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DOCKET NO. 55959

JOINT PETITION OF TEXAS ENERGY	§	PUBLIC UTILITY COMMISSION
ASSOCIATION FOR MARKETERS	§	
AND ALLIANCE FOR RETAIL	§	OF TEXAS
MARKETERS FOR DESIGNATION	§	
UNDER 16 TAC § 25.475(b)(1)	§	

**REP COALITION'S EXCEPTIONS TO THE
PROPOSED DECLARATORY ORDER**

The Texas Energy Association for Marketers (TEAM) and Alliance for Retail Markets (ARM) (collectively, the REP Coalition) respectfully submit these Exceptions to the Proposed Declaratory Order (Exceptions) issued in this proceeding on September 4, 2024. The memorandum accompanying the proposed declaratory order (Proposed Order) established September 18, 2024, as the deadline for filing corrections or exceptions.¹ Therefore, this pleading is timely filed. The REP Coalition respectfully requests that the Public Utility Commission of Texas (Commission) reject the Proposed Order and issue an order consistent with these Exceptions. In support thereof, the REP Coalition would show the following.

I. EXECUTIVE SUMMARY

The REP Coalition has filed this petition to have the Commission determine whether the newly adopted Electric Reliability Council of Texas (ERCOT) Contingency Reserve Service (ECRS) ancillary service is a new cost or fee beyond a retail electric provider's (REP's) control for existing contracts entered into prior to the implementation of this new ancillary service. If the Commission makes the requested determination, then REPs could choose to make a one-time adjustment (related solely to the incremental cost of ECRS) to the price charged on prospective bills for customer contracts entered into prior to June 9, 2023. The Proposed Order incorrectly asserts that the REP Coalition seeks retroactive application of the designation sought here.

ECRS is the first new ancillary service that has been implemented by ERCOT in more than 20 years. The designation requested here is necessitated by Commission rule amendments adopted in December 2021 in response to legislation regarding wholesale indexed products that would pass through real-time settlement point prices and other market risk. The Proposed Order incorrectly

¹ Proposed Declaratory Order with Memorandum at 1 (Sept. 4, 2024).

asserts that in adopting this rule change, the Commission contemplated that the new rule language would exclude designation of ECRS as a new ancillary service.

At the time that amendments to 16 Texas Administrative Code (TAC) § 25.475 were adopted, ECRS was not developed, and further development had been paused in the wake of Winter Storm Uri. However, the Proposed Order would adopt a policy indicating that REPs should have priced in ECRS from the time that the concept of implementing ECRS was approved in 2019. As the Commission continues to implement substantial changes to the wholesale ERCOT market pursuant to legislative direction, REPs need to be able to address such changes in law that cause new costs or fees beyond the REP's foresight and control into existing retail contracts in order to efficiently price products to customers and offer long-term products to customers. The Proposed Order as filed would reflect a public policy determination that would harm residential and small customers by encouraging prices that reflect additional regulatory uncertainty of potential future costs for new ancillary services that may not even be implemented during the term of those customers' retail contracts or having limited options for longer term contracts. Therefore, the REP Coalition respectfully requests that the Commission designate ECRS as an ancillary service product that caused REPs to incur costs beyond their control for contracts that were existing prior to the implementation of this new ancillary service on June 10, 2023.

II. INTRODUCTION

The Commission has already determined by a previous order in this case:

First, the outcome of this proceeding will not necessarily result in a price charge for customers. Rather, the Commission's ultimate determination in this proceeding is one of general applicability and will provide the competitive retail market with guidance on whether a REP can pass through a charge to its customer on an existing fixed rate contract under 16 TAC § 25.475(b)(5).²

It is important for customers that REPs understand how the rule language in 16 TAC § 25.475(b)(5) will impact the ability of REPs to adjust existing fixed priced contracts for regulatory changes implementing new ancillary services or other new costs or fees approved by the Commission that create costs that are beyond the REP's control after the existing contract was established.

² Order on Appeal of Order No. 4 at 2 (May 2, 2024).

Today, residential and small commercial customers are seeking and entering into fixed price contracts for retail electric service with multi-year terms of up to five years. These longer-term contracts are beneficial to customers and the market because they allow for, and in fact essentially require, longer term purchased power agreements or other types of hedges. The Proposed Order, if left unchanged, would add significant regulatory uncertainty regarding the cost to serve those contracts, and would create a situation where REPs are left without direction as to how or if the costs of future new ancillary or reliability services can or should be recovered despite the plain language of 16 TAC § 25.475(b)(5), which indicates the price of an existing fixed rate contract can vary if the Commission makes the designation requested in this proceeding.

The Proposed Order should be revised to prevent far-reaching impacts on existing contracts beyond those raised in the instant petition relating to ECRS. Further, the Proposed Order fails to refute the REP Coalition's record evidence demonstrating that, prior to June 9, 2023, REPs lacked sufficient certainty regarding how ERCOT would deploy ECRS to effectively anticipate or account for the quantity and cost of ECRS in their multi-year contracts with residential and small commercial customers.³ Any attempt by REPs to do so as far back as suggested in the Proposed Order (i.e., 2019 when Nodal Protocol Revision Request (NPRR) 863 was first adopted by the ERCOT Board) would have been highly speculative. Therefore, the Commission should revise the Proposed Order to grant the REP Coalition's petition for designation of ECRS as a new ancillary service that caused REPs to incur costs beyond their control for customer contracts that existed prior to June 9, 2023. For the convenience of the Commission, the REP Coalition has attached the proposed order included with the REP Coalition briefing in this case.

III. EXCEPTIONS TO PROPOSED DECLARATORY ORDER

A. The Proposed Order is not consistent with House Bill 16 or the implementing Commission Rule.

The Proposed Order relies on a misinterpretation of legislation adopted following Winter Storm Uri as a basis for rejecting the requested ECRS designation that is at issue in this case. It is important to consider the context of that legislation and the subsequent rulemaking. The statute at issue, House Bill (HB) 16,⁴ introduced a prohibition on offering residential and small commercial

³ REP Coalition's Initial Brief at 3 (May 31, 2024).

⁴ 87th Tex. Leg., R.S., House Bill (HB) 16 (eff. Sept. 1, 2021).

customers a “wholesale indexed product” in which the price paid “includes a direct pass-through of real-time settlement point prices” in ERCOT.⁵ The stated concern was that residential and small commercial customers could not fairly understand and evaluate the risk of direct exposure to prices that fluctuate with real-time market conditions within ERCOT that can vary exponentially. In adopting the rule changes to implement HB 16 in Project No. 51830,⁶ the Commission further prohibited all indexed products, including those that would have ancillary services as a component in the formula for a customer’s price. Importantly, HB 16 made no changes to the existing statutory language that allows REPs to adjust fixed rate product prices to reflect changes in laws “that result in new or modified fees or costs that are not within the retail electric provider’s control.”⁷

The Proposed Order seems to conflate the prohibition against residential and small commercial contracts containing certain “pass-through” components with the pre-existing, statutorily recognized concept of allowing one-time adjustments to existing fixed price contracts for newly created or modified costs or fees that are beyond the REP’s control. The REP Coalition’s request here is consistent with that rule, and, contrary to the assertions in the Proposed Order, would not result in customers being exposed to “fluctuation of electricity rates”⁸ in ancillary service costs.

Ordinarily, the rule language stands on its own. However, in this case, the Proposed Order draws public policy conclusions as to the intent of the rule by citing isolated statements from the transcript of the open meeting at which the rule language at issue was adopted. The REP Coalition offers the following context and analysis in response, and respectfully requests that the Commission reject the proposed conclusions based on the isolated transcript references and instead issue an order approving the REP Coalition’s petition for all the reasons set out in initial briefing and repeated below.

⁵ HB 16 at 1, codified as Public Utility Regulatory Act, Tex. Util. Code § 39.110(a) and (b) (PURA).

⁶ *Review of Certain Retail Electric Customer Protection Rules*, Project No. 51830, Order Adopting Amendments (Dec. 16, 2021).

⁷ See PURA § 39.112(a).

⁸ Proposed Order at 4.

B. The Proposed Order mischaracterizes the deliberation at the open meeting adopting the rule language at issue.

The Proposed Order mischaracterizes the discussion at the December 16, 2021 open meeting where the Commissioners voted to approve the current rule language at issue in this case. In stating that, “the commissioners repeatedly expressed a strong aversion to allowing REPs to pass along the cost of ancillary services, including ECRS, to fixed rate customers,”⁹ the Proposed Order ignores numerous instances where the Commissioners stated a specific desire to allow changes in ancillary services and specifically, ECRS, to potentially be adjusted into existing fixed price contracts in specific circumstances. Near the end of their deliberation, the Commissioners thoroughly discussed this exact point. Commissioner McAdams stated that the intent of the proposed language was to:

[L]eave this Commission flexibility to where we can try to move -- depending on how large these ancillary services are, to adopt a plan that we can promulgate to retailers **that allows them to start passing through some costs.**¹⁰

Further, and in contravention of the discussion in the Proposed Order, then-Chairman Lake stated:

[E]ven if you do a two-year contract...fixed contract now, in 24 months and in Month 23. . . a new ancillary service comes out, [...]for that month, ...that would not be considered an existing ancillary service. **And so for that one month those charges could be passed through**, but as soon as that 24 month rolls out ... as soon as you get to Month 24 and it’s a new contract, now that is part of the new -- the ancillary -- existing ancillary services.¹¹

This change illustrates that former Chairman Lake’s thinking on the subject evolved throughout the deliberation process, and that by relying on a quote from the beginning of the discussion, the Proposed Order does not reflect that evolution and misses the final takeaway of the discussion.

Contrary to the characterization in the Proposed Order, the open meeting transcript actually suggests that the Commissioners intended this rulemaking change to apply to ECRS. For example,

⁹ Proposed Order at 3.

¹⁰ Open Meeting Tr. at 33:5–9 (Dec. 16, 2021) (emphasis added). Non-substantive revisions have been made to this transcript excerpt for readability. The REP Coalition notes that, despite this language cited from the Open Meeting transcript, the present petition does not request a “pass-through” of costs but rather the opportunity to make a one-time price adjustment.

¹¹ *Id.* at 32:16–33:3 (emphasis added).

Commissioner McAdams suggested an edit to add the word “existing,” which was ultimately adopted by the Commission. In discussing the edit, he stated:

... I would add ‘existing’ to ancillary service charges, meaning that **what we have in the system today, those charges and those fluctuations in charges shall not be passed through to consumers**, upholding the fixed means fixed principle.¹²

As of the time of the adoption of the amendments to this rule, ECRS was not “in the system today.” Commissioner McAdams goes on to explain his edit and specifically mentions ECRS—which he noted was still “being considered.”¹³

In response to Commissioner McAdams’ suggestion, Commission Staff offered changes to the proposed rulemaking to further clarify that ancillary service costs, like those of ECRS, could be passed through in specific situations.¹⁴ As explained by Commission Staff in offering those changes at the open meeting, the changes would apply in instances where:

... there are extraordinary or unexpected costs associated with a new or modified ancillary service in the -- in the opinion of the Commission as part of like **the approval of the NPRR or the entry of the new -- the new ancillary service, you guys would have the discretion to make that pass-throughable.** ...¹⁵

In other words, Commission Staff identified two situations where an ancillary service could be allowed to be passed through: upon the approval of the NPRR or upon the entry of the new ancillary service into the market.

As relevant for the instant petition, while the original NPRR 863 that identified ECRS was adopted by the ERCOT Board in 2019, NPRR 863 determined neither the timing, nor the quantities, nor the implementation parameters of ECRS, and ECRS did not enter the market until years later, on June 9, 2023, with the relevant parameters identified just months before that implementation. Unlike the Proposed Order’s assertion that a REP must have “no awareness”¹⁶ of the concept of a forthcoming product for it to be “pass-throughable”, the discussion at the open

¹² *Id.* at 20:13–18 (emphasis added).

¹³ *Id.* at 20:20–21.

¹⁴ *Id.* at 97:15–16 (David Smeltzer stated that the changes were meant to “capture[] the intent that was expressed by Commissioner McAdams.”) (emphasis added).

¹⁵ *Id.* at 98:7–12 (emphasis added).

¹⁶ Proposed Order at 5.

meeting was clear that there are specific timings that serve to trigger when ancillary service costs may be considered eligible to be passed through.¹⁷

Regarding the process of evaluating whether specific ancillary service charges could be adjusted into existing fixed price products, Commissioner Cobos stated:

And we've got to strike a balance between, you know, providing all that transparency and visibility to the retail market so they can plan going forward and hedge going forward, that that is their business model, is to plan for the future and hedge.¹⁸

The final rule struck that balance by clarifying that while REPs could not pass through existing ancillary services costs to customers on fixed price contracts, REPs potentially could pass through new ancillary services, if the Commission determined, in a proceeding like the instant one, that the costs of those services were beyond the REP's control to hedge against.

C. The Proposed Order would establish public policy that would harm customers.

The Proposed Order states that “a REP selling a fixed price product to a customer in 2022 cannot claim to have had no awareness that ECRS costs were on the way.”¹⁹ The awareness of potential future costs is not the standard in statute or the Commission's rule for when or how a REP should include future costs in existing contracts. In fact, the Proposed Order goes so far as to state that REPs should have taken into account the cost of ECRS since the date the initial creation of the *concept* was approved on February 12, 2019.²⁰ This approach would create a scenario where customers are paying prices for services that may not even be implemented during the term of their retail contract and for which the costs could not have been known that far in advance. As noted, while ECRS was approved in 2019, *the relevant parameters for determining cost were not determined until shortly before implementation in June 2023*. Thus, any attempt to incorporate ECRS costs prior to June 2023 would have an () no basis in fact. In other words, to accomplish

¹⁷ As aforementioned, the REP Coalition is not requesting a direct past-through of ECRS-related costs but rather the opportunity for a one-time price adjustment to existing fixed rate contracts to address such costs.

¹⁸ Open Meeting Tr. at 34:3–8.

¹⁹ Proposed Order at 5.

²⁰ *Id.*

what the Proposed Order posits would have been reasonable, REPs would have had to guess at a future unknown cost and unknown timing of implementation of that cost.

Using the approach set out in the Proposed Order would lead to absurd results. For example, under the Proposed Order's reasoning, REPs should already be pricing Dispatchable Reliability Reserve Service (DRRS) into retail customer contracts for residential and small commercial customers and, in fact, should have done so since the day the legislation (HB 1500) became effective. Similar to ECRS, however, the relevant decisions that will impact cost to the REPs—such as quantity of procurement and characteristics of the resources that will qualify to provide DRRS—are still under development and have yet to be decided. Further, as with ECRS, the timing of the implementation of DRRS is still unknown—potentially years out. As another example, under the reasoning of the Proposed Order, REPs should have been pricing the market redesign discussed as the Performance Credit Mechanism (PCM) into customer's plans since the Commission's Blueprint was adopted in January 2022²¹ or at least since the effective date of House Bill 1500 (i.e., September 1, 2023), which codified guardrails for the PCM.²² Of course, the PCM has not been designed and implemented, and the associated costs and timing of PCM, if it were to be implemented, are not yet known.

In sum, if adopted, the approach suggested by the Proposed Order would result in a litany of hypothetical costs needing to be included in customers' fixed price contracts, inevitably leading to Texas residential and small commercial customers bearing the potentially high cost of Commission-imposed regulatory uncertainty. If the Proposed Order is left unchanged, customers would be exposed to price adjustments on existing contracts²³ and, if adopted as proposed, new customer contracts would also reflect hypothetical and speculative future costs, to guard against the REP having to absorb those costs later. Such a result would contradict the purpose of the language of the rule and would cause unnecessary increased costs to all customers.

²¹ *Review of Wholesale Electric Market Design*, Project No. 52373, Approval of Blueprint for Wholesale Electric Market Design and Directives to ERCOT (Jan. 13, 2022).

²² See 88th Tex. Leg., R.S., House Bill 1500 (eff. Sept. 1, 2023), codified at PURA § 39.1594.

²³ If the adjustment were due to an ancillary service change, the Commission would be in the position of determining whether or not the future service was one that would cause REPs to incur costs beyond their control and thus that could be passed through under 16 TAC § 25.475(b)(5).

D. Petitioners did not request, and are not requesting, retroactive application of the ECRS designation or any resulting price adjustments, and the timing of the application does not disadvantage customers.

One of the key aspects of the Proposed Order requiring clarification is the timing of the application and the requested effective date of any Commission designation in this case. The REP Coalition has not sought and does not seek retroactive application of the designation of ECRS as an ancillary service that caused REPs to incur costs beyond their control. The Proposed Order incorrectly states:

If the REP Coalition's petition were granted in this case, it is possible that ECRS costs incurred as much as 18 months before the petition was filed could be retroactively passed along to the consumer. The REP Coalition's delay in making its request long after ECRS's implementation results in an unacceptable potential for harm to customers.²⁴

This is not at all the case here. As an initial matter, the Proposed Order mistakenly asserts that 18 months elapsed between the June 9, 2023 effective date of ECRS and the filing of the REP Coalition's petition in February 2024—presumably that was a typo.²⁵ Eight months, which is the actual time between June of last year and February of this year, is a significantly shorter timeframe than the 18 months cited in the Proposed Order. In any event, and as previously stated in its petition and in briefing, the REP Coalition seeks to have the requested designation apply only *on a going forward basis*. The requested designation would apply only to customer contracts that were entered into prior to June 9, 2023, and any one-time adjustment to account for the unknown ECRS cost for those existing contracts would apply only on a going forward basis after the effective date of the Order in this proceeding. Much like the scenario that former Chairman Lake described at the December 16 2021 open meeting, if, in the 23rd month of a 24-month contract, there was a new ancillary service implemented and the Commission were to approve REPs' ability to pass through these new costs, then for that 24th month only, the REPs could adjust the price charged to reflect the costs of the new ancillary service of that final month to those existing contracts only.

As a practical matter, many customer contracts that were entered into prior to June 9, 2023 have expired, and thus, would not be subject to a price adjustment regardless of the outcome of this proceeding. However, the public policy determinations here will give much needed meaning

²⁴ Proposed Order at 6.

²⁵ *Id.* at 5.

to the rule language that was adopted in 2021. If the Proposed Order were to move forward as-is, it would essentially negate the careful balance that the Commission expressly enacted in adopting the rule.

Accordingly, while the timing of this decision is somewhat delayed from the date that ECRS was put into effect mid-last year, it is only the REPs that bear exposure because of any such delay given that the REP Coalition is only requesting a going-forward price adjustment; REPs have had to absorb any costs to-date, which a forward-looking price adjustment will not recover.

For background, the REP Coalition had raised the issue of obtaining the designation contemplated under the new rule language long before the filing of the application that underlies this proceeding. The first formal Commission filing by a segment of the members of the REP Coalition was made in November 2023 and sought the designation without creating a separately docketed matter.²⁶

E. The Proposed Order is incorrect in its assertion that the requested designation should be denied based on a broad-based assertion that ancillary services can be hedged.

As the Proposed Order recognizes in this case, ECRS is the first new ancillary service put in place since the adoption of the language in the Commission's rule at issue in this proceeding. It was not one of the other long-standing ancillary services for which REP's have some ability to hedge against market price fluctuations. Instead, prior to its implementation on June 9, 2023, the market had no ability to reasonably anticipate the cost, much less enter into contracts to hedge against the cost of ECRS. Further, as the Commission has seen, recent NPRRs²⁷ and discussions at ERCOT and the Commission have made clear that the implementation of ECRS remains in flux. See, for example, the following statement from Commission Staff offered as background is helpful to provide context:

NPRR864, Creation of ERCOT Contingency Reserve Service and Revisions to Responsive Reserve, was filed on January 1, 2018 to create ECRS as a new Ancillary Service (AS) and was approved by the ERCOT

²⁶ *Wholesale Electric Market Design Implementation*, Project No. 53298, Texas Energy Association for Marketers' Request for Designation under 16 Texas Administrative Code § 25.475(b)(5) to Address ERCOT Contingency Reserve Service (Nov. 13, 2023).

²⁷ See, e.g., *Review of Protocols Adopted by the Independent Organization*, Project No. 54445, Order Rejecting ERCOT Nodal Protocol Revision Request 1224 (Aug. 5, 2024). This NPRR would have implemented manual deployment triggers for ECRS.

Board on February 12, 2019. The revisions were implemented on June 10, 2023, after more than five years of development.

In response to significant concerns voiced by the Independent Market Monitor (IMM) related the procurement and deployment of ECRS following its June 2023 implementation, stakeholders engaged in substantive debate over how and when ERCOT should use the new ancillary service. During the December 2023 discussions regarding the 2024 Ancillary Service methodology, the Technical Advisory Committee (TAC) voted to endorse the 2024 AS Methodology only after ERCOT committed *to review the methodology used to compute the minimum quantities of ECRS and identify potential alternatives by April 30, 2024, taking into account the analysis that the IMM has conducted on the impact of ECRS.*²⁸

In short, the market (including REPs) had incomplete information, which prevented determinations regarding the cost of this new ancillary service or the manner in which ERCOT would procure and deploy the service until it was actually procured and deployed. As an indicator of the feasibility of hedging the cost of ECRS, December 2023 was the first contract month that could be hedged via the Intercontinental Exchange (ICE). The chart, provided as Attachment A, shows that December 11, 2023, was the first date ICE published any data for the contract.²⁹ While the appearance of a product on ICE does not provide an indicator of the quantities that were actually subject to hedging transactions, it certainly shows that no public offerings were available for at least six months following the date ERCOT first implemented the service. Accordingly, the assertions that REPs could have or should have controlled the cost of ECRS through hedging in 2019 when the NPRR was created or in December 2021 after the implementation of the amendments to 16 TAC § 25.475 are not based in fact.

To this day, forward wholesale market liquidity has been slow to develop and is still quite limited compared to other ERCOT market-based ancillary services. Absent the necessary tools such as an ability to hedge, a proxy product, or a forward curve, there was no way for REPs or the Commission to evaluate a method to reasonably price ECRS into a product until after the summer in 2023 ended.

²⁸ Project No. 54445, Staff Recommendation Memo on NPRR 1224 (Jul. 22, 2024).

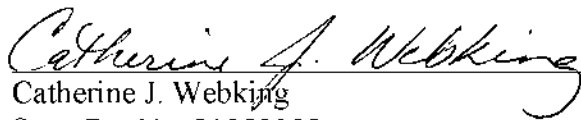
²⁹ See Attachment A, showing that ICE did not begin posting forward price product offerings for ECRS until December 11, 2023.

IV. CONCLUSION

REP Coalition respectfully requests the Commission accept these exceptions and issue a final order consistent with these exceptions that designates ECRS as a new ancillary service that caused REPs to incur cost beyond their control for customers with existing contracts at the time of its implementation on June 9, 2023 and that this designation apply only to prices on a going-forward basis from the date of this order. To support this request, the REP Coalition offers the Proposed Order attached to these Exceptions for consideration by the Commission as an order consistent with this request.

Respectfully submitted,

ON BEHALF OF THE REP COALITION



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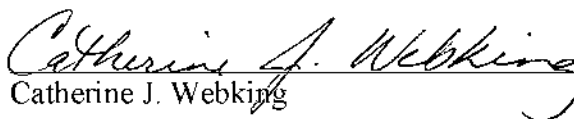
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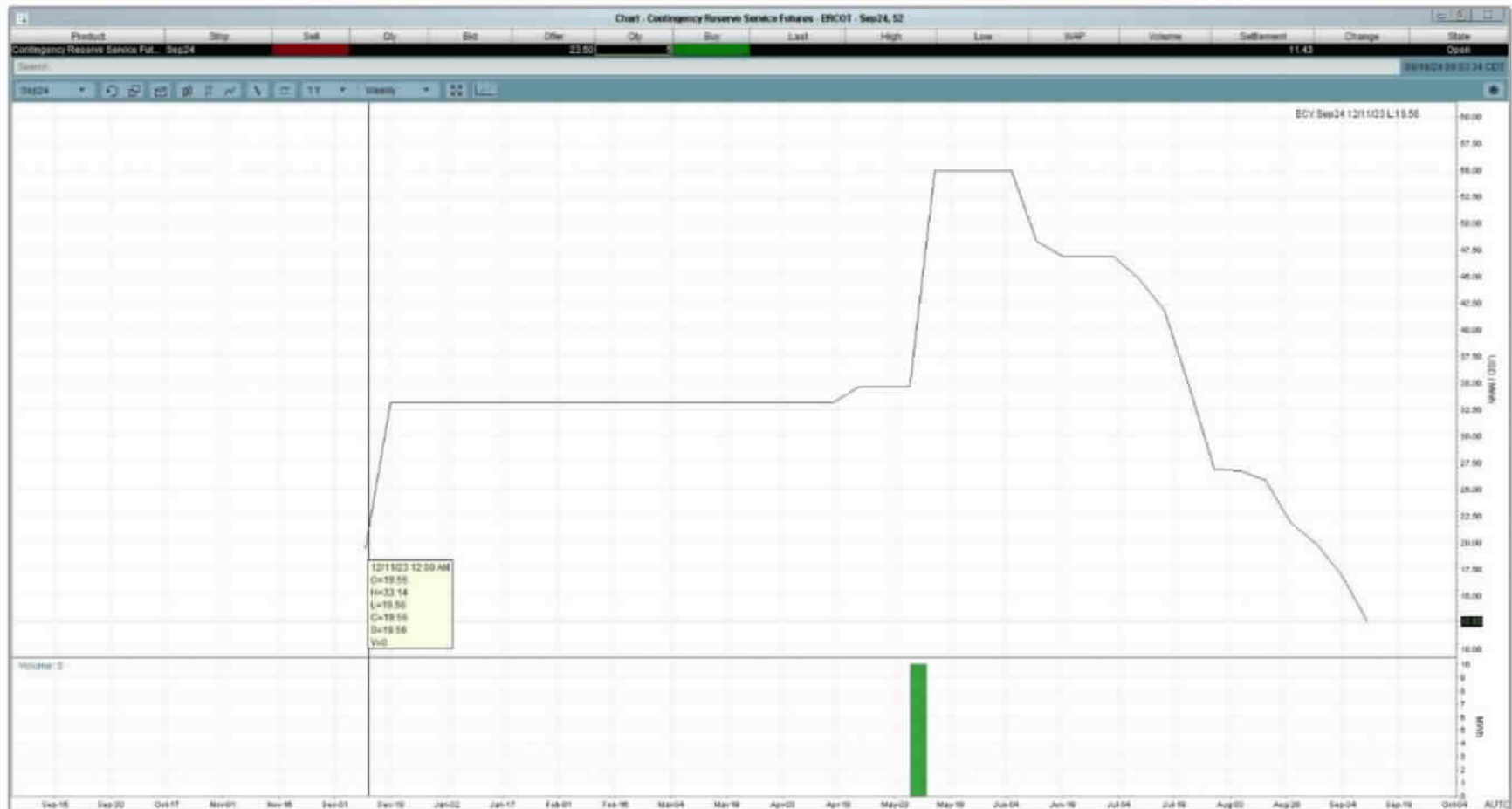
CERTIFICATE OF SERVICE

I hereby certify that notice of the filing of this document was provided to all parties of record via electronic mail on September 18, 2024 in accordance with the Order Suspending Rules, issued in Project No. 50664.


Catherine J. Webking

Attachment A

ICE ECRS Product Offerings



Initial Pricing Posting 12/11/2023

DOCKET NO. 55959

JOINT PETITION OF TEXAS	§	PUBLIC UTILITY COMMISSION
ENERGY ASSOCIATION FOR	§	
MARKETERS AND ALLIANCE FOR	§	OF TEXAS
RETAIL MARKETS FOR	§	
DESIGNATION PURSUANT TO 16	§	
TEX. ADMIN. CODE § 25.475(B)(5)	§	

PROPOSED ORDER

This Order addresses the petition filed by the Texas Energy Association for Marketers and Alliance for Retail Markets (collectively, REP¹ Coalition) on December 8, 2023. In the petition, the REP Coalition seeks a designation under 16 Texas Administrative Code (TAC) § 25.475(b)(5). Specifically, the REP Coalition is asking the Commission to designate the ERCOT Contingency Reserve Service (ECRS) as an ancillary service product “incurring charges beyond the REP’s control for a customer’s existing contract.”²

For the reasons discussed in this Order, the Commission concludes that, under 16 TAC § 25.475(b)(5), ECRS is an ancillary service product incurring charges beyond a REP’s control for a residential or small commercial customer with a contract that was executed on or before June 9, 2023.

I. Background

The REP Coalition is comprised of two industry associations whose individual members are REPs operating in the regions of Texas within the Electric Reliability Council of Texas (ERCOT) and open to retail competition. Under PURA³ § 17.004, the Commission is authorized to adopt customer protection rules for retail electric service. Per the customer protection rules, there are two major categories of retail electric products—fixed rate and variable price.⁴ In December 2021, and following Winter Storm Uri, the Commission amended the definitions of

¹ Retail Electric Provider.

² 16 TAC § 25.475(b)(5).

³ Public Utility Regulatory Act, Tex. Util. Code §§ 11.001–66.016 (PURA).

⁴ 16 TAC § 24.475(b)(5), (11) and § 25.475(c)(2)(D).

“fixed rate product” and “price” to include the “cost of ancillary services.”⁵ The Commission further modified the definition of “fixed rate product” to include the following:

The price may not vary from the disclosed amount to reflect changes in ancillary service charges 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.⁶

ECRS is a new ancillary service product. Prior to its implementation in June 2023, there were four types of ancillary service products procured by ERCOT: Regulation Up, Regulation Down, Responsive Reserve Service (RRS,) and Non-Spin Reserve Service (NSRS). All four ancillary services have been in place in some form since the inception of the ERCOT wholesale market.⁷ RRS has been integral to the suite of ancillary service products since the beginning of the zonal market and was originally designed based on the technology available, i.e., thermal generation resources.⁸ ECRS was implemented to separate the 10-minute energy deployment component from RRS and create two, single-component ancillary services to remove barriers to entry and enhance market efficiency.⁹

The ERCOT Board approved Nodal Protocol Revision Request (NPRR) 863, creating ECRS, in February 2019. At that time, PURA § 39.151 had not yet been amended to require Commission approval of all protocol revisions¹⁰ and the definitions of “fixed rate product” and “price” did not yet include any specific references to changes in ancillary services. The procedures for the deployment of ECRS were not finalized until April 2023,¹¹ and ERCOT began procuring

⁵ *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).

⁶ *Id.*

⁷ *MOD Report on the ERCOT Wholesale Market – The First Year*, Project No. 26390, 2002 Annual Report on the ERCOT Wholesale Market at i (Jul. 2003). At the opening of the market there was a fifth ancillary service called Replacement Reserve.

⁸ Creation of Primary Frequency Response Service Product and Revisions to Responsive Reserve. NPRR 863, Board Report at 3 (Feb. 2, 2019).

⁹ *Id.* at 4.

¹⁰ See PURA § 39.151(g-6).

¹¹ ERCOT Contingency Reserve Service (ECRS) Deployment and Recall Procedure Version 0.1 (Apr. 14, 2023) (including a table titled Document Revisions with an entry listing April 14, 2023, as the date of the Initial Version of the document).

and deploying ECRS on June 9, 2023.¹² As load-serving entities in ERCOT, REPs are allocated the cost of ancillary services based on load ratio share. Therefore, REPs began incurring the costs of ancillary services with ERCOT settlement invoices issued for all periods on and after June 9, 2023.

II. Discussion

Embedding specific reference to ancillary services into the definitions of “fixed rate product” and “price” protects customers from fluctuations in the prices of ancillary service products the same way they are protected against fluctuations in other wholesale energy costs. To address a regulatory change, such as the introduction of a new ancillary service like ECRS, the Commission included additional language in the definition of “fixed rate product” that provides an opportunity for the Commission to designate an ancillary service as incurring charges beyond a REP’s control for a customer’s existing contract. Allowing such a designation is consistent with PURA § 39.112(a).

Based on the record evidence, ECRS caused REPs to incur costs beyond their control because it was not possible for REPs to know when, in what quantity, and how ECRS would be deployed leading up to the June implementation. Absent this information, REPs could not anticipate or estimate the cost of the new ancillary services product with any reasonable certainty. The lack of certainty also impeded the development of a robust forward market for ECRS. Without sufficient market liquidity to hedge or historical price information there was little to no way for REPs to reasonably price ECRS into a fixed rate product prior to the implementation of this new ancillary service.

Under 16 TAC § 25.475(b)(5), the Commission designates ECRS as an ancillary service product incurring charges beyond a REP’s control for a customer’s existing contract.

III. Ordering Paragraphs

1. ECRS is an ancillary service product incurring charges beyond a REP’s control for a customer with a contract that was executed on or before June 9, 2023.

¹² Market readiness support for QSEs during implementation of the ERCOT Contingency Reserve Service (ECRS), Market Notice M-A060723-10 Operations (Jun. 7, 2023).

2. The Commission denies all other motions and any other requests for general or specific relief, if not expressly granted.

Signed at Austin, Texas the _____ day of _____, 2024.

PUBLIC UTILITY COMMISSION OF TEXAS
