informal disposition and (3) expressly limiting parties to the applicant and Commission Staff.
- **The requirement that each borrower execute a security agreement, pledge agreement, and depository agreement conflicts with SB 2627.**
 - The statute provides only one remedy for default—an AG suit for appointment of a receiver—and expressly forbids the state or Commission taking an ownership interest in a project.
 - The rule should be revised to conform to the sole statutory remedy for default.
- **The term “new construction” is undefined and injects uncertainty into determinations of eligibility, so “new” should be deleted.**
 - The statute provides the only relevant time metric—whether a project met the CDR standards before June 1, 2023—so adding the word “new” is unnecessary and injects ambiguity.
- **Instead of EAF, the Commission should use NERC's “Equivalent Unplanned Outage Factor” (EUOF) as the performance metric.**
 - EUOF better accounts for operational realities such as the need for planned outages and the negligible performance impact of small derates
 - The optimal EUOF standard should be 15% (or 85% if expressed as 100-EUOF)

ATTACHMENT A

§25.510. Texas Energy Fund In-ERCOT Generation Loan Program.

- (a) **Purpose.** The purpose of this section is to implement Public Utility Regulatory Act (PURA) §34.0104, which establishes requirements and terms for loans to finance dispatchable electric generating facilities within the ERCOT region.
- (b) **Definitions.** The following words and terms, when used in this section, have the following meanings unless the context indicates otherwise.
- (1) **Borrower** -- An applicant to the Texas Energy Fund who is successfully awarded a loan under this section.
- (2) **Commercial operations date** -- The date on which the electric generating facility has completed all qualification testing administered by ERCOT and is approved for participation in the ERCOT market~~[, as identified by ERCOT in the applicable monthly generator interconnection status report]~~.
- (3) **Equivalent unplanned outage factor (EUOF)** -- A measurement of generating unit forced unavailability, defined by the North American Electric Reliability Corporation and computed as:

$$\text{EUOF} = \Sigma (\text{UOH} + \text{EUDH}) / \Sigma \text{PH} \times 100\%$$

Where

PH = Period Hours = Number of hours in the period being reported that the unit was in the active state.

UOH = Unplanned Outage Hours = Sum of all hours during Forced Outages + Startup Failures + Maintenance Outages + Maintenance Outage Extensions.

EUDH = Equivalent Unplanned Derated Hours = Each individual Unplanned Derating is transformed into equivalent full outage hour(s). This is calculated by multiplying the actual duration of the derating (hours) by the size of the reduction (MW) and dividing by the Net Maximum Capacity (NMC). These equivalent full outage hours are then summed, such that:

$$\text{EUDH} = \Sigma (\text{Derating Hours} \times \text{MW Size of Reduction}) / \text{NMC}$$

(c) **Eligibility.**

- (1) An electric utility other than a river authority is not eligible for a loan under this section.
- (2) The following activities are eligible for a loan under this section if they also satisfy the requirements in paragraph (3) and are not ineligible as defined in paragraph (4):
 - (A) ~~[New]~~ ~~[e]~~Construction of an electric generating facility, which may comprise one or more generating units, capable of generating at least 100 megawatts (MW) of capacity with an output that can be controlled primarily by forces under human control.
 - (B) Upgrades to an existing electric generating facility~~[ies]~~ that results in a net increase of at least 100 MW of capacity ~~[for each facility]~~ with an output that can be controlled primarily by forces under human control.

- (3) ~~[In addition, a]~~ A proposed facility must:
- (A) be designed to interconnect and provide power to the ERCOT power region;
 - (B) register with ERCOT as a generation resource;
 - (~~C~~B) be designed to participate in the ERCOT wholesale market; and
 - (~~D~~E) be eligible to interconnect to the ERCOT region based on the attributes of the owners of the facility, according to the requirements in the Lone Star Infrastructure Protection Act (codified at Texas Business and Commerce Code § 117.002).
- (4) The following activities are not eligible for a loan under this section:
- (A) Construction or operation of an electric energy storage facility.
 - (B) Construction or operation of a natural gas transmission pipeline.
 - (C) Construction of a ~~[Any planned]~~ facility that met the planning model requirements necessary to be included in the capacity, demand, and reserves report issued by ERCOT before June 1, 2023.
 - (D) Construction or operation of a facility ~~[Operation]~~ that primarily serves an industrial load or private use network.

(d) **Notice of intent to apply.**

- (1) At least 60 days before submitting an application under this section, an applicant must submit a notice of intent to apply in the manner prescribed by the commission. Information submitted to the commission as part of the notice of intent to apply is confidential and not subject to disclosure under Chapter 552, Government Code. A

corporate parent may submit the notice on behalf of its subsidiary applicant. The notice of intent to apply must include:

- (A) The applicant's corporate name and the name of the electric generating facility for which it seeks a loan;
- (B) The anticipated generation capacity of each electric generating facility proposed to be financed with a loan under this section;
- (C) The anticipated commercial operations date of each electric generating facility;
- (D) The amount of the loan requested; and
- (E) For each electric generating facility, information demonstrating that the applicant or a corporate parent, on the applicant's behalf, is capable of financing project-related costs not supported by a loan awarded under this section.

- (2) Concurrent with the notice of intent to apply, the applicant, or a corporate parent of the applicant, must separately file a letter with the commission stating the applicant's corporate name, ~~[and]~~ the MW capacity that the requested loan amount will finance, and the loan amount expected to be requested.

- (e) **Application requirements and process.** A loan application must be submitted in the form and in the manner prescribed by the commission. A corporate parent may submit an application on behalf of its subsidiary applicant. Information submitted to the commission as part of the loan application process is confidential and not subject to disclosure under Chapter 552, Government Code. An application must include each of the requirements

detailed in this subsection. An applicant may withdraw an application at any time while under commission review.

- (1) The applicant's corporate name and the name of the electric generating facility for which it requests a loan.
- (2) Amount of the loan requested.
- (3) The anticipated generation capacity of the electric generating facility proposed to be financed with a loan under this section.
- (4) Applicant information.
 - (A) A copy of any information submitted to ERCOT regarding the applicant's attestation of market participant citizenship, ownership, or headquarters;
 - (B) Evidence of the applicant's prior experience with siting, permitting, financing, constructing, commissioning, operating, and maintaining dispatchable electric generating facilities to provide reliable electric service in competitive energy markets;
 - (C) Evidence of the applicant's or a corporate parent's creditworthiness, including:
 - (i) An equity commitment letter demonstrating the ability to fund the necessary project equity (at least 40 percent of the remaining estimated cost of construction) plus the required three percent construction escrow deposit amount.
 - (ii) Financial statements, including statements of the applicant's or corporate parent's total assets, total liabilities, net worth, and credit ratings issued by major credit rating agencies.

(5) Project information.

- (A) A narrative explanation that details how the facility 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 preparations for compliance with §25.53 of this title (relating to Electric Service Emergency Operations Plans) and §25.55 of this title (relating to Weather Emergency Preparedness);
- (B) Demonstration of the project's eligibility under subsection (c) of this section;
- (C) Project-specific information that will allow the commission to determine and evaluate the viability and attributes of the electric generating facility, including:
 - (i) A table with the resource's planned operation attributes, including nameplate capacity, seasonal net maximum sustainable ratings during winter and summer, cold and hot temperature start times, and the original equipment manufacturer's estimated EUOF [~~equivalent availability factor (EAF)~~] calculation, if available [~~in North American Electric Reliability Corporation (NERC's) generating availability data system (GADS)~~];
 - (ii) A statement indicating whether the electric generating facility will serve an industrial load or private use network, and if so, a description of how the electric generating facility will primarily serve and benefit the ERCOT bulk power system given its

relationship to an industrial load or private use network, ~~[and]~~ whether and in what circumstances the facility's full generation output would be available to the ERCOT bulk power system ~~[during any Energy Emergency Alert]~~, and a copy of any information submitted to ERCOT regarding private use network net generation capacity availability;

- (iii) A one-line diagram of the proposed project, if available;
- (iv) Evidence of site control, consistent with applicable ERCOT planning guide requirements;
- (v) An up-to-date phase 1 environmental site assessment, conducted in accordance with standards identified in 40 C.F.R. Part 312;
- (vi) A description of the electrical interconnection plan, including evidence that the proposed project is in the interconnection queue with ERCOT and has completed the ERCOT screening study; and ~~[a]~~ copies[y] of the full interconnection study and standard generator interconnection agreement with the interconnecting transmission service provider, if completed~~;~~ ~~and a copy of the executed standard generation interconnection agreement~~];
- (vii) A description of the 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;

- (viii) A description of the 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, and organizational charts;
- (ix) A list of all required environmental, construction, and operating permits with current approval status;
- (x) A description of the air emissions compliance plan, including evidence of receipt of any required air emissions credits;
- (xi) 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 capital and an annual operating and maintenance budget; and
- (xii) A proposed project schedule with anticipated dates for major project milestones, such as execution of the standard generation interconnection agreement, completion of the full interconnection study, start date for the engineering of the project, construction start date, submission of applicable registration documents with ERCOT and the commission, energization (backfeed date), initial synchronization and parallel operation with the ERCOT grid, and commercial operations date.

(6) **Estimated cost.** A description of estimated project costs, which includes:

- (A) Development, construction, and capital commitments required for the project to reach completion;

- (B) Permitting-related costs;
- (C) Development fees;
- (D) Land acquisition and lease costs;
- (E) Legal fees;
- (F) Up-front fees;
- (G) Commitment fees;
- (H) Interest rate protection;
- (I) Ancillary credit facility fees;
- (J) Title insurance; and
- (K) Interconnection costs.

(f) **Evaluation Criteria.** The commission will approve or deny an application on the criteria and evaluation outlined in this subsection.

(1) The commission will evaluate an application under this section based on:

(A) The applicant's or a corporate parent's:

- (i) Quality of services and management, as shown by [~~the applicant's~~] prior history of electricity generation in this state and this country and proposed organizational structure for the project for which the applicant seeks a loan;
- (ii) Efficiency of operations, as shown by [~~the applicant's~~] existing generation resources and proposed operational attributes of the project for which the applicant seeks a loan;

- (iii) History of electricity generation operations in this state and this country;
- (iv) Resource operation attributes, including fuel type and heat rate, seasonal net maximum sustainable rating, resource ramp rate, and capacity factor;
- (v) Ability to address regional and reliability needs, including the ability to comply with the requirements of §25.53 of this title (relating to Electric Service Emergency Operations Plans) and §25.55 of this title (relating to Weather Emergency Preparedness);
- (vi) Access to resources essential for operating the facility for which the loan is requested, such as land, water, and reliable infrastructure, as applicable;
- (vii) Evidence of creditworthiness and access to capital and ability to repay the loan on the terms established in the loan agreement; and
- (B) The nameplate generation capacity and total estimated costs of the facility for which the loan is requested.
- (2) The commission may also consider the following criteria:
 - (A) The suitability of the facility site to support the construction, operation, and maintenance of the proposed facility and to provide sufficient access to utilities;
 - (B) The sufficiency of the various construction and equipment supply contracts necessary to construct the facility;
 - (C) The outcomes of ~~planned~~ tests of the resource's operating capabilities;

- (D) The commercial feasibility of the facility's construction schedule;
- (E) The facility's proposed environmental permits and commitments;
- (F) The reasonableness of the applicant's forecast of non-fuel operating and maintenance costs;
- (G) The methodology used to construct the facility's financial forecast of projected net revenues;
- (H) The sufficiency of the applicant's proposed sources of equity to cover the costs of the facility not funded through a loan provided under this section;
- (I) Whether it is reasonable to expect, based upon good engineering judgment, that the facility can achieve the applicant's long-term EUOF[EAF] and capacity projections; and
- (J) The basis for the total projected construction costs, including project contingencies.

(g) **Loan Structure.** An approved loan will have the following characteristics:

- (1) Consist of no more than 60 percent of the estimated cost of the electric generating facility to be completed;
- (2) Be the senior debt secured by the electric generating facility to be completed;
- (3) Have a repayment term of 20 years;
- (4) Be payable on a pro rata basis starting on the third anniversary of the estimated commercial operations date of the electric generating facility as stated on the application; and

- (5) Be structured as senior debt secured by a first lien security interest in the assets and revenues of the project.
- (h) **Loan Terms and Agreements.** A borrower must enter into one or more agreements with the commission that includes the terms of this section.
- (1) **Credit agreement**—the primary agreement between the borrower and the commission that will govern the terms and conditions under which the commission will authorize the loan of funds to the borrower. The credit agreement will include the following key terms:
- (A) **Performance covenant**—the electric generating facility financed by the loan must meet an EUOF[EAF] performance of 15[50], measured on a calendar-year basis, for all applicable hours during each calendar year included in the term of the loan. [~~EAF is the fraction of a given operating period in which a generating unit is available to produce electricity without any outages or equipment deratings.~~]
- (B) **Construction and term loan facility**—a senior secured first lien construction and term loan facility 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. 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 commission.
 - (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 will 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 specified by the commission. The commission will review the construction drawdown certificate and, upon approval, will instruct the Texas Treasury Safekeeping Trust Company to disburse funds.
 - (iv) Upon the commercial operations date of the facility and fulfillment of any other conditions precedent, the construction loan will convert to an amortizing term loan applicable to the total disbursements to the borrower.
- (C) Equity capital contributions—the commission will verify the borrower’s required equity capital contributions (at least 40 percent of the ~~[estimated]~~ capital cost of the project).

- (D) Interest—interest on the loan amounts disbursed under the credit agreement will accrue at a fixed annual rate of three percent.
- (E) Voluntary prepayment—the borrower may voluntarily prepay the ~~[total]~~ loan amount under the credit agreement in whole or in part at any time without premium or penalty.
- (F) Collateral—to secure the indebtedness under the credit agreement, the borrower will enter into the security agreement described in paragraph (2) of this section ~~[grant the commission a first priority security interest in all of its existing and after-acquired real and personal property related to the facility and in all of the outstanding equity interests of the borrower in the facility]~~.
- (G) Change of ownership and control—a change of ownership and control occurs if greater than 50 percent of the equity interest in the project is sold to a third party. The borrower and the third party must submit an application for change of ownership and control that meets the requirements of subsections (c) and (e) of this section. A change of ownership and control will require the commission's approval.
- (H) Compliance and audit covenants—the credit agreement will include debt covenants requiring the borrower to meet all statutory requirements for loan application eligibility and a debt covenant requiring that the borrower submit annual financial audits, credit assessments, and electric generating facility performance assessments throughout the term of the loan. If the borrower also serves an industrial load or private use network, the borrower

must also submit an annual accounting showing that the ~~[majority of the]~~ output of the electric generating facility primarily served the ERCOT bulk power system during the performance year.

(2) ~~[**Depository agreement**—an agreement between the borrower and commission that will give the commission, as lender, control over the borrower's deposit accounts and securities accounts to perfect the commission's security interest in those accounts.]~~

~~[(3)]~~ **Security agreement**—an agreement between the borrower and the commission that will give the commission~~[-as lender,]~~ the right to seek the remedy authorized in PURA §34.0108(c) in the event of a default by the borrower. ~~[take control of and transfer all material project assets in the event of a default on the credit agreement; subject to the applicable procedures and approvals identified in PURA §34.0108.]~~

~~[(4)]~~ ~~**Pledge agreement**—an agreement between the borrower and the commission that will create a security interest in the equity interests of the project in favor of the commission as the senior secured party.]~~

~~[(5)]~~ **Deposit agreement**—an agreement between the borrower and the commission in which the borrower will agree to a deposit described in subsection (i) of this section.

~~[(6)]~~ **Events of default**—the borrower must agree to specified events of default, which include:

- (A) Failure to pay principal, interest, or other amounts due;
- (B) Material ~~[B]~~ breach of covenants in any agreement;
- (C) Inaccuracy of representations in any agreement;
- (D) Bankruptcy or insolvency of the borrower; and

(E) Abandonment.

~~[(7) Remedies for events of default the borrower must agree to the remedies described in PURA §34.0108 following an event of default.]~~

(i) **Deposits.**

(1) The borrower must deposit in an escrow account held by the Texas Comptroller of Public Accounts an amount equal to three percent of the estimated cost of the project for which the loan is provided. 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, subject to commission authorization, the borrower may withdraw the deposit funds from the escrow account if the facility for which the loan was provided is interconnected in the ERCOT region:

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

(ii) after the fourth anniversary but before the fifth anniversary of the date the initial loan funds were disbursed, if the commission finds that extenuating circumstances caused the delay.

(B) For deposits related to upgrades to existing facilities, subject to commission authorization, the borrower may withdraw the deposit funds from the escrow account if the facility for which the loan was provided is completed:

- (i) before the third anniversary of the date the initial loan funds were disbursed; or
 - (ii) after the third anniversary but before the fourth anniversary of the date the initial loan funds were disbursed, if the commission finds that extenuating circumstances caused a delay in the completion of the project.
 - (C) For the purpose of this subsection, interconnection occurs when the electric generating facility is physically connected and able to inject energy into the ERCOT region.
- (3) Upon the occurrence of an event that entitles the borrower to withdraw its deposit, the borrower will file a notice of satisfaction with the commission stating that the borrower requests the return of the deposit. The notice must state:
- (A) The event that entitles the borrower to withdraw the deposit;
 - (B) The date of interconnection or initial loan disbursement, as applicable; and
 - (C) A detailed statement of extenuating circumstances, if any, that support the borrower's request for a later withdrawal of the deposit.
- (4) The commission will evaluate each notice of satisfaction to determine whether the borrower is entitled to withdraw its deposit. If the borrower demonstrates that it has satisfied the requirements for withdrawal, then the commission will instruct the comptroller to return the deposit to the borrower. If the commission determines that withdrawal is not authorized, then it will instruct the comptroller to transfer the deposit to the Texas Energy Fund.

- (j) **Parties and Eligibility for Informal Disposition**~~[No Contested Case or Appeal]~~. An ~~[Neither an]~~ application for a loan and ~~[nor]~~ a request for withdrawal of a deposit is each a contested case eligible for administrative review under §22.32 of this title (relating to Administrative Review), and a request for withdrawal of a deposit is also eligible for informal disposition under §22.35 of this title (relating to Informal Disposition). Only the applicant and commission staff are parties to an application for a loan or a request for withdrawal of a deposit. ~~[Commission decisions on a loan application or request for withdrawal of deposit are not subject to motions for rehearing or appeal.]~~
- (k) **Expiration.** This section expires September 1, 2050.