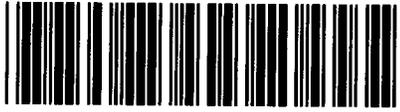




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PROJECT NO. 37897-

PUC PROCEEDING RELATING TO	§	PUBLIC UTILITY COMMISSION
RESOURCE AND RESERVE	§	OF
ADEQUACY AND SHORTAGE	§	TEXAS,
PRICING	§	

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COMMENTS OF THE OFFICE OF PUBLIC UTILITY COUNSEL

Comes Now the Office of Public Utility Counsel (OPUC) and files the following comments regarding the Proposal for Publication, as published in the April 27, 2012 *Texas Register*, for the proposed new P.U.C. SUBST. R. §25.508 to increase the high system-wide offer cap (HCAP) to \$4,500 beginning August 1, 2012 and ending when the amendments to the HCAP contemplated by Public Utility Commission (PUC or the Commission) Project No. 40268 are effective.<sup>1</sup>

I. Introduction

OPUC shares the concerns regarding resource adequacy and lauds the Commission's actions to date in seeking solutions to address the issue. As an active representative of residential and small business customers on the Electric Reliability Council of Texas (ERCOT) Board of Directors and ERCOT's Technical Advisory Committee (TAC), OPUC continues to seek the appropriate balance between reliability, cost, and market efficiencies. Consequently, OPUC has supported the Commission's directives to date to implement changes to a variety of ERCOT's Protocols and other reliability-driven administrative initiatives to enhance both the access to needed resources for peak generation and the prices for those resources. Furthermore, OPUC supports the ERCOT energy-only market design and the scarcity pricing mechanism

<sup>1</sup> 37 Tex. Reg. 2911 (April 27, 2012); and *Rulemaking to Amend P.U.C. SUBST. R. §25.505, Relating to Resource Adequacy in the Electric Reliability Council of Texas Power Region*, Project No. 40268.

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inherent in that design that allows prices to rise in response to a scarcity of resources in the market to promote resource adequacy. OPUC believes genuine scarcity-induced price signals will encourage existing generation resources to be on-line, incent the building of new generation, and provide a greater incentive for loads to voluntarily reduce their demand during times of scarcity. However, while OPUC believes an increase in the HCAP may, indeed, be necessary, as contemplated in the Commission's rulemaking Project No. 40268, the timing of the proposed HCAP increase in this particular proposal has the potential to significantly disrupt the retail market. Accordingly, OPUC respectfully requests the Commission take no action on this proposal.

## II. Timing Of The Proposed Increase In The HCAP

OPUC supports the statements of Commissioner Anderson's March 21, 2012 memorandum and his comments at the April 12, 2012 Open Meeting, all which support the belief that making a change (in the HCAP) this summer is neither necessary nor warranted. As stated by Commissioner Anderson at the April 12, 2012 Open Meeting, "*I don't know what signal it -- that it sends this summer other than panic.*"<sup>2</sup> Accordingly, OPUC identifies the following reasons why it believes this proposal is premature and unnecessary:

- 2,000 megawatts (MW) of mothballed generation, approximately 430 MW more capacity than last summer, will be available this summer. ERCOT expects to have nearly 74,000 MW of generation resources available to serve the summer peak demand.<sup>3</sup>
- ERCOT's Summer 2012 assessment assumes weather will be warmer and drier than the 15-year historical average but less extreme than 2011.<sup>4</sup>

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<sup>2</sup> Open Meeting Tr. at 75, lines 16-18 (April 12, 2012); and *PUC Proceeding Relating to Resource and Reserve Adequacy and Shortage Pricing*, Project No. 37897, Memorandum of Commissioner Anderson (March 21, 2012).

<sup>3</sup> *Generation Reserves Remain Tight for Summer; ERCOT Expects Calls for Energy Conservation*, ERCOT News Release (May 1, 2012).

<sup>4</sup> *Id.*

- We have not yet assessed the impacts of the Protocol changes and other reliability-driven administrative initiatives implemented in late 2011 and early 2012.<sup>5</sup> Many of these changes have the potential to promulgate better price signals when scarcity conditions occur in the wholesale market, and we should let these changes “play out” this summer.
- Recently approved rulemakings related to emergency response service (ERS), energy storage, distributed generation, and ERCOT pilot projects, in addition to the proposed amendments to the energy efficiency rules, have the potential to begin contributing in the near-term to addressing resource adequacy concerns.<sup>6</sup>
- Demand response initiatives currently underway, such as ERCOT’s ERS pilot using advanced meters to aggregate load and the expansion of utilities’ energy efficiency load management programs for 2012, should also help mitigate resource adequacy issues this summer.<sup>7</sup>
- Market participants may have insufficient time to adjust their risk strategies. If retail electric providers (REPs), other load-serving entities (LSEs), and larger loads have already locked in their summer hedging strategy based on the current HCAP, it will likely raise collateral costs and be disruptive to the retail market.<sup>8</sup>
- Finally, and this issue will be addressed more fully in Section III, if the rule change is interpreted as a “change in law,” this would potentially allow LSEs/REPs to break fixed-price contracts and pass the increased costs along to end-users.<sup>9</sup>

<sup>5</sup> Nodal Protocol Revision Requests (NPRRs) 426, 427, 428, 432, 434, and 435, were approved by the ERCOT Board of Directors in December 2011 and February 2012, which, among other things, moved 500 MW from Non-Spinning Reserve Service to Responsive Reserve Service, established offer floors for on and off-line Non-Spinning Reserve Service, and priced energy at the HCAP for Responsive Reserve, Regulation-Up Service, Reliability Must Run, and units acquired by ERCOT through the Reliability Unit Commitment process.

<sup>6</sup> *Rulemaking to Amend Substantive Rule §25.507, Relating to (ERCOT) Emergency Interruptible Load Service (EILS)*, Project No. 39948 Order Adopting Repeal of §25.507 and New §25.507 (March 23, 2012); *Rulemaking on Energy Storage Issues*, Project No. 39917 Order Adopting Amendments to §25.192 and §25.501 As Approved at the March 7, 2012 Open Meeting (March 30, 2012); *Rulemaking to Implement SB 365 & SB 981 Relating to Distributed Generation*, Project No. 39797 Order Adopting Amendment to §25.211 and §25.217 As Approved At The May 18, 2012 Open Meeting (May 24, 2012); *PUC Rulemaking Proceeding Concerning an ERCOT Pilot Project*, Project No. 40150 Order Adopting Amendment To §25.361 As Approved At The May 18, 2012 Open Meeting (May 24, 2012); and, *Rulemaking Proceeding to Amend Energy Efficiency Rules*, Project No. 39674 Proposal for Publication of Amendments to §25.181 As Approved At The April 12, 2012 Open Meeting (April 20, 2012).

<sup>7</sup> *PUC Proceeding Relating to Resource and Reserve Adequacy and Shortage Pricing*, Project No. 37897, Memorandum of Chairman Nelson (March 6, 2012).

<sup>8</sup> *PUC Proceeding Relating to Resource and Reserve Adequacy and Shortage Pricing*, Project No. 37897, Memorandum of Commissioner Anderson (March 21, 2012).

<sup>9</sup> *Id.*

### III. Proposal For Publication Preamble Question

#### a. This is not a change in law

In the Preamble of the Proposal for Publication, comment was requested on the following question:

“The direct effect of the new section will be to allow resources to offer services in the ERCOT ancillary service auctions at higher prices. In turn, this direct effect is expected to increase revenues to resources, which will be paid for by LSEs, including retail electric providers. Will the new section implicate the provisions of §25.475 that allow retail electric providers to change rates in fixed-rate products for retail customers due to ‘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?’”

OPUC does not believe that a change in the HCAP constitutes a change contemplated in PUC SUBST. R. §25.475 that would enable a REP to change the prices to its fixed rate contracts.

The rule is quite clear as to when the price may vary from the contract price:

**25.475(b)(5) 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 (TRE) 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 HCAP is a component of the wholesale electricity market and is specified in the Commission’s rule; it is **not** codified into any federal, state or local law. It is also not a change in TDU charges or a change in the ERCOT or TRE administrative fees. In other words, the HCAP does not fit into any of the exceptions provided in PUC SUBST. R. 25.475 to allow a REP to change the price of a fixed rate product. In fact the HCAP would more accurately be

described as an energy cost to the REPs. Under the rules, when a REP ends up paying high spot market prices, those higher prices cannot be passed through to the fixed rate products. If the HCAP is increased, the only change that would occur is the degree to which the spot prices would increase, therefore under the current version of PUC SUBST. R. 25.475, the additional costs to the REPs for the energy cannot be passed through. OPUC understands that this interpretation may result in REP defaults which, in itself, may be harmful to end-use customers as evidenced in summer 2008 when five REPs defaulted and customers were involuntarily transferred to another provider. However, OPUC still cannot read PUC SUBST. R. 25.475 to permit the REPs to change the price of a fixed price contract due to the Commission changing the HCAP.

Furthermore, increasing the HCAP this summer with such short notice to the market creates regulatory uncertainty. In order for the market to attract new investors (as generators or as REPS), they must be assured that the regulatory body is supportive and understands the need for consistency. As explained by Commissioner Anderson at the April 12, 2012 Open Meeting, *"Because if -- if you -- if you tell loads that the Commission at a whim -- that's a bit overstatement - - can suddenly change the rules on them, that's disruptive to, again, large industrials, the commercial classes, not to mention residential customers who've said, well, you know what, I'm going to pay a little more to get a fixed rate contract because that protects me, as it did in 2011, against the volatility."*<sup>10</sup>

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<sup>10</sup> Open Meeting Tr. at 80, lines 7-15 (April 12, 2012).

## **b. Mitigation for Customers**

As noted above, Commissioner Anderson expressed his concern for the customers that may have paid a higher price for the security of a longer term contract. If the REPs are permitted to breach those customer contracts, the customers will not only be forced to pay a higher price in the future, but they will have lost money spent in the past for security that they did not receive. Furthermore, the resultant customer confusion that will most certainly accompany this action will have its own harmful effects on the retail market.

OPUC understands that if the Commission does move forward and change the HCAP this summer but does not allow the REPs to breach their contracts, that some REPs may incur unsustainable losses. OPUC is hopeful, however, that the impacts to REPs will be minimal so that the REPs are able to collect the revenue without breaking customer contracts or imposing new, higher prices on their customers.

However, to the extent the Commission does increase the HCAP this summer and the Commission does declare that the REPs may break fixed rate customer contracts, OPUC would encourage the REPs to provide those fixed rate customers with 14 days' notice that their price will increase and allow those customers to switch providers without incurring early termination penalties. This protection is extended to customers for changes in other contract terms (other than price) under §25.475(d) and OPUC believes this would be the minimum safeguard that should be afforded to customers.

#### IV. Conclusion

OPUC respectfully requests the Commission take no action on this proposal and instead, focus its attention on PUC Project No. 40268 to increase the HCAP rather than raise it this summer. However, if the Commission does choose to raise the cap this summer, OPUC would urge the Commission to encourage the REPs not to break customer contracts or impose higher prices on their customers.

DATED: May 29, 2012

Respectfully submitted,

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