PROJECT NO. 55826

TEXAS ENERGY FUND IN-ERCOT	**§**	**PUBLIC UTILITY COMMISSION**
	§	
GENERATION LOAN PROGRAM	**§**	**OF TEXAS**
	§	

TCPA COMMENTS IN RESPONSE TO PROPOSAL FOR PUBLICATION OF NEW 16 TAC §25.510

Texas Competitive Power Advocates ("TCPA") is a trade association representing power generation companies and wholesale power marketers with investments in Texas and the Electric Reliability Council of Texas ("ERCOT") wholesale electricity market. TCPA members and their affiliates provide a wide range of important market functions and services in ERCOT, including development, operation, and management of power generation assets, power scheduling and marketing, energy management services and sales of competitive electricity service to consumers. TCPA members provide almost fifty percent of the total generating capacity and eighty-two percent of the gas generation capacity in ERCOT. TCPA members have invested billions of dollars in the state and employ thousands of Texans.

TCPA continues to appreciate the enormous effort of the Public Utility Commission of Texas ("PUC" or "Commission") to implement the Texas Energy Fund ("TEF") expeditiously and appreciates the opportunity to provide feedback on the Proposal for Publication ("PfP"). TCPA hopes the following comments will provide insight into some of the issues generators believe need further discussion prior to the final adoption of 16 TAC §25.510.

I. RESPONSE TO STAFF QUESTIONS RELATED TO ELIGIBILITY REQUIREMENTS

I. "Should the rule require registration as a power generation company with the commission as a condition for eligibility to receive a loan? Why or why not?"

The rule and/or the credit agreement should require that a loan applicant acquire all necessary permits to operate an electric generating facility in ERCOT, including, at the appropriate time, a power generation company registration with the Commission, and maintain such registration during the term of the loan. However, while continuous registration will be required for a loan recipient to operate the generating facility for which it received loan funds, such registration should not be required at the time of application or as a condition of receiving loan funds, which will necessarily be disbursed during construction (i.e., before registration as a power generation company is typically sought). Rather, registration should be received by the Commercial Operations Date ("COD") as defined in the PfP, consistent with 16 TAC § 25.109, which only requires a person to register as a power generation company "before the first day it generates electricity." Additionally, registration should be continuously maintained during the duration of the loan agreement.

II. "Should the rule require registration as a Generation Resource with ERCOT as a condition for eligibility to receive a loan? Why or why not?"

Similarly, the rule and/or credit agreements should require a loan recipient to acquire and maintain all necessary permits to operate its resource, including, when applicable, registration as a Generation Resource. As with registration with the Commission, registration with ERCOT should not be required at the time of application or as a condition of disbursing loan funds. Rather the loan recipient should be required to register as a Generation Resource by the timeframe required by ERCOT in applicable Protocols and Other Binding Documents and no later than by COD. Additionally, registration should also be required to be continuously maintained for the term of the loan.

III. "How should the commission evaluate PURA § 34.0106(b)'s prohibition against providing a loan to an electric generating facility that will be used primarily to serve an industrial load or private use network?

a. Should the commission prescribe a percentage of total energy output that an electric generating facility must achieve to be eligible for a loan? If so, what percentage should the commission prescribe?

b. Should the commission employ another method to ensure that an electric generating facility primarily serves the ERCOT grid? If so, what method is appropriate and why?"

TCPA believes that the Legislature's prohibition against loans for a facility that is used primarily to serve an industrial load or private use network ("PUN") demonstrates that the Commission should not use the TEF to subsidize private, behind the meter generation.

As "primarily" means "for the most part" (synonymous with "chiefly") or "in the first place" (synonymous with "originally"),[1] if the Commission is to permit PUNs to qualify for the TEF, it should prescribe a percentage of no less than (but could easily be much more than) 51% of total facility net energy output in the ERCOT wholesale market to be eligible for a loan.[2]

Further, the eligible amount of the loan should be tied directly to the percentage of total net energy output in the ERCOT wholesale market. For example, if 51% of an electric generating facility's energy output is offered into the ERCOT wholesale market, then a loan to that facility should only be eligible for up to 60%[3] of 51% of the estimated project costs required to serve ERCOT load under Subsection (e)(6) of the proposed rule. Costs that are directly attributable to or associated with the portion that serves (or is anticipated to serve) the PUN or industrial load should not be eligible.[4]

In calculating availability for all resources (including PUNs), TCPA suggests the Commission utilize the North American Electric Reliability Corporation ("NERC") Generator Availability Data System ("GADS") definitions for availability. If the Commission creates terms with the same acronyms but with different meanings, it will create confusion and lead to unintentional reporting error. In addition, a fundamental concern with the rule is that it could be interpreted that a single hour with an EAF below 50 will trigger a breach, which TCPA presumes

[1] https://www.merriam-webster.com/dictionary/primarily.

[2] 51% would represent the most liberal interpretation of "for the most part" – but a more holistic reading of the term "primarily" could also support a higher percentage that represents industrial use of the facility to be the exception to the rule (e.g., 90+%).

[3] *See* PURA § 34.0104(b)(2) ("The commission may provide a construction loan under this section only: … (2) in an amount that does not exceed 60 percent of the estimated cost of the facility to be constructed.").

[4] Examples of excluded costs may include, but are not limited to, radials and feeders interconnecting the facility to the PUN or industrial load, steam piping and appurtenances serving a co-located steam host, pro rata share of a steam generator not used for the production of electricity, balance of plant equipment necessary for the service of the PUN or industrial load, etc.

is not the intent of the proposed rule. To address this ambiguity, TCPA recommends that the proposed rule expressly provide for performance to be calculated on a rolling average basis over some length of time (e.g., at least 12 months), rather than on an hourly basis, to ensure that borrowers are reasonably able to meet performance requirements throughout the loan term and not placed at undue risk of default due to unexpected and sometimes unavoidable circumstances such as a forced outage lasting hours or even days. Further, for facilities that may serve both ERCOT load and PUN/industrial load simultaneously, TCPA suggests the Commission specify a proscriptive performance calculation methodology that does not allow the facility to allocate less equivalent outage hours to the portion of the facility serving ERCOT load.[5]

Additionally, an electric generating facility should only be eligible for a TEF loan if the other statutory requirements are met – i.e., in addition to the facility primarily serving load in the ERCOT market, the portion of the facility serving ERCOT load must achieve at least a 100 MW increase in net output, and the loan must be secured as the senior debt on the facility. Only then should the cost of the facility be eligible for a loan at all, and as noted, costs not specifically excluded should then be prorated by the amount of MW that will be provided to the ERCOT grid (and further discounted to reflect the 60% limitation on total costs that are eligible for a TEF loan under the statute).

Lastly, TCPA suggests the Commission require that the minimum percentage of the facility's capacity that must be available to the ERCOT wholesale market to satisfy the "primarily" threshold be available to the ERCOT grid in all hours of the year (outside of unavoidable or reasonable facility outages or derates). If, on the other hand, "primarily" is interpreted to mean energy available to ERCOT only after an Energy Emergency Alert is declared, the developer may

[5] www.nerc.com/pa/RAPA/gads/DataReportingInstructions/Appendix_F_Equations_2023_DRI.pdf

build a high efficiency combined cycle, which is significantly more costly than a simple cycle, and the efficiency benefits thus would inure to the benefit of the industrial load or PUN in most hours, yet the capital costs of the higher efficiency would be subsidized by Texans.

II. ADDITIONAL COMMENTS REGARDING THE PROPOSAL FOR PUBLICATION

PURA § 34.0108(c) gives the Commission discretion in when they seek receivership for a default, as it states, "In the event of a default on a loan made under this chapter, *at the request of the commission* [emphasis added], the attorney general shall bring suit in a district court in Travis County for the appointment of a receiver…"

In other words, the Commission could decide not to request receivership in the event of a default. Further, although the statute details the types of occurrences that constitute a default, nothing in the statute precludes the Commission from including standard contract provisions like force majeure, materiality, foreseeability, and prudence in determining whether a default of the agreement has occurred in the first place.[6] The Commission should thus consider under what circumstances a default should occur in the first place or result in the extreme remedy of receivership, and should include standard contract provisions that would allow for possible extenuating circumstances, such as force majeure, and would take into account the severity of the

[6] A catastrophic, unforeseeable failure of a long-lead component – e.g., generator step up transformer, generator, etc. – would likely trigger a performance default under the current draft rules, yet it would not be prudent, or even practical, to maintain a panoply of capital spares for every conceivable contingency.

breach. TCPA believes it may not be in the best interest of the state to seek receivership for every breach, regardless of severity.

To further the goal of avoiding default, the final rule also should include reasonable notice and cure provisions prior to a default.

III. CONCLUSION

TCPA appreciates the opportunity to submit comments on the in-ERCOT generation loan program PfP and looks forward to collaborating with the Commission on a final rule. TCPA remains committed to helping craft a program that will maintain a competitive market and improve reliability.

Dated: January 5, 2024

Respectfully submitted,

Paul Townsend
Director of Communications & Administration
State Bar No. 24052037
Texas Competitive Power Advocates (TCPA)
paul@competitivepower.org
(512) 853-0655

Michele Richmond
Executive Director
Texas Competitive Power Advocates (TCPA)
michele@competitivepower.org
(512) 653-7447

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Executive Summary

- Registration as a power generation company with the PUC and as a generation resource with ERCOT should be required as a condition for eligibility to receive a loan, but not until the commercial operations date. Once received, registrations should be maintained for the life of the loan.
- To be eligible for a loan, the Commission should require an electric generating facility to provide no less than 51% of its total energy output in the ERCOT wholesale market.
- For a facility serving a PUN or industrial load, any loan amount should be prorated to the percentage of its total net output in ERCOT.
- Costs associated with the portion that serves the PUN or industrial load should not be eligible for state funding.
- Availability for all resources (including PUNs) for purposes of the performance covenant should be based on NERC GADS definitions. Availability should also be calculated on a rolling-average basis over some length of time (e.g., at least 12 months), rather than an hourly basis, to ensure that borrowers do not experience an undue risk of default due to unavoidable circumstances such as a forced outage lasting hours or even days. For facilities that serve both ERCOT load and PUN/industrial load simultaneously, the Commission should specify a proscriptive performance calculation methodology that does not allow the facility to allocate less equivalent outage hours to the portion of the facility serving ERCOT load.
- The final rule should include guidance under which circumstances the Commission may not seek receivership for a breach, as well as whether the Commission will consider the severity of the breach and any possible extenuating circumstances.
- Additionally, the rule should include reasonable notice and cure provisions prior to a default.