

Testimony of the Texas Public Power Association (TPPA)

Regarding the Public Utility Commission of Texas (PUC), Office of Public Utility Counsel (OPUC), and the Electric Reliability Council of TEXAS (ERCOT)

SUNSET ADVISORY COMMISSION

February 12, 2022

INTRODUCTION

The Texas Public Power Association (TPPA) appreciates the opportunity to provide testimony regarding the Sunset Commission's review of the Public Utility Commission of Texas (PUC), Office of Public Utility Counsel, and the Electric Reliability Council of Texas (ERCOT). TPPA looks forward to supporting the Commission and the Legislature as these agencies and the state's electric utility industry are examined via the Sunset process.

TPPA represents 72 municipally owned electric utilities (MOUs) and other publicly owned electric systems that provide power to over five million Texans. MOUs have been providing low-cost reliable electricity in their communities for over 100 years. MOUs are "full service" electric utilities that interface with customers, own poles and wires, and often own and operate power plants that participate fully in the ERCOT wholesale market. Approximately 15% of the retail electric customers in Texas are served by MOUs.

TESTIMONY SUMMARY

TPPA respectfully offers the following testimony concerning the basic structure of the electric utility industry and selected recommendations from the November 2022 Sunset staff report on the PUC, OPUC, and ERCOT. Additional detail can be found in the "discussion" section which concludes this written testimony.

- **INDUSTRY STRUCTURE: NO MAJOR CHANGES TO THE STATUTORY FRAMEWORK ARE NEEDED.** TPPA agrees with Sunset staff's approach to focus on operational issues rather than re-evaluating policy. As noted in the report, the Legislature has set a clear policy for overseeing electric, water, and telecommunications utility providers. TPPA believes that no major changes need to be made to the basic statutory framework for the electric industry in Texas. The current authority of MOU governing bodies to set municipal electric rates and policies for MOUs and to determine if and when to "opt in" to deregulated retail electric markets should be maintained.

Similarly, TPPA does not believe that the Legislature should provide ERCOT with additional oversight authority over local distribution systems. Local decision-making for distribution systems has served MOU customers well, with MOUs serving as leaders in the deployment of battery storage and distributed generation

in ways that are right-sized to the needs of local communities while still maintaining strict standards for safety and reliability as well as affordable rates to end users.

Any statutory changes should focus on the overall reliability of the bulk electric system, maintain the stability of the industry, ensure functional wholesale and retail markets with effective oversight, and preserve stakeholder involvement.

1. PUBLIC UTILITY COMMISSION

- CONTINUE THE PUC (PUC Recommendation 5.1) – *SUPPORT*. The staff report is correct in stating that the state has a continuing need to oversee the electric, water, and telecommunications utility industries. TPPA supports the continuation of this agency.
- PUC EXCEPTIONAL ITEM REQUESTS FOR DATA ANALYTICS STAFF AND ADDITIONAL ENGINEERING EXPERTISE (PUC Recommendation 1.1) – *SUPPORT*. TPPA agrees that the PUC needs this additional expertise.
- PUC DIRECTIVES TO ERCOT OUTSIDE OF RULEMAKING/CONTESTED CASES (PUC Recommendation 1.2) – *NEUTRAL*. TPPA agrees with the layout of the issues described by the Sunset Staff, however, TPPA is concerned that this could creep to other aspects and/or other agencies. In general, TPPA opposes any process by which an agency would be allowed to circumvent the requirements of the Administrative Procedure Act (APA) in issuing new rules, policies, or procedures. Allowing PUC directives to flow to ERCOT without the benefits of an APA-compliant rulemaking or contested case at any stage could result in a dramatic reshaping of the electric market in Texas without the public participation and transparency the public deserves.

That said, should the Legislature wish to create a process by which PUC could issue directives to ERCOT outside the bounds of the APA, the Legislature should create tight limits on this process to ensure that it does not become normal operating practice.

- PUC AUTHORITY OVER ERCOT PROTOCOLS (PUC RECOMMENDATION 1.3) – *NEUTRAL*. TPPA is concerned that authorizing PUC to mandate certain modifications to ERCOT Protocols could result in the PUC's political appointees overruling or modifying needed technical decisions made by the ERCOT Board for the reliability of the ERCOT grid.
- PUC RELIABILITY STANDARD OR GOAL (PUC RECOMMENDATION 1.6) – *SUPPORT*. TPPA notes that such a directive appears to have been recently enacted into statute – see PURA § 39.159(b)(1), as established by SB 3.

- PUC POLICIES TO CLARIFY ROLES OF/AMONG COMMISSIONERS (PUC Recommendation 1.9) – SUPPORT. In many ways, PUC Staff report not only to their direct supervisor and the chain of command on the Staff side of the agency but also to each of the Commissioners, who often request specific input from Staff on non-contested cases. With the newly-expanded set of five Commissioners, this could become another burden on certain key staffers. The expansion to five commissioners is also a key reason why TPPA also supports better delineating the roles of Commissioners between each other, to ensure that Commissioners do not accidentally duplicate others' work, as well as to provide clarity to Staff on appropriate chain-of-command among the commissioners.
- ALLOWING PUBLIC INPUT AT PUC OPEN MEETINGS (PUC Recommendation 2.2) – SUPPORT. Until recently, it was PUC practice that affected parties could respectfully ask to approach the bench and seek recognition during the discussion of an item during an open meeting. TPPA believes that the PUC's recent decision to limit this practice disadvantages affected parties by prohibiting their ability to clarify facts or correct misstatements in real-time. However, TPPA is neutral on whether this recommendation should be enacted as a PUC-specific requirement, rather than a broad improvement to all state agencies.
- IMPROVEMENTS TO PUC WEBSITE (PUC Recommendation 2.3) – SUPPORT. TPPA supports this recommendation, as agency websites can often become outdated. Providing clear website guidance and an updated user interface would improve public access and understanding, reducing burdens on both the industry and on the Commission.
- IMPROVEMENTS TO PUC DATA COLLECTION AND ANALYSIS (PUC Recommendation 4.1) – SUPPORT. These types of issues often get pushed back due to legislative implementation and contested cases, but a focus on fundamental workflow issues can dramatically improve an agency's effectiveness.
- PUC PRECEDENT MANUAL (PUC RECOMMENDATION 4.3) – SUPPORT. TPPA members have experienced PUC staff actions that conflict with decades-old practices. A precedent manual would assist PUC staff in ensuring consistent application of rules.

2. OFFICE OF PUBLIC UTILITY COUNSEL

- CONTINUE OPUC (OPUC Recommendation 6.1) – SUPPORT. TPPA agrees that aligning the review periods for PUC and OPUC continues to provide benefits.

3. ELECTRIC RELIABILITY COUNCIL OF TEXAS

- ESTABLISH THE TECHNICAL ADVISORY COMMITTEE IN STATUTE (TPPA RECOMMENDATION). TPPA supports statutory recognition of the Technical Advisory Committee (TAC) as a necessary input to the now-independent

ERCOT Board. TAC should continue to be broadly representative and include municipally-owned electric utilities.

- REQUIRE ERCOT TO COMPLY WITH THE OPEN MEETINGS ACT (TPPA RECOMMENDATION). The procedures for the openness of ERCOT Board meetings are laid out in ERCOT's governing documents, which under proposed bylaws amendments currently under deliberation, the ERCOT Board would solely control. Under this proposal, the ERCOT Board could choose to amend those procedures to limit or eliminate public participation or awareness. Applying the Open Meetings Act to the ERCOT Board would demonstrate ERCOT's openness to public engagement, ensuring that Texans can be confident that the decisions made by the ERCOT Board were done so transparently.
- END REQUIREMENT FOR ERCOT CORPORATE MEMBERSHIP TO PARTICIPATE IN STAKEHOLDER PROCESS (TPPA RECOMMENDATION). At present, ERCOT limits participation in its stakeholder process, including the ability to nominate representatives to sit on the various stakeholder committees and subcommittees, to entities that pay thousands of dollars to become corporate members of the nonprofit organization. This unduly limits who can participate in the ERCOT stakeholder process, preventing many smaller entities from participating and elevating the voices of larger companies. ERCOT should be directed to remove any requirement that limits participation in the ERCOT stakeholder process only to corporate members, opening up the process to all market participants.

DISCUSSION

Major changes in the electric utility industry and the regulatory role of the Public Utility Commission have taken place since the Public Utility Regulatory Act (PURA) was initially enacted in 1975. Legislative changes in 1995 effectively deregulated the wholesale market for electricity. Senate Bill 7 (SB 7), enacted in 1999, restructured the electric utility industry and partially deregulated the retail electric market in certain parts of the state. The Legislature also acted swiftly to respond to the tragedy of Winter Storm Uri, passing a suite of legislation to mitigate the possibility that such devastation would ever occur again. In addition, over the last several decades, legislation has modified policies regarding renewable energy standards, energy efficiency goals, ERCOT governance, and other matters without altering the basic statutory framework of the electric utility industry.

The statutory role of the PUC with respect to municipally owned electric utilities (MOUs) is strictly limited by law. Title 2, Chapter 40 of PURA provides for local governance and management of MOUs. Local authorities have jurisdiction regarding MOU rates, utility policies, customer protections, and other matters. However, customers of MOUs who reside outside of the city limits of an MOU can appeal rate decisions of the MOU to the PUC. SB 7 gave MOU governing bodies the authority to opt into the deregulated retail

electric markets if they so choose.¹ The provisions of SB 7 recognize the success of MOUs, which continue to provide affordable rates and value to their communities.

As the Texas Legislature examines the electric utility industry, TPPA respectfully urges that the fundamental statutory framework underpinning the industry remain. Specifically, TPPA would recommend the following general objectives:

- Maintain the basic Senate Bill 7 framework.
- Maintain community governance of municipal utilities.
- Ensure the reliability of the electric system in Texas.
- Maintain the stability of the electric utility industry.
- Ensure functional wholesale and retail markets with effective market oversight.
- Preserve stakeholder involvement in market / grid governance and in the decision-making process.

With respect to the basic role of the Public Utility Commission of Texas, the Sunset report found that the PUC has been effective. While the Sunset Commission will explore potential administrative efficiency gains through consolidation of other regulatory agencies, the state has a clear and continuing interest in regulating the electric industry. Although the PUC has limited jurisdiction over municipal utilities, TPPA believes that the current placement of regulatory functions has served the state well.

The Sunset report suggests that the Legislature consider appropriating the PUC its exceptional item requests for funding a data analytics team and additional engineering expertise (**PUC Recommendation 1.1**). TPPA agrees that additional expertise is deeply needed for the PUC. While the Commission is required to maintain an Independent Market Monitor for the wholesale electric market,² it does not appear that the retail market is as heavily analyzed, given recent major consolidations within that market.³ The PUC's customer protection mission would benefit from additional analysis of all markets it regulates.

The Sunset report suggests that PUC should be authorized to give directives to ERCOT outside formal rulemaking and contested cases, with stakeholders being able to formally provide input on these directives (**PUC Recommendation 1.2**). TPPA agrees with the layout of the issue by Sunset Staff – the PUC currently uses multiple processes to provide ERCOT with direction, and there is no clear method as to which process the PUC utilizes for any particular issue. TPPA is, however, neutral on whether a process outside formal rulemakings and contested cases is needed.

In general, TPPA opposes any means by which an agency would be allowed to circumvent the requirements of the Administrative Procedure Act (APA) in issuing new rules, policies,

¹ Lubbock Power & Light is currently in the process of entering the deregulated retail market.

² TPPA also supports continuing the requirement that the PUC and ERCOT contract with an Independent Market Monitor.

³ See L.M. Sixel, NRG closes deal to buy competitor Direct Energy, Houston Chronicle (Jan. 5, 2021) <https://www.houstonchronicle.com/business/energy/article/NRG-closes-deal-to-buy-competitor-Direct-Energy-15847530.php>

or procedures, which has provided a clear process for agencies across Texas that balances an agency's ability to update rules, policies, and procedures with the public's right to be consulted on those updates. ERCOT is not subject to the APA, and its rulemakings are carried out in a process that the ERCOT Board controls through its governing documents. Allowing PUC directives to flow to ERCOT without the benefits of an APA-compliant rulemaking or contested case at any stage could result in a dramatic reshaping of the electric market in Texas without the public participation and full transparency the public deserves.

That said, should the Legislature wish to create a process by which PUC could issue directives to ERCOT outside the bounds of the APA, the Legislature should create strict limits on this process to ensure that it does not become normal operating practice. Specifically, the Legislature should require that:

- PUC's instruction be provided via a written document, approved by a majority of Commissioners during a PUC open meeting,
- PUC's instruction is designed to address an exigent reliability issue that cannot be resolved through a rulemaking, emergency rulemaking, or contested case without putting the reliability of the ERCOT grid at risk, and the document provide a written explanation of the exigent reliability issue,
- PUC's instruction be limited in time, with a requirement that should the PUC wish to make this instruction permanent, it proceed through an APA-compliant rulemaking or contested case, and
- PUC provide a forum for public comment and review, including posting a draft of the instruction at least an hour before the open meeting at which it will be approved, and allowing comment during the time the instruction is effective.

The Sunset report recommends that the PUC be authorized to remand, with suggested modifications, any ERCOT Protocols changes before them for approval (**PUC Recommendation 1.3**). TPPA is neutral on this suggestion. TPPA is concerned that authorizing PUC to mandate certain modifications to ERCOT Protocols could result in the PUC's political appointees unduly influencing technical decisions made by the ERCOT Board.

The Sunset report recommends that the PUC be directed to develop a state reliability standard or goal in its rules (**PUC Recommendation 1.6**). TPPA notes that such a directive appears to have been recently enacted into statute – see PURA § 39.159(b)(1), as established by SB 3.⁴

The Sunset report suggests that the PUC develop policies to better clarify the roles and responsibilities among Commissioners, including how Commissioners interact with PUC Staff (**PUC Recommendation 1.9**). TPPA supports this recommendation. In many ways, PUC Staff report not only to their direct supervisor and the chain of command on the Staff side of the agency but also each of the Commissioners, who often request specific input

⁴ Sec. 39.159 (b)(1) states that: "The commission shall ensure that the independent organization certified under Section 39.151 for the ERCOT power region... establishes requirements to meet the reliability needs of the power region."

from Staff on non-contested cases. With the newly-expanded set of five Commissioners, this could become a burden on certain key staffers. The expansion to five commissioners is also a key reason why TPPA also supports better delineating the roles of Commissioners between each other, to ensure that Commissioners do not accidentally duplicate others' work.

The Sunset report recommends that the PUC allow public testimony at PUC meetings on agenda items (**PUC Recommendation 2.2**). TPPA supports this policy and hopes that the PUC will implement it independently of the Sunset review process. Until recently, it was PUC practice that affected parties could respectfully ask to approach the bench and seek recognition during the discussion of an item during an open meeting. TPPA believes that the PUC's recent decision to limit this practice disadvantages affected parties by prohibiting their ability to clarify facts or correct misstatements in real-time. However, TPPA is neutral on whether this recommendation should be enacted as a PUC-specific requirement, rather than a broad improvement to all state agencies.

The Sunset report suggests that the PUC be directed to provide more easily accessible information as part of its current website redesign efforts (**PUC Recommendation 2.3**). TPPA supports this recommendation, as agency websites can often become stale. TPPA also notes that, while search functions could be improved, the filing Interchange on the PUC website is largely functional and useable for the industry, and filings are relatively simple to make. To the extent that the PUC makes website enhancements, TPPA urges the PUC to continue best practices that are currently working well. TPPA would recommend additional funding for the PUC to hire a contractor to improve its website functionality, given that this is outside the core functions of the PUC.

The Sunset report suggests that PUC be directed to develop a plan to improve its data collection and analysis (**PUC Recommendation 4.1**). TPPA supports this recommendation. These types of issues often get pushed back due to legislative implementation and contested cases, but a focus on fundamental workflow issues can dramatically improve an agency's effectiveness.

The Sunset report suggests that the PUC should be required to create and maintain a precedent manual (**PUC Recommendation 4.3**). TPPA supports this recommendation. With the turnover rates at the agency, several TPPA members have experienced PUC staff actions that conflict with decades-old practices. A precedent manual would assist PUC staff in ensuring consistent application of rules.

NEW RECOMMENDATIONS

Establish TAC in statute.

In 2011, the Sunset Commission took up a Sunset staff recommendation that ERCOT's Technical Advisory Committee (TAC) be established in statute. This recommendation was ultimately not adopted by the Sunset Commission itself, but with SB 2's requirement that ERCOT maintain an independent Board, the importance of TAC is more-self-evident. Establishing TAC in statute would ensure that the ERCOT Board continues to benefit from

the technical knowledge and expertise of market participants. Moreover, TAC should continue to be broadly representative and include municipally-owned electric utilities.

Require the ERCOT Board to comply with the Open Meetings Act.

ERCOT performs some quasi-governmental and monopolistic actions, including operating an electric grid to the exclusion of all others and authority to levy various mandatory fees on market participants. In fact, in some litigation forums, ERCOT has claimed that it is a governmental unit entitled to sovereign immunity. Despite this, the ERCOT Board is not required to comply with fundamental transparency requirements, including the Open Meetings Act.⁵ The procedures for the openness of ERCOT Board meetings are laid out in ERCOT's governing documents, which under proposed bylaws amendments currently under deliberation, the ERCOT Board would solely control. Under this proposal, the ERCOT Board could choose to amend those procedures to limit or eliminate public participation or awareness.

Applying the Open Meetings Act to the ERCOT Board would demonstrate ERCOT's openness to public engagement, ensuring that Texans can be confident that the decisions made by the ERCOT Board were done so transparently.

End the ERCOT corporate membership requirement for the stakeholder process.

At present, ERCOT limits participation in its stakeholder process, including the ability to nominate representatives to sit on the various stakeholder committees and subcommittees, to entities that pay thousands of dollars to become corporate members of the nonprofit organization. This unduly limits who can participate in the ERCOT stakeholder process, preventing many smaller entities from participating and elevating the voices of larger companies. ERCOT should be directed to remove any requirement that limits participation in the ERCOT stakeholder process only to corporate members, opening up the process to all market participants.

In conclusion, TPPA again appreciates the opportunity to provide this testimony to the Sunset Advisory Commission. We hope to support the Commission's activities and deliberations going forward.

Additional information or questions may be directed to the Texas Public Power Association, Shelly Botkin, Executive Director, sbotkin@tpa.com.

⁵ While some Board meetings are attended by a sufficient number of PUC Commissioners that they also become PUC open meetings, this is not always the case. Oftentimes, Board meetings, particularly Board committee meetings, do not have a quorum of PUC Commissioners, and these meetings are operated entirely on ERCOT's in-house meetings rules.