



## **Filing Receipt**

**Filing Date - 2024-09-23 09:48:58 AM**

**Control Number - 55959**

**Item Number - 38**

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## Public Utility Commission of Texas

TO: Shelah Cisneros  
Commission Counsel

All Parties of Record

FROM: Hunter Burkhalter   
Chief Administrative Law Judge

RE: **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)*

DATE: September 23, 2024

On September 4, 2024, I filed a Proposed Declaratory Order (PDO) in the above-styled and numbered docket. The Commission will consider the PDO at a future open meeting. On September 18, 2024, the Office of Public Utility Counsel and Commission Staff each made a filing in which they stated that they agreed with the PDO and had no exceptions.

Also on September 18, 2024, the Texas Energy Association for Marketers (TEAM) and Alliance for Retail Markets (ARM) (collectively, the REP Coalition) filed exceptions to the PDO.

In my opinion, the bulk of the REP Coalition's exceptions raise issues already briefed and addressed in the PDO and do not warrant further discussion here. However, two issues raised by the REP Coalition merit further discussion.

First, the REP Coalition correctly points out typographical errors on pages 5-6 of the PDO. A Revised PDO is attached which changes the phrase "18 months" to "eight months."

The second issue has to do with the possible retroactive impact of the declaration the REP Coalition seeks. The PDO states: "If the REP Coalition's petition were granted in this case, it is possible that ECRS costs incurred as much as [eight] months before the petition was filed be could retroactively passed along to the consumer."<sup>1</sup> In their exceptions, the REP Coalition challenges this assertion by arguing that the coalition seeks to apply the declaration only prospectively, not retroactively. I do not believe the coalition's planned use of the declaration is dispositive, and I continue to believe that the sentence quoted above is accurate.

<sup>1</sup> PDO at 6.



It may be that the REP Coalition wishes only to apply the declaration it seeks in a prospective manner, but the declaration itself would not be so limited. The coalition seeks a declaration that: “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.”<sup>2</sup> Such a declaration is open-ended and does not prohibit retroactive application. As has already been noted,<sup>3</sup> the Commission’s ultimate determination in this proceeding will be one of general applicability. Thus, if the Commission were to declare that “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,” I see no reason why any REP with a customer with such a contract could not retroactively pass along the costs of ECRS all the way back to when ECRS charges were first assessed.

The Revised PDO is ready for the Commission’s consideration.

/lsw

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<sup>2</sup> See, Ordering Paragraph 1 from the DPO attached to the REP Coalition’s exceptions, filed on September 18, 2024.

<sup>3</sup> See, Commissioner Cobos memo filed on May 1, 2024, at 2.

**DOCKET NO. 55959**

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

**REVISED PROPOSED DECLARATORY ORDER**

In this proceeding, the Texas Energy Association for Marketers and the Alliance for Retail Markets (collectively, the REP Coalition) ask the Commission to designate a specific type of ancillary service product as one that incurs “charges beyond the REP’s [retail electric provider’s] control for a customer’s existing contract,” under 16 Texas Administrative Code (TAC) § 25.475(b)(5). The ancillary service product at issue is one implemented by the Electric Reliability Council of Texas, Inc. (ERCOT) and is known as ERCOT contingency reserve service (ECRS). For the reasons discussed in this Order, the Commission declines to designate ECRS as 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**

Under PURA<sup>1</sup> § 17.004, the Commission is authorized to adopt customer protection rules for retail electric service. The Commission’s customer protection rules identify at least two major categories of retail electric products—fixed rate products and variable price products.<sup>2</sup> This case concerns fixed rate products.

The REP Coalition is comprised of two industry associations whose individual members are REPs operating in the regions of Texas within ERCOT and open to retail competition. Both members of the REP Coalition represent members who offer fixed rate products to their customers.

The dispute in this case stems from an amendment to 16 TAC § 25.475 that the Commission made in late 2021 and that became effective on January 6, 2022. Prior to January 6, 2022, “fixed rate product” was defined in 16 TAC § 25.475(b)(5) as follows:

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<sup>1</sup> Public Utility Regulatory Act, Tex. Util. Code §§ 11.001-66.016.

<sup>2</sup> 16 TAC § 25.475(b)(5), (11) and (c)(2)(D).

Fixed rate product—A retail electric product with a term of at least three months for which the price (including recurring charges) for each billing period of the contract term is the same throughout the contract term, except that the price may vary from the disclosed amount solely to reflect actual changes in the Transmission and Distribution Utility (TDU) charges, changes to the Electric Reliability Council of Texas (ERCOT) or Texas Regional Entity administrative fees charged to loads or changes resulting from federal, state or local laws that impose new or modified fees or costs on a REP that are beyond the REP's control.

This definition specified, among other things, that the prices charged under a fixed rate product could not vary to account for “recurring charges.”

In the wake of Winter Storm Uri, the Commission amended 16 TAC § 25.475(b)(5) in Docket No. 51830 on December 16, 2021.<sup>3</sup> The amendments, effective January 6, 2022, are underlined below:

Fixed rate product—A retail electric product with a term of at least three months for which the price (including recurring charges and ancillary service charges) for each billing period of the contract term is the same throughout the contract term, except that the price may vary from the disclosed amount solely to reflect actual changes in Transmission and Distribution Utility (TDU) charges, changes to the Electric Reliability Council of Texas (ERCOT) or Texas Regional Entity administrative fees charged to loads or changes resulting from federal, state or local laws that impose new or modified fees or costs on a REP that are beyond the REP's control. The prices 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.

This primary effect of this amendment was to establish a general rule that the price of “ancillary service charges” are included within the price of a fixed rate product, meaning that a REP cannot

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<sup>3</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 (Dec. 16, 2021).

vary the amount charged to a fixed rate product customer to account for variations the REP may encounter in ancillary service charges. The new last sentence of the amended rule, however, creates the possibility that, on occasion, an exception to the general rule can be made so that a REP *can* pass the cost of an ancillary service charge on to its fixed rate product customers. Specifically, the Commission can “expressly designate” a specific type of ancillary service product as incurring charges beyond the REP’s control, therefore enabling the REP to pass along those costs to fixed rate product customers. The rule does not explain or define the process by which such an express designation is to be made.

As stated above, the Commission amended the rule at its open meeting on December 16, 2021. The proposed rule that was presented to the Commission for possible adoption only included the “and ancillary service charges” phrase but did not include the underlined last sentence. The Commissioners discussed the proposed rule extensively at that meeting. Throughout their discussion, the commissioners repeatedly expressed a strong aversion to allowing REPs to pass along the cost of ancillary services, including ECRS, to fixed rate customers. For example, Chairman Lake stated:

To me, this all comes down to the question of: Are individual residential household customers better at managing the financial risk of the ERCOT market, or are the [REPs], who these households pay their money to, better at managing risk? For me, the answer is the [REPs] who collect those monthly checks. Our job is not to provide comfort to those companies [that provide fixed rate products]. . . . It’s not our job to manage the risk for [the REPs], and it’s not our job to provide a cushion to enhance their profits. . . . I don’t want to allow a back-end default setting . . . to allow these retail providers to sneak the next product in the back door so it is passed through to customers without – without any measure or checks and balances. . . . *So, what do we do to ensure that, . . . when we do get ECRS, how can we ensure that those costs, those new ancillary services are not passed on to consumers?”*<sup>4</sup>

Ultimately, the Commission voted to add the last sentence, underlined above, to 16 TAC § 25.475(b)(5), so as to give the Commission the discretion to make “extraordinary or unexpected costs associated with a new or modified ancillary service” “pass-throughable” if the REP community proves it is warranted.<sup>5</sup>

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<sup>4</sup> Transcript of Dec. 16, 2021 open meeting, at 21-22 (emphasis added).

<sup>5</sup> Transcript of Dec. 16, 2021 open meeting, at 98.

## II. Discussion

In the present case, the REP Coalition asks the Commission to, under 16 TAC § 24.475(b)(5), expressly designate ECRS as an ancillary service product that incurs charges beyond the control of REPs for residential or small commercial customers with a fixed rate product contract that was executed on or before June 9, 2023. ECRS is a new ancillary service product first implemented by ERCOT in June 2023. It is also the first new ancillary service implemented in the ERCOT market since the amendment to 16 TAC § 24.475(b)(5). This is the first proceeding in which the designation process created by last sentence of 16 TAC § 24.475(b)(5) has been invoked.

The other parties to this case—Commission Staff and the Office of Public Utility Counsel—oppose the REP Coalition’s request.

Because ECRS was first implemented in June 2023, the REP Coalition argues that a REP who sold a fixed rate product to a customer before June 2023 could not have anticipated or controlled for the costs ECRS would create in the future. For this reason, the REP Coalition contends it would be inequitable to prohibit the REP from passing ECRS costs along to its fixed rate product customers.

For a variety of reasons, the Commission denies the REP Coalition’s request. First, the REPs were in a much better position to anticipate and account for future costs of ECRS than their residential and small commercial customers were. The Commission has a strong interest, and a statutory obligation, to protect consumers in the electricity market.<sup>6</sup> In passing legislation to enhance customer protection following Winter Storm Uri, the Legislature has recognized (just as the Commission has recognized) that, unlike REPs, residential customers lack the expertise to anticipate or weather the fluctuation of electricity rates.<sup>7</sup> Ancillary service charges are necessary to maintain the safety and reliability of the electric grid. In some instances, these costs may be difficult for REPs to accurately predict. Nevertheless, there is no question that REPs have a significantly greater ability to do so than their residential and small commercial customers.

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<sup>6</sup> *See, e.g.*, PURA § 11.002(c) (“It is the purpose of this title to grant the [Commission] authority to make and enforce rules necessary to protect customers of . . . electric services consistent with the public interest.”)

<sup>7</sup> *See, e.g.*, Bill analysis for HB 16, House Research Organization (Mar. 30, 2021).

Second, the REPs have long had reason to know the ECRS costs were in the offing and they, therefore, had some ability to price their fixed rate products to account for those costs. It is true that ECRS was first implemented in June 2023 and, therefore, a REP who sold a fixed rate product to a customer in 2022 would have had difficulty estimating the future cost of ECRS. Nevertheless, a REP selling a fixed rate product to a customer in 2022 cannot claim to have had no awareness that ECRS costs were on the way. The ERCOT Nodal Protocols revision that initially created the concept of ECRS was approved on February 12, 2019.<sup>8</sup> Thus, REPs wishing to sell fixed rate products have known since early 2019 that they should take into account the possible costs of ECRS when pricing their products. Moreover, the Commission's aversion to passing ECRS costs along to residential customers was made plain at its December 16, 2021 open meeting when it discussed the amendment to 16 TAC § 25.475(b)(5). These factors should have prompted REPs, prior to June 2023, to price fixed rate products to take into account the possible costs of ECRS. Stated differently—and using the terminology from 16 TAC § 25.475(b)(5)—when devising contracts prior to June 2023, the possible costs of ECRS to REPs were not entirely “beyond the REP’s control.”

Third, the timing of the REP Coalition’s request undermines the REP Coalition’s case. Roughly eight months passed between when ECRS became operational (June 2023), and the REP Coalition filed its petition in this proceeding (February 2024). The Commission’s Order adopting the amendments to 16 TAC § 25.475(b)(5) envisions that the process for designating an ancillary service as one beyond the REP’s control is supposed to occur before the ancillary service goes into effect:

The review process implemented by the commission for ancillary service products [*i.e.*, the process delineated in the last sentence of 16 TAC § 25.475(b)(5)] substantially addresses the commenters’ concerns by ensuring that, *prior to implementation*, charges associated with [a] 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.<sup>9</sup>

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<sup>8</sup> ERCOT Nodal Protocols Revision Request (NPRR) 863, Board Report (Feb. 12, 2019).

<sup>9</sup> *Review of Certain Retail Electric Customer Protection Rules*, Project No. 51830, Order Adopting Amendments to 16 TAC §§ . . . 25.475 . . . as Approved at the December 16, 2021 Open Meeting, at 47 (Dec. 16, 2021) (emphasis added).



Obtaining the designation before the implementation of a new ancillary service charge has the benefit of safeguarding customers from being retroactively billed for ancillary service charges for consumption that occurred in the past. If the REP Coalition's petition were granted in this case, it is possible that ECRS costs incurred as much as eight 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.

Fourth, the REP Coalition failed to prove that, on balance, the declaration they seek is warranted. Ancillary service products are market-based products that can be hedged or otherwise mitigated by a REP to achieve a level of risk certainty. Residential and small commercial customers do not have such an ability to minimize risk. The Commission's Order adopting the amendments to 16 TAC § 25.475(b)(5) explained that the burden of proof would be on the REP community to "demonstrate the necessity of pass through eligibility for each ancillary service project."<sup>10</sup> The Commission further noted, "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."<sup>11</sup> The REP Coalition failed to prove that the need for consumer protection is outweighed by the need to protect REPs from risk of reduced profitability due to ECRS costs.

### III. Ordering Paragraphs

In accordance with the discussion and analysis above, the Commission issues the following orders.

1. The Commission declines to declare ECRS as 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.
2. The Commission denies all other motions and any other requests for general or specific relief, if not expressly granted.

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*, at 48,

Signed at Austin, Texas the \_\_\_\_\_ day of \_\_\_\_\_ 2024.

**PUBLIC UTILITY COMMISSION OF TEXAS**

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**THOMAS J. GLEESON, CHAIRMAN**

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**LORI COBOS, COMMISSIONER**

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**JIMMY GLOTFELTY, COMMISSIONER**

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**KATHLEEN JACKSON, COMMISSIONER**

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**COURTNEY K. HJALTMAN, COMMISSIONER**