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PROJECT NO. 55826

**TEXAS ENERGY FUND IN-ERCOT
GENERATION LOAN PROGRAM**

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**PUBLIC UTILITY COMMISSION
OF TEXAS**

PROPOSAL FOR PUBLICATION OF NEW 16 TAC §25.510

The Public Utility Commission of Texas (commission) proposes new 16 Texas Administrative Code (TAC) §25.510 relating to the Texas Energy Fund In-ERCOT Generation Loan Program. This new rule will implement Public Utility Regulatory Act (PURA) §34.0104 as enacted by Senate Bill (SB) 2627 during the Texas 88th Regular Legislative Session. The proposed rule will establish procedures for applying for a loan for construction of dispatchable electric generation facilities within the ERCOT region, evaluation criteria, and terms for repayment. The proposed rule also specifies a performance standard that an electric generating facility must achieve to obtain a loan.

Growth Impact Statement

The agency provides the following governmental growth impact statement for the proposed rule, as required by Texas Government Code §2001.0221. The agency has determined that, for each year of the first five years that the proposed rule is in effect, the following statements will apply:

- (1) the proposed rule will not create a government program and will not eliminate a government program;
- (2) implementation of the proposed rule will require the creation of new employee positions but will not require the elimination of existing employee positions;

(3) implementation of the proposed rule will not require an increase in legislative appropriations because Texas Constitution article III, §49-q provides that “money in the Texas energy fund may be administered and used, without further appropriation . . .”;

(4) implementation of the proposed will not require a decrease in future legislative appropriations to the agency;

(5) the proposed rule will not require an increase and will not require a decrease in fees paid to the agency;

(6) the proposed rule will create a new regulation;

(7) the proposed rule will not expand, limit, or repeal an existing regulation;

(8) the proposed rule will not change the number of individuals subject to the rule’s applicability;
and

(9) the proposed rule will not affect this state’s economy.

Fiscal Impact on Small and Micro-Businesses and Rural Communities

There is no adverse economic effect anticipated for small businesses, micro-businesses, or rural communities as a result of implementing the proposed rule. Accordingly, no economic impact statement or regulatory flexibility analysis is required under Texas Government Code §2006.002(c).

Takings Impact Analysis

The commission has determined that the proposed rule will not be a taking of private property as defined in chapter 2007 of the Texas Government Code.

Fiscal Impact on State and Local Government

David Gordon, Executive Counsel, Executive Director Division, has determined that for the first five-year period the proposed rule is in effect, there will be no fiscal implications for the state or for units of local government under Texas Government Code §2001.024(a)(4) as a result of enforcing or administering the sections.

Public Benefits

Mr. Gordon has determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated as a result of enforcing the section will be increased construction of dispatchable electric generating facilities in the state. There will be no probable economic cost to persons required to comply with the rule under Texas Government Code §2001.024(a)(5) because the rule is designed to offer low-interest loans to qualifying electric generating facilities.

Local Employment Impact Statement

For each year of the first five years the proposed section is in effect, there should be no effect on a local economy; therefore, no local employment impact statement is required under Texas Government Code §2001.022.

Costs to Regulated Persons

Texas Government Code §2001.0045(b) does not apply to this rulemaking because the commission is expressly excluded under subsection §2001.0045(c)(7).

Public Hearing

The commission staff will conduct a public hearing on this rulemaking if requested in accordance with Texas Government Code §2001.029. The request for a public hearing must be received by December 22, 2023. If a request for public hearing is received, commission staff will file in this project a notice of hearing.

Public Comments

Interested persons may file comments electronically through the interchange on the commission's website or by submitting a paper copy to Central Records, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. Comments must be filed by January 5, 2024. Comments should be organized in a manner consistent with the organization of the proposed rules. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed rule. The commission will consider the costs and benefits in deciding whether to modify the proposed rules on adoption. All comments should refer to Project Number 55826.

In addition to comments on the text of the proposed rule, the commission invites interested persons to address the following questions related to eligibility requirements of the proposed rule:

1. Should the rule require registration as a power generation company with the commission as a condition for eligibility to receive a loan? Why or why not?
2. Should the rule require registration as a Generation Resource with ERCOT as a condition for eligibility to receive a loan? Why or why not?

3. How should the commission evaluate PURA § 34.0106(b)'s prohibition against providing a loan to an electric generating facility that will be used primarily to serve an industrial load or private use network?
 - a. Should the commission prescribe a percentage of total energy output that an electric generating facility must achieve to be eligible for a loan? If so, what percentage should the commission prescribe?
 - b. Should the commission employ another method to ensure that an electric generating facility primarily serves the ERCOT grid? If so, what method is appropriate and why?

Each set of comments should include a standalone executive summary as the last page of the filing. This executive summary must be clearly labeled with the submitting entity's name and should include a bulleted list covering each substantive recommendation made in the comments. Comments should be limited to 12 pages, excluding the executive summary, and any attached redlines.

Statutory Authority

The rule is proposed under Public Utility Regulatory Act (PURA) §14.001, which grants the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by this title that is necessary and convenient to the exercise of that power and jurisdiction; §14.002, which authorizes the commission to adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction; §34.0104, which authorizes the commission to use money in the Texas

Energy Fund to provide loans to finance upgrades to or new construction of electric generating facilities in the ERCOT region; §34.0106(c), which requires the commission to adopt performance standards that electric generating facilities must meet to obtain a loan; and §34.0110, which authorizes the commission to establish procedures for the application and award of a grant or loan under PURA chapter 34, subchapter A.

Cross Reference to Statute: Public Utility Regulatory Act §§14.001, 14.002, 34.0104; 34.0106(c), and 34.0110.

§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.
- (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:
 - (A) New construction of an electric generating facility 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 existing electric generating facilities that result 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 proposed facility must:
- (A) be designed to interconnect and provide power to the ERCOT power region;
 - (B) be designed to participate in the ERCOT wholesale market; and
 - (C) 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) 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) 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.

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;
 - (E) For each electric generating facility, information demonstrating that the applicant 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 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.
- (e) **Application requirements and process.** A loan application must be submitted in the form and in the manner prescribed by the commission. 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 creditworthiness, including:
 - (i) An equity commitment letter demonstrating the ability to fund the necessary project equity (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 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 §25.55 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 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 equivalent availability factor (EAF) calculation 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 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; a copy of the full interconnection study 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 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:

- (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;
- (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; 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 the facility can achieve the applicant's long-term 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 loan 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 EAF performance of 50 for all hours during 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 (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 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 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 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 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) **No Contested Case or Appeal.** 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.
- (k) **Expiration.** This section expires September 1, 2050.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

**ISSUED IN AUSTIN, TEXAS ON THE 30TH DAY OF NOVEMBER 2023 BY THE
PUBLIC UTILITY COMMISSION OF TEXAS
ADRIANA GONZALES**