

**STATEMENT OF POSITION OF COMMERCIAL METALS CORPORATION,
CHAPARRAL STEEL MIDLOTHIAN L.P., AND NUCOR STEEL IN SUPPORT OF
TIEC'S APPEAL OF THE FEBRUARY 5, 2009 TAC ACTION TABLING PRR 776**

Commercial Metals Corporation (CMC), Nucor Steel (Nucor) and Chaparral Steel Midlothian L.P. (Chaparral) are members of the Industrial Segment of ERCOT in good standing. Further, each is adversely affected by the Technical Advisory Committee's (TAC) failure to adopt PRR 776 and instead table it pending completion of work on another PRR intended to create and implement a new scarcity pricing mechanism for the Zonal Market. Consequently, CMC, Nucor and Chaparral collectively submit this statement of position in support of TIEC's appeal, pursuant to Section 8.3.3 of ERCOT's Board Policies and Procedures.

Preliminary Procedural Issues

Two procedural issues were raised at TAC in an effort to prevent the Board from considering and acting upon the merits of PRR 776. The first is the contention that TAC's failure to approve PRR 776 (the vote was 20 to 10 in favor, just shy of the 67% required for approval) is non-appealable because it purportedly does not constitute an "act" of TAC. According to ERCOT's General Counsel, a failed vote to approve a PRR does not constitute an appealable "act" of TAC. The second procedural issue is whether, in the context of an appeal of an act by TAC to table a motion, the ERCOT Board is limited solely to consideration of the appropriateness of tabling the PRR and is not empowered to address the merits of the tabled PRR.

We submit that the failure of a TAC vote to approve a PRR constitutes TAC action which is appealable by an affected person pursuant to Section 8.1 of ERCOT's Board Policies and Procedures and that ERCOT General Counsel's interpretation of that section to the contrary is incorrect. We submit further that the appeal of the tabling of a PRR in no way limits the ability of the Board to consider the merits of a PRR that in this instance is fully ripe for consideration.

As to whether the vote on the PRR constitutes an "action," the ERCOT Board Policies and Procedures Section 8.1 says "Any entity that can demonstrate that it is affected by a TAC action . . . may appeal the TAC action to the Board." As noted above, CMC, Nucor and Chaparral are "affected" by the TAC action. The terms in the Board's Policies and Procedures should be given their plain and ordinary meaning. *Boswell v. Brazos Elec. Power Co-op., Inc.* 910 S.W.2d 593, 600 (Tex.App.-Fort Worth, 1995, cert den.) According to Black's Law Dictionary, "action" means "[t]he process of doing something; conduct or behavior." Black's Law Dictionary 31 (8th ed. 2004). The vote by the TAC constituted an "action" since the TAC "did something" and engaged in "behavior." To construe the word "action" in any other manner would leave affected persons "in perpetual limbo since inaction is never treated as either approval or rejection." *City of Rockwall v. Hughes*, 246 S.W.3d 621, Willett dissenting, fn 28 (Tex., 2008.)

Furthermore, there does not appear to be a dispute that the vote on the motion to table was an “action,” appealable to this Board. The TAC Procedures, paragraph E, prescribe Robert’s Rules of Order as the appropriate guide. Under Robert’s Rules, a motion to table captures the “pending question and *everything adhering to it.*” <http://www.rulesonline.com/rror-05.htm#28> (emphasis added). Thus, the question of the merits of PRR 776 “adheres” to the motion to table. Once the question is before the Board, it is the duty of the Board “to initiate *any specific action* required, in their opinion, to fulfill the purposes of ERCOT. Amended and Restated Bylaws of ERCOT, Section 4.10 (emphasis added). With regard to appeals from TAC actions the Bylaws make clear that “such actions are reported to the Board for review and *nothing herein* shall affect the ability of the Board to independently consider such guidelines, criteria and actions, and to *take such action* with respect thereto as the Board *deems appropriate*, including revocation and remand with instructions.” Bylaws, Section 5.2. In other words, the Board can consider everything the TAC could consider with regard to PRR 776 and can take any action that is required to fulfill the purposes of ERCOT.

This matter is now before ERCOT as an “Urgent” matter and the ERCOT rules require an “expedited process” to determine such appeals. Board Policy and Procedures, Section 8.4. The opponents of consideration want to avoid “expedited process” by the Board. This is inconsistent with the Board’s duty and ERCOT rules. In order to properly process this Urgent matter, the Board should review the substance of PRR 776 and take the appropriate action.

Background

PRR 776 was filed by TIEC to correct a gross inequity in Balancing Energy Service (BES) pricing. Currently, when Non-Spinning Reserves (NSRS) are deployed, the posted BES price is recalculated on an *ex post facto* basis - after loads have already purchased the balancing energy, resulting in the inability of loads to receive and react to true price signals, and further resulting in loads relying to their detriment on false price signals posted in advance by ERCOT. The cause of the *ex post facto* price change is PRR 650, which provides that, whenever any NSRS is deployed, the entirety of the NSRS purchased by ERCOT is added to the BES bid stack, regardless of whether it is all deployed or not, and the BES price recalculated accordingly.

Operation of PRR 650 has deprived loads of the ability to respond to price signals, and has further resulted in unjustified BES price spikes. A good example of this is the *ex post facto* BES price spike that occurred during eight intervals on August 7, 2008, when posted BES prices in the range of \$117 to \$250/MWh were re-priced after the fact at \$1999/MWh. Loads cannot operate in a cost effective manner when subject to these kinds of unforeseeable after-the-fact price modifications. During these eight intervals alone, the steel mills estimate that the *ex post facto* price increase cost the mills between \$500,000 and \$1,000,000. These loads would without question have curtailed their energy consumption during these

intervals had they been aware that ERCOT's posted prices were not valid and that the actual prices would be over eight times the prices posted in advance by ERCOT.

The current BES pricing also means that cheaper capacity is not being efficiently dispatched into the market. As noted by the Market Monitor in comments filed addressing PRR 776, the after-the-fact price spike during these eight intervals occurred notwithstanding that over 1000MW of dispatchable capacity with a marginal cost much less than \$1999/MWh was available but not dispatched. Sending the right pricing signals is critical to the operation of a workable electric market.

Loads simply cannot continue to operate indefinitely with *ex post facto* pricing and highly aberrant shifts in the BES clearing price caused by PRR 650. Implementation of a solution to this problem has become increasingly urgent given ERCOT's recent greatly increased purchase of, and reliance upon, NSRS. PRR 776 is the solution upon which all market participants have reached general agreement, and should be adopted by the Board without delay.

Support for TIEC Appeal

As noted in TIEC's appeal, PRR 776 was originally submitted by TIEC on August 25, 2008 and was granted "urgent" status by PRS on October 23, 2008. At the November 6, 2008 TAC meeting, PRR 776 was tabled with TIEC's consent in order for market participants to discuss and agree upon possible improvements to the PRR as originally filed. The result is a fully vetted, thoroughly debated consensus PRR, the passage of which is urgently required and is more than ripe for adoption.

Unfortunately, some stakeholders who actively participated in crafting the compromise version of PRR 776 now insist that PRR 776 should not be adopted without the simultaneous adoption of PRR 791, which was only first filed in mid-December, and which purports to implement a new scarcity pricing mechanism. That PRR has not been fully vetted. The sponsors of that PRR have not demonstrated to date why a new scarcity pricing mechanism is necessary, what the cost impact of the PRR would be on loads, how often the pricing mechanism would come into play, or whether there are satisfactory alternatives that would be less costly for loads. In fact, there has been no compelling case made that current revenues received by generators are inadequate, or that the failure to adopt PRR 791 would endanger generation adequacy. Nor have these stakeholders offered to terminate the current scarcity pricing mechanism in exchange for adoption of a new one.

Additionally, it is important to note that the scarcity pricing mechanism proposed in PRR 791 was specifically not adopted by the PUC at the time the current generation adequacy rule was adopted. It is inappropriate for stakeholders, each of whom are motivated by financial self-interest to decide this type of issue because a scarcity pricing mechanism results in the shifting between market participants of massive amounts of money. The PUC is the proper forum for this issue and it is

inappropriate for ERCOT stakeholders to preempt the PUC's prerogative by implementing a new scarcity pricing mechanism in the form of a PRR – especially one that the PUC has previously rejected. The Commission is the best entity suited to establish the fundamental policy issue of scarcity pricing. Once the policy is set, ERCOT can establish the highly technical details for implementing such a mechanism.

Those who favor delay for PRR 776 argue that the remaining issues surrounding PRR776 and PRR791 will be resolved prior to the March 5th TAC meeting, and thus this Board should delay implementation of PRR776. The steel companies feel much more work needs to be done with regard to the scarcity pricing mechanism and do not believe it is appropriate to hold needed reforms hostage to such work. In fact, adoption of PRR776 will provide significant incentive to move PRR791 along. The Board should adopt the well-vetted PRR 776 and support the adoption of a pragmatic scarcity pricing mechanism at the Commission. The steel companies do not necessarily oppose the adoption of a new scarcity pricing mechanism. What we do oppose is the adoption of a new scarcity pricing mechanism outside of the context of a PUC rulemaking, and without first thoroughly evaluating all aspects of the new proposal, including possible alternatives.

Plainly and simply, PRR 791 is not ripe for decision at this time. The forum selected by the PRR sponsors is not the appropriate forum to decide scarcity pricing, the proposed scarcity mechanism requires additional evaluation, the existing scarcity pricing mechanism needs to be terminated before a new one is adopted (the sponsors of PRR 776 do not appear to support this), and other potentially more cost effective solutions should at least be examined before adoption of the proposed scarcity pricing mechanism.

PRR 776 is being held hostage by operation of TAC's most recent vote to table the PRR, pending refinement and approval of PRR 791 – something that may never in fact occur. This is unacceptable. When a PRR has been granted "urgent" status, as has PRR 776, it is incumbent upon TAC and the Board to address the PRR in a definitive and expeditious fashion. The indefinite tabling on an urgent PRR that is ripe for action in order to await further development and approval of a separate PRR is clearly not contemplated by the Protocols or the Board Policies and Procedures. The steel mills submit that it is wholly inappropriate to put PRR 776, which has urgent status, into indefinite limbo by again tabling the PRR, pending action on PRR 791.

Some market participants have made rather extravagant claims regarding the impact that PRR 776 would have on the BES market and have asserted that the simultaneous adoption of PRR 791 is necessary in order to prevent that adverse impact. The problem, though, is that they have not yet demonstrated that the impact of PRR 776 would depress prices to an unreasonable degree during scarcity conditions. It would likely slow the progression of prices to the offer cap during shortage conditions, but that is not necessarily unreasonable since there is no reason to expect that prices should rise to the offer cap unless there is a serious

shortage of available capacity. The current shortage pricing mechanism is sufficient for at least the short term to ensure that offer caps are reached when the bid stack is exhausted. Furthermore, the proponents of PRR 791 have yet to demonstrate that PRR 776 would produce a reduction in generator revenue such that generation adequacy would be endangered.

In any event, adoption of PRR 776 does not mean that action will be taken on implementation of a new scarcity pricing mechanism. Loads have committed to work in good faith with generators and other market participants to correct deficiencies in the current scarcity pricing mechanism, and they will do so, but additional time and effort is needed to accomplish that objective. A new scarcity pricing mechanism is not something to be decided without careful examination of all aspects of the proposal, and the reasonableness of less costly alternatives – for instance, a mechanism that would increase net revenues to peaking units without creating a windfall for other types of units that are already receiving more than ample compensation.

Accordingly, we urge the Board to hear TIEC's appeal, and to approve PRR 776 in the form set out in TIEC's comments submitted in advance of the February 5, 2009 TAC meeting.