Filing Receipt

Filing Date - 2024-06-14 02:22:21 PM

Control Number - 55959

Item Number - 32

DOCKET NO. 55959

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

COMMISSION STAFF'S REPLY BRIEF

I. INTRODUCTION AND SUMMARY

The Texas Energy Association for Marketers (TEAM) and Alliance for Retail Markets (ARM) (together, the REP Coalition) filed a petition to designate Electric Reliability Council of Texas (ERCOT) Contingency Reserve Service (ECRS) as "a specific type of ancillary service product as incurring charges beyond the REP's control for a customer's existing contract" under 16 TAC § 25.475(b)(5), so that individual retail electric providers (REPs) may pass through that charge now to certain customers with preexisting fixed rate contracts. Commission Staff opposes the petition and timely files its reply brief.

On June 10, 2023, ERCOT implemented ECRS as a new ancillary service product: the first new ancillary service in ERCOT in over a decade. However, REPs have been aware of ECRS since 2018, when the product was first introduced in Nodal Protocol Revision Request (NPRR) 863. The NPRR was vigorously debated throughout that calendar year and ultimately received ERCOT board of directors' approval in February 2019. When the Commission amended 16 TAC § 25.475 to allow a REP to pass through certain ancillary service charges, it did so by requiring Commission designation of the ancillary service "as incurring charges beyond the REP's control for a customer's existing contract".[1] Though this is a case of first impression, the current petition does not satisfy the conditions contemplated by the Commission's rule. First, Petitioners' request comes nearly two years after the REP Coalition was both aware of the potential impacts of ECRS charges and able to request designation of the charges as beyond their members' control. Second, Petitioners failed to demonstrate that the designation of ECRS is a necessity that meets the balancing test set forth in Project No. 51830. Accordingly, the petition should be denied.

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[1] *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 16 TAC §25.499 as Approved at the December 16, 2021, Open Meeting (Dec. 16, 2021).

II. ARGUMENT

The REP Coalition's petition fails for three primary reasons. First, the proper time to raise the question of whether ECRS costs could be recovered by REPs was shortly after the Commission issued its final order in Project No. 51830. Second, the REP Coalition failed to adequately show the necessity of passing through to retail customers ECRS charges now, a year after its implementation. Thus, granting the petition now fails the balancing test set out in Project No. 51830: balancing the protection of retail customer interests with the Commission's duty to enable a robust competitive retail market. And third, the underlying costs themselves are not eligible to be passed through to customers under the plain language of the rule. Finally, even if Commission Staff agreed that the petition was not out of time and the balancing test did in fact lean towards Petitioner's arguments, to grant the petition now would create an unfair surprise to consumers and allow what would amount to a misleading and anticompetitive practice under PURA[2] § 17.001.

A. REPs failed to demonstrate the eligibility and necessity of a pass through for ECRS charges

Before considering whether Petitioners fulfilled their burden to show the necessity of passing through ECRS costs to retail customers and then turning to the balancing test to determine whether the needs of competitive retail market are adequately balanced with consumer safeguards, the Commission must first determine whether Petitioners met the eligibility test for ECRS to be designated as an ancillary service as a pass through, or as they have labeled it, as a one-time adjustment to pass through the ECRS charges.

i. Eligibility - ECRS is a recurring charge

Petitioner's argument centers around the amount of ECRS procured; however, the REP Coalition misses a fundamental component of analysis: ECRS charges are a recurring cost. As the Office of Public Utility Counsel (OPUC) argued in its brief, that the "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."[3] OPUC's argument is sound: recurring charges are not of the type of cost the Commission contemplated could be

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[2] Public Utility Regulatory Act, Tex. Util. Code §§ 11.001—66.016 (PURA).

[3] Docket No. 55959, OPUC's Reply Brief at 6 (Jun. 7, 2024).

passed through to consumers on fixed rate contracts because the ERCOT-invoiced amount varies by each REP's monthly load-ratio share. And because of this variability, REPs are far better situated to mitigate the associated financial risk than their customers. That the amount invoiced to the REPs was higher than anticipated does not suddenly make this type of recurring charge eligible for pass through treatment. Such logic could accordingly be applied to a REP's wholesale energy charges, and certainly the Commission did not intend for fixed-rate contract consumers to bear that risk.

ii. Eligibility - ECRS costs not beyond a REP's control

NPRR 863, creating the ECRS product, was approved on February 12, 2019, after more than a year in development through the ERCOT stakeholder process. Though the final cost to REPs may have been unknown at the time the revision was adopted, the key components have been long understood since then. Because those components were known and understood, REPs, for example, could have priced in ECRS procurement quantity uncertainty by mirroring incremental Responsive Reserve Service (RRS) Market Clearing Prices for Capacity (MCPCs). High MCPCs and the underlying pricing dynamics are well-known issues from 2021. Moreover, a variety of risk management tools and services for the wholesale energy markets exist in this mature industry. REPs had the ability to model various outcomes and seek different risk management options to minimize their exposure.

Finally, Petitioner's analogy to Dispatchable Reliability Reserve Service (DRRS) falls flat. Today, DRRS is still a conceptual idea and no policy or technical parameters have been established for that product yet.[4] Thus, a request today to designate DRRS as a cost beyond a REP's control would be very premature. Certainly by 2022, however, REPs had enough information – and more importantly, vastly better information than their customers have access to – to make a reasoned estimate of the financial risks ECRS presented.

iii. Necessity

Even if it were appropriate to entertain the untimely petition, or that analysis showed that ECRS was an eligible product, the REP Coalition failed to meet its burden in demonstrating the necessity allowing for ECRS charges to be passed on to consumers. As the Commission realized,

[4] NPRR 1235, Dispatchable Reliability Reservice Service as a Stand-Alone Ancillary Service, was filed by ERCOT on May 29, 2024, and has yet to receive its first ERCOT stakeholder committee hearing.

ancillary service products are market-based products that can be hedged or otherwise mitigated by a REP to a significantly greater level of risk certainty than a consumer. Thus, in the Order in Project No. 51830, the Commission specified that it will "require the REP community to demonstrate the necessity of pass through eligibility for each ancillary service product."[5] Thus, Petitioners have the burden to prove that it is necessary the ECRS product charges should not be borne by the REPs and should, instead, be passed on to the consumer.

Petitioners made a series of claims from reduced profitability to difficulty in forecasting ECRS costs and compared the instant request to a nascent DRRS product. However, the comparison does not demonstrate why the pricing risks of ECRS, a product which was sufficiently developed long before its implementation, could not have been adequately accounted for by REPs and thus necessitating a pass through now. For example, REPs with lower risk tolerance could have created products that have higher prices or shorter contract terms. REPs had eighteen months to model various possible market outcomes using different procurement quantities to gauge the risk they might have had to bear. And in that time, a flourishing marketplace for REP risk management and bilateral trading has grown – solely so that REPs can hedge financial risks. However, the petition does not show that REPs made any such plans or efforts, and thus, the REP Coalition failed to demonstrate why it is necessary that the Commission find ECRS charges eligible to be passed through.

Petitioner's claims that denial of their request will result in unintended, harmful consequences lack support. Moreover, pricing pressure is a necessary force to help maintain a healthy, competitive retail marketplace. Rather than decrease competition, the competition in the retail space will reward those REPs that seek to provide most cost-effective plans with the best customer service. Demand for high quality retail products will serve as a counterweight to increasing costs or decreasing term lengths on a systemic basis. Ultimately, competition and innovation are the hallmarks of a robust market. Thus, if the lamentable but purely hypothetical consequences cited by Petitioners is the only issue, these reasons do not support a finding that denial of the petition would be an unreasonable restraint on cost recovery by REPs. And thus, Petitioner's arguments do not meet the burden of necessity as established in the Commission's order in Project No. 51830.

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[5] Project No. 51830, Order at 47 (Dec. 16, 2021).

B. *Petition is untimely*

Regardless of the methodology of recovering ECRS costs—whether as Petitioners presented here as a "one time adjustment"[6] or, as OPUC noted in its brief, the contemplated recurring charge such as transmission costs[7]—the framework provided by the Order in Project No. 51830 should control.

As the REP Coalition admitted, ECRS is not a new concept.[8] After the final order was issued in Project No. 51830, REPs were then aware that ECRS charges needed the appropriate designation in order for them to pass through these charges to their customers. Petitioners have noted that ECRS was implemented in June of 2023 and, thus, had about eighteen months between adoption of the final order and implementation of ECRS to file a petition. Importantly, the Order in Project No. 51830 clearly states, "the review process implemented by the commission for ancillary service products substantially addresses the commenters' concerns by ensuring that, ***prior to implementation***, charges associated with new ancillary service product are eligible for review by the commission on a case-by-case basis to determine if they are appropriate for pass through."[9] (emphasis added) This instant petition was filed December 8, 2023, approximately six months after ECRS was already implemented.

The Commission's specificity that designation should come prior to product implementation is a clear effort to safeguard consumers from surprising billing amounts associated with consumption that occurred in the past. Should the Commission grant Petitioner's request, consumers will be negatively impacted by having this charge retroactively appear on their bills for activity that occurred a year ago. Suggesting that the petition merely represents an "option" to pass through ECRS costs is misleading at best. As Petitioner's brief already acknowledges, REPs routinely pass through many other available charges, such as transmission and distribution charges, and further argue that the goal in seeking declaratory action is so that REPs can seek recovery alleged lost profit due to the cost of ECRS procurement. The Commission's intention to designate certain ancillary service charges as eligible to be passed through to customers is precisely designed

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[6] Docket No. 55959, REP Coalition's Initial Brief at 9 (May 31, 2024).

[7] OPUC's Reply Brief at 5 (Jun. 7, 2024).

[8] REP Coalition's Initial Brief at 2 (May 31, 2024).

[9] Project No. 51830, Order at 47 (Dec. 16, 2021).

to avoid the situation the REP Coalition's request would present: untimely, surprising bill increases over which consumers have no control.

Finally, no other relevant changes in law or rule have been passed that may have tolled this filing limitation in disregard of the Commission's decision in 2021. Petitioner's delay in raising these questions now, long after implementation, results in an unacceptable potential harm to consumers and the petition should be denied accordingly.

C. *The balancing test: market needs and consumer protection*

The Order in Project No. 51830 created a balancing test between the competitive retail market and customer protection when reviewing whether a cost should be passed through.[10] The Commission in Project No. 51830 noted that REPs are in the superior position to predict pricing fluctuations than customers. Thus, the risk allocation model in fixed contracts adopted in Project No. 51830 is "consistent with the commission's other determinations in this rulemaking that market entities, not customers, should bear the risk of unpredictable price fluctuations beyond reasonable market expectations for electric service."[11] However, in recognizing that there may be eligible ancillary service products that are demonstrably necessary to pass through to consumers, the Commission created a test that balances the necessity of cost recovery by REPs and a competitive market with consumer protection.

i. *Analysis under REP needs and for a competitive retail market*

In a genuinely competitive marketplace, there are no guarantees for REPs to earn a predetermined profit from their fixed-rate products. Similarly, they are not assured of recovering all their expenses for their product offerings. A competitive REP then will seek out ways to hedge those risks.

Many REPs use a risk management hedging strategies and execute energy trading themselves or engage companies that perform risk management services for them. Not only do REPs participate in the congestion revenue rights or day ahead markets, they often participate in bilateral trades outside the ERCOT-administered markets to hedge their financial risks. Such a

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[10] *Id.* at 46-47. "The added language to the definition of 'fixed rate product' specifies that the commission, in its discretion, may review whether costs outside of a REPs control incurred for ancillary service products may be passed through in the price for a fixed rate product in existing customer contracts. The commission will review costs associated with ancillary service products for pass through eligibility to balance customer protection interests and the risk concerns of REPs."

[11] *Id.* at 6.

secondary market is part of market design as evidenced by ERCOT Nodal Protocols § 4.4.7, which specifically addresses ancillary service trading to accommodate and encourage the free flow of these trades. The REPs' incentive to mitigate risk fosters further innovations in this market and, in turn, further encourages competition and expands the industry. For example, bilateral and over the counter trades are available on the Intercontinental Exchange (ICE) for the ERCOT power region.[12] Ultimately, if liquidity is truly a concern, then allowing REPs to pass through ECRS costs inhibits the growth and maturity of the secondary markets and the liquidity of these types of financial instruments. REPs will also engage with companies that help them seek and acquire portfolios of customers to help spread risk across its existing customer portfolio.

Additionally, REPs have the superior knowledge with ready access to a wide portfolio of predictive analytic tools from software to consulting services that offer insights into pricing scenarios and hedging as well as actual risk management for retailers to offset market risk – all services that are unavailable or even unheard of to the average consumer. Even just the one-off opportunities available to REPs, such as regularly offered free webcasts, seminars, newsletters, and conferences where energy market outlook information is shared freely, vastly outnumber the single free and unbiased platform for consumers to compare retail electric products supported by the Commission.[13] Even if consumers had the time to wade through the hundreds of REP websites to compare individual plans, they lack the same expertise to understand underlying wholesale and retail market conditions as the REPs do to make the kind of educated business decisions that the REPs did when establishing their rates. Thus, REPs' manifold ability to mitigate their risks far outnumber a consumer's limited information and ability to assume this additional financial burden.

REPs' incentives and their numerous methods to hedge risk are fundamental to the competitive environment and expansion of the industry that is part of the Commission's mission to support. Not only does it discourage innovation in competitive products, allowing REPs to pass on these surprise costs also inhibits the bilateral trading market in ancillary services and retail risk management.

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[12] See at "ERCOT North 345KV Real-Time Peak Daily Fixed Price Future", one of many ERCOT tied futures products at ICE, described as "A daily cash settled Exchange Futures Contract based upon the mathematical average of peak hourly electricity prices published by ERCOT for the location specified in Reference Price." https://www.ice.com/products/6590453/ERCOT-North-345KV-Real-Time-Peak-Daily-Fixed-Price-Future

[13] See powertochoose.org.

Certainly, granting the petition now fails to provide the consumer protections granted by PURA § 39.101(b)(5) and (6) and, thus, fails to balance the need of a healthy competitive industry, while protecting consumers and ensuring that they receive the benefits of that free and fair competitive market. Passing through ECRS costs here fails to meet the balancing test set by the Order in Project No. 51830.

ii. ***Analysis under consumer protection safeguards***

Under PURA § 39.101(b)(6), customers are entitled to protection against unfair practices that include billing of services that were not authorized or provided. The Commission noted as much in its Order in Project No. 51830: "it is fundamentally unfair for customers to bear an unexpected, unknown cost that could be exponentially higher than what is expected upon signing of a contract for a fixed rate product."[14] Yet, there is no evidence in the REP Coalition's petition that consumers here authorized a passthrough of ECRS charges, whether as a single adjustment or a recurring charge, to appear on their bills a year or even more after they entered into these fixed price contracts. Thus, the need for protection against unauthorized billed services stands. Additionally, under PURA § 39.101(b)(5), customers are entitled to receive information to make an informed choice. REPs have shown no evidence that the affected customers were ever aware that, a year or more after entering into their contracts, they could also have this additional charge for ECRS passed on to them. Consumers may have heard news after ECRS was implemented and intuited that such a cost existed. Many are likely still unaware. Thus, the REPs' admission noted by the Commission in Project No. 51830—that consumers do not have "sufficient information to make an informed choice of provider if individual REPs … elect to pass these costs through to customers directly"—also still holds true.[15] Thus, Petitioner's failure to meet the eligibility and necessity factors is dispositive as the clear and present need for consumer protection is not outweighed by unsubstantiated concerns of reduced profitability or lack of ease in forecasting ECRS procurement. The petition should be denied.

D. ***Passing through ECRS now runs counter to PURA §§ 17.001 and 17.004***

Finally, even if all the factors set forth in Project No. 51830 were satisfied, passing through a one-time adjustment would be antithetical to the Commission's obligation to protect retail

[14] Project No. 51830 Order at 48 (Dec. 16, 2021).

[15] *Id.*

customers as described in PURA §§ 17.001 and 17.004. Allowing REPs to pass through this charge to existing fixed rate contracts is in violation of the Commission's duty under PURA § 17.004(1) to protect consumers from fraudulent, unfair, misleading, deceptive, or anticompetitive business practice as well as billing for services that were not provided or authorized, as well as § 17.001's duty to safeguard to safeguard consumers against businesses that do not have the technical and financial resources to provide adequate service.

i. *Pass through is essentially fraudulent, unfair, misleading, deceptive, or anticompetitive business practices*

Even if even if the result of the balancing test showed that the needs of the REPs to passthrough this charge outweighed the likely harm conferred to their customers, a one-time adjustment is not the appropriate methodology for REPs to recover ECRS costs. A one-time adjustment option approved here would occur through an unknown billing mechanism and would likely be inconsistently applied to consumers through various descriptions, rates, and formulas. This behavior is capricious to the point that it amounts to deceptive and unfair business practice.

1. Pass through of a one-time adjustment is misleading and unfair

PURA § 17.001 places a duty on the Commission to prevent unfair and anti-competitive practices. Petitioners repeatedly stated that in seeking the designation of ECRS, a favorable decision would result only in the option for individual REPs to pass through the charge to their customers as they see fit. Yet, the REP Coalition failed to describe any method by which these charges would be passed through to customers—indicating a high probability of an inconsistent application of an optional authority, which could result in unfair and unverifiable billing processes. This results in an anti-competitive and misleading practices. Customers that experience the sudden appearance of this pass-through charge not only did not agree to it when they chose the product and provider, they have no basis against which to compare rates of different REPs to determine how ECRS charges would be assessed, a situation predicted and already determined by Commission to be unfair to consumers in Project No. 51830 when it noted that the pass through of an ancillary service cost is "fundamentally unfair for customers to bear an unexpected, unknown cost that could be exponentially higher than what is expected upon signing of a contract for a fixed rate product."[16] Adding it now, a year or more after customers signed the contract, is misleading.

[16] Order in Project 51830 at 48.

Additionally, whether as billed as a one-time adjustment or other type of cost that passes ECRS costs to consumers, allowing it to be retroactive is fundamentally deceptive. Petitioners noted that REPs did not incur ECRS costs until June 9, 2023.[17] Yet they seek to recover these costs from customers with contracts before the date ECRS costs were incurred.[18] Nothing in the REP Coalition's petition indicates which REPs will be optioning this charge, the methodology of billing this one time cost such as how these charges will be calculated, or how they will be apportioned. Thus, it is expected that consumers who entered into these fixed price contracts before implementation of ECRS will bear the cost of a service they never received. This is a deceptive business practice in violation of PURA § 17.004(1).

Moreover, customers that attempt to switch away from REPs seeking to unfairly pass through ECRS charges may be additionally burdened with early termination fees to cancel the contract or penalties if they rightfully protest a surprise fee to their fixed rate contract.

Finally, though REPs had predicted extraordinary increases in ancillary service procurement in their 2021 comments filed in Project No. 51830, Petitioners now maintain it was impossible for REPs to have reasonably foreseen ECRS costs and priced their fixed rate contracts accordingly. If it was impossible for the business professionals in the industry, then this price adjustment would be an unfair surprise to a consumer who obtained a fixed price contract. Avoiding fluctuations in retail electric prices was presumably why the customer chose a fixed rate product in the first place. As the Commission noted in Project No. 51830, "allowing REPs to modify the price of a fixed rate product based on changes in costs associated with ancillary service charges does not ensure that customers are entitled to reliable and reasonably priced electricity, nor - by the REPs' own admission - do customers have sufficient information to make an informed choice of provider if individual REPs may elect to pass these costs through to customers directly."[19] If anything, the passage of time from the final order in Project No. 51830 to the current proceeding has increased the likelihood for consumer surprise. And now, this sudden increase to

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[17] REP Coalition's Initial Brief, Docket No. 55959 (May 31, 2024) at 17.

[18] Id. at 3. "A REP that entered into a multi-year contract for retail electric service with a residential or small commercial customer prior to that time, in 2022 for example,…" indicating an intention or likelihood that REPs will pass on ECRS costs to customers with 2022 contracts – at least six months before ECRS costs were incurred.

[19] Order in Project No. 51830 at 48.

consumer electric bills may result in consequences for consumers, particularly so for those on fixed or low incomes. This is in clear violation of PURA §17.004(1).

2. Passing through a one-time adjustment is anti-competitive behavior

REPs did not show that customers were not informed of this fee when they chose the specific product and provider over the competitors. Thus, the REPs passing on this cost now, when it was not disclosed initially to customers during selection, amounts to anticompetitive behavior.

ii. ***Pass through is counter to duty to safeguard against business lacking sufficient capability***

PURA § 17.004 established the protection of consumers against business that do not have technical and financial resources to provide adequate service as a primary public policy objection. Petitioners argue that REPs could not foresee ECRS costs, and thus, if obligated to absorb these costs, could operate at a loss, or could lose customers. Though the claims lack support, they do raise the question of whether these companies actually have sufficient technical capability to provide the type of risk management contemplated by the legislature and the Commission.

When consumers cannot depend on consistent procedure and also cannot reasonably compare products, they cannot make an informed choice of a REP, which undermines the competitive market. Thus, while it does not appear that REPs are intentionally misleading or deceptive in attempting to pass through ancillary service charges, it is against public interest for customers to bear an unexpected, unknown cost and to protect a free and fair competitive marketplace.

III. CONCLUSION

Commission Staff respectfully requests that the commission denies the REP Coalition to designate ECRS as a type of ancillary service product as incurring charges beyond the REP's control and prohibit REPs from passing through ECRS charges to preexisting residential and small commercial customer contracts.

Dated: June 14, 2024

Respectfully Submitted,

PUBLIC UTILITY COMMISSION OF TEXAS

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DOCKET NO. 55959

CERTIFICATE OF SERVICE

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document will be provided to all parties of record via electronic mail on June 14, 2024, in accordance with the Second Order Suspending Rules, issued in Project No. 50664.

/s/ Rachel Seshan
Rachel Seshan