



## **Filing Receipt**

**Filing Date - 2024-02-02 02:57:49 PM**

**Control Number - 55959**

**Item Number - 12**

**DOCKET NO. 55959**

<b>JOINT PETITION OF TEXAS</b>	<b>§</b>	<b>PUBLIC UTILITY COMMISSION</b>
<b>ENERGY ASSOCIATION FOR</b>	<b>§</b>	
<b>MARKETERS AND ALLIANCE FOR</b>	<b>§</b>	<b>OF TEXAS</b>
<b>RETAIL MARKETS FOR</b>	<b>§</b>	
<b>DESIGNATION UNDER 16 TAC</b>	<b>§</b>	
<b>§ 25.475(b)(5)</b>	<b>§</b>	

**REP COALITION’S APPEAL OF INTERIM ORDER NO. 4**

The Texas Energy Association for Marketers (TEAM) and Alliance for Retail Markets (ARM) (collectively, REP Coalition) respectfully files this appeal of portions of Interim Order No. 4 determining the form of notice to be provided in this proceeding.<sup>1</sup> Pursuant to 16 Texas Administrative Code (TAC) § 22.123(a)(2), this appeal is timely filed on or before February 5, 2024. If possible, the REP Coalition requests that this appeal be considered at the February 15, 2024 Open Meeting to allow this case to proceed within the timelines identified by the Administrative Law Judge (ALJ).

**I. EXECUTIVE SUMMARY**

The REP Coalition supports the original notice recommendation of the Commission Staff in this proceeding to provide notice through Electric Reliability Council of Texas (ERCOT) market notice and *Texas Register*.<sup>2</sup> The REP Coalition respectfully appeals the portions of Order No. 4 that would expand these notice requirements because:

- This case does not involve the Public Utility Commission of Texas (Commission) ruling on any retail price for electric service. Even if it did, the additional notice requirements of newspaper publication and individual REP website notice in Order No. 4 are not consistent with the existing mechanisms in the Commission’s rules for informing customers of adjustments to fixed price contract prices for changes beyond a retail electric provider’s (REP) control.
- Order No. 4’s expansion of the notice requirement to newspaper publication that is applicable to transmission and distribution utility (TDU) base rate case proceedings is not reasonable to apply in this case.

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<sup>1</sup> Order No. 4 Specifying Notice Requirements and Establishing Procedural Schedule (Jan. 26, 2024).

<sup>2</sup> Commission Staff’s Recommendations and Proposed Procedural Schedule at 2–3 (Jan. 4, 2024).

- Order No. 4 would impose additional website publication requirements on entities that are not parties to this proceeding.
- Order No. 4's requirements are unprecedented for competitive entities and rate-regulated entities, and are not consistent with the Commission's rules.

Notice through Electric Reliability Council of Texas (ERCOT) market notice and *Texas Register* notice is reasonable for the reasons discussed herein.

## II. BACKGROUND

Based on changes to the Commission's rules adopted in December of 2021, the rule requires that any new ancillary service that is implemented in the pendency of an existing customer contract cannot be treated as other costs beyond a REP's control unless the Commission: "*expressly designates* a specific type of ancillary service product as incurring charges beyond the REP's control for a customer's existing contract."<sup>3</sup>

The procedure for an express designation from the Commission is not reflected in the procedural rules. However, in the open meeting discussion where this language was adopted, the discussion contemplated that the Commission would make this designation at the time the new ancillary service was approved.<sup>4</sup> Commission approval of ancillary services is handled either through rulemaking or Commission approval of ERCOT nodal protocol revision requests. This appeal is limited to the question of the form of public notice that should be provided for this specific case which addresses for the first time the designation of ERCOT Contingency Reserve Service (ECRS) as an ancillary service change that has caused REPs to incur costs beyond their control.

The PUC Staff's original recommendation on notice was for notice to be provided through an ERCOT Market Notice and *Texas Register* notice. The REP Coalition agrees with that recommendation for this matter of first impression and has worked with the Commission Staff and the Office of Public Utility Council to develop agreed language for those notices.

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<sup>3</sup> 16 TAC § 25.475(b)(5) (Emphasis added).

<sup>4</sup> *Review of Certain Retail Electric Customer Protection Rules*, Project No. 51830, December 16, 2021 Open Meeting (Dec. 16, 2021).

In Order No. 3, the ALJ sought input from the parties on his proposal that notice should be given by newspaper publication and mail as required by 16 TAC § 22.51(a)(1) and (2), which is the notice rule that applies to base rate cases brought by electric utilities.

The ALJ then issued Order No. 4 which adds the following requirements to notice in addition to the original Commission Staff recommendation of the ERCOT Market Notice and *Texas Register* notice:

- TEAM and ARM must publish notice of the application at least once a week for two consecutive weeks in a newspaper of general circulation in each county in which a fixed rate product affected by the petition is offered. Such publication must be completed by March 8, 2024.
- TEAM and ARM must identify, by February 16, 2024, all of their REPs that offer a fixed rate product affected by the petition.
- TEAM and ARM must post and maintain notice of the application on any websites they may have, commencing by March 1, 2024.
- Each REP that is a member of TEAM or ARM and that offers a fixed rate product affected by the petition must post and maintain notice of the application on its website, commencing by March 1, 2024.
- TEAM and ARM must provide proof of notice, including the notice required of their REP members, by March 22, 2024.
- By April 5, 2024, Commission Staff must file a recommendation on the sufficiency of notice and propose a schedule for further processing.<sup>5</sup>

The REP Coalition requests that the Commission grant this Appeal of Order No. 4 to remove these extra notice requirements and allow this proceeding to move forward with ERCOT Market Notice and *Texas Register* Notice.

### III. ARGUMENT

Order No. 4 should be modified to remove requirements for newspaper publication and individual website postings because those required forms of notice are not consistent with Commission rules and would create customer confusion. Further, the additional notice

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<sup>5</sup> Order No. 4 at 2.

requirements would cause undue expense and further delay of this proceeding. Accordingly, the additional notice requirements do not constitute “reasonable notice to affected persons.”<sup>6</sup> The initial order from the ALJ that led to the notice required by Order No. 4 was premised on the incorrect presumption “that the relief sought in the petition is analogous to a rate increase for fixed rate customers.”<sup>7</sup> Based on the genesis of this petition, the nature of the relief requested, the differences between the retail electric market and rate-regulated utility service, and the scope of the Commission’s regulatory authority over REPs, the REP Coalition continues to agree with Commission Staff’s initial recommendation that a notice published in the *Texas Register* along with an ERCOT Market Notice is reasonable.

**A. The relief requested in this proceeding is not analogous to the relief requested in a base rate case for an electric utility.**

Order No. 4 effectively treats this proceeding as analogous to a transmission and distribution utility base rate proceeding. No customer charges or rate adjustments, however, will be determined in this proceeding. Whether or not a REP applies a one-time price adjustment to residential and/or small commercial contracts after this designation will vary by REP, and by individual customer contract. In other words, a Commission designation will not automatically result in a price change for all existing customers who entered into a contract before the implementation of ECRS. Further, the retail market is open to customer choice, which means that unlike customers of electric utilities, a customer in an area open to competitive choice is not required to take service from any particular REP. Retail customers served by REPs have the ability to choose both their REP and their electric plan.

Treating this proceeding as analogous to an electric rate case steps well outside the regulatory paradigm applicable to retail electric service. Under PURA,<sup>8</sup> the Commission’s role in the retail electric space is one of customer protection as opposed to rate regulation. Rather than original ratemaking jurisdiction over REP pricing, the Commission has the authority “to adopt and enforce rules to protect retail customers from fraudulent, unfair, misleading, deceptive, or

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<sup>6</sup> 16 TAC § 22.55.

<sup>7</sup> Order No. 3 Finding Petition Administratively Complete and Requiring Clarification Regarding Notice at 3 (Jan. 8, 2024).

<sup>8</sup> Public Utility Regulatory Act, Tex. Util. Code §§ 11.001–66.016 (PURA).

anticompetitive practices.”<sup>9</sup> The Commission is also charged with developing a process for the timely resolution of disputes between REPs and the retail customers they serve.<sup>10</sup> To perform these functions, the Commission has adopted comprehensive customer protection rules that include a series of requirements regarding how adjustments to fixed price products are implemented and how those price changes are disclosed to customers.<sup>11</sup> If an individual customer receives a one-time price adjustment that they believe is inconsistent with their contract for service, they may complain with their REP, and if dissatisfied with the results of the REP’s complaint investigation or supervisory review, they have a right to utilize the Commission’s complaint process.<sup>12</sup>

This proceeding is not an adjudication of the reasonableness of a pricing adjustment. The designation that is contemplated in 16 TAC § 25.475(b)(5) and requested by the REP Coalition is a statement of general applicability regarding the legal classification of a new ancillary service. It is a corollary to the rulemaking completed in Project No. 51830 where the Commission amended the definition of “price” found in 16 TAC § 25.475(b)(8) in a manner that required an express designation for ancillary services.<sup>13</sup> Because this proceeding is an extension of changes that were adopted in a rulemaking being applied for the first time, notice in the *Texas Register* is consistent with the notice for rules of general applicability under the Administrative Procedure Act.

Moreover, this particular designation for ECRS is presented in a standalone proceeding only due to timing circumstances that are unique to ECRS, namely, that Nodal Protocol Revision Request (NPRR) 863—initially creating ECRS—was approved in 2019, which was not only before the Commission adopted the changes to 16 TAC § 25.475(b)(5) but also before PURA § 39.151(g-6) was amended to require Commission approval of all protocol revisions.<sup>14</sup> For any

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<sup>9</sup> PURA § 17.001(b).

<sup>10</sup> PURA § 17.157(c).

<sup>11</sup> 16 TAC § 25.475.

<sup>12</sup> *See generally*, 16 TAC § 25.485. While the Commission does not have the authority to set a REP’s prices, it does have the authority “to adopt and enforce rules to protect retail customers from fraudulent, unfair, misleading, deceptive, or anticompetitive practices” and to develop a process for the timely resolution of disputes between REPs and the retail customers they serve. PURA §§ 17.001(b) and 17.157(c).

<sup>13</sup> *Review of Certain Retail Electric Customer Protection Rules*, Project No. 51830, Order Adopting Amendments to 16 TAC § 25.43, § 25.471, § 25.475, § 25.479, and § 25.498 and New § 25.499 as Approved at the December 16, 2021 Open Meeting at 117–18 (Dec. 16, 2021).

<sup>14</sup> Act of May 31, 2021, 87th Leg., R.S., ch. 425, § 3, 2021 Gen. and Special Laws of Tex. 830, 832 (to be codified as an amendment to PURA § 39.151).

new ancillary service adopted in the future, the Commission will have the opportunity to make a designation under 16 TAC § 25.475(b)(5) contemporaneous with its consideration of the protocol revisions ERCOT develops to implement the service. This is the process that was discussed on the record as this rule language was approved.<sup>15</sup>

The notice required for this proceeding should take into account the marked regulatory differences between REPs and electric utilities and should be reflective of the nature of the relief requested and the unique procedural circumstances necessitating this proceeding. Order No. 4 does not recognize these elements, and therefore, should be modified.

**B. Newspaper notice is not reasonable and would create customer confusion.**

Order No. 4 requires TEAM and ARM to publish notice of the application at least once a week for two consecutive weeks in a newspaper of general circulation in each county in which a fixed rate product affected by the petition is offered. Because fixed rate products are offered in all competitive service areas, the REP Coalition would need to publish notice in a newspaper of general circulation in each county in which a REP provides service. Therefore, the ALJ is effectively requiring the REP Coalition to publish notice of the application at least once a week for two consecutive weeks in a newspaper of general circulation in each county served by TDUs in the ERCOT market. Order No. 4 would require newspaper notice to be published in 135 newspapers across the state. A list of these newspapers that would be required under Order No. 4 is attached to this appeal as Attachment 1.

First, such generalized notice would result in customer confusion by improperly implying that their pricing would be determined in this proceeding. As noted, if the Commission were to approve the designations sought, many customers would ultimately receive no price adjustment. The applicability would vary by the competitive product under which a customer is served and the start date of that contract, and it would also vary according to which REP serves the customer.

The newspaper notice requirement is overly burdensome and is not consistent with the Commission precedent on proceedings involving cost changes beyond a REP's control. TDUs are only required to provide newspaper notice in base rate cases. No such notice is required for the multiple changes that are beyond a REPs control that trigger the language for permissible price

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<sup>15</sup> *Review of Certain Retail Electric Customer Protection Rules*, Project No. 51830, December 16, 2021 Open Meeting (Dec. 16, 2021).

adjustments in 16 TAC § 25.475, such as TDU changes for Energy Efficiency Cost Recovery Factor, Transmission Cost Recovery Factor, Distribution Cost Recovery Factor, the recently approved Resiliency Cost Recovery Rider,<sup>16</sup> and changes to the ERCOT System Admin Fee. Furthermore, 16 TAC § 25.475(d)(2) already addresses the requirements for REPs to notify customers of allowable price changes to fixed rate products under the rule's narrow definition, rendering the need for Order No. 4 to dictate notice requirements regarding price changes moot. Newspaper notice will not expand awareness of this proceeding to any potential party that would participate in presenting arguments on the substantive issue in this case—whether or not the implementation of ECRS causes REPs to incur costs beyond their control in existing customer contracts. Perhaps ironically, requiring such newspaper notice would simply add to the costs beyond a REP's control resulting from the implementation of the new ancillary service. Accordingly, newspaper notice is not a reasonable form of notice to impose in this proceeding of generally applicability that does not involve Commission adjudication of a proposed rate.

**C. The provisions of Order No. 4 that are specific to the individual members of TEAM and ARM are inequitable and not reasonable for this proceeding.**

The notice requirements specified in Order No. 4 are, in part, directed at the individual members of TEAM and ARM who are not parties to this proceeding, and therefore, cannot be ordered to provide notice. While TEAM and ARM are parties to this proceeding, they are separate and distinct legal entities from their individual members. The petition was brought by the REP trade associations that are separate legal entities from their members. The result of this proceeding will provide clarity for the entire market, not just the REPs that are members of these associations. Petitioning for the requested designation through TEAM and ARM is entirely appropriate because the determination to be made under 16 TAC § 25.475(b)(5) will be one of general applicability—no different than changes in TDU rates or the ERCOT System Admin Fee. The applicable language in 16 TAC § 25.475 does not, and should not, require individual REPs to separately apply for this legal designation. Consequently, a Commission decision that ECRS is an ancillary service

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<sup>16</sup> *Transmission and Distribution System Resiliency Plans*, Project No. 55250, Order Adopting New 16 TAC § 25.62 (“The commission agrees with ARM and TEAM that providing sufficient notice to REPs before a new or updated RCRR is effective is important, so REPs have sufficient time to implement any related changes. The commission adds the relevant language to the rule accordingly.”).



incurring a cost beyond a REP's control would not be limited to only those REPs who are members of TEAM and ARM.

Nevertheless, Order No. 4 reaches through the REP trade associations and places specific requirements on the individual members of TEAM and ARM that are contrary to the fundamental tenets of a competitive market to the point of inequity. As explained earlier in this pleading, each REP will have complete discretion regarding whether to apply a one-time price adjustment should the Commission designate ECRS as an ancillary service incurring costs beyond a REP's control. Yet, Order No. 4 effectively requires TEAM and ARM to publicly identify all of their member REPs that offer a fixed rate product affected by the petition, and then requires each member REP identified to post and maintain notice of the application on its website. Order No. 4 would apply this requirement regardless of whether or not the REP actually would implement a one-time price adjustment should the Commission grant the petition. Therefore, under Order No. 4, customers of REPs that would not have implemented a one-time price adjustment could be led incorrectly to believe that their fixed price contract would change; meanwhile REPs that are not members of TEAM or ARM that would implement a one-time price adjustment would not have the same requirement. This is a recipe for customer confusion that can and should be avoided.

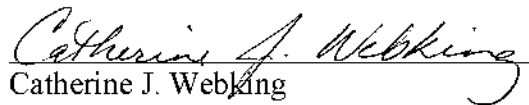
Finally, TEAM and ARM do not, and should not, have information regarding pricing decisions or plans of their individual members. As trade associations, TEAM and ARM maintain strict antitrust policies in order to avoid allegations of antitrust law violations and carefully restrict the information that is shared by their members. Under these policies, TEAM and ARM do not collect or possess information regarding their individual members' operations, and they have no ability to compel their members to provide such information. TEAM and ARM therefore have no insight regarding which member REPs offer a fixed rate product affected by the petition, and whether or not any specific member would apply a one-time price adjustment, should the Commission designate ECRS as an ancillary service incurring costs beyond a REP's control.

#### **IV. CONCLUSION**

The notice requirements in Order No. 4, particularly the provisions that place requirements on the individual members of ARM and TEAM and requires newspaper notice, reach far beyond "reasonable notice to affected persons" pursuant to 16 TAC § 22.55, which is the only notice provision governing this proceeding. Therefore, the REP Coalition's appeal of Order No. 4 should be granted. The REP Coalition respectfully urges the Commission to overrule the portions of

Order No. 4 requiring notice beyond the publication in the *Texas Register* and a Market Notice sent by ERCOT to all load-serving entities and qualified scheduling entities. The REP Coalition also requests any further relief to which it may be justly entitled.

Respectfully submitted,



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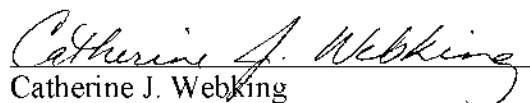
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**CERTIFICATE OF SERVICE**

I hereby certify that notice of the filing of this document was provided to all parties of record via electronic mail on February 2, 2024 in accordance with the Order Suspending Rules, issued in Project No. 50664.

  
Catherine J. Webking

## Attachment 1 – Newspapers Required Under Order No. 4

Newspapers	
1	Albany News
2	Abilene Reporter-News
3	Alice Echo-News Journal
4	Alpine Avalanche
5	American Statesman
6	Andrews County News
7	Anson Western Observer
8	Athens Daily Review
9	Baird Banner
10	Bay City Tribune
11	Baylor County Banner
12	Beeville Bee-Picayune
13	Big Bend Sentinel
14	Big Lake Wildcat
15	Bob Spring Herald
16	Brady Standard-Herald
17	Breckenridge American
18	Brentwood Bulletin
19	Brownfield News
20	Brownwood Bulletin
21	Buffalo Express
22	Carrizo Springs Javelin
23	Coleman Chronicle
24	Coleman Chronicle & Democrat-Voice
25	Corpus Christi Coastal Bend Legal & Business News
26	Crane News
27	Cuero Record
28	Del Rio News-Herald

## Attachment 1 – Newspapers Required Under Order No. 4

### Newspapers

29	Denton Record-Chronicle
30	Devils River News
31	Eastland County Today
32	Eden Echo
33	Eldorado Success
34	Fairfield Recorder
35	Falfurrias Facts
36	Fannin County Leader
37	Fort Stockton Pioneer
38	Fort Worth Star-Telegram
39	Fredericksburg Standard-Radio Post
40	Frio-Nueces Current
41	Gainesville Daily Reporter
42	Galveston Daily News
43	Gonzales Inquirer
44	Graham Leader
45	Groesbeck Journal
46	Hamlin Herald
47	Harlingen Valley Morning Star
48	Hondo Anvil Herald
49	Hood County News
50	Houston Chronicle
51	Jackson County Herald-Tribune
52	Jacksonville Progress
53	Jeff Davis County Mountain Dispatch
54	Jim Hogg County Enterprise
55	Junction Eagle
56	Killeen Daily Herald

## Attachment 1 – Newspapers Required Under Order No. 4

Newspapers	
57	Kingsville Record & Bishop News
58	Knox County News-Courier
59	Lamesa Press Reporter
60	Laredo Morning Times
61	Lockhart Post-Register
62	Lufkin Daily News
63	Mason County News
64	Menard News and Messenger
65	Midland Reporter-Telegram
66	Mount Pleasant Daily Tribune
67	Nacogdoches Daily Sentinel
68	Odessa American
69	O'Donnell Index-Press
70	Ozona Stockman
71	Palestine Herald Press
72	Paris News
73	Pecos Enterprise
74	Pleasanton Express
75	Polk County Publishing
76	Port Lavaca Wave
77	Quanah Tribune-Chief
78	Rains County Leader
79	Red River Sun
80	Robert Lee Observer/Enterprise
81	Rotan Double Mountain
82	Rusk Cherokeean Herald
83	San Angelo Standard-Times
84	San Saba News & Star

## Attachment 1 – Newspapers Required Under Order No. 4

Newspapers	
85	Seguin Gazette
86	Sherman Herald Democrat
87	Sherman/Denison Herald-Democrat
88	Silverton Caprock Courier
89	Snyder Daily News
90	Stephenville Empire Tribune
91	Sterling Courier
92	Sulphur Springs News-Telegram
93	Sweetwater Reporter
94	Temple Daily Telegram
95	Texas Mohair Weekly
96	Texas Spur
97	The Advance-Guard Press
98	The Banner Press Newspaper
99	The Comanche Chief
100	The Dallas Morning News
101	The Eagle Pass News Gram
102	The Facts (Brazosport)
103	The Foard County News
104	The Goldthwaite Eagle
105	The Karnes Countywide
106	The Mexia News
107	The Monaharis News
108	The Monitor
109	The News of San Patricio
110	The Observer/Enterprise
111	The Paducah Post
112	The Paris News

## Attachment 1 – Newspapers Required Under Order No. 4

Newspapers	
113	The Progress
114	The Reporter
115	The Rockport Pilot
116	The Stamford Star dba Haskell Star
117	The Terrell Tribune
118	The Wheeler Times
119	Throckmorton Tribune
120	Tyler Morning Telegraph
121	Uvalde Leader-News
122	Van Horn Advocate
123	Vernon Daily Record
124	Victoria Advocate
125	Wacahatchie Sun
126	Waco Tribune-Herald
127	Waxahatchie Daily Light
128	Weatherford Democrat
129	Wharton Journal-Spectator
130	Wichita Falls Times Record News
131	Wilson County News
132	Wise County Messenger
133	Wood County Monitor
134	Zapata County News
135	Zavala County Sentinel