Proposed §25.510(h)(1)(B), §25.510(h)(1)(B)(i), and (h)(1)(B)(ii)–Construction and Term Loan Facility, Borrower's Request for Loan Disbursement Upon Initial Closing, Borrower's Request for Loan Disbursements, and Equity Commitment During the Term of the Construction Loan

Proposed §25.510(h)(1)(B)(i) and (h)(1)(B)(ii) state that at the initial closing of a credit agreement, the borrower can request a loan disbursement of up to 60 percent of documented incurred expenses. During the loan term, the borrower may request disbursements up to 60 percent of project costs, while contributing agreed-upon equity.

TIEC suggested that, before allowing a borrower to receive TEF loan disbursements, the commission should require an applicant to demonstrate that the first 30 percent of anticipated construction costs have been funded. TIEC reasoned that the proposed rule creates a risk that a borrower could receive its TEF loan early in construction and then fail to achieve commercial operation. Calpine had a similar recommendation, but for 40 percent of anticipated construction costs, and that such funds should go into the project first, prior to the applicant receiving funds from the loan program to further ensure the applicant's creditworthiness.

Golden Spread recommended reducing the equity requirement from 40 percent to 20 percent in §25.510(h)(1)(B)(ii).

Vistra suggested that loan disbursements should not be limited to 60 percent of incurred costs.

Advanced Power stated that §25.510(h)(1)(B) does not address the issue of re-borrowing and requested clarification on whether TEF will include revolving facilities.

Commission Response

The commission agrees with suggestions by TIEC and Calpine that, prior to TEF loan distributions, a borrower should fund a portion of its equity or other sources of funding contribution to project costs. However, the commission declines to predetermine the percentage of project costs to be funded using the applicant's other sources of funding before releasing TEF loan funds, and instead modifies §25.510(h)(1)(B) to allow for pro-rata contributions of other sources of funding based on the applicant's or its corporate sponsor's creditworthiness and the discretion of the commission.

The commission has eliminated from the rule the minimum 40 percent equity requirement, and so the modification recommended by Golden Spread is unnecessary.

The commission declines Vistra's recommendation to not limit funding to 60 percent of incurred costs. PURA §34.0104(b)(2) limits loans to "an amount that does not exceed 60 percent of the estimated cost of the facility to be constructed."

Proposed §25.510(h)(1)(B)(iii)–Construction and Term Loan Facility: Drawdown Certificates

Proposed §25.510(h)(1)(B)(iii) requires borrowers to submit a construction drawdown certificate to request disbursement of loan funds.

Calpine recommended using an independent third-party subject matter expert, in the field of dispatchable generation project development engineering, to assist in developing a form drawdown certificate.

Calpine stated the use of a subject matter expert will reduce administrative burden and facilitate a more expedient review of drawdown certificates, as the form should require certification by an industry expert.

Commission Response

The required content of drawdown certificates will be determined during due diligence. The commission declines to specify the precise contents of a drawdown certificate in the rule and will use industry best practices in its development.

Proposed §25.510(h)(1)(C)–Equity Capital Contributions

Proposed §25.510(h)(1)(C) states that the commission will verify the borrower's required equity capital contributions (40 percent of the estimated capital cost of the project).

LCRA recommended removing the word "equity" from this section. Golden Spread recommended similar language and proposed reducing the 40 percent capital cost requirement to 20 percent. Vistra recommended adding "at least" before "40 percent" and eliminating "estimated."

TIEC suggested that developers should be allowed to self-fund more than 40 percent and use debt for remaining non-TEF funding requirements, rather than being required to use equity.

Commission Response

The commission modifies the rule to reflect that there is no explicit requirement for 40 percent equity. An applicant may submit its anticipated financing structures, which will be evaluated

during due diligence. While proposed structures with various forms of debt for the non-TEF portion of the funding will be considered, priority will be given to applications with equity at the project level. Moreover, projects with higher levels of equity contribution or with financing structures with corporate guarantees of TEF project debt may yield more favorable evaluation results. The commission also modifies the rule to add, at (h)(8), the requirement for applicants who wish to use subordinated debt in place of equity to assume the cost of drafting any required subordination agreements.

The commission agrees with Vistra on deleting "estimated," but will not add "at least," given the lack of an explicit equity requirement. The commission modifies §25.510(h)(1)(C) to remove the explicit requirement of 40 percent equity to align with other provisions related to equity.

Proposed §25.510(h)(1)(D)–Interest

Proposed §25.510(h)(1)(D) states that interest on the loan amounts disbursed under the credit agreement will accrue at a fixed annual rate of three percent.

WattBridge suggested postponing the accrual of interest until the project has been commercially operational for three years as that coincides with the start of loan repayment. WattBridge suggested interest accrual before that third anniversary should be incorporated as additional project cost.

Commission Response

PURA §34.0104(f)(3) states that a loan "must bear an interest rate of three percent." The statute does not provide for postponing the accrual of interest, as recommended by WattBridge.

Interest accrues daily during construction and until the third anniversary of the project's estimated COD. This interest may be capitalized in certain circumstances, as determined during the due diligence process. Only the portion of interest capitalized during construction is considered a project cost--see (e)(6)(H), where the commission adds interest accrued and capitalized during construction as an allowable project cost.

Proposed §25.510(h)(1)(E)–Voluntary Prepayment

Proposed §25.510(h)(1)(E) allows the borrower to voluntarily prepay the total loan amount under the credit agreement in whole or in part at any time without premium or penalty.

Vistra pointed out a typographical correction recommending removing the word "total" from this section.

Commission Response

The commission agrees that "total" in §25.510(h)(1)(E) is not applicable and modifies the rule for clarity. Voluntary pre-payments, including partial pre-payments, are allowed without penalty except that the loan agreement may require that applicants cover TEF interest rate breakage costs. Additionally, the TEF administrator will negotiate with a borrower seeking to prepay part or all of the loan other conditions related to prepayment, which may include the continuation of the performance, compliance, or audit covenants for the entirety of the envisioned 20-year loan period.

Proposed §25.510(h)(1)(F) – Collateral

Proposed §25.510(h)(1)(F) states that to secure the indebtedness under the credit agreement, the borrower will 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.

Advanced Power recommended allowing the developer the flexibility to grant shared first priority security interests to other counterparties. NRG also proposed allowing shared first priority security interest with hedge counterparties, enhancing cash flow stability for generation projects, benefiting project lenders. NRG stated the change would comply with the statutory requirement for the loan to be the senior debt secured by the facility, because sharing a senior security interest does not detract from the seniority of the interest. NRG provided redlines consistent with its recommendations.

Calpine suggested specifying how the collateral requirement relates to eligibility for PUNs and industrial generators.

TPPA requested clarification on whether this includes intellectual property, including, for instance, software leased to the facility by OEMs or other contractors.

Vistra stated that any commission remedy other than what is described in SB 2627 is prohibited and the Legislature only allowed appointment of a receiver as the remedy for default. Vistra stated, per SB 2627, the commission is barred from owning the real and personal property of the facility applicant and a security interest facilitates state ownership of private property in a default. Vistra provided redlines consistent with the recommendations.

Commission Response

PURA §34.0104(b)(3) states that TEF loans will be secured by project facilities. The commission disagrees with recommendations from Advanced Power and NRG to permit shared first priority security interest because the TEF loan is to be the senior debt of the project. In keeping with the requirement that any other debt must be subordinate to the TEF loan, the non-TEF debt of facilities associated with industrial load or PUNs must also be subordinate to the TEF loan.

Regarding TPPA's request for clarification, collateral is required for all project assets and equity. If intellectual property is a project asset, that intellectual property needs to be included as collateral. If there is intellectual property, leased or otherwise, the intellectual property itself or the lease to it needs to be included as collateral, though the underlying intellectual property will be governed by the lease.

The commission disagrees with Vistra's assertion that the commission's remedy--appointment of a receiver--conflicts with the commission requiring a security interest. The commission can hold the lien and exercise its interests via a receiver without taking ownership of the underlying assets.

Proposed §25.510(h)(1)(G)–Change of Ownership and Control

Proposed §25.510(h)(1)(G) states that 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 third party must apply for change of ownership approval from the commission.

Advanced Power stated that it would be atypical for a lender to have control over these types of decisions and suggested that commission approval for a sale of equity interests above the borrower's direct parent should not be required. Advanced Power suggested limiting change of control to direct ownership of the asset securing the loan, not ownership above direct control.

Calpine recommended eliminating §25.510(h)(1)(G), suggesting change of ownership and control should not need commission approval as this sort of approval would not otherwise be required for a generating facility's change in ownership outside of the TEF loan context. Calpine further stated that it is not administratively necessary, because, as a registered PGC, the generating facility would be required to apply to amend its PGC registration should a change of control result in a change of corporate parent. Calpine recommended that if the commission deems this additional approval necessary, the commission should establish an administrative approval process for such an application, including the use of a commission-approved form with a specified timeline for approval.

WattBridge proposed a 60-day review period for change of ownership and control. For non-rate regulated assets that generally do not require commission approval, the purchase and sale of an existing GR can be completed in 30 days between the signing of the agreement and actual transfer, subject to the Hart-Scott-Rodino Act. WattBridge stated that a lengthy regulatory review process will dampen investor interest and diminish the value of a plant with a TEF loan.

TIEC suggested using the standard for change of ownership and control from sale, transfer, and merger (STM) regulations. TIEC stated that PURA §39.915 requires approval for any transaction where 50 percent of stock is sold or where a controlling or operational control will be transferred. TIEC noted that the higher, more robust standard in §25.510(h)(1)(G) is appropriate and should be used for this program because the program is taxpayer support for subsidized loans.

NRG suggested adding language that consent will not be unreasonably withheld and allowing 90 days for commission approval.

Commission Response

Given the use of public funds for a TEF loan, the commission determines that review and approval of an application to change ownership and control for TEF loan recipients is appropriate to ensure that a TEF-funded facility continues to meet TEF objectives after acquisition. Therefore, the commission disagrees with Advanced Power and Calpine that there should be no review or approval of such changes. The commission modifies (h)(1)(H) to require a third party acquiring a TEF-funded facility to meet the performance covenant of the facility and the audit and compliance covenants for the remainder of the borrower's loan term. In addition, the commission adds a sentence to (h)(1)(H) to signify that the commission's determination on a change of ownership and control does not affect any person's obligations under PURA §39.158.

The commission does not seek to place an undue burden on potential changes in ownership and control, agrees with NRG's suggestion to clarify the rule to note that consent will not be unreasonably withheld, and modifies the rule to reflect this clarification. However, the commission declines the suggestions by WattBridge, TIEC, and NRG to impose specific timelines associated with change of ownership and control approval because some transactions may involve complex arrangements that necessitate extensive review. Additionally, the commission declines TIEC's proposal to adopt the standards in PURA §39.915 to govern a change of control evaluation because the public interest concerns in a transaction involving the sale of a TEF-funded facility are not the same as the sale of electric utility assets. PURA §39.915 protects retail customers when there is a sale of assets of a rate-regulated entity. But in this rule, the commission's primary concern is that a TEF facility continues to serve ERCOT in the manner described in the borrower's application and loan commitments.

Proposed §25.510(h)(1)(H)–Compliance and Audit Covenants

Proposed §25.510(h)(1)(H) states that credit agreements include covenants requiring borrowers to meet loan eligibility and submit annual audits. If serving an industrial load or PUN, borrowers must show that the majority of electric facility output served the ERCOT power system.

Calpine recommended including a confidentiality clause. Calpine recommended that annual financial audits, credit assessments, and electric generating performance assessments, as well as the annual accounting showing output of the electric generating facility, are confidential and not subject to disclosure under Chapter 552, Government Code.

Vistra recommended the commission prioritize facilities that will participate fully in the market. Vistra further suggests that if the PUNs are funded, then only a prorated percentage of the generator's cost should receive funding. Vistra recommended that the proration should account for the amount of generation participating in the market.

TPPA recommended strengthening the "primarily" language to support ERCOT more than PUNs. Vistra recommended modifying the language to clarify that if the borrower also serves an industrial load or PUN, the borrower must also submit an annual accounting showing that the output of the electric generating facility primarily served the ERCOT bulk power system during the performance year. Vistra provided specific redline language.

Drax Group also suggested aligning the audit requirement with definition of "primarily." Drax Group proposed a definition for "primarily" that excludes any facility that contributes no less than 100 MW of capacity to ERCOT, regardless of whether the facility is serving load behind the meter.

Commission Response

The commission agrees with Calpine that certain aspects of the information required for loan performance monitoring may be commercially sensitive and confidential. Therefore, the commission modifies the rule to maintain the confidentiality of financial audits, credit assessments, and electric generating facility performance assessments.

In response to Vistra's recommendation that only a prorated amount of a PUN generator's costs should be eligible for a TEF loan, the commission modifies (g)(1) to allow only those costs

related to the percentage of a PUN generator's capacity dedicated to ERCOT to be eligible for a TEF loan. However, the commission declines to modify the rule to prioritize facilities that will participate fully in the market because the universe of applicants is not known at this time, and the commission will fully evaluate all applicants based on the strength of their applications.

In response to TPPA's comment, the commission modifies (c)(1)(C) to define the requirements that an electric generating facility serving an industrial load or PUN must meet. Regarding Vistra's recommendation for an annual accounting, the commission modifies the rule to add subsection (h)(1)(I), which requires an electric generating facility serving an industrial load or PUN to submit an annual accounting showing its net capacity made available to ERCOT in the prior year, as compared to its nameplate capacity and the NCP demand of the associated industrial load or PUN.

The commission agrees with the Drax Group that the annual audit should align with the definition of "primarily." The commission adds the annual accounting requirement so that it may confirm that an electric generating facility associated with a PUN or an industrial load continues to reserve the primary portion of its capacity for ERCOT. However, the commission disagrees with the Drax Group's suggested definition of "primarily" because this suggested definition ignores the comparison between capacity dedicated to an industrial load or PUN and capacity dedicated to ERCOT. This comparison is essential for the commission's interpretation of "primarily."

Proposed §25.510(h)(1) and (h)(2)–Definitions for Credit Agreement and Depository Agreement

Proposed §25.510(h)(1) and (h)(2) define the following loan terms: credit agreement and depository agreement.

CPS Energy recommended recognizing that, according to §1208.002 of the Texas Government Code, any security interest connected to public debt obligations of a municipal utility system is statutorily perfected.

Vistra contended that the requirements of §25.510(h)(2) are inconsistent with the SB 2627 and should, therefore, be removed or modified.

Commission Response

The commission acknowledges CPS Energy's comment that any security interest related to public debt obligations of a municipal utility system is statutorily perfected. Accordingly, the commission adds new paragraph (h)(9) to allow an MOU or river authority to provide substitute documentation customarily associated with the issuance of a public security to meet all preceding requirements of subsection (h), including any obligations of the MOU or river authority under other applicable statutes. Any such substitute documentation must be prepared by an MOU or river authority at that entity's expense and must be on terms satisfactory to the commission.

The commission declines Vistra's proposed modification to the rule. While PURA §34.0108 specifies certain remedies in the event of default, it does not prohibit the inclusion of additional loan requirements. The requirements of §25.510(h)(2) are appropriate.

Proposed §25.510(h)(3) and (h)(4)–Definitions for Security Agreement and Pledge Agreement

Proposed §25.510(h)(3) and (h)(4) define the following loan terms: security agreement and pledge agreement.

CPS Energy asserted that certain agreements are not applicable to MOUs applying to the TEF loan. CPS Energy recommended additional language which would state that the remedy to the debtholder, in the event of default by an MOU, would reside in a rate covenant to compel the borrower to impose a rate sufficient to satisfy the debt obligations.

Commission Response

The commission acknowledges CPS's position that a public power entity is not able to consent to certain activities described in PURA § 34.0108. Accordingly, the commission adds new paragraph (h)(9) to allow an MOU or river authority to provide substitute documentation customarily associated with the issuance of a public security to meet all preceding requirements of subsection (h), including appropriate remedies upon borrower default. Any such substitute documentation must be prepared by an MOU or river authority at that entity's expense and must be on terms satisfactory to the commission.

Proposed §25.510(h)(3), (h)(4), and (h)(5)–Definitions for Security Agreement, Pledge Agreement, and Deposit Agreement

Proposed §25.510(h)(3), (h)(4), and (h)(5) define the following loan terms: security agreement, pledge agreement, and deposit agreement.

Vistra recommended using only a security agreement that recognizes PURA §34.0108(c) as the remedy for default. Vistra argued that the mandate for each borrower to execute a security agreement, pledge agreement, and depository agreement conflicts with SB 2627.

Shell Energy proposed expanding the security lien on the project to use project assets as collateral for hedge agreements, either through a capped lien amount or on a pari passu basis, ensuring stable cash flow. Shell recommended that if a hedge agreement is not required, any monthly gross margin above 125 percent of the project's pro forma should go into the Debt Service Reserve Fund. If the project is delayed by nine months or exceeds the budget by 40 percent, the commission should have step-in rights, including auctioning the project to other Market Participants.

Commission Response

The commission disagrees with Vistra that the commission's remedies for a default should be limited only to PURA §34.0108. While PURA §34.0108 specifies certain remedies in the event of default, it does not prohibit the inclusion of additional loan requirements. The requirements of §25.510(h)(2) are appropriate.

The commission disagrees with Shell Energy's proposed amendments. The existing protections in §25.510(h)(3) are sufficient to safeguard public funds consistent with the restrictions of PURA §34.0108 and the purpose of TEF.

Proposed §25.510(h)(6) and (h)(7)–Events of Default & Remedies

Proposed §25.510(h)(6) outlines the events of default to which the borrower must agree. Proposed §25.510(h)(7) requires the borrower to agree to the remedies described in PURA §34.0108 following an event of default.

TPPA recommended detailing the procedures for determining when an event of default has occurred, how a borrower can respond, and what process the borrower must follow in a default. TPPA commented that program participants need to be able to understand what constitutes default, who will make decisions on whether default has occurred, and what the process is. TPPA further recommended confirming that any defaults not sufficiently covered by collateral would result in a loss to the fund itself.

NRG proposed the inclusion of standard provisions related to potential default, such as notice and opportunity to cure, materiality thresholds, and force majeure provisions. NRG argued that the legislature did not prohibit these provisions and the provisions are necessary to safeguard against default. NRG provided redlines consistent with its recommendations.

TCPA advised using standard contract provisions to determine if a default has occurred. TCPA noted it is not beneficial for the state to seek receivership for all breaches. To prevent default, TCPA recommended including reasonable notice and cure provisions in the final rule.

Calpine proposed that events in §25.510(h)(6)(B) through §25.510(h)(6)(E) should only be considered a default if the events pose a material adverse effect to the project or its finances. Calpine also suggested that the commission should have the discretion to waive a breach or default without penalty to the borrower. If a default is declared, Calpine recommended mandatory arbitration with a third-party expert. Calpine argued that not all breaches that do not result in a material adverse effect should be considered a default. Calpine provided redlines consistent with its recommendations.

Vistra recommended revising the language in §25.510(h)(6)(B) to include "Material breach."

Commission Response

The commission declines to further detail the procedures determining an event of default. Subsection (h)(1) provides for a credit agreement, and (h)(6) identifies specific events of default. The rules have sufficient general guidance which, combined with the credit agreement executed between the borrower and the commission, will govern specific procedures.

The commission confirms that a default not covered by collateral or other credit support would result in a loss for the fund. PURA §34.0108 does not prescribe any other mechanisms to recover losses.

The commission declines the rule modifications proposed by NRG, TCPA, Calpine, and Vistra. PURA §34.0106(c) requires performance standards to be included in a debt covenant, and a recipient's failure to adhere to such requirements will constitute a breach of the covenant. The commission will develop appropriate cure periods along industry norms as part of the standard loan documentation.

Proposed §25.510(h)(6)–Events of Default

Proposed §25.510(h)(6) outlines the specified events of default to which the borrower must agree.

Shell Energy proposed that a delay of 12 months in reaching the projected COD should be considered a default event. In such a case, the commission should have the right to auction the project to other Market Participants. This comment also applies to §25.510(h)(7).

LSP recommended removing breach of performance covenant from the events of default and instead proposes to require the project sponsor to develop a plan acceptable to the commission to cure the performance breach.

Commission Response

The commission declines Shell Energy's proposed modification to the rule. Per PURA §34.0104(h) and (i), the failure to timely construct or upgrade a project facility may result in the borrower forfeiting the three percent deposit of its project costs. The commission declines to further penalize any such failure as an independent default event.

The commission declines LSP's proposed modification to the rule. PURA §34.0106(c) requires performance standards to be included in a debt covenant, and a recipient's failure to adhere to such requirements will constitute a breach of the covenant. The commission will develop appropriate cure periods along industry norms as part of the standard loan documentation.

Proposed §25.510(h)(7)–Remedies for Events of Default

Proposed §25.510(h)(7) requires the borrower to agree to the remedies described in PURA §34.0108 following an event of default.

LCRA commented that the proposed default remedies in PURA §34.0108 are not applicable to certain potential borrowers under state law. LCRA argued that certain legal constraints may prevent the commission from appointing a receiver, as PURA §34.0108 suggests. LCRA commented that borrowers should only comply with the default remedy if the default remedy does not contradict existing law.

Sierra Club suggested the commission clarify that the commission will not own defaulted projects but will instead transfer the defaulted projects to a court-established receivership.

Commission Response

The commission acknowledges LCRA's position that a public power entity is not able to consent to certain activities described in PURA § 34.0108. Accordingly, the commission adds new paragraph (h)(9) to allow an MOU or river authority to provide substitute documentation customarily associated with the issuance of a public security to meet all preceding requirements of

subsection (h), including appropriate remedies upon borrower default. Any such substitute documentation must be prepared by an MOU or river authority at that entity's expense and must be on terms satisfactory to the commission.

PURA §34.0108(b) prohibits the state, including the commission, from owning projects or facilities, and §34.0108(c), (d), (e), and (f) clearly establish the receivership process, authorities, and requirements. The commission declines Sierra Club's suggestion to revise the rule.

Proposed §25.510(i)(1)–Escrow Deposit Requirement for Loan Disbursement

Proposed §25.510(i)(1) requires the borrower to deposit three percent of the project's estimated cost in a Texas Comptroller-held escrow account before the initial loan disbursement.

WattBridge recommended using letters of credit as an alternative for cash deposits for commercial efficiency. WattBridge notes that letters of credit are regularly used in lieu of cash and are a more commercially efficient use of capital.

Commission Response

The commission agrees that it is suitable for a borrower to provide a standby letter of credit in lieu of a cash deposit. However, to protect the commission's interest in advancing TEF projects, the letter of credit must be supported by a financial institution acceptable to the commission. Accordingly, the commission revises §25.510(i)(1) to allow for a standby letter of credit, but also adds standards for the types of institutions that are acceptable to support a letter of credit.

Proposed §25.510(i)(2)–Requirements for Withdrawal of Escrow Deposit

Proposed §25.510(i)(2) outlines the requirements for escrow deposit withdrawal.

TPPA asked what would happen if a borrower failed to timely request the return of its deposit. TPPA also asked what happens if the commission does not provide authorization to withdraw a borrower's deposit.

Commission Response

PURA § 34.0104 describes the requirements applicable to borrower deposits. Under that section, if the commission does not authorize withdrawal of a deposit, then the comptroller must deposit any escrow funds to the credit of the Texas Energy Fund. Accordingly, sections 25.510(i)(2) and 25.510(i)(3) describe how borrowers may withdraw deposit funds, and §25.510(i)(4) directs the commission to instruct the comptroller to transfer the deposit to the Texas Energy Fund if a withdrawal is not authorized. Failure of the borrower to meet withdrawal conditions including a timely request would result in the commission determining a withdrawal is not authorized. In response to TPPA, the commission modifies §25.510(i)(4) to reflect that failure to notify the commission of project completion will result in a return of the deposit to the Texas Energy Fund.

Proposed §25.510(i)(2)(C)–Definition of Interconnection in ERCOT Region

Proposed §25.510(i)(2)(C) explains that 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.

WattBridge proposed linking escrow funds' withdrawal to ERCOT's Part 2 approval during commissioning, which occurs when resources are able to enter the real-time market. WattBridge recommended adding "as outlined under the Part 2 process" to this proposed section.

Commission Response

The commission declines WattBridge's suggestion to use Part 2 in determining interconnection. For the purpose of this subsection, interconnection occurs on the resource commissioning date, as established in the ERCOT Nodal Protocols, of the last GR that is part of an electric generating facility financed by a loan under this rule. The commission modifies §25.510(i)(2)(C) to reflect this change.

Proposed §25.510(i)(4)–Evaluation & Decision Process for Deposit Withdrawals

Proposed §25.510(i)(4) states that the commission will evaluate each notice of satisfaction to determine whether the borrower is entitled to withdraw its deposit. If requirements are met, the deposit is returned. If not, the deposit is transferred to the TEF.

TPPA requested more details about the approval process for a withdrawal request.

Commission Response

The commission declines to modify the rule to provide further details of a withdrawal request because §25.510(i)(3) describes the process for filing a notice of satisfaction upon the occurrence of an event that entitles a borrower to a return of its deposit. Borrowers seeking authorization

for withdrawal must file a notice with the commission that includes information required in (i)(3). The commission declines to make any changes in response to TPPA's request for clarification.

***Proposed §25.510(j)*–No Contested Case or Appeal**

Proposed §25.510(j) states that neither an application for a loan nor a request for withdrawal of a deposit is a contested case. Commission decisions on a loan application or request for withdrawal of deposit are not subject to motions for rehearing or appeal.

Vistra suggested proceedings under this rule should be contested cases subject to judicial review. Vistra asserted that all commission actions are either contested cases or rulemakings governed by the Texas Administrative Procedure Act (APA). Accordingly, Vistra recommended delegating authority to the commission's administrative law judge under 16 TAC §22.32, and processing applications under 16 TAC §22.35. Vistra offered a proposal for streamlined contested cases, where intervention would be limited to the applicant and commission staff.

TPPA requested clarification on whether the rule would prohibit all forms of appeal, including judicial review.

Calpine suggested applicants should be allowed to supplement or refile denied or deficient loan applications without prejudice, avoiding the need for a contested case proceeding. Calpine added that if the commission does process applications through contested case procedures, the only parties should be the applicant and commission staff.

NRG opposed a contested case process for making determinations on applications. NRG commented that contested case procedures were not workable given the statutory timelines for application determinations and loan disbursements. NRG recommended that if the rule were to be revised to include a contested case process, the rule should be clear that the proceeding would only include the applicant and staff, and the contested case would be processed in an informal manner without hearing.

Commission Response

The commission declines Vistra's recommendation to modify the rule relating to contested case procedures. A contested case is a proceeding in which a state agency determines the legal rights, duties, or privileges of a party *after an opportunity for an adjudicative hearing*. No part of Chapter 34 of PURA provides an applicant the opportunity for an adjudicative hearing relating to a request for TEF funding. The commission interprets the absence of an opportunity for hearing to signify that contested case rights under the Texas APA do not apply to any application for a loan, change of ownership request, or request for withdrawal under this rule. Consequently, applicants do not have the opportunity to move for rehearing or seek judicial review under the Texas APA because those rights are exclusively associated with contested cases.

Commission determinations on loan applications are final. The limitation of an appeal mechanism reflects that the commission will not develop an internal appeal process. The commission is unable to provide further clarification in response to TPPA because it does not have the power to define the jurisdiction of Texas courts with respect to the various challenges that applicants may present in relation to this rule.

The commission agrees with Calpine, TPPA, and NRG that the absence of Texas APA contested case procedures does not prevent an applicant from supplementing or revising an application upon the request of the commission after initial application submission.

This new rule is adopted under the provisions of PURA §§14.002, which provides the commission with the authority to adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction; 34.0104, which provides the framework to establish procedures for applying for a loan for construction of dispatchable electric generation facilities within the ERCOT region, evaluation criteria, and terms for repayment; 34.0106, which establishes restrictions on loans and requires the commission by rule to adopt performance standards based on reliability metrics appropriate for the types of facilities for which loans may be provided; and 34.0108, which establishes procedures in the event of a default.

Cross reference to statutes: Public Utility Regulatory Act §§14.002 and 34.0104, 34.0106, and 34.0108.

§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, 34.0106, and 34.0108, which establish 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 and executes a loan agreement with the commission.

(2) **Commercial operations date** -- The resource commissioning date, as defined in the ERCOT protocols, for the last generation resource that is part of an electric generating facility financed by a loan under this section.

(3) **Generation resource** -- has the same meaning as defined in the ERCOT protocols.

(4) **12-Month performance availability factor (PAF)** --A metric calculated with ERCOT availability and real time (RT) telemetered data for each generation resource in an electric generating facility financed by a loan under this section. The PAF is computed as the average ratio of each generation resource's RT high sustainable limit (HSL) and its obligated capacity over a 12-month measurement period, expressed as a percentage. Intervals that occurred during an approved planned outage of a generation resource are excluded. The PAF is calculated as follows:

$$PAF = \frac{\Sigma\left(\frac{RT\ Telemetered\ HSL \times Available\ Flag}{Obligated\ Capacity}\right)}{Total\ Evaluated\ Period\ Intervals} \times 100.$$

"RT telemetered HSL" is the HSL telemetered by the generation resource in real time. "Available flag" is a binary flag that is equal to the minimum of a current operating plan (COP) available flag and an RT available flag. "COP available flag" is a binary flag that equals one if each hourly check of the generation resource's COP for the hour that includes the interval in question indicates the generation resource will be available in that interval (i.e., any status other than OUT), with such hourly checks starting at 14:30 on the day before the relevant interval; otherwise, the flag equals zero. "RT available flag" is a binary flag that equals one if the RT telemetered resource status code indicates the generation resource is available (i.e., any status other than OUT); otherwise, the flag equals zero. For a generation resource that provides capacity to an industrial load or private use network (PUN), obligated capacity is equal to the net capacity that is dedicated to ERCOT, as of the commercial operations date. For all other generation resources, obligated capacity is equal to the adjusted seasonal net max sustainable rating (defined as the registered ERCOT Seasonal Net Max Sustainable Rating adjusted for planned derates). "Total evaluated period intervals" is equal to the total number of intervals in the evaluation period, excluding any that occurred during an approved planned outage of the generation resource.

(5) **12-Month planned outage factor (POF)**—A metric calculated with ERCOT data for each generation resource in an electric generating facility financed by a loan under this section. <u>The POF is</u> computed as the percentage of time each generation resource spent in planned outages over a 12-month measurement period. The POF is calculated as follows:

$$POF = \left[1 - \frac{Total\ Evaluated\ Period\ Intervals}{Total\ Period\ Intervals}\right] \times 100.$$

"Total period intervals" is equal to the total number of intervals in the evaluation period. "Total evaluated period intervals" is equal to the total number of intervals in the evaluation period that the generation resource was not in a planned outage.

(c) **Eligibility.**

(1) A power generation company, municipally owned utility (MOU), electric cooperative, or river authority is eligible for a loan under this section. An electric utility other than a river authority is not eligible for a loan under this section.

(2) The following are eligible for a loan under this section:

(A) New construction of an electric generating facility having at least 100 megawatts (MW) of nameplate capacity with an output that can be controlled primarily by forces under human control. For purposes of this section, new construction of an electric generating facility means that the facility site has no existing point of interconnection to the ERCOT power region.

(B) An upgrade to an existing electric generating facility that results in a net increase of at least 100 MW of nameplate capacity for the facility with an output that can be controlled primarily by forces under human control. For purposes of this section, an existing electric generating facility already has a point of interconnection to the ERCOT power region, and the upgrade does not require an additional point of interconnection to enable delivery of energy from the increased capacity.

(C) A new or upgraded electric generating facility that is serving or will serve an industrial load or PUN, provided that the electric generating facility meets the following conditions: the portion of new nameplate capacity that will serve the industrial load or PUN must be less than 50 percent of the facility's total new nameplate capacity, and the remainder of new capacity serving the ERCOT market must be greater than 100 MW.

(3) In addition, to be eligible for a loan under this section, a proposed electric generating facility must:

(A) be designed to interconnect and provide power to the ERCOT region;

(B) be designed to participate in the ERCOT wholesale market;

(C) consist of one or more generation resources that interconnect to the ERCOT region through a single point of interconnection; and

(D) 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. For the purposes of this section, only the infrastructure necessary to connect an electric generating facility to a natural gas supply system may be considered part of the cost of the facility and eligible for a loan. Only those costs in support of new or upgraded capacity that is exclusively provided to the ERCOT region are eligible.

(C) Construction of an electric generating 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 upgrade of an electric generating facility that will provide more than 50 percent of its nameplate capacity to an industrial load or PUN.

(E) Construction or upgrade of an electric generating facility that is capable of switching service at its point of interconnection between ERCOT and another power region.

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

(1) No earlier than May 1, 2024 and no later than May 31, 2024, an applicant must submit a notice of intent to apply in the manner prescribed by the commission. A corporate sponsor or parent may submit the notice of intent on behalf of a subsidiary applicant. Except as provided in paragraph (2) of this subsection, 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. The notice of intent to apply must include:

(A) The applicant's legal name and the proposed name of the electric generating facility for which it seeks a loan;

(B) The anticipated nameplate capacity of each generation resource in an electric generating facility proposed to be financed with a loan under this section, and if the proposed facility will serve an industrial load or PUN, the net nameplate capacity of each generation resource that will be dedicated to ERCOT;

(C) The anticipated commercial operations date of each generation resource in the electric generating facility;

(D) The amount of the loan requested; and

(E) For each electric generating facility, if an applicant anticipates contributing equity in its application, a non-binding attestation demonstrating that the applicant, or a corporate sponsor or parent on the applicant's behalf, is capable of financing project-related costs not financed by a loan under this section.

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

(e) **Application requirements and process.** A loan application must be submitted in the form and in the manner prescribed by the commission. The application portal will be open for an eight-week window, beginning on June 1, 2024, at 12:00 am, and closing on July 27, 2024, at 11:59 pm. The executive director may extend the application window by providing public notice of the extension at least 30 days prior to the previously announced closing date. The executive director may also open additional application windows if necessary to achieve the objectives of this section. A corporate sponsor or parent may submit an application on behalf of a 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 legal name and the proposed name of the electric generating facility for which it requests a loan.

(2) Amount of the loan requested.

(3) The anticipated nameplate capacity of each generation resource in an electric generating facility proposed to be financed with a loan under this section, and in the case of an electric generating facility that will serve an industrial load or PUN, the nameplate capacity of each generation resource that is proposed to be dedicated to ERCOT and the anticipated maximum non-coincident peak demand of the industrial load or PUN.

(4) Applicant information.

(A) A copy of any information submitted to ERCOT regarding the applicant's attestation of market participant citizenship, ownership, or headquarters, if submitted, or a direct attestation of market participant citizenship, ownership, or headquarters, if such information has not yet been submitted to ERCOT;

(B) Evidence of the applicant's experience with siting, permitting, financing, constructing, commissioning, operating, and maintaining electric generating facilities to provide reliable electric service in competitive energy markets;

(C) Evidence of the applicant's creditworthiness, including:

(i) A binding equity commitment letter, if the applicant proposes to fund any project costs using equity, or a binding letter with information regarding the applicant's other funding sources, demonstrating the ability to fund the balance of project costs separate from the loan under this section plus the required three percent construction escrow deposit amount; and

(ii) Audited financial statements for each of the previous five fiscal years of the applicant's operations, or if not available, audited financial statements of the applicant's corporate sponsor or parent company. Statements must include total assets, total liabilities, and net worth; and, if available for the applicant, its corporate sponsor or parent, or both, 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 §25.55 of this title (relating to Weather Emergency Preparedness);

(B) Demonstration of the project's eligibility under subsection (c) of this section, including a statement indicating whether any generation resource in the electric generating facility will serve an industrial load or PUN;

(C) Project-specific information that will allow the TEF administrator to evaluate the viability and attributes of the electric generating facility, and each individual generation resource, including:

(i) A table with the resource operation attributes, including nameplate capacity, heat rate, seasonal net maximum sustainable ratings during winter and summer, cold and hot temperature start times, resource ramp rate, and the original equipment manufacturer's estimated equivalent availability factor (EAF) calculation.

(ii) If any generation resource in the electric generating facility will serve an industrial load or PUN, an attestation of the net nameplate capacity of each generation resource that will be dedicated to ERCOT and nameplate capacity that will serve the industrial load or PUN, 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 PUN, including details of all obligations or commitments of the electric generating facility to provide energy or capacity to the industrial load or PUN, and whether the proposed electric generating facility's generation capacity would be available to the ERCOT bulk power system during any Energy Emergency Alert, and a copy of any information submitted to ERCOT regarding PUN net generation capacity availability;

(iii) One-line diagrams of the proposed project for both transmission planning and the facility;

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

(v) An up-to-date phase I 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; a copy of the ERCOT screening study, if completed; and a copy of the full interconnection study with the interconnecting transmission service provider, if completed;

(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, capital, and an annual operating and maintenance budget; and

(xii) A proposed project schedule with anticipated dates for major project milestones, such as the start date for project engineering, construction start date, submission of available interconnection documents with ERCOT, completion date of the ERCOT screening study, completion date of the full interconnection study, execution of the standard generation interconnection agreement, if applicable, submission of applicable registration documents with ERCOT and the commission, and commercial operations date.

(6) **Estimated costs.** 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 accrued and capitalized during construction;

(I) Ancillary credit facility fees, if applicable;

(J) Title insurance; and

(K) Interconnection costs.

(f) **Evaluation Criteria.** The commission will approve or deny an application based on the criteria and TEF administrator evaluations outlined in this subsection. Evaluations and other recommendations provided by the TEF administrator are advisory only. All final decisions on whether to approve or deny each application will be made by the commission.

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

(A) The applicant's or its corporate sponsor or parent's:

(i) Quality of services and management 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 asset management practices;

(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 ratings for winter and summer, cold and hot temperature start times, resource ramp rate, and the original equipment manufacturer's estimated EAF;

(v) Ability to address regional and reliability needs;

(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 ability to repay the loan on the terms established in the loan agreement, including the applicant's total assets, total liabilities, net worth, and credit ratings issued by major credit rating agencies;

(B) The nameplate capacity, total forecasted revenues, and total estimated costs of the facility for which the loan is requested; and

(C) The completeness of the application.

(2) The TEF administrator 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) Whether and to what extent the proposed facility will serve an industrial load or PUN;

(D) The commercial feasibility of the facility's construction schedule, including the projected commercial operations date;

(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, expenses, and cash flows;

(H) The sufficiency of the applicant's proposed sources of equity or other funding sources to cover the costs of the facility not funded through a loan provided under this section;

(I) Whether the facility can achieve the applicant's EAF and capacity projections over the life of the loan agreement; and

(J) The basis for the total projected construction costs, including project contingencies.

(3) The TEF administrator will conduct due diligence on each application to gauge the feasibility of the project. Each applicant must submit an independent engineer's report, signed and sealed by a professional engineer licensed in the state of Texas, at the applicant's own expense, that assesses the feasibility of the project, its location, and all supporting commercial agreements relating to fuel, water, site control, and interconnection. The TEF administrator may request that an applicant provide additional information it determines necessary to conduct a complete evaluation of the project proposal.

(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, or in the case of an electric generating facility that serves an industrial load or PUN, consist of no more than 60 percent of a percentage of total estimated facility costs equal to the percentage of the total capacity of the facility that is dedicated to ERCOT;

(2) Be the senior debt secured by:

(A) the electric generating facility to be completed; or

(B) with regard to an MOU or river authority, the revenues of the applicant's utility system into which the electric generating facility will be incorporated and made a part of;

(3) Have a term of 20 years;

(4) Be payable starting on the third anniversary of the estimated commercial operations date of the electric generating facility as stated in the application;

(5) Be payable ratably on terms on which the TEF administrator and the applicant have agreed, based on the applicant's expectation of cash flows from the project and the TEF administrator's assessment of the applicant's cash flows; and

(6) With respect to a borrower other than an MOU or river authority, be structured as senior debt secured by a first lien security interest in the assets and revenues of the project.

(7) Notwithstanding paragraph (1) through (6) of this subsection, a loan accepted by a borrower that is an MOU or river authority may be in the form of a public security, as defined in Chapter 1201, Government Code, issued under Texas laws governing MOU or river authority financing, provided that the MOU or river authority, at its own expense, presents documentation of indebtedness satisfactory to the commission.

(h) **Loan Terms and Agreements.** A borrower must enter into one or more agreements with the commission that include 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 loan funds to the borrower. The credit agreement will include the following key terms:

(A) **Performance covenant** -- each generation resource in an electric generating facility that is financed by a loan under this section must maintain a PAF of at least 85 percent and a POF no greater than 15 percent, evaluated monthly, over the trailing 12-month period, throughout the term of the loan.

(B) **Loan facility** -- a senior secured first lien loan facility will be advanced to the borrower in one or more drawdowns after the closing date of the credit agreement and upon satisfaction of any conditions precedent, and may continue until the project achieves commercial operation. Amortization schedules for the loan facilities will be determined during due diligence and specified in the credit agreement.

(i) Upon initial closing of the credit agreement and after the borrower has met the conditions precedent outlined in the loan 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 TEF administrator. Equity may be funded pro rata with TEF debt or may be required in its entirety prior to funding of TEF debt, based on the credit quality of the application and discretion of the commission and as outlined in the loan agreement.

(ii) During the period of construction, the borrower may request loan disbursements for up to 60 percent of the documented project construction and commissioning costs.

(iii) For all loan disbursements, the borrower must submit a construction drawdown certificate in the form specified by the commission. The TEF administrator will review the construction drawdown certificate and, upon the TEF administrator's approval, will instruct the Texas Treasury Safekeeping Trust Company to disburse funds.

(C) Other capital contributions. The TEF administrator will verify the borrower's ability, or the ability of the borrower's corporate sponsor, to fund the required commitment of the balance of no less than 40 percent of the construction and commissioning costs.

(D) Interest on the loan amounts disbursed under the credit agreement will accrue daily at a fixed annual rate of three percent, starting at initial disbursement and continuing throughout the term of the loan.

(E) Voluntary prepayment -- the borrower may voluntarily prepay the loan amount under the credit agreement in whole or in part at any time without premium or penalty, except that the loan agreement may require that borrowers pay any breakage costs associated with the loan, and the borrower must agree to adhere to the terms of the performance covenant for the duration of the 20-year term.

(F) Collateral -- to secure the indebtedness under the credit agreement, the borrower, other than an MOU or river authority, will 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) Registration -- prior to the initial loan disbursement, the borrower must register with the commission as a power generation company, unless the borrower is an MOU, electric cooperative, or river authority. The borrower must also agree to register each generation resource in the electric generating facility with ERCOT, according to ERCOT's registration requirements in its protocols for generation resources.

(H) 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 commission, that meets the eligibility requirements of subsections (c) and (e) of this section. The acquiring third party must agree to adhere to the terms of the performance covenant in paragraph (1)(A) of this subsection and compliance and audit covenant in paragraph (1)(I) of this subsection for the remainder of the 20-year term of the borrower's loan. A change of ownership and control will require the commission's approval, and such approval will not be unreasonably withheld. Upon approval of a change of ownership and control, the acquiring third party must update the power generation company registration and the generation resource registration to reflect the change of ownership and control. The commission's determination on a change of ownership does not impact any person's obligations under PURA §39.158.

(I) 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 and credit assessments throughout the term of the loan. If the borrower's electric generating facility serves an industrial load or PUN, the borrower must also submit an annual accounting, at the generation resource level, showing the capacity made available exclusively to the ERCOT bulk power system during the performance year. The annual accounting must consist of a comparison between the sum of the nameplate capacity of each generation resource in the electric generating facility and the maximum non-coincident peak demand of the associated industrial load or PUN. Annual financial audits, credit assessments, and electric generating facility performance assessments submitted under this section are confidential and not subject to disclosure under Chapter 552, Government Code.

(2) **Depositary 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 authorize the commission, as lender, to 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) Breach of a covenant in any agreement that has not been remedied within the time prescribed by the loan 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.

(8) **Subordination and other agreements** -- to the extent that the project is to be financed by debt other than a loan under this section, each other creditor must agree that a loan under this section will be the senior debt secured by the facility. The borrower will be responsible for the preparation and costs associated with any agreement necessary to maintain the senior position of the loan under this section.

(9) With respect to a borrower that is an MOU or river authority, the forms by which the requirements of paragraph (1) through (8) of this subsection are accomplished can be substituted by documentation satisfactory to the commission that is customarily used in connection with the issuance of public securities that are subject to approval by the Office of the Texas Attorney General or satisfied by reference to applicable Texas law. An MOU or river authority that presents documentation in accordance with this paragraph will be responsible for the preparation and costs of that documentation.

(i) **Deposits.**

(1) The borrower must deposit in an escrow account held by the Texas Comptroller of Public Accounts or provide in a standby letter of credit an amount equal to three percent of the estimated cost of the project for which the loan is provided. The terms of a standby letter of credit must permit a draw in full upon a commission determination

that withdrawal of a borrower's deposit is not authorized under paragraph (4) of this subsection. The borrower must deposit the required funds or provide the standby letter of credit before the initial loan amount is disbursed.

(A) Standby letters of credit provided under paragraph (1) of this subsection must use the standard form standby letter of credit template approved by the commission. The original document of the standby letter of credit must be provided in a manner established by the commission.

(B) The standby letter of credit must be issued by a financial institution that is supervised by the Board of Governors of the Federal Reserve system, the Office of the Comptroller of the Currency, or a state banking department and is a:

(i) U.S. domestic bank with an investment-grade credit rating; or

(ii) U.S. domestic office of a foreign bank with an investment-grade credit rating.

(2) The borrower may not withdraw the deposit from the escrow account or terminate its standby letter of credit unless authorized by the commission.

(A) For deposits related to the construction of new facilities, the commission will authorize the borrower's withdrawal of its deposit funds or the release of the borrower's standby letter of credit, as applicable, 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, the commission will authorize the borrower's withdrawal of its deposit funds or the release of the borrower's standby letter of credit, as applicable, 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 last generation resource that is part of an electric generating facility financed by a loan under this section is issued a resource commissioning date, as defined in the ERCOT protocols .

(3) Upon the occurrence of an event that entitles the borrower to withdraw its deposit or request termination of its standby letter of credit--interconnection or completion of its project--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) A description of the event that the borrower asserts as justification for withdrawal of the deposit or termination of the standby letter of credit, including the date on which the event occurred and any relevant evidence required to support the assertion;

(B) The date of initial loan disbursement; and

(C) A detailed statement of extenuating circumstances, if any, that support the borrower's request for a late withdrawal of the deposit resulting from a delayed interconnection or completion of the project, as described in paragraph (2)(A)(ii) or (B)(ii) of this subsection.

(4) The commission will evaluate each notice of satisfaction to determine whether the borrower is entitled to withdrawal of its deposit or release of its standby letter of credit. 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 or will release the borrower's standby letter of credit. If the commission determines that withdrawal is not authorized, including if the borrower fails to file a timely notice of satisfaction, then it will instruct the comptroller to transfer the deposit to the Texas Energy Fund or will direct a draw on the borrower's standby letter of credit and deposit the funds in the Texas Energy Fund.

(j) **No Contested Case or Appeal.** None of an application for a loan, a request for withdrawal of a deposit, or a request for approval of a change of ownership is a contested case. Commission decisions on a loan application or request for withdrawal of deposit are not subject to motions for rehearing or appeal under the commission's procedural rules.

(k) **Expiration.** This section expires September 1, 2050.

This agency certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority. It is therefore ordered by the Public Utility Commission of Texas that §25.510, Texas Energy Fund In-ERCOT Generation Loan Program, is hereby adopted with changes to the text as proposed.

Signed at Austin, Texas the 2nd day of April 2024.

PUBLIC UTILITY COMMISSION OF TEXAS

THOMAS GLEESON, CHAIRMAN

Lori Cobos

LORI COBOS, COMMISSIONER

JIMMY GLOTFELTY, COMMISSIONER

Kathleen Jackson

KATHLEEN JACKSON, COMMISSIONER