



CompetitivePower.org

April 6, 2022

Rules Coordinator
Railroad Commission of Texas
Office of General Counsel
1701 N. Congress
Austin, Texas 78701

Re: Texas Competitive Power Advocates' Supplemental Comments on Proposed Amendments to 16 TAC §7.455 and Repeal of 16 TAC §7.305, relating to Curtailment Standards.

Texas Competitive Power Advocates ("TCPA") respectfully submits these supplemental comments in response to the Railroad Commission of Texas's ("RRC" or "Commission") Proposed Amendments to 16 Texas Admin. Code ("TAC") §7.455 and Proposed Repeal of 16 TAC §7.305 (the "Proposed Rules" or the "Curtailment Rules").

The Proposed Rules were published in the Texas Register on November 26, 2021. On January 7, 2022, TCPA timely submitted its initial comments on the Proposed Rules (the "Initial Comments"). On March 22, 2022, TCPA representatives met with Commission Staff concerning the changes to the Proposed Rules being considered by Staff in response to public comments. TCPA files these supplemental comments to address changes to the Proposed Rules being considered by Staff, as discussed at the March 22 meeting.

TCPA's understanding, based on its meeting with Staff, is that Staff does not intend to incorporate any of the changes recommended by TCPA in its Initial Comments, and is also considering adopting several changes that risk undermining the ultimate goal of the Proposed Rules – ensuring that gas supply is properly allocated in a curtailment event.

TCPA urges the Commission to adopt the changes it recommended in its Initial Comments so that customers are appropriately prioritized during a curtailment event. See TCPA's attached Proposed Redlines to RRC's Initial Proposed Amendment to 7.455, which was filed with the Initial Comments and is resubmitted in its entirety here. In addition, TCPA recommends that the Commission decline to adopt several of the changes to the Proposed Rules currently being considered, as discussed herein.

EXECUTIVE SUMMARY

As expressed in its Initial Comments, TCPA applauds the Commission's efforts in updating its curtailment priorities and formalizing efforts to provide clear and consistent curtailment standards. In particular, TCPA appreciates the Commission's recognition of the importance of ensuring that natural gas can be supplied to electric generation facilities in curtailment events.

TCPA does, however, maintain that a number of modifications to the Proposed Rules are necessary to ensure that human needs are properly served in an emergency situation. As discussed in detail in its Initial Comments, TCPA recommends the following changes to the Proposed Rules:

- A. Include a methodology and directive to estimate the total gas supply that is curtailable (i.e., the jurisdictional gas).
- B. Include electric generation facilities in the definition of "human needs customers" and place them in the same priority tier as other human needs customers.
- C. The prioritization in the curtailment order must include both firm deliveries of natural gas and firm transportation capacity, instead of focusing on a firm supply of natural gas commodity. There should, however, also be a mechanism to ensure that Force Majeure claims are legitimate.
- D. Provide greater clarity as to what the Commission considers as a curtailment event, or in the alternative, require intrastate gas pipelines to provide a definition of what they consider a curtailment event to be part of their tariff.

Based on its meeting with Staff, TCPA's understanding is that Staff does not intend to include any of TCPA's recommendations, while also considering adoption of other revisions that

would undermine certain of these recommendations, along with the overall intent of the Curtailment Rules. As discussed herein, TCPA's recommended changes are necessary to ensure the proper functioning of the Curtailment Rules and should be adopted.

Moreover, certain of the changes being considered by Staff are problematic. As an example, rather than including a methodology and directive for estimating the jurisdictional gas, Staff is instead considering proposing for adoption a narrow application of the Proposed Rules, which is particularly concerning, given that the rules apply only when supply is scarce and prioritization is necessary. In addition, Staff is considering a provision that would allow intrastate gas pipelines to be relieved of any due diligence requirements for customer claims of human needs priority. Such provisions, along with other proposals discussed herein that are being considered, would significantly hinder the ability of the State to meet its obligation to ensure adequate gas supplies are delivered to true human needs customers during an emergency situation and should not be incorporated into the Proposed Rules.

TCPA urges the Commission to adopt the changes described in its Initial Comments and shown in the proposed redline attached to these Supplemental Comments, and to reject the changes being considered that would undermine the effectiveness of the Proposed Rules, as discussed in these Supplemental Comments.

DISCUSSION

I. Notice and Potential Republication

As a preliminary matter, TCPA would address the notice issues raised by Staff at the March 22 meeting. TCPA's understanding based on its meeting with Staff is that Staff is concerned that certain changes proposed by TCPA and others were not reasonably foreseeable in the draft rule and therefore could not properly be adopted in the final rule.

As discussed below, TCPA believes most or all of its recommended changes satisfy the applicable notice requirements. However, in the event that Staff disagrees, the solution is republication of the Proposed Rules, rather than declining to adopt the necessary changes that will allow the rules to function as intended. Winter Storm Uri made clear that it is *critical* that entities such as electric power generation facilities and other facilities serving human needs are properly prioritized in an emergency situation. If republication is necessary to ensure the Curtailment Rules provide the necessary framework so that human needs customers continue to receive heat and power when the next emergency weather event occurs, then the rules should be republished.

A. *Legal Background*

The Texas Administrative Procedure Act (“APA”) requires an agency to “give at least 30 days’ notice of its intention to adopt a rule before it adopts the rule.”¹ Notice of a proposed rule consists of, among other things, a brief explanation of the proposed rule, the text of the proposed rule, and a request for comments on the proposed rule from any interested person.²

The rationale behind the notice and comment requirement is “the expectation that the final rules will be somewhat different and improved from the rules originally proposed by the agency.”³ It is clear, therefore, that the rulemaking process anticipates that the rule ultimately adopted by an agency will differ from what was originally noticed.

In determining whether notice of a rulemaking is sufficient, the relevant inquiry is “whether the agency's notice fairly apprises affected parties of the pertinent issues to allow them to comment and participate in the rulemaking process in a meaningful and informed manner.”⁴ Under this

¹ Tex. Gov't Code § 2001.023(a).

² Tex. Gov't Code § 2001.024(a)(1)-(2), (7).

³ See *Texas Workers' Comp. Comm'n v. Patient Advocs. of Texas*, 136 S.W.3d 643, 650 (Tex. 2004), quoting *Trans-Pacific Freight Conf. v. Fed. Mar. Comm'n*, 650 F.2d 1235, 1249 (D.C.Cir.1980).

⁴ See *Texas Workers' Comp. Comm'n v. Patient Advocs. of Texas*, 136 S.W.3d 643, 650 (Tex. 2004); see also, *State Bd. of Ins. v. Deffebach*, 631 S.W.2d 794, 801 (Tex. App. – Austin 1982), writ refused NRE (Sept. 15, 1982).

inquiry, the adopted rule satisfies the APA’s notice requirements if it “is a logical outgrowth of the proposed rule,” such that “the final rule does not materially alter the issues raised in the proposed rule.”⁵

B. Application to TCPA’s Recommendations

As discussed below, TCPA’s recommendations constitute “a logical outgrowth of the proposed rule,” in satisfaction of the APA’s notice requirements. If the Commission disagrees, however, it should republish notice to ensure the adopted rule functions properly (as discussed above).

- i. Include a methodology and directive to estimate the total gas supply that is curtailable (i.e., the jurisdictional gas).

The Proposed Rules would govern the delivery and sale of natural gas during curtailment events, in order to better address emergency situations. The rules do not, however, provide a means of determining the total gas supply that is curtailable, and for that reason, it is impossible to determine whether the rule is sufficient to solve for emergencies.

TCPA’s recommendation that the Proposed Rules include a method for estimating the jurisdictional gas is a logical outgrowth of the Proposed Rules, as it provides a method for determining the amount of gas subject to the rule. Such an addition would not result in new subjects or persons being affected by the altered rule.

If, however, the Commission is concerned that the adoption of this recommendation would result in its notice being insufficient under the APA, TCPA believes the issue is important enough for the Commission to republish notice, particularly given the amount of time before the upcoming winter.

⁵ *Id.*

As an alternative, TCPA believes this issue could properly be addressed in the preamble to the adopted rule. Such a preamble discussion would help to provide the clarity needed by the rule without the need for republication.

- ii. Place electric generation facilities in the same priority tier as other human needs customers.

The Proposed Rules recognize the importance of maintaining gas supply to “electric generation facilities” and propose to elevate firm deliveries to such facilities to the second priority tier during a curtailment event, behind only firm deliveries to human needs customers and firm deliveries to local distribution systems which serve human needs customers. Affected persons were, therefore, clearly put on notice concerning the prioritization of electric generation facilities and human needs customers and permitted to comment and participate in the rulemaking process in a meaningful and informed manner on those topics. Indeed, in response to other comments, and as discussed in more detail below, Commission Staff is considering adding additional categories of facilities to the definition of “human needs customers” and thus elevating them to first in priority in a curtailment event. The Commission’s similarly adding “electric generation facilities” to the definition of “human needs customers” would constitute a logical outgrowth of the proposed rule and satisfy the APA’s notice requirements.

- iii. Revise the definitions of “firm deliveries” and “curtailment event.”

As discussed in its Initial Comments and below, TCPA has recommended that the Commission define “firm deliveries” and “curtailment event” to provide clarity. The Commission has not indicated that it plans to adopt TCPA’s recommended changes, but it is considering adopting a definition of “firm deliveries” and revising the definition of “curtailment event.” Such changes to the Proposed Rules are clearly foreseeable and a logical outgrowth of the rules. No

republishing of notice would be necessary for the Commission to adopt TCPA's recommendations concerning these definitions.

- iv. Adopt a mechanism to ensure that a Force Majeure claim was legitimate or other curtailment of firm natural gas delivery was legitimate and equitably implemented.

In conjunction with its request that the Commission clarify the term "firm deliveries," TCPA recommends that the Commission recognize that firm delivery can be compromised by force majeure claims and other curtailments such as Operational Flow Orders ("OFO") on gas pipelines. To provide confidence in the intrastate gas market, TCPA recommends that the Commission impose a transparency requirement on intrastate gas suppliers and pipelines to ensure a claimed force majeure or curtailment was legitimate and equitably implemented.

The concept of "firm deliveries" is key to the Proposed Rules, and to the extent that "firm delivery" under the rules can be compromised by force majeure claims or other curtailments, the Commission can and should work to ensure that such claims are legitimate. The term "force majeure" is not currently used in the Proposed Rules, however, but "contractual guarantee" discussions throughout the rule directly (or at least indirectly) necessarily encompass the concepts of both force majeure and transportation curtailments via OFO. While there may be an argument that such a requirement is not a logical outgrowth of the Proposed Rule, given the importance of the issue, and the time available before the next winter, TCPA requests that the Commission republish the rules if it determines republishing is necessary to address this key issue.

II. Jurisdictional Gas and Reach of the Proposed Rules

TCPA's Initial Comments noted that not all gas on the intrastate pipeline system may actually be subject to the Commission's curtailment rule, and TCPA therefore recommended that the rule should include a method for estimating the total supply that is curtailable (i.e., the "jurisdictional gas") so that the rule's reach and its impact on emergency situations may be

understood. More specifically, TCPA recommended that the rule should include certain requirements that would promote transparency on intrastate pipelines, as described at pages 5-6 of its Initial Comments.

It is our understanding that the Curtailment Rule would apply to “deliveries of natural gas owned by a gas utility” and/or “deliveries utilizing a gas utility’s transportation capacity.” It is our interpretation that an entity that is not considered a gas utility (such as a gas marketer) would still be subject to the Curtailment Rules if such gas is transported on a natural gas utility pipeline.

Any other interpretation would allow gas marketers and affiliates of natural gas utilities to avoid the Curtailment Rules, thus undermining the key goal of the Curtailment Rules – to ensure customers are properly prioritized in a curtailment event – and reducing the likelihood that the rule will be sufficient to solve for emergencies. TCPA thus (1) re-urges the Commission to adopt the transparency requirements discussed in the Initial Comments, and (2) requests that the Commission confirm the Proposed Rules apply to all gas owned by a natural gas utility or transported on a natural gas utility pipeline, including that owned by gas marketers or affiliates of natural gas pipelines.

III. Electric Generation Facilities as a Component of Human Needs

As discussed in TCPA’s Initial Comments, the Proposed Rules should be revised to consider electric generation facilities as “human needs customers,” given that a significant portion of the heating infrastructure in Texas requires electricity, and electric generation is a critical component of meeting human needs.⁶ TCPA’s understanding is that Staff has thus far declined to include this recommendation. As discussed in detail in TCPA’s Initial Comments, however, Winter Storm Uri illustrated that it is *critical* that electric generation facilities be able to supply

⁶ Initial Comments, pp. 9-10.

power to residences, hospitals, churches, and schools in order to ensure that these consumers have heat and power during the worst types of weather events. Electric generation facilities are thus properly considered human needs customers.

Despite the fact that Staff has not proposed to include electric generation facilities as a component of human needs, Staff *has* shown a willingness to broaden the definition of “human needs customers.” In TCPA’s meeting with Staff, Staff indicated that it was considering adding “water and wastewater facilities” and “small commercial customers that cannot practicably be curtailed without curtailing human needs” to the definition of “human needs customers.” Electric generation facilities are certainly *at least* as critical to serving human needs as these types of facilities. It is likely that these additional facilities and entities, require electric service as well as gas. For example, while TCPA acknowledges the critical need to keep water and wastewater facilities functioning at all times, it seems unlikely that such facilities require gas and not electric service to effectuate that. By prioritizing electric service, with these other critical services, the likelihood of keeping emergency services such as heating, water, waste, etc. is maximized. TCPA thus continues to urge that the Commission include electric generation facilities in the definition of human needs customers.

IV. Definition of “Firm Deliveries”

As discussed in the Initial Comments, TCPA recommends specifically defining the term “firm deliveries” to bring clarity to a term used throughout the Proposed Rules. The definition of this term should include both (1) firm deliveries of natural gas to an entity, and (2) entities that have firm transportation. As described in our Initial Comments, this definition is broad enough to reflect how fuel gets to a customer (i.e. self-supply utilizing firm transport or delivered to customer by a gas utility or third party) but avoids using the more generic term of firm supply of the gas

commodity itself which may evoke controversial Force Majeure claims from Winter Storm Uri.⁷ In addition, in its Initial Comments, TCPA requests that the Commission require entities that declare Force Majeure to submit the details of all gas transactions in the vicinity of the impacted locations for review to ensure there were no improper sales made.⁸

TCPA's understanding, based on its meeting with Staff, is that Staff does not intend to include these recommendations. Rather, Staff is considering revising the definition to state that firm deliveries are "natural gas deliveries that are provided on a guaranteed basis under contract."

This revised definition, and particularly its introduction of the new undefined term "guaranteed basis" does not provide the clarity that the rule needs, but only raises additional questions. If the term "guaranteed" truly means guaranteed, then can a contract containing a force majeure or OFO curtailment clause be considered firm? And, if the "guaranteed basis" requirement is *not* defeated by the presence of a force majeure or OFO curtailment clause, the revised rule merely adds a new undefined term that unnecessarily creates additional confusion without recognizing the significant role that force majeure and OFO curtailments play in the insecurity of the State's gas supply.

TCPA thus requests that the Commission revise the term "firm deliveries" as provided in the attached redline, and reject the suggested addition of the "guaranteed basis" requirement.

⁷ TCPA Initial Comments, pp. 7-9.

⁸ *Id.*

V. Definition of “Curtailed Event”

As discussed by TCPA in its Initial Comments, the proposed definition of “curtailed event” would allow individual gas utilities to unilaterally determine when a curtailed event is or is not occurring.⁹ TCPA thus requested that the Commission provide greater clarity as to what qualifies as a curtailed event, or in the alternative, for intrastate gas pipelines to provide a definition of what they consider a curtailed event to be made publicly available.

In TCPA’s meeting with Staff, however, Staff indicated that while it is considering various changes to the definition of “curtailed event,” at this time, it intends to retain the portion of the proposed definition that would give gas utilities discretion in determining when a curtailed event is occurring. Applying the proposed definition, does not provide greater clarity, but would allow an individual gas utility to unilaterally choose whether or not to implement curtailed requirements on a case-by-case basis. TCPA reiterates its request that the Commission revise the definition as specified in the Initial Comments.

VI. Gas Pipelines’ Due Diligence Requirements

TCPA’s understanding, based on its meeting with Staff, is that Staff is considering revising the Proposed Rules in response to public comments to provide that in applying priorities, a gas utility may rely on the representations of its customers and/or their end users regarding the nature of customers’ deliveries. This is simply unworkable, as it would negate any duty of a gas pipeline to investigate or conduct any due diligence of a customer’s claim of human needs priority. This is despite the fact that a customer’s specious claim of priority could prevent a legitimate human needs customer from receiving the needed gas supply during an emergency, including power generation

⁹ TCPA Initial Comments, pp. 6-7.

customer that are necessary to ensure that human needs customers have heat and power during the worst types of weather events.

Staff's indications that the draft Curtailment Rules' will expressly relieve gas pipelines of any duty to ensure that human needs claims are legitimate would undermine the purpose of the rules and the goal of ensuring that true human needs customers are served in an emergency situation. The Proposed Rules should not adopt this provision.

CONCLUSION

TCPA recognizes the difficult task presented to the RRC with respect to prioritizing customers during a curtailment event and appreciates the opportunity to meet with Commission Staff and offer supplemental comments. However, the reason for the Proposed Rules is to provide clear regulations to natural gas utilities that ensure human needs customers are provided adequate natural gas supplies during emergency situations. Without assessing how much gas is subject to the Proposed Rules it is impossible to determine the impact and effectiveness of the Proposed Rules. Furthermore, choosing not to include electric generation facilities as human needs customers effectively renders 60% of homes in Texas that rely on electricity for home heating as a secondary priority given the need for electricity for home and water heating – and puts the human needs of the remaining Texas homes that rely on natural gas for home heating at risk as well, since a gas furnace cannot blow warm air without electricity. Finally, allowing individual natural gas utilities to unilaterally determine when curtailment events occur and allowing gas utilities to rely on the representations of their customers as to their curtailment priority without any due diligence requirement fails to ensure that gas will be delivered where it is needed most during an emergency. If TCPA's suggested revisions to the Proposed Rules discussed above are incorporated, TCPA would support the adoption of the Proposed Rules.

Sincerely,

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PROPOSED REDLINES TO RRC'S INITIAL PROPOSED AMENDMENT TO 7.455.

(RRC amendment in single underline and our proposed edits in double-strikethrough and double-underline):

(a)(5) Human needs customers--Residences and other locations where people may congregate in an emergency, such as schools and places of worship, and hospitals, police, fire, military, and civil defense facilities; and electric generation facilities.

(d)(1) Unless a gas utility has an approved curtailment plan pursuant to subsection (e) of this section, a gas utility shall apply the following priorities in descending order during a curtailment event:

(A) firm deliveries of natural gas to human needs customers and firm deliveries of natural gas to local distribution systems which serve human needs customers [*if “electric generation facilities is not added to the definition of “human needs customers,” and “firm deliveries” is not defined as proposed below, then in the alternative amend (d)(1)(A) here with and firm deliveries of natural gas to electric generation facilities and supply to electric generation facilities with firm transport;*

(2) For purposes of this section, the term “firm deliveries” shall mean delivered gas or a customer with firm transport.

(3) Customers within a priority class which is subject to curtailment shall be curtailed to the extent practicable on an equal basis. If a customer's end-use requirements fall under two or more priorities, then such requirements must be treated separately when applying this schedule of priorities. Transportation customers have equivalent end-use priorities as sales customers.

(h) Monitoring and reporting. A gas utility must notify the commission and the Texas Energy Reliability Council when a curtailment is implemented. The gas utility must provide a report to the commission and the Texas Energy Reliability Council within 30 days of a curtailment event that provides sufficient information to confirm implementation of the curtailment plan, including volumes of curtailed gas by prioritization tier. The commission will aggregate and publish data sufficient to determine curtailed volumes by hour, day, region, and the priorities in subsection (d).