



## **Filing Receipt**

**Filing Date - 2024-01-22 02:51:16 PM**

**Control Number - 55959**

**Item Number - 9**

**DOCKET NO. 55959**

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

**TEXAS ENERGY ASSOCIATION FOR MARKETERS' AND  
ALLIANCE FOR RETAIL MARKETS' RESPONSE TO ORDER NO. 3**

The Texas Energy Association for Marketers (TEAM) and Alliance for Retail Markets (ARM) (collectively, REP Coalition) respectfully submit this response to Order No. 3 issued on January 8, 2024.<sup>1</sup> This response is timely filed on or before January 22, 2024.

**I. RESPONSE REGARDING NOTICE**

This Response provides additional information and input on the subject of notice as requested by Judge Burkhalter. The Staff (Staff) of the Public Utility Commission of Texas (Commission) and the administrative law judge (ALJ) agree that notice in this proceeding is governed by 16 Texas Administrative Code (TAC) § 22.55, which authorizes the presiding officer to require “reasonable notice to affected persons.”<sup>2</sup> Commission Staff recommended that the REP Coalition should be required to satisfy the following notice requirements: (1) provide notice via an Electric Reliability Council of Texas (ERCOT) market notice that will be served on all load serving entities (LSEs) and qualified scheduling entities (QSEs); and (2) provide a onetime publication of notice in the *Texas Register*.<sup>3</sup> The ALJ raised questions regarding both types of proposed notice recommended by Commission Staff. The REP Coalition responds to the ALJ’s questions as raised in Order No. 3 below.

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<sup>1</sup> Order No. 3 Finding Petition Administratively Complete and Requiring Clarification Regarding Notice (Jan. 8, 2024) (Order No. 3).

<sup>2</sup> Commission Staff’s Recommendations and Proposed Procedural Schedule at 2 (Jan. 4, 2024) (Commission Staff’s Response to Order No. 1); Order No. 3 at 2.

<sup>3</sup> Commission Staff’s Response to Order No. 1 at 2–3.

### **A. Proposed Market Notice**

The REP Coalition supports Commission Staff's recommendation that notice of this proceeding be provided via an ERCOT market notice that will be served on all LSEs and QSEs. The REP Coalition has collaborated with ERCOT and is allowed to represent that ERCOT has voluntarily agreed to assist with the distribution of the notice of this proceeding via a market notice. The REP Coalition, Commission Staff, and the Office of Public Utility Counsel (OPUC) are working on an agreed proposed market notice for publication by ERCOT, which includes all of the notice contents recommended by Commission Staff. An ERCOT market notice to all LSEs and QSEs is appropriate in this proceeding because the market notice will capture all REPs who are serving residential or small commercial customers under a fixed rate product with a contract term that began before June 9, 2023. Therefore, the REP Coalition believes that an ERCOT market notice is the most effective and efficient method to notify the intended audience and agrees with Commission Staff's recommendation that the ERCOT market notice will satisfy the applicable notice requirements.<sup>4</sup>

### **B. Proposed Texas Register Notice**

The REP Coalition agrees with Commission Staff that a notice published in the *Texas Register* is also reasonable. The REP Coalition is working with the Commission Staff and OPUC to develop agreed *Texas Register* notice language consistent with Order No. 3 and Staff's recommendation.

#### **1. Notice requirements for traditional cost of service rate cases for public utility rates that are set by the Commission are not appropriate in this instance.**

The REP Coalition supports the original recommendation for notice filed by the Commission Staff and stands ready to comply with that notice as described herein. As noted by Commission Staff in that recommendation, this case is more analogous to the Commission's proceedings to consider ERCOT's application for approval of a Debt Obligation Order that ultimately led to securitization charges that were adjusted into the fixed rate products for existing customer contracts. The REP Coalition provides the following input to demonstrate that this case

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<sup>4</sup> Commission Staff's Response to Order No. 1 at 2–3.

is not analogous to a rate case brought by a regulated public utility, and therefore, why notice provided under 16 TAC § 22.51(a)(1) and (2) should not apply and is not reasonable.

First, the notice provisions found in 16 TAC § 22.51(a)(1) and (2) do not directly apply to this proceeding. Those rules only apply to proceedings initiated by an “electric utility” under PURA<sup>5</sup> Chapter 36, Subchapters C through E; and to proceedings initiated by a “telecommunications utility” under PURA Chapter 51, § 51.009, and Chapter 53, Subchapters C through E. The definition of “electric utility” explicitly excludes retail electric providers (REPs).<sup>6</sup> Moreover, the Commission is expressly prohibited from “. . . mak[ing] rules or issu[ing] orders regulating competitive electric services, *prices*, or competitors or restricting or conditioning competition except as authorized in this title. . . .”<sup>7</sup> Therefore, the Commission’s procedural rules governing proceedings involving an electric utility’s proposed change in rates are not directly applicable to the instant petition.

The REP Coalition also disagrees with the suggestion that the relief requested in the petition is analogous to a rate increase for fixed rate customers. No customer charges or rate adjustments will be determined in this proceeding. This proceeding is an extension of the rulemaking completed in Project No. 51830 where the Commission amended the definition of “price” found in 16 TAC § 25.475(b)(8) in a manner that necessitated an express designation for ancillary services.<sup>8</sup> Stated another way, notice that the price of a fixed price product can change if the Commission makes the designation required under 16 TAC § 25.475(b)(5) has already been provided to all retail customers because this statement of general applicability was adopted pursuant to the notice and comment provisions of the Administrative Procedures Act.

The determination that is required by the Commission rule and requested by the REP Coalition is a statement of general applicability regarding the legal classification of a new ancillary service. No particular rate adjustment will be approved in this proceeding. Whether or not a REP applies a one-time price adjustment to residential and/or small commercial contracts after this designation will vary by REP, and by individual customer contract. If an individual customer

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<sup>5</sup> Public Utility Regulatory Act, Tex. Util. Code §§ 11.001–66.016 (PURA).

<sup>6</sup> “The term [“electric utility”] does not include a retail electric provider.” PURA § 31.002(6)(H).

<sup>7</sup> PURA § 39.001(c) (emphasis added).

<sup>8</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 at 117–18 (Dec. 16, 2021).

receives a one-time price adjustment that they believe is inconsistent with their contract for service, they may utilize the Commission's complaint process.<sup>9</sup>

Further, the retail market is open to customer choice, which means that unlike customers of electric utilities, a customer in an area open to competitive choice is not required to take service from any particular REP. Retail customers served by REPs in ERCOT have the ability to choose both their REP and their electric plan. There are also a series of requirements in the Commission's rules regarding how adjustments to fixed price products are implemented and how those price changes are disclosed to customers.<sup>10</sup>

**2. The cost impact of any price adjustment is not of the magnitude presumed in Order No. 3.**

Although no rates or final cost will be determined in this proceeding, it may be helpful to put the market cost of ECRS in context to demonstrate that any ultimate adjustment to a customers' charges would not mean that the \$600 million cost identified in 2023, as referenced in Order No. 3, would be included in any billing adjustments to residential and small commercial customers. First, any ECRS cost adjustments would only be for the portion of the total market cost of ECRS that is associated with residential and small commercial customers that are taking service under contracts that were in existence at the time ECRS was implemented. Second, while the cost of ECRS was more than \$600 million in 2023, the actual cost relative to the size of the ERCOT market is comparably very small. As detailed in the Petition filed by the REP Coalition in this case, for an average residential customers using 1,000 kWh per month, that would translate to ~\$2.50 in increased costs beyond the REP's control to serve each residential customer in a given month.<sup>11</sup> While the actual cost absorbed by each REP will vary, expectations for future ECRS costs, and their customers' load patterns, this should help to give a rough order of magnitude for the additional ECRS costs on a per customer basis.

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<sup>9</sup> See generally, 16 TAC § 25.485. While the Commission does not have the authority to set a REP's prices, it does have the authority "to adopt and enforce rules to protect retail customers from fraudulent, unfair, misleading, deceptive, or anticompetitive practices" and to develop a process for the timely resolution of disputes between REPs and the retail customers they serve. PURA §§ 17.001(b) and 17.157(c).

<sup>10</sup> 16 TAC § 25.475

<sup>11</sup> Joint Petition for Designation Addressing ERCOT Contingency Reserve Service at 6 (Dec. 8, 2023).

### 3. **Notice from individual REPs to individual customers is not appropriate.**

First, while TEAM and ARM are parties to this proceeding, they are separate legal entities from their members. These associations are appropriate parties to this proceeding because the legal determination to be made under 16 TAC § 25.475(b)(5) will be one of general applicability. Consequently, a Commission decision that ECRS is an ancillary service incurring a cost beyond a REP's control will not be limited to only those REPs who are members of TEAM and ARM. The applicable language in 16 TAC § 25.475 does not, and should not, require individual REPs to apply for this legal designation. During the open meeting where this language was adopted, the discussion surrounding this designation for ancillary services indicated that it would coincide with the Commission's approval of the new ancillary service. As in the securitization cases noted in PUC Staff's notice recommendation, notice to individual customers is not required every time the Commission approves a change that results in a new cost or fee beyond the REP's control.<sup>12</sup>

## II. **CONCLUSION**

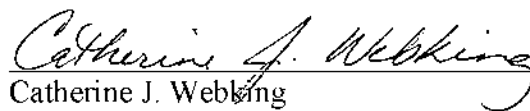
In short, the REP Coalition urges the ALJ to find that, for the purposes of noticing retail customers, notice published in the *Texas Register* constitutes reasonable notice under 16 TAC § 22.51(a)(1) and (2) because: (1) the notice requirements in 16 TAC § 22.51(a)(1) and (2) do not apply to REPs; (2) this proceeding cannot be analogous to an electric utility rate increase because REPs do not have a captive customer base and the Commission lacks jurisdiction over a REP's competitive prices; (3) this proceeding will not determine any rate adjustment for any individual customer; (4) this proceeding seeks a legal determination of general applicability as a corollary to the Commission's rulemaking in Project No. 51830 that will apply to all REPs; and (5) individual REPs that are members of TEAM and ARM are not parties to this proceeding and should not be required to give notice by publication and mail as required by 16 TAC § 22.51(a)(1) and (2).

The REP Coalition respectfully requests that the ALJ approve Commission Staff's recommendation regarding notice in this proceeding, and order that notice be provided (1) voluntarily by ERCOT via an ERCOT market notice that will be served on all LSEs and QSEs; and (2) via a one-time publication of notice in the *Texas Register*. The REP Coalition also requests any further relief to which it may be justly entitled.

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<sup>12</sup> Other examples include changes to ERCOT System Admin Fee, TDU rate changes such as EECRF, TCRF and DCRF.

Respectfully submitted,



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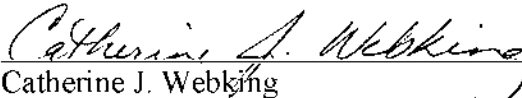
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**CERTIFICATE OF SERVICE**

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

  
Catherine J. Webking