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PUC DOCKET NO. 55959

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

OFFICE OF PUBLIC UTILITY COUNSEL’S REPLY BRIEF

The Office of Public Utility Counsel (“OPUC”), representing the interests of residential and small commercial consumers in Texas, respectfully submits this reply brief and shows the following:

I. THE REP COALITION’S ARGUMENTS HAVE ALREADY BEEN HEARD AND REJECTED BY THE COMMISSION AND FOUND TO BE CONTRARY TO CONSUMER PROTECTION GOALS.

The Commission has broad powers to protect consumers in the electricity market.¹ During the 87th legislative session, House Bill (“HB”) 16 was enacted to prohibit the sale of wholesale indexed products,² which based prices on real-time settlement point prices and had the potential to reflect substantial price volatility especially during emergencies.³ The bill also contains additional provisions to increase protections for residential consumers, all of which were ultimately adopted. The House Research Organization stated, on behalf of supporters of the bill,

¹ Public Utility Regulatory Act (“PURA”) § 11.002(c) states, “It is the purpose of this title to grant the Public Utility Commission of Texas authority to make and enforce rules necessary to protect customers of telecommunications and electric services consistent with the public interest.”

² Acts of the 87th Texas Legislature, ch. 132 (HB 16), 2021.

³ Bill Analysis for HB 16, House Research Organization (Mar. 30, 2021).

“As evidenced by the aftermath of [Winter Storm Uri], residential customers do not have the expertise to weather the fluctuation of electricity rates.”⁴

The Commission then engaged stakeholders to implement the changes in HB 16 in Project No. 51830. In the order adopting various rule amendments resulting from that effort, the Commission clarified “that the price of fixed rate products does not vary with changes in ancillary service costs for residential and small commercial customers, unless the commission specifically designates a type of ancillary service charge that is beyond the REP’s control.”⁵ The Commission reasoned that “indexed products — the price of which on any future date is unknown at the start of each billing period, can fluctuate unpredictably, and are indexed to metrics that are not available to the customer as part of the enrollment process — do not provide sufficient information for a residential or small commercial customer to make an informed choice of service.”⁶ In particular, the Commission’s “proposed definitions of ‘price’ and ‘fixed rate product’ were intended to ensure that REPs are *prohibited from passing through the cost of ancillary services* to customers enrolled in fixed rate products” (emphasis added).⁷

Petitioners in this case — the Texas Energy Association of Marketers (“TEAM”) and the Alliance for Retail Markets (“ARM”) — are now arguing what they were essentially arguing during the rulemaking:

⁴ *Id.*

⁵ Order Adopting Amendments to 16 TAC §25.43, 25.471, 25.475, 25.479, and 25.498 and New 16 TAC §25.499 as Approved at the December 16, 2021 Open Meeting, Project No. 51830, *Review of Certain Retail Electric Customer Protection Rules*, (Dec. 16, 2021), at 2. (Order in 51830).

⁶ *Id.* at 12.

⁷ *Id.* at 40-41.

- REPs have limited ability to hedge changes in the quantity or types of ancillary services procured by ERCOT;⁸
- Not allowing the pass-through of these expenses would stifle competition;⁹ and
- Instead, retail consumers should shoulder costs *if and when* their REP decides.¹⁰

In responding to the argument that existing, relatively stable ancillary services are somehow distinguishable from newer ancillary services, the Commission declined to make that distinction in Project No. 51830, stating, “Such distinctions would not effectuate the commission’s customer protection goal of insulating customers from hazardous price increases as whatever portion of ancillary service charges that may not be known is the portion most subject to volatility due to outlier events... Ancillary service charges are a necessary cost that is required to maintain the safety and reliability of the electric grid, and while the commission recognizes that these costs may be challenging for REPs to predict with accuracy, *REPs are in a significantly better position to do so than residential or small commercial customers* and have access to a much wider array of financial tools to manage those risks”¹¹ (emphasis added). Nothing has changed the REP’s superior position over consumers to hedge costs. Petitioners argue that REPs had limited information due to the newness of ERCOT Contingency Reserve Service (“ECRS”) in the marketplace, but most

⁸ REP Coalition’s Initial Brief, Docket No. 55959 (May 31, 2024) at 2-3; Alliance for Retail Markets’ Comments in Response to Proposal for Publication, Project No. 51830, *Review of Certain Retail Electric Customer Protection Rules*, (Aug. 27, 2021) at 14; Texas Energy Association for Marketers’ Response to Request for Comments on Proposal for Publication, Project No. 51830, *Review of Certain Retail Electric Customer Protection Rules*, (Aug. 27, 2021) at 18.

⁹ REP Coalition’s Initial Brief, Docket No. 55959 (May 31, 2024) at 10-11; Reply Comments of Alliance for Retail Markets, Texas Energy Association for Marketers, and Coalition of Competitive Retail Electric Providers, Project No. 51830, *Review of Certain Retail Electric Customer Protection Rules*, (Sept. 7, 2021), at 7.

¹⁰ REP Coalition’s Initial Brief, Docket No. 55959 (May 31, 2024) at 11-12.

¹¹ Order in 51830 at 46-47.

residential and small commercial consumers continue to have limited, if any, awareness of ECRS specifically or ancillary services broadly.

Contrary to their second main argument, the procurement of ECRS has not precluded REPs from making profits or competing in the marketplace. No evidence has been proffered to show a direct link between ECRS and diminished competition. Petitioners claim that ECRS put REPs in the position of either operating at a loss or losing customers to competition.¹² OPUC concedes that ECRS has been a challenge under the existing ERCOT procurement methodology and supports efforts to revisit the procurement methodology,¹³ but only hypothetical arguments have been offered to suggest any concrete hardship — beyond an increased cost of doing business — as a result of this new ancillary service. Significantly, by claiming that some REPs could lose customers to others “by setting a higher price,” petitioners essentially argue that competition is contrary to the public interest,¹⁴ an argument that has long been rejected in challenges to anticompetitive actions.¹⁵ Competition has not, and will not, suffer by placing the onus on REPs to offer prices that both reflect their costs and that attract consumers. These arguments were settled in Project No. 51830 and need not be revisited here.

¹² REP Coalition’s Initial Brief, Docket No. 55959 (May 31, 2024) at 5.

¹³ See Joint Consumers Comments to Nodal Protocol Revision Request No. 1224, *ECRS Manual Deployment Triggers* (Apr. 4, 2024) available at <https://www.ercot.com/mkt/rules/issues/NPRR1224>.

¹⁴ Texas Energy Association for Marketers’ and Alliance for Retail Markets’ Joint Petition for Designation Addressing ERCOT Contingency Reserve Service, Docket No. 55959 (Dec. 8, 2023) at 7 and 9.

¹⁵ See *Nat’l Soc. of Prof. Engineers v. U.S.*, 435 U.S. 679, 689 (1978); and see *Nat’l Collegiate Athletic Assoc. v. Alston*, 594 U.S. 69, 95 (2021) (“This Court has regularly refused materially identical requests from litigants seeking special dispensation from the Sherman Act on the ground that their restraints of trade serve uniquely important social objectives beyond enhancing competition.”). Petitioners make no claims of anticompetitive conduct against the state but offer the same arguments that their activity, or requested activity, should be permitted because to do otherwise would impair competition.

II. COSTS RELATED TO ECRS ARE NOT “COSTS THAT ARE NOT WITHIN THE RETAIL ELECTRIC PROVIDER’S CONTROL” UNDER THE APPLICABLE STATUTE OR RULE

Conventions of statutory construction weigh heavily against an interpretation that ancillary services should be considered a cost beyond a REP’s control under PURA § 39.112(a) and 16 TAC 25.475(b)(5). Such an interpretation could readily be applied to all ancillary service costs and quantities, which are always unpredictable at some level. This position was summarily rejected by the Commission in Project No. 51830.¹⁶ Second, in applying the canon of statutory construction *noscitur a sociis*, the meaning of words in a list is defined by the words around it;¹⁷ here, “changes to federal, state, or local laws that result in new or modified fees or costs that are not within the retail electric provider’s control” is limited to not mean *any* changes conceivable, but those similar to “actual changes in transmission and distribution utility charges” and “changes to ERCOT or Texas Regional Entity administrative fees charged to loads.”¹⁸ Thus, statute creates a category of fees that are distinct from the “price for each billing period, *including recurring charges*” that relate to providing retail electric services. Recurring charges are defined as those that are expected to appear on customer bills at least three out of every twelve billing cycles.¹⁹ Petitioners have recognized, and OPUC agrees, that ancillary services are recurring charges.²⁰

¹⁶ Order in 51830 at 46-47.

¹⁷ “The canon of statutory construction known as *noscitur a sociis* – ‘it is known by its associates’ - holds that the meaning of a word or phrase, especially one in a list, should be known by the words immediately surrounding it ... [the courts] rely on this principle to avoid ascribing to one word a meaning so broad that it is incommensurate with the statutory context.” See *Greater Houston Partnership v. Paxton*, 468 S.W.3d 51, 61 (Tex. 2015).

¹⁸ PURA § 39.112(a).

¹⁹ 16 TAC § 25.475(b)(9).

²⁰ Texas Energy Association for Marketers’ Response to Request for Comments on Proposal for Publication, Project No. 51830, *Review of Certain Retail Electric Customer Protection Rules*, (Aug. 27, 2021) at 17 and 18; Alliance for Retail Markets’ Comments in Response to Proposal for Publication, Project No. 51830, *Review of Certain Retail Electric Customer Protection Rules*, (Aug. 27, 2021) at 13-14.

More to the point, transmission and distribution utility charges are set by the Commission and are similar in function to administrative fees charged by ERCOT; these costs would be the same no matter which REP a customer chose to obtain retail services from in a given area. Ancillary service fees *do* vary by REP based on their load ratio share, as petitioners stated.²¹ The Commission should not now allow petitioners to masquerade a recurring charge unique to each REP as a one-time price adjustment across the board.

Further, for two reasons, OPUC suggests the Commission should exercise caution in making any designation under the existing language of 16 TAC 25.475(b)(5). First, without clear, articulated criteria, a designation of a recurring charge as a cost exceeding the REP's control under 16 TAC § 25.475(b)(5) could be considered arbitrary and capricious as (1) ignoring the plain language of the Commission's regulations, or (2) improperly basing such a decision on non-statutory criteria or legally irrelevant factors. As explained above, recurring charges have been clearly acknowledged, defined, and separated from non-recurring costs that vary by REP. Additionally, that REPs incurred a net cost higher than what ECRS was intended to produce does not make an ancillary service less of a recurring charge, so consideration of that argument as a basis for a designation under 16 TAC § 25.475(b)(5) would be relying on non-statutory and legally irrelevant criteria. Second rules do not clearly limit the designation to allowing a one-time price adjustment; based on the statutory language, which is reflected in the rule, electricity bills reflect (1) fixed prices, and (2) specifically designated variable costs (transmission and distribution costs, ERCOT administrative fees, and costs outside the control of the REP resulting from a change in federal, state, or local laws). A "one-time price adjustment" is not contemplated under 16 TAC § 25.475(b)(5). Allowing a one-time price adjustment in a contested case under the rule would

²¹ REP Coalition's Initial Brief, Docket No. 55959 (May 31, 2024) at 3.

constitute *ad hoc* rulemaking, which would be inappropriate here, as the costs of ECRS had been contemplated since 2019 (or at least for the past year of its deployment) and thus no unforeseen circumstances exist.²²


III. CONCLUSION

In conclusion, REPs have brought forth these arguments before and the Commission summarily rejected the argument that REPs are in a more sympathetic position to handle ECRS costs than residential and small commercial consumers. Additionally, the statute does not contemplate ancillary service charges being passed on to customers with fixed-rate contracts. Finally, the Commission should exercise caution before making any designation under the rule that could be deemed arbitrary and capricious or *ad hoc* rulemaking. For these reasons, articulated in more detail above, OPUC requests that TEAM's and ARM's petition for a designation pursuant to 16 TAC § 25.475(b)(5) be denied. OPUC further requests such other relief to which it may be entitled.

Date: June 7, 2024

Respectfully submitted,

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²² *Tex. State Bd. of Pharmacy v. Witcher*, 447 S.W.3d 520 (Tex. App.—Austin 2014, pet. denied) (reaffirming that, absent exceptional circumstances, agencies are prohibited from *ad hoc* rulemaking).

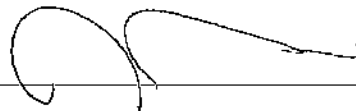
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**ATTORNEYS FOR THE
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CERTIFICATE OF SERVICE
PUC DOCKET NO. 55959

I hereby certify that a copy of the foregoing document was served on all parties of record in this proceeding on this 7th day of June 2024, by facsimile, electronic mail, and/or first class, U.S. Mail.

Julie Davis

A handwritten signature in black ink, appearing to be 'Julie Davis', written over a horizontal line.