

TEX-LA ELECTRIC COOPERATIVE OF TEXAS, INC.

WHITE PAPER ON PRR No. 546

INTRODUCTION

Tex-La Electric Cooperative of Texas, Inc., (“Tex-La”) is appealing a decision made on November 4, 2004, by the ERCOT Technical Advisory Committee (“TAC”) in which TAC failed to approve PRR No. 546. The motion to pass PRR No. 546 narrowly failed on a vote of: 13 For; 2 Against; and 13 Abstentions (a motion must have 50% or 15 votes in favor to pass). Tex-La and Rayburn Country Electric Cooperative, Inc., (“Rayburn Country”) requested an amendment to ERCOT Protocols § 7.5.6 allowing continued eligibility of pre-assigned congestion rights (“PCRs”) for an electric cooperative or municipally-owned utility that has an annual energy and capacity allocation from a federal hydroelectric generator that predates September 1, 1999. As PRR No. 546 failed to receive the required amount of affirmative votes, Tex-La now appeals TAC’s decision to the ERCOT Board.

BACKGROUND

SB 7 introduced language into PURA that prohibited the implementation of the new competitive market from affecting cooperatives’ access to their resources. Section 41.102 of PURA states “Nothing in this subtitle shall limit the access of an electric cooperative . . . to the wholesale electric market.” Congestion costs, of course, limit a cooperative’s access to its resources, and as a result, pre-assigned congestion rights (“PCRs”) were developed as a means of exempting non-opt-in cooperatives from congestion costs that would otherwise be charged for their existing resources.

During the negotiations of the ERCOT Protocols that led up to the presentation and adoption of the Protocols by the Commission in Docket 23220, the ERCOT stakeholders recommended that non opt-in entities (“NOIEs”), i.e., electric cooperatives and municipally-owned utilities, should receive PCRs during that time period when these entities did not participate in the competitive retail electric market.

Throughout the Protocols process, members of the PUC Staff opposed the creation of PCRs and any favorable treatment of NOIEs in the fledgling competitive market. Staff’s stated reasoning was simple: The existence of PCRs had no place in the competitive market and amounted to a subsidization of NOIEs’ congestion costs by those participants in the competitive retail electric market.

The Commission, in its Order on Rehearing in Docket 23220 and again in Docket 24770,¹ however, rejected the Staff’s position and found that PCRs were appropriate for NOIEs provided that those NOIEs had a “long-term (greater than five years) contractual commitment for annual capacity and energy from a specific remote resource prior to September 1, 1999.”²

Denison Dam was completed in 1943 and was originally designed to control flooding on the Red River as well as provide hydroelectric power during World War II. Managed by the SWPA, the hydro-generated electricity from the Denison Dam is allocated to certain *preference customers* pursuant to federal mandate:

"SWPA will not withdraw any capacity now under contract to a preference customer in order to sell the capacity to another preference customer. As contracts expire, SWPA will offer to enter into peaking contracts for the sale of a like amount of capacity ... In the case of isolated project contracts ... the SWPA will negotiate new contract arrangements for each project's

¹ Report of the Electric Reliability Council of Texas to the PUCT Regarding the Implementation of the ERCOT Protocols.

² ERCOT Protocols § 7.5.6. Direct Allocation of Pre-assigned Congestion Rights.

production with the preference customer then receiving the benefit of such federal project."

45 Fed. Reg. 19032, 19035-36 (1980).

The federal government, in this passage, prevents the SWPA from selling output from the Denison Dam hydroelectric station to anyone other than Tex-La and Rayburn Country, preference customers who share the output. These two cooperatives, and their members before them, have been allocated the output of Denison Dam since it was originally completed.

SWPA provided Tex-La and Rayburn Country with a first draft of their current fifteen year agreement for Denison Dam hydropower in **August of 1997**, two full years before Senate Bill 7 became effective, and over six years prior to the expiration of the then existing twenty year agreement on December 31, 2003. As with most contracts involving the Federal government, the process did not move quickly, however the contract was finally completed and executed on March 13, 2000. This type of advance negotiation is unheard of in the private sector, but is typical of this type of contract with the federal government. And it illustrates the unique and perpetual nature of the relationship. The contract between Tex-La, Rayburn Country, and the SWPA, a "captive seller" in this transaction, simply extended the continued obligation that began in the late 1940s. Tex-La is unaware of any contract for power in Texas that has been in existence for a longer term than the subject power contract, whether between a cooperative, a municipality, or an investor-owned utility, and a power supplier.

PRR No. 546 SHOULD BE APPROVED

Tex-La and Rayburn Country find themselves in a situation that is an unintended and unforeseen consequence of the existing protocol. Their contract was executed six

months after the September 1, 1999 cutoff date, but about eight months before the EROCT protocols were first completed and filed with the PUCT in November 2000. The impact only became clear after the new northeast congestion zone was created in the fall of 2003, which for the first time separated Tex-La's load in the north zone from Denison Dam. After being rejected for PCR treatment by ERCOT, Tex-La purchased "normal" Transmission Congestion Rights ("TCRs") at a cost of approximately \$53,000. While this amount is not insignificant, Tex-La is concerned more about future exposure, particularly if a nodal market design is implemented. The amount of PCRs needed by Tex-La is small, only approximately 12 megawatts. In addition, the PRR is narrowly focused, and would not affect the other two federal projects in ERCOT, as they are located within the same congestion zone as the load they serve.

At both the Protocol Review Subcommittee and TAC levels, the PRR received votes in favor well in excess of votes against. The PRR failed to pass through TAC only because of a high number of abstentions, a result that surprised many in attendance. ERCOT stakeholders that have indicated a position have strongly favored the PRR.

In addition, in ERCOT's own report to the Commission,³ ERCOT asserted that, not only were PCRs appropriate in light of the lengthy negotiations of the stakeholders, but that the below market valuation method, later replaced by the 15% of market valuation methodology, maintained the parity in the terms and conditions of use of the transmission system under the 1995 legislative revisions to PURA.

PUC Staff, in comments filed with ERCOT on October 21, 2004, acknowledged that the rationale for PCRs was to partially insulate NOIEs against congestion cost increases brought about by regulatory and market changes following the passage of

³ ERCOT's Report initiated and formed the basis of Docket 24770.

Senate Bill 7. PUC Staff then goes on to argue, however, that the proposed revision would “subsidize” Tex-La and Rayburn Country, given that the SWPA contract was not formally executed before September 1, 1999.

PUC Staff further explains its rationale. While completely failing to acknowledge the fact that this contractual agreement for hydro-electric power has been in place for well over fifty (50) years, and that both Tex-La and Rayburn Country are by definition preference customers entitled to such power, Staff submits that Tex-La, after the passage of SB7, did not have an obligation to go forward with the SWPA contract and instead should have considered alternative power contracts that took into consideration the congestion costs related to such transactions. Such a position is, quite simply, absurd.

To suggest that Tex-La give up its rights as a preference customer to the allocated hydro-electric power, power that has an approximate cost of fifteen (15) mills/kWh, and instead contract for alternative power in the market, which is approximately three (3) times as costly, ignores reality.⁴

While, technically speaking, Tex-La and Rayburn Country *could* have decided *not* to accept a long-term contract from a captive seller for arguably the cheapest energy and capacity in the state of Texas, to do so would be a clear dereliction of the duties and obligations owed to its members, and would furthermore be contrary to the intent behind the creation of the SWPA pursuant to the Flood Control Act of 1944 (rates

⁴ It is interesting and ironic to note that it was Tex-La’s actions in 1993 that led to the opening of the wholesale transmission market in Texas. At that time, Texas Utilities had refused to provide transmission service to Tex-La for the delivery of hydroelectric energy and capacity from the Denison Dam. Tex-La filed suit at the Federal Energy Regulatory Commission alleging an FPA § 211 violation. As a result of that case, the ERCOT wholesale market soon was open for competition by and through revisions to PURA in 1995.

shall be established “in such a manner as to encourage the most widespread use at the lowest possible rates to consumers consistent with sound business principles”).⁵

The requested revision is completely consistent with the legislative intent of SB 7, irrespective of PUC Staff’s unsupported statement to the contrary. In fact, the Commission has previously approved deviations from the express language of the Protocols. For example, in Docket 24770, South Texas Electric Cooperative, Inc., (“STEC”) averred that it should be excepted from the requirement that all NOIEs lose their rights and ownership of PCRs immediately upon opting in to the competitive retail electric market. Such request for an exception was granted in the Commission’s Final Order in Docket 24770. In that particular instance, the Commission recognized the importance of ensuring that NOIEs would not suffer harm when it entered the competitive retail electric market because STEC would need time to rearrange its power supply portfolio and contracts. The Commission found STEC’s request to be in the public interest, notwithstanding the fact that the Protocols state that such PCRs were available only until that time that a cooperative or MOU implemented retail customer choice, or such other date as specified by the Commission. Tex-La and Rayburn Country respectfully submit that the instant situation requires the same consideration and understanding.

CONCLUSION

Tex-La and Rayburn Country, as a result of being preference customers afforded a unique opportunity to purchase extremely low-cost energy and capacity, and furthermore, as a result of the realities of negotiating with a branch of the federal government, are in a situation that requires an exception. This requested exception is

⁵ Flood Control Act of 1944, § 5.

narrowly tailored and reflective of the analogous exception given to Tex-La and Rayburn Country in ERCOT Protocols § 16.5.1.1. (Waiver of Federal Hydroelectric Facilities) and very similar to the exception granted by the NUS signatories and Commission to STEC in Docket 24770. Reversal of the TAC decision will further the intent of the Flood Control Act of 1944, 45 Fed. Reg. 19032 (1980), and PURA99. Approval of PRR No. 546 is in the public interest and will allow Tex-La and Rayburn Country to continue to serve their member-customers with the lowest cost power available.