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DOCKET NO. 55959

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

COMMISSION STAFF’S RESPONSE TO ORDER NO. 3

On December 8, 2023, Texas Energy Association for Marketers (TEAM) and Alliance for Retail Markets (ARM) (collectively, REP Coalition) filed a petition to have the Electric Reliability Council of Texas (ERCOT) Contingency Reserve Service (ECRS) designated as an “ancillary service incurring a cost beyond a retail electric provider’s (REP) control” under 16 Texas Administrative Code (TAC) § 25.475(b)(5). The REP Coalition’s members are individual REPs subject to the Commission’s jurisdiction.

On January 8, 2024, the administrative law judge (ALJ) filed Order No. 3, directing the parties to respond by January 22, 2024, on proposed methods of notice: specifically, notice by publication and by mail to each member REP’s fixed rate customers, and ERCOT market notice. Therefore, this pleading is timely filed.

I. PROPOSED ERCOT MARKET NOTICE

Statutory authority to direct ERCOT to publish notice lies in PURA § 39.151(d), which states, in relevant part: “[t]he commission has complete authority to oversee and investigate the independent organization's finances, budget, and operations as necessary to ensure the organization's accountability and to ensure that the organization adequately performs the organization's functions and duties. The independent organization shall fully cooperate with the commission in the commission's oversight and investigatory functions.” However, as Commission Staff believes an ERCOT market notice will best serve both the public interest and due process for individual REPs, upon issuance of Order No. 4, Commission Staff sought ERCOT’s voluntary assistance in delivering the suggested market notice to the REP segment of market participants.

Commission Staff and ERCOT have developed the following plan to publish the market notice. ERCOT can notify market participants via a communication called a “Market Notice.” Specifically, a Market Notice is an email sent by ERCOT and transmitted to designated, publicly subscribed, email distribution lists maintained by ERCOT staff. Market Notices remain accessible

and searchable on ERCOT's Market Notice archive page for three years following distribution.¹ This will serve notice on all REPs currently operating in the ERCOT market, including those serving residential and small commercial customers under a fixed rate contract term that began before June 9, 2023. REPs that are no longer operating in the ERCOT market will not be able to avail themselves of any potential relief granted by the Commission in this proceeding. Commission Staff and the REP Coalition have attached a joint draft notice as Exhibit A. The draft Market Notice includes pertinent details, like the docket number, intervention deadline, and a description of the petition.²

II. PROPOSED NOTICE: PUBLICATION AND MAILING

In Order No. 3, the ALJ suggested that notice provisions required under the Commission's ratemaking rules may serve as a reasonably analogous process for this proceeding. Commission Staff agrees that notice should be provided to the affected residential and small commercial customers of the petitioners' member organizations. However, because the petitioners did not identify which of its member organizations might seek to avail themselves of a favorable designation in this proceeding, Commission Staff initially suggested a common, though less effective, method of service of notice.

To effectuate more robust service as contemplated by the ALJ, Commission Staff recommends the ALJ require the petitioners to identify which of its member organizations might seek to pass through ECRS charges, should the Commission permit it. Additionally, any REP that is not a member of the REP Coalition but would like to avail itself of the potential relief sought by the petitioners should similarly be required to self-identify. Absent this information, the Commission cannot reasonably determine whether notice was sufficiently served to the hundreds of thousands, if not millions, of potentially affected customers.

The ALJ's order also raises the question of whether a REP that *did not* provide sufficient notice to its customers should be permitted to pass through ECRS charges as contemplated by the petition. Commission Staff suggests that, if the most analogous procedural paradigm is that of a ratemaking proceeding, then any REP that fails to provide sufficient notice should not be permitted

¹ Found at https://www.ercot.com/services/comm/mkt_notices/archives

² See Exhibit A. Parties note that the intervention deadline is currently blank in the proposed market notice. Once the ALJ issues a procedural schedule, which presumably will occur prior to the date the notice is to be issued and include an intervention deadline date, the parties will update the market notice accordingly.

to pass through the ECRS charges, again assuming the Commission views the petitioners' request favorably.

Additionally, notice rules under 16 TAC § 22.51(a) provide that the applicant must give notice through publication "on a newspaper having general circulation in each county containing territory affected by the proposed rate change".³ Commission Staff contends that because the class of affected persons is geographically dispersed throughout the state, and that many newspapers' content is often hidden by a paywall, such notice may not be sufficient. Commission Staff suggests additional methods for effective notice that better serves public interest and transparency. Commission Staff recommends that TEAM and ARM:

- 1) publish notice utilizing all their social media platforms such as Facebook, X (formerly known as Twitter), and Instagram to reach the greatest number of potentially affected persons; and
- 2) publish notice on their individual websites.

The Texas Civil Practice and Remedies Code §17.033⁴ allows for service of citation through social media. Class action suits have long utilized social media to publish notice of suit to potential class members with successful engagement.⁵ These forms of communication are established means for service of process and notice of class action, and as such, Commission Staff contends will serve as effective notice for customers here.

Additionally, under 16 TAC § 25.475(c)(4), each REP that maintains websites must publish information from its Electricity Fact Label (EFL). Thus, Commission Staff further recommends that each REP seeking to pass through ECRS charges publish the approved notice of the filing on their website pages containing their EFLs and maintain them on the site for at least 30 days after the intervention deadline passes.

³ 16 TAC § 22.51(a)(1)

⁴ "(a) If substituted service of citation is authorized under the Texas Rules of Civil Procedure, the court, in accordance with the rules adopted by the supreme court under Subsection (b), may prescribe as a method of service an electronic communication sent to the defendant through a social media presence. (b) The supreme court shall adopt rules to provide for the substituted service of citation by an electronic communication sent to a defendant through a social media presence." This addition to the TRCP enacted Senate Bill 891 (86th Leg., R.S.), which required the Texas Supreme Court to adopt "rules to provide for the substituted service of citation by an electronic communication sent to a defendant through a social media presence."

⁵ See *Mark v. Gawker Media LLC*, 2014 U.S. Dist. LEXIS 155424 (Nov. 3, 2014, S.D.N.Y.)

Finally, because each individual REP can identify its affected customers, since they will be the same customers the REP would bill the ECRS recovery costs if the petition is successful, it would not be burdensome for each REP seeking to pass through ECRS charges to send the approved notice via U.S. mail as directed by 16 TAC § 22.51(a)(2). Accordingly, Commission Staff recommends that each REP seeking to pass through ECRS charges publish the approved notice of the filing to each affected customer by mail, as well as through all their normal methods of customer communications for contractual and billing issues such as email and any other communications platforms.

III. CONCLUSION

Commission Staff respectfully requests entry of an order consistent with this pleading.

Date: January 22, 2024

Respectfully Submitted,

**PUBLIC UTILITY COMMISSION OF
TEXAS**

**DIVISION OF COMPLIANCE AND
ENFORCEMENT**

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CERTIFICATE OF SERVICE

I certify that unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on January 22, 2024 in accordance with the Second Order Suspending Rules, issued in Project No. 50664.

/s/ Rachel Seshan
Rachel Seshan

EXHIBIT A

CONFIDENTIAL – DRAFT FOR DISCUSSION PURPOSES

NOTICE DATE:

NOTICE TYPE: Legal

SHORT DESCRIPTION: Notice of Petition for Designation Addressing ERCOT Contingency Reserve Service (ECRS)

INTENDED AUDIENCE: All Load Serving Entities (LSEs); All Qualified Scheduling Entities (QSEs), and Retail Electric Providers (REPs)

DAY AFFECTED:

LONG DESCRIPTION: ERCOT provides the following notice at the request of Public Utility Commission of Texas (Commission) Staff:

On December 8, 2023, the Texas Energy Association for Marketers (TEAM) and Alliance for Retail Markets (ARM) (collectively, REP Coalition) filed with the Commission a petition requesting a that the Commission designate ERCOT Contingency Reserve Service (ECRS) as an ancillary service incurring a cost beyond a retail electric provider's (REP) control pursuant to 16 Texas Administrative Code (TAC) § 25.475(b)(5).

Under 16 TAC § 25.475(b)(8), the term "price" as it relates to a product for retail electric service includes ancillary services. Under 16 TAC § 25.475(b)(5), the price of a fixed rate product "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." The combined effect of these provisions is to require an express Commission designation regarding a new ancillary service before a REP can apply a one-time price increase to an existing contract for a residential or small commercial fixed rate product that was executed before the implementation of the new ancillary service.

The Commission's resolution of the REP Coalition's request will affect REPs that are providing service to residential and/or small commercial customers in the competitive service areas of ERCOT. If the Commission designates ECRS as an ancillary service incurring a cost beyond a REP's control, it could provide REPs with an option to make a one-time increase to existing fixed price contracts for residential and small commercial customers that were executed prior to the implementation of the new ancillary service. If the Commission approves the REP

Coalition's request, residential and small commercial customers on existing fixed rate contracts that were in effect prior to June 10, 2023, will be affected because the price adjustment will result in rate increase.

A complete copy of the application is available at PUC 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)*.

The intervention deadline in this docket is _____, 2024, which is 30 days after proof of this notice being filed in the proceeding. Persons who wish to intervene in or comment upon these proceedings should notify the Public Utility Commission of Texas (Commission) as soon as possible, as the intervention deadline will be imposed. A request to intervene or for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326. Further information may also be obtained by calling the Public Utility Commission at (512) 936-7120 or (888) 782-8477. Hearing and speech-impaired individuals may contact the commission through Relay Texas at 1-800-735-2989.

CONTACT: Persons with questions or who want more information on this petition may contact TEAM and ARM via their legal representatives at cwebking@spencerfane.com or carrie.collierbrown@lockelord.com, or call these legal representatives at (512) 575-6060 or (512) 305-4732, respectively during normal business hours. A complete copy of this petition is available for inspection on the website of the Public Utility Commission under PUC Docket No. 55959 as listed above.