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**DOCKET NO. 40000
PUBLIC UTILITY COMMISSION OF TEXAS**

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**COMMISSION PROCEEDING TO
ENSURE RESOURCE ADEQUACY
IN TEXAS**

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**BEFORE THE PUBLIC UTILITY
COMMISSION OF TEXAS**

**COMMENTS AND REQUEST FOR WORKSHOP
OF THE BUTLER FIRM, PLLC**

The Butler Firm, PLLC, is in the business of providing legal and consulting services to developers of solar generation and other sustainable energy projects both in Texas and throughout the world. Our clients are concerned that the Public Utility Commission (hereinafter “Commission”) has undervalued the feasibility for solar energy to serve as a solution for resource adequacy. These comments request that attention be given to solar generation as a source of cost-competitive electricity that is available during periods of peak electric demand and that can reasonably be constructed and deployed more swiftly than other generation resources. Specifically, we respectfully request a workshop under a separate docket to address the advantages of encouraging solar development in the ERCOT market. With the establishment of a workshop, stakeholders and leaders in the solar industry will have a forum to create viable solutions that can attract investors and financiers to the ERCOT market and mitigate our resource adequacy risks.

We also request that the workshop meetings occur before the Commission commits to any program that would solely benefit existing gas-fired generation without the promise of any new generation being built. The “scarcity reserves” program suggested by GDF Suez and its consultant Professor Hogan (“GDF Suez Plan”) would buy unnecessary reserves in “scarcity periods” simply to produce additional revenue to gas-fired turbine generators. There is no evidence that the recipients would use that revenue to build new generation of any type or that the program would attract the “missing money” leading to new peak capacity in the near future. Institutional investors and financiers repeatedly have expressed trepidation in investing in new gas fired generation in an energy only market because of the volatility of fuel prices.

We appreciate the tremendous effort that the Commissioners, the PUC Staff and ERCOT have applied towards the resource adequacy issue and we support the decision to increase wholesale price caps. We also respect the efforts of ERCOT's consultants, The Brattle Group, in analyzing the difficulties of providing sufficient new generation in a competitive wholesale market for electricity and ancillary services with energy-only market prices. We simply reject the concept that a "gas-only" incentive based on paying for unneeded additional operating reserves as "scarcity pricing" without requiring that added revenues be directly linked to building new generation is a reasonable step to maintaining an appropriate capacity reserve for ERCOT. Paying for peak generation from solar resources is a more efficient model than paying a gas peaker plant to spin and burn fuel in case it is needed and ensures that energy market prices maintain their true value, which in turn keeps prices affordable for Texas consumers.

The GDF Suez Plan Discriminates in Favor of Gas-Fired Generators

Solar projects could not participate in the GDF Suez Plan to purchase "scarcity reserves" for the simple reason that generally solar power is sold as it is produced (absent access to a storage facility). Solar does not have "spinning" reserves, because nothing "spins" when the sun activates the PV panels. Nor can solar PV provide passive reserves, because there is no mechanism to dispatch an exact amount of solar production. Solar is not the only generation technology that would be unlikely to participate in the "scarcity reserve" program. Wind power also has to sell power as the wind blows, which makes bidding into a reserve, without storage, difficult.

Nuclear and coal units in ERCOT operate as "base load" generators, selling around the clock except for scheduled or unscheduled outages. There are large base-load gas generators as well, but most of the gas units in ERCOT are intermediate or peaking generators. The economic dispatch model used to administer ERCOT calls for bids for power for resale, operating reserves and other ancillary services each day. Bid stacks are set up based primarily on price with lowest price dispatched first. Because bids are primarily based on the marginal cost of operating a unit, primarily older gas-fired units with higher heat rates are the units available on the margin in periods of high demand. If "scarcity reserves" were purchased on a given day, the higher heat

rate generators would be selected because lower-priced units already would have been dispatched. The “more money” that the Commission recognizes as necessary to support new generation would wind up in the hands of companies owning older, less efficient gas-fired generation.

Due to the lack of transparency as to names, volumes and prices that have been dispatched in ERCOT, we cannot determine what owners and units would most likely be selling “scarcity reserves.” The GDF-Suez Plan, however, would only get “more money” for existing generators in ERCOT. New prospective generating entities would have no access to “scarcity reserve” income. By seeking a forum for the solar industry via creation of a workshop, we are only requesting a chance to show how alternative plans can provide additional generation from more sources, more quickly, at lower cost, and at a better cost/benefit ratio than the GDF-Suez Plan.

A Private Withholding of Capacity among Competing Generators Would Be Unlawful

The GDF Suez Plan to establish “scarcity reserves,” as outlined by Professor Hogan, would be illegal if it were implemented by the competitive generators serving ERCOT without an approved regulatory program based on mandates of the Texas Legislature. Normally, private agreements to hold back capacity when demand is high and prices rising are considered to be violations of the Clayton Antitrust Act.¹ Increasing operating reserves as peak loads develop removes the new reserve’s output from the supply available for sale, which effectively raises prices to end use customers due to the operating reserve demand curve. In addition, the “more money” is shifted from the customers paying for the increased reserves to the owners of the “scarcity reserves.”

Regulatory lawyers might cite *Parker v. Brown*² for a state action exception to the federal antitrust law to excuse this withholding program. The difference is that in *Parker* the State specifically had delegated authority to limit and control the California raisin crop. That

¹ §7 of the Clayton Act, 38 Stat. 731, 15 U. S. C. §18.

² *Parker v. Brown*, 317 U. S. 341 (1943).

precedent has been whittled away over the years. Just last week the U.S. Supreme Court cut back on the scope of *Parker* in *Federal Trade Commission v. Phoebe Putney Health System*, 568 U.S. ___, ___ (February 19, 2013):

But given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, “state-action immunity is disfavored, much as are repeals by implication.” *FTC v. Ticor Title Ins. Co.*, 504 U. S. 621, 636 (1992). Consistent with this preference, we recognize state-action immunity only when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that “is the State’s own.”

The Texas Utility Code makes clear that the policy as to electric generation in the switch to competitive wholesale and retail electric markets was not to provide a cover for efforts to manipulate market prices. It is contrary to that principle to permit the withholding of generation from the market under a “scarcity reserves” plan that will increase costs to consumers without any assurance that new generation will be forthcoming as a result. Section 35.002 of the Utility Code declares the policy:

Sec. 35.002. RIGHT TO COMPETE AT WHOLESALE.

A provider of generation, including an electric utility affiliate, exempt wholesale generator, and qualifying facility, may compete for the business of selling power.

Further support is found on Section 39.101, which states:

Sec. 39.001. LEGISLATIVE POLICY AND PURPOSE.

(a) The legislature finds that the production and sale of electricity is not a monopoly warranting regulation of rates, operations, and services and that the public interest in competitive electric markets requires that, except for transmission and distribution services and for the recovery of stranded costs, electric services and their prices should be determined by customer choices and the normal forces of competition. As a result, this chapter is enacted to protect the public interest during the transition to and in the establishment of a fully competitive electric power industry.

(c) Regulatory authorities, excluding the governing body of a municipally owned electric utility that has not opted for customer choice or the body vested with power to manage and operate a municipally owned electric utility that has not opted for customer choice, may not make rules or issue orders regulating competitive electric services, prices, or competitors or restricting or conditioning competition except as authorized in this title and may not discriminate against any

participant or type of participant during the transition to a competitive market and in the competitive market.

(d) Regulatory authorities, excluding the governing body of a municipally owned electric utility that has not opted for customer choice or the body vested with power to manage and operate a municipally owned electric utility that has not opted for customer choice, shall authorize or order competitive rather than regulatory methods to achieve the goals of this chapter to the greatest extent feasible and shall adopt rules and issue orders that are both practical and limited so as to impose the least impact on competition.

Adopting the GDF Suez Plan as proposed would violate both the letter and the spirit of PURA, as amended. The Commission should seek an incentive that does not inappropriately favor either existing ERCOT generators or gas-fired generation. We wish to show the Commission non-discriminatory alternatives that are fully competitive with gas-fired generation.

Additional Questions about the GDF Suez Plan

There are a number of unanswered questions about the GDF Suez Plan to increase the amount of spinning and non-spinning reserves when generation "scarcity" is a problem in ERCOT:

- Who will get the revenue from the excess operating reserves purchased by ERCOT?
- Will the revenue recipients be motivated to build additional generation with their new money?
- How will the cost of additional reserves on a demand curve be allocated to the various customer classes?
- Will ERCOT take bids for all daily reserves at once or will there be a separate solicitation for the "scarcity" reserves?
- Will it be possible for base load coal and nuclear to bid to supply "scarcity" reserves?
- Will solar or wind generators be eligible to supply "scarcity" reserves?
- How would one calculate the cost/benefit ratios comparing the cost of "scarcity reserves" and new reserves that come on-line in ERCOT?
- Are investors of new generation assets going to invest in gas-fired generation in an energy-only market especially due to the volatility of fuel prices?

Conclusion and Prayer

The Butler Firm remains puzzled by the failure to consider solar energy as a viable source of power that is available during periods of maximum loads considering the cost to build solar has dropped significantly. With the high levels of solar resource available in the Competitive Renewable Energy Zones (CREZ) including west Texas, solar is on parity with most forms of generation as evidenced by El Paso Electric's recent execution of a twenty-year Long-Term Purchased Power Agreement for solar at a rate of 5.79 cents a kilowatt-hour.³ Solar is a true cost-competitive peak resource that can fill the biggest gap in ERCOT's array of generation: the lack of resources that make their greatest contribution to meet summer heat spells. Texas has had great success in adding wind resources for ERCOT at a far lower cost per MW than alternatives. Solar generating resources can be put in service more quickly than other generation and does not suffer from potential fuel price increases, impact of water scarcity, or any carbon controls or taxes.

WHEREFORE, The Butler Firm respectfully prays that the commission set up a workshop under a separate docket involving solar resources before taking final action on the GDF Suez Plan proposed by Professor Hogan.

Respectfully submitted,

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³ See Procedural Order, Case No. 12-00386-UT, Before the New Mexico Public Regulation Commission.