



Workshop: NPRR1312

Revising ERCOT's Standard
Form Market Participant
Agreement, Protocols Section 22,
Attachment A

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Workshop Agenda

I. **Standard Form Market Participant Agreement (SFA) overview**

- Purpose and history of ERCOT's SFA
- Brief overview of other ISO/RTO Standard Market Participant Agreements

II. **NPRR1312**

- Need for proposed changes
- Discussion of proposed changes to the SFA and ERCOT Protocols
- Discussion of proposed changes to other ERCOT Agreements/Forms

SFA Overview

- The SFA is an Agreement entered into between ERCOT and a Market Participant (MP) that “[s]ets forth the terms and conditions by which ERCOT and the Market Participant will discharge their respective duties and responsibilities under the ERCOT Protocols.”
 - The SFA serves as an acknowledgment of the statutory requirement to comply with the Protocols. See Public Utility Regulatory Act (PURA) § 39.151(j).
 - The SFA includes important terms that are contractual in nature such as: forum selection/choice of law, representations and warranties, limitation of damages and liability, assignment, venue, no partnership, etc.; and
 - As of July 1, 2007, the SFA includes the required provision excluding the Independent Market Monitor from certain liability. See 16 Tex. Admin. Code § (Rule) 25.365(o).
- ERCOT has had SFAs since the Zonal Protocols were approved in [2001](#). See [Zonal Protocols](#).
 - The Zonal Protocols included multiple SFAs that were distinct to each MP registration type (i.e., Load Serving Entity, Resource Entity, Qualified Scheduling Entity, etc.).

SFA Overview

- ERCOT currently maintains a singular SFA for all MP registration types.
- ERCOT has two additional Standard Form Agreements that a Resource Entity can enter into if it intends to supply either Reliability Must-Run (RMR) Service or Black Start Service. These Agreements are executed after the Resource Entity executes the SFA.
- NPRR1312 includes changes to the SFA and the Standard Form RMR and Black Start Agreements.

Other ISO/RTO Market Participant Agreements

ISO/RTO	SFA Equivalent
SPP	<ul style="list-style-type: none">• <u>Attachment AH</u> to SPP's Open Access Transmission Tariff.• Brief agreement that addresses service and standard contractual matters such as notice, termination, and the MP's representations and warranties.• Requires MP to comply with the Tariff.
PJM	<ul style="list-style-type: none">• <u>Standard Form Agreement to Become a Member of the LLC</u>, Schedule 4 of the PJM Operating Agreement (part of Tariff).• Brief agreement that primarily indicates that the MP agrees to be bound by and accepts all the terms of PJM's Operating Agreement.
MISO	<ul style="list-style-type: none">• <u>Attachment W</u> in the "Attachments" section of MISO's Tariff.• Brief agreement that incorporates the Tariff by reference.• Additional legal documents are required to register as a MISO MP (NDA, annual certification/disclosure forms).

Other ISO/RTO Market Participant Agreements

ISO/RTO	SFA Equivalent
CAISO	<ul style="list-style-type: none">• Most relevant agreement is the <u>Scheduling Coordinator Agreement</u> in Appendix B.1 of the Tariff; CAISO only deals directly with Scheduling Coordinators (equivalent to QSEs in that they submit bids for energy and ancillary services).• Requires a Scheduling Coordinator to abide by the CAISO Tariff, both generally and regarding specific issues such as dispute resolution, penalties/sanctions, and liability.• Contains standard contract clauses for notice, termination, representations and warranties, severability, governing law/forum, etc.• Provides that the Tariff prevails over the Agreement in the event of a conflict.

Other ISO/RTO Market Participant Agreements

ISO/RTO	SFA Equivalent
NYISO	<ul style="list-style-type: none">• An MP must execute <u>both</u> pro forma agreements for NYISO's Market Services Tariff (relating to energy/ancillary services) <u>and</u> Open Access Transmission Tariff (relating to transmission), regardless of the specific market function that the MP is interested in.• The MP agrees to comply with the NYISO Tariff, including taking/paying for or supplying services to the ISO.• The ISO agrees to provide services in accordance with the Tariff.
ISO-NE	<ul style="list-style-type: none">• Market Participant Service Agreement, Attachment A to ISO-NE Tariff.• Like CAISO, contains a general requirement for the MP to comply with ISO-NE Operating Documents (including Tariff) <u>and</u> states that specific matters are governed by the Operating Documents (such as dispute resolution, liability, force majeure, etc.).• Contains standard legal terms such as notice, waiver, amendment, governing law, no assignment, and no third-party beneficiaries.• Contains additional sections explaining ISO's role/mission, MP registration requirements, MP equipment operation/maintenance requirements, MP's reservation of rights to its assets, and terms of MP's purchases and sales to the ISO.

NPRR1312 Promotes the Following Policy Objectives:

- Updating SFA to reflect:
 - ERCOT's sovereign immunity and the Public Utility Commission of Texas' (PUC) exclusive jurisdiction per the Texas Supreme Court's *CPS v. ERCOT* decision (*CPS*); and
 - Winter Storm Uri lessons learned
- Promoting efficiency
- Harmonizing the SFA with the Protocols
- Modernizing the SFA to reflect current legal/technological norms

Current SFA Sections v. Proposed SFA Sections

- | | |
|--|--|
| 1. Notice | 7. [Reserved] ** <u>Default and Force Majeure</u> |
| 2. Definitions | 8. Default <u>Limitation of Damages and Liability</u> |
| 3. Terms and Termination* | 9. Limitation of Damages and Liability and |
| 4. Representations, Warranties, and Covenants* | Indemnification <u>Dispute Resolution</u> |
| 5. Participation Obligations* | 10. Dispute Resolution <u>Miscellaneous</u> |
| 6. ERCOT Obligations* | 11. Miscellaneous |

* No substantive changes

**Existing Section 7 (Reserved) currently contains no language

SFA Section 1, Notice

ISSUES:

1. Notice terms are technologically out-of-date (fax is allowed as an option) and, in certain contexts, the terms create unnecessary expense as notice by mail is required, even though it has become common for contracts to allow notice by e-mail.
2. MPs must re-execute their SFA every time the notice terms are amended.

PROPOSED CHANGES:

1. Update terms to remove notice by fax and allow notice by e-mail in certain contexts where notice by mail is currently required.
2. Move the revised notice terms from the SFA to Protocols § 1 to avoid MPs needing to re-execute their SFA if the terms are amended.

SFA Section 1, Notice

Section 1. Notice.

Any Notice required to be given under this Agreement shall be provided in accordance with the Notice procedures contained in Protocol Section 1, Overview, except where another section of the Protocols authorizes notice by a different procedure under specified circumstances.

All notices required to be given under this Agreement shall be in writing, and shall be deemed delivered three (3) days after being deposited in the U.S. mail, first class postage prepaid, registered (or certified) mail, return receipt requested, addressed to the other Party at the address specified in this Agreement or shall be deemed delivered on the day of receipt if sent in another manner requiring a signed receipt, such as courier delivery or overnight delivery service. Either Party may change its address for such notices by delivering to the other Party a written notice referring specifically to this Agreement. Notices required under the ERCOT Protocols shall be in accordance with the applicable Section of the ERCOT Protocols.

If to ERCOT:

Electric Reliability Council of Texas, Inc.
Attn: Legal Department
8000 Metropolis Drive (Building E), Suite 100
Austin, Texas 78744
Telephone: (512) 225-7000
E-mail: MPRegistration@ercot.com
Faeximile: (512) 225-7079

If to Participant regarding a breach or Default under this Agreement, then Notice will be sent using Participant's contact information below:

[Insert Participant Name]
[Insert Contact Person/Dept.]
[Insert Street Address]
[Insert City, State Zip]
[Insert Telephone]
[Insert E-mail Address]
[Insert Faeximile]

Participant may amend its contact information under this Agreement by submitting a Notice of Change of Information (NCI) form (Section 23, Form E, Notice of Change of Information) to ERCOT.

New language clarifying that notice under the SFA will follow the procedures set forth in Protocols § 1, as slightly revised for modernization.

New language requiring e-mail contact for ERCOT and MP and deleting fax number.

New language clarifying and standardizing how an MP should update its contact information for notice purposes.

Corresponding Changes to Protocols § 1 re: Notice

1.8 Notice

(1) These provisions apply to giving Notice under the Protocols:

- (a) Where these Protocols require an Entity to provide, send, or deliver Notice, or to notify another Entity, such Notice shall be in writing unless otherwise specified. Where these Protocols do not specify the method by which written Notice should be sent, then the Notice may be sent by:
 - (i) Hand-delivery;
 - (ii) Electronic mail;
 - (iii) Overnight delivery service (e.g., Federal Express, DHL or similar service) that requires a signed receipt;
 - (iv) The Messaging System, Market Notice, or other electronic means provided for by these Protocols; or
 - (v) U.S. Mail, first class postage prepaid, registered (or certified) mail, return receipt requested, properly addressed.
- (b) Notice by facsimile, electronic mail, the Messaging System, Market Notice, or other electronic means provided for by these Protocols is considered received when sent unless transmitted after 5:00 p.m. local time of the recipient or on a non-Business Day, in which case it is considered received one Business Day after it was sent.
- (c) Notice by overnight delivery service that requires a signed receipt is considered received on the day that it was received.
- (d) Notice by U.S. Mail is considered received three days after the date it was deposited in the U.S. Mail, first class postage prepaid, registered (or certified) mail, return receipt requested, properly addressed.
- (e) If ERCOT is providing Notice to a Market Participant as required by the Protocols, then such Notice shall be provided to the Market Participant's Authorized Representative and backup Authorized Representative, in addition to any other person who is required to receive Notice under the Protocols. If ERCOT is providing Notice to a Market Participant regarding a breach or Default under an Agreement, then such Notice is only required to be provided to the Market Participant's contact for Notice listed in Section 22, Attachment A, Standard Form Market Participant Agreement. If a Market Participant is providing Notice to ERCOT as required by the Protocols or as provided under an Agreement, then such Notice shall be provided to ERCOT's contact for Notice listed in Section 22, Attachment A.
- (f) When the Protocols require a Notice to be in writing, sending it by electronic mail, the Messaging System, Market Notice, or other electronic means satisfies the requirement that the Notice be in writing.

No substantive change to the Protocols' existing Notice provisions (Protocols § 1.7(3)), just:

- Moving that section out from under § 1.7 Rules of Construction to a new section; and
- Eliminating notice by fax.

SFA Section 2, Definitions (ERCOT Protocols)

ISSUE: The term “ERCOT Protocols” is defined in both the SFA and Protocols § 1.1(1), and the definitions are substantially similar.

PROPOSED CHANGE: Delete duplicative “ERCOT Protocols” definition in the SFA because one definition promotes standardization and consistency. The deletion will also avoid MPs needing to re-execute their SFA if the definition is amended.

~~B. “ERCOT Protocols” shall mean the document adopted by ERCOT, including any attachments or exhibits referenced in that document, as amended from time to time, that contains the scheduling, operating, planning, reliability, and Settlement (including Customer registration) policies, rules, guidelines, procedures, standards, and criteria of ERCOT. For the purposes of determining responsibilities and rights at a given time, the ERCOT Protocols, as amended in accordance with the change procedure(s) described in the ERCOT Protocols, in effect at the time of the performance or non performance of an action, shall govern with respect to that action.~~

SFA Section 2, Definitions (Breach and Default)

ISSUE: The terms “Material Breach,” “Payment Breach,” “QSE Affiliation Breach,” “Other Material Breach,” and “Default” are defined in the SFA but not the Protocols.

PROPOSED CHANGE: Move these definitions from the SFA to Protocols § 2 (*Definitions*) to promote consistency and standardization because that is where the majority of ERCOT’s defined terms are found. This change is also consistent with another NPRR1312 proposal to move the SFA’s Default terms to the Protocols to promote efficiency and avoid MPs needing to re-execute their SFAs if Default terms are later amended.

Corresponding Changes to Protocols § 2 re: Breach and Default Definitions

Material Breach

A breach of an obligation under the Protocols, Other Binding Documents or an Agreement that may result in a Default. A Material Breach, includes, but is not limited to, one of the following categories:

Payment Breach

Failure by a Market Participant to pay, when due, any payment or Financial Security obligation owed to ERCOT (or its designee, if applicable) under the Protocols, Other Binding Documents, or any Agreement with ERCOT.

QSE Affiliation Breach

Failure by a Market Participant to designate or maintain an association with a QSE, if required by the Protocols.

Other Material Breach

Any material failure by a Market Participant or ERCOT to comply with the Protocols, Other Binding Documents, or any Agreement.

These definitions are restated from existing SFA Section 8.A(1)-(5) and are to be moved to Protocols § 2.

Default

An event, including an uncured Material Breach, as more particularly defined in the Protocols or any Agreements, that gives rise to certain remedies under the Protocols or an Agreement.

Protocols § 2 Definitions (Force Majeure Event)

ISSUES: The definition of “Force Majeure Event” in the Protocols provides that both a general “storm” or a “curtailment, order, regulation or restriction imposed by governmental... authorities” may constitute a Force Majeure Event. However, the definition should not excuse performance due to general winter weather for which an MP is required to weatherize or provide that a PUC order or ERCOT instruction constitutes a Force Majeure Event.

PROPOSED CHANGES

1. Delete the term “storm” and add the more specific terms “hurricane,” “tornado,” and “lightning strike.” This clarifies that a Force Majeure Event is not a storm (such as a winter storm) or other inclement weather and specifies certain events that would qualify.
2. Revise definition to clarify that a Force Majeure Event does not include any actions taken by the PUC or ERCOT.

Protocols § 2 Definitions (Force Majeure Event)

Force Majeure Event

Any event beyond the reasonable control of, and that occurs without the fault or negligence of, an Entity whose failure to performance was proximately caused~~is prevented~~ by the occurrence of such event. Examples of such a Force Majeure Event may include the following, subject to the limitations of the above sentence: an act of God, labor disturbance, act of the public enemy, war, insurrection, riot, fire, ~~storm~~ hurricane, tornado, lightning strike,~~or~~ flood, explosion, breakage or accident to machinery or equipment, or a curtailment, order, regulation or restriction imposed by governmental, military, or lawfully established civilian authorities. Notwithstanding the foregoing, a Force Majeure Event does not include any action taken by the Public Utility Commission of Texas (PUCT) or ERCOT, nor does it include wholesale prices whether or not resulting from a Force Majeure Event, nor any event caused in whole or in part by a failure to follow Good Utility Practice, or to satisfy requirements under applicable law or the Protocols regarding weatherization or physical resiliency.

Protocols § 2 Definitions (Market Participant)

ISSUES:

1. The definition of “Market Participant” in the Protocols includes an entity that has not signed the SFA; however, ERCOT’s process for MP registration requires an MP to do so. This is essential for ensuring MPs comply with the standards and obligations necessary for participation in ERCOT markets and the grid.
2. Potential compliance concerns regarding MP obligations. For example, the Lone Star Infrastructure Protection Act (LSIPA) places specific requirements on “Market Participants,” and if an MP does not comply, the MP could be subject to PUC enforcement and administrative penalties.

PROPOSED CHANGE: Revise to state that an MP is an entity that has executed the SFA in Protocols § 22 and is registered with ERCOT under one or more MP categories and delete any existing language that indicates otherwise.

Protocols § 2 Definitions (Market Participant)

Market Participant

An Entity, other than ERCOT, that has executed a Standard Form Market Participant Agreement (Section 22, Attachment A, Standard Form Market Participant Agreement) and is registered with ERCOT under one or more of the following categories:~~engages in any activity that is in whole or in part the subject of these Protocols, regardless of whether that Entity has signed an Agreement with ERCOT. Examples of such an Entity include but are not limited to the following:~~

- (a) Load Serving Entity (LSE);
- (b) Qualified Scheduling Entity (QSE);
- (c) Transmission and/or Distribution Service Provider (TDSP);
- (d) Congestion Revenue Right (CRR) Account Holder;
- (e) Resource Entity;
- (f) Independent Market Information System Registered Entity (IMRE); and
- (g) Renewable Energy Credit (REC) Account Holder.

SFA Section 3, Term and Termination

Section 3. Term and Termination.

- A. Term. The initial term ("Initial Term") of this Agreement shall commence on the Effective Date and continue until the last day of the month which is twelve (12) months from the Effective Date. After the Initial Term, this Agreement shall automatically renew for one-year terms (a "Renewal Term") unless the standard form of this Agreement contained in the ERCOT Protocols has been modified by a change to the ERCOT Protocols. If the standard form of this Agreement has been so modified, then this Agreement will terminate upon the effective date of the replacement agreement. This Agreement may also be terminated during the Initial Term or the then-current Renewal Term in accordance with this Agreement.
- B. Termination by Participant. Participant may, at its option, terminate this Agreement:
- (1) Immediately upon the failure of ERCOT to continue to be certified by the Public Utility Commission of Texas (PUCT) as the Independent Organization under PURA §39.151 without the immediate certification of another Independent Organization under PURA §39.151;
 - (2) If the "REC Account Holder" box is checked in Section A. of the *Recitals* section of this Agreement, Participant may, at its option, terminate this Agreement immediately if the PUCT ceases to certify ERCOT as the Entity approved by the PUCT ("Program Administrator") for carrying out the administrative responsibilities related to the Renewable Energy Credit Program as set forth in PUC Substantive Rule 25.173(hg) without the immediate certification of another Program Administrator under PURA §39.151; or
 - (3) For any other reason at any time upon thirty days written notice to ERCOT.
- C. Termination by ERCOT. ERCOT may terminate this Agreement in accordance with the Default provisions in Section 16, Registration and Qualification of Market Participants.
- DE. Effect of Termination and Survival of Terms. If this Agreement is terminated by a Party pursuant to the terms hereof, the rights and obligations of the Parties hereunder shall terminate, except that the rights and obligations of the Parties that have accrued under this Agreement prior to the date of termination shall survive.

No substantive change, just adds new language referring to the existing SFA Default provisions that are to be moved to Protocols § 16.

SFA Section 4, Representations, Warranties, & Covenants

- No substantive change to this section.
- These terms are contractual in nature and do not need to be moved to the Protocols.

SFA Sections 5 & 6, Participant Obligations & ERCOT Obligations

ISSUE: While the Protocols state that both MPs and ERCOT are required to comply with ERCOT's Other Binding Documents (OBDs), the SFA currently only states compliance with the Protocols is required.

- See Protocols § 1.1(5) (“To the extent that Other Binding Documents are not in conflict with these Protocols or with an Agreement to which it is a party, each Market Participant, the IMM, and ERCOT shall abide by the Other Binding Documents...”).

PROPOSED CHANGE: Revise SFA to clarify that an MP and ERCOT are required to comply with both the Protocols and OBDs.

SFA Sections 5 & 6, Participant Obligations & ERCOT Obligations

Section 5. Participant Obligations.

- A. Participant shall comply with, and be bound by, all ERCOT Protocols and Other Binding Documents (OBDs).
- B. Participant shall not take any action, without first providing written notice to ERCOT and reasonable time for ERCOT and Market Participants to respond, that would cause a Market Participant within the ERCOT Region that is not a “public utility” under the Federal Power Act or ERCOT itself to become a “public utility” under the Federal Power Act or become subject to the plenary jurisdiction of the Federal Energy Regulatory Commission.

Section 6. ERCOT Obligations.

- A. ERCOT shall comply with, and be bound by, all ERCOT Protocols and Other Binding Documents.
- B. ERCOT shall not take any action, without first providing written notice to Participant and reasonable time for Participant and other Market Participants to respond, that would cause Participant, if Participant is not a “public utility” under the Federal Power Act, or ERCOT itself to become a “public utility” under the Federal Power Act or become subject to the plenary jurisdiction of the Federal Energy Regulatory Commission. If ERCOT receives any notice similar to that described in Section 5(B) from any Market Participant, ERCOT shall provide notice of same to Participant.

SFA Section 7, Default & Force Majeure

ISSUES:

1. Default provisions and the Force Majeure clause are in the SFA, and thus an MP must re-execute their SFA each time those sections are amended.
2. When a breach cannot be reasonably cured within 14 Business Days, ERCOT does not have the same “opportunity to cure” to avoid Default that an MP has.

PROPOSED CHANGES:

1. Transfer the Default terms and Force Majeure clause from the SFA to Protocols § 16 to establish a universal standard that can be applied to other ERCOT Agreements (like the RMR and Black Start Agreements).
 - Reorganize the Default and Force Majeure SFA sections consistent with the structure of the Protocols.
2. Revise Default terms so that ERCOT has the same opportunity to avoid a Default as an MP.

SFA Section 7, Default & Force Majeure

Section 7. [RESERVED]

Section 7B. Default and Force Majeure.

Default and Force Majeure under this Agreement shall be governed by Section 16, Registration and Qualification of Market Participants. A Default or Material Breach of this Agreement by a Party shall not relieve either Party of the obligation to comply with the ERCOT Protocols and Other Binding Documents.

A. ~~Event of Default.~~

~~(1) Failure by Participant to (i) pay when due, any payment or Financial Security obligation owed to ERCOT or its designee, if applicable, under any agreement with ERCOT ("Payment Breach"), or (ii) designate/maintain an association with a QSE (if required by the ERCOT Protocols) ("QSE Affiliation Breach"), shall constitute a material breach and event of default ("Default") unless cured within one (1) Bank Business Day after ERCOT delivers written notice of the breach to Participant. Provided further that if such a material breach, regardless of whether the breaching Party cures the breach within the allotted time after notice of the material breach, occurs more than three (3) times in a 12-month period, the fourth such breach shall constitute a Default.~~

~~(2) A material breach other than a Payment Breach or a QSE Affiliation Breach includes any material failure by Participant to comply with the ERCOT Protocols. A material breach under this subsection shall constitute an event of Default by Participant unless cured within fourteen (14) Business Days after delivery by ERCOT of written notice of the material breach to Participant. Participant must begin work or other efforts within three (3) Business Days to cure such material breach after delivery of the breach notice by ERCOT, and must prosecute such work or other efforts with reasonable diligence until the breach is cured. Provided further that if a material breach, regardless of whether such breach is cured within the allotted time after notice of the material breach, occurs more than three (3) times in a 12-month period, the fourth such breach shall constitute a Default.~~

~~A material breach under this subsection shall not result in a Default if the breach cannot reasonably be cured within fourteen (14) Business Days, and Participant:~~

- ~~(a) Promptly provides ERCOT with written notice of the reasons why the breach cannot reasonably be cured within fourteen (14) Business Days;~~
- ~~(b) Begins to work or other efforts to cure the breach within three (3) Business Days after ERCOT's delivery of the notice to Participant; and~~

New language combining the Default and Force Majeure sections, confirming those matters will be governed by Protocols § 16, and restating the existing SFA Section 8.B(3) obligation to comply with Protocols (including OBDs).

Moving the existing SFA Default and Force Majeure sections to the Protocols

Corresponding Changes in Protocols § 16 re: Default

16.20 Default Under an Agreement Between ERCOT and a Market Participant and Remedies for Default

- (1) This section shall apply to an event of Default under an Agreement between ERCOT and a Market Participant except where the Protocols provide for different procedures to be used to resolve a specific type of dispute.

16.20.1 Default by a Market Participant and ERCOT's Remedies

- (1) A Default under an Agreement occurs when:
- (a) ERCOT notifies a Market Participant that the Market Participant has committed a Payment Breach, and the Market Participant fails to cure the breach within one Bank Business Day of receiving such Notice;
 - (b) ERCOT notifies a Market Participant that the Market Participant has committed a QSE Affiliation Breach, and the Market Participant fails to cure the breach within one Bank Business Day of receiving such Notice;
 - (c) ERCOT notifies a Market Participant that the Market Participant has committed an Other Material Breach, and the Market Participant fails to cure the breach within 14 Business Days of receiving such Notice;
 - (d) A Market Participant commits a fourth Material Breach after committing a Material Breach more than three times within a 12-month period, regardless of whether the Market Participant has cured any of the three prior breaches within the allotted time after the Market Participant receives notice of the prior Material Breaches.
- (2) An Other Material Breach shall not result in a Default if a Market Participant cannot reasonably cure the breach within 14 Business Days, and the Market Participant:
- (a) Promptly provides ERCOT with written Notice of the reasons why the breach cannot be reasonably cured within 14 Business Days;
 - (b) Begins reasonable efforts to cure the breach within three Business Days after receiving ERCOT's Notice of the breach; and
 - (c) Prosecutes the curative efforts with reasonable diligence until the efforts are completed.
- (3) Bankruptcy by a Market Participant shall constitute an event of Default, except for the filing of a petition in involuntary bankruptcy or similar involuntary proceedings that is dismissed within 90 days thereafter.

§16.20 is new language explaining this section applies to a Default under an Agreement with ERCOT.

§16.20.1(1)-(3) are restatements of existing SFA Section 8.A(1)-(3).

Corresponding Changes in Protocols § 16 re: Default

- (4) In the event of a Default by a Market Participant, ERCOT may pursue any remedies that ERCOT has under the Protocols, at law or in equity. In the event of a Default by a Market Participant, if the Protocols do not specify a remedy for a particular Default, ERCOT may, at its option and upon Notice to the Market Participant, immediately terminate the Market Participant's registration and Standard Form Market Participant Agreement (Section 22, Attachment A, Standard Form Market Participant Agreement). If ERCOT terminates a Market Participant's Standard Form Market Participant Agreement, then all other Agreements that were entered into under the Protocols are automatically terminated. Termination is effective when the Market Participant receives ERCOT's notice of termination.
- (a) In the event of a Market Participant's bankruptcy, the Market Participant waives any right to challenge ERCOT's right to set off amounts that ERCOT owes to the Market Participant by the amount of any sums owed by the Market Participant to ERCOT, including any amounts owed pursuant to the operation of the Protocols.
- (5) This Section does not affect ERCOT's right to suspend or terminate a Market Participant's registration or access to ERCOT systems as may otherwise be permitted in the Protocols or other applicable law.

§16.20.1(4) is a restatement of existing SFA Section 8.B(1) and adds new language providing that:

1. If an MP's SFA is terminated, then all other Agreements that MP has entered into under the Protocols are automatically terminated; and
2. Termination is effective when the MP receives ERCOT's notice of termination.

§16.20.1(5) is new language. An example of why this was added would be ERCOT's termination/suspension of an of MP's registration/access due to the MP's non-compliance with the LSIPA.

Restatement of SFA § 8.B(3)

Corresponding Changes in Protocols § 16 re: Default

16.20.2 Default by ERCOT and Market Participant's Remedies

- (1) A Default by ERCOT under an Agreement occurs when ERCOT commits an Other Material Breach, other than a breach of an obligation to make a payment to a Market Participant, and ERCOT fails to cure such breach within 14 Business Days after ERCOT receives notice of such breach from an affected Market Participant.
- (2) An Other Material Breach under this section shall not result in a Default if ERCOT cannot reasonably cure the breach within 14 Business Days, and ERCOT:
 - (a) Promptly provides an affected Market Participant with written Notice of the reasons why the breach cannot be reasonably cured within 14 Business Days;
 - (b) Begins work or other efforts to cure the breach within three Business Days after ERCOT receives Notice of the breach from an affected Market Participant; and
 - (c) Prosecutes the curative work or efforts with reasonable diligence until the curative work or efforts are completed.
- (3) A Settlement dispute is not a Material Breach or subject to the Default procedures in the Protocols but instead is governed by procedures in the Protocols relating to Settlement and billing disputes and the Alternative Dispute Resolution (ADR) process in Section 20, Alternative Dispute Resolution Procedure and Procedure for Return of Settlement Funds. ERCOT's resolution of an ADR is appealable to the PUCT under P.U.C PROC. R. 22.251, Review of Electric Reliability Council of Texas (ERCOT) Conduct.

§16.20.2(1) is a partial restatement existing SFA Section 8.A(3) and refers to the relocated definition of "Other Material Breach."

§16.20.2(2) is new language providing ERCOT an opportunity to cure an Other Material Breach and avoid default.

§16.20.2(3) is new language clarifying that a Settlement dispute is not a Material Breach and is subject to the ADR procedures in Protocols § 20.

Corresponding Changes in Protocols § 16 re: Default

(4) Unless otherwise specified in the Protocols and subject to Section 20, in the event of a Default by ERCOT, a Market Participant's remedies shall be limited to:

(a) Termination of the Standard Form Market Participant Agreement (Section 22, Attachment A, Standard Form Market Participant Agreement) upon notice to ERCOT; and

(b) Seeking relief from the PUCT under P.U.C PROC. R. 22.251.

(5) Notwithstanding the foregoing, in the event of a Default arising from a Material Breach by ERCOT of any of its representations, warranties, or covenants in the Standard Form Market Participant Agreement, a Market Participant's sole remedy shall be termination of the Standard Form Market Participant Agreement upon notice to ERCOT.

§16.20.2(4) is a partial restatement of existing SFA Section 8.B(2) with changes to clarify an MP's opportunities for remedy.

§16.20.2(5) is a restatement of existing SFA Section 8.B(2)(b).

Corresponding Changes in Protocols § 16 re: Force Majeure

16.21 Force Majeure

- (1) If, due to a Force Majeure Event, ERCOT or a Market Participant is in Material Breach, other than a Payment Breach, with respect to an obligation under a written Agreement, then such breach shall not result in a Default, except as otherwise provided by the Protocols, if the breaching Entity complies with the following requirements:
- (a) The breaching Entity shall take reasonable steps, consistent with Good Utility Practice, to remedy such breach;
- (b) The breaching Entity shall notify the other Entity as soon as reasonably practicable, but not later than 14 calendar days after the breaching Entity becomes aware of the Force Majeure Event; and
- (c) The breaching Entity shall provide notice to the other Entity, as soon as reasonably practicable, when the Force Majeure Event ends.
- (2) Notice under this section shall include a detailed description of the obligations affected by a Force Majeure Event and how the Force Majeure Event prevented the breaching Entity from fulfilling those obligations. A failure to provide timely and adequate Notice under paragraphs (1) and (2) above regarding a Force Majeure Event shall constitute a waiver of the claim of Force Majeure Event.
- (3) Notwithstanding the foregoing, a Force Majeure Event does not relieve a Market Participant of any obligation to make payments, and a failure to make payments will result in a Default. A Force Majeure Event also does not excuse a Market Participant from any consequences of non-performance pursuant to the Protocols or any Agreement.

§16.21(1)-(2) is a restatement of existing SFA Section 8.C(1).

§16.21(3) is a restatement of existing SFA Section 8.C(2).

SFA Section 8, Limitation of Damages & Liability

ISSUES:

1. Overall, the existing limitation of damages and liability language is effective but needs some clarification.
 - Ex: Punitive damages are now known as exemplary damages under Chapter 41 of the Texas Civil Practice & Remedies Code.
2. The scope of ERCOT's immunity is understood differently considering the Texas Supreme Court's decision in *CPS*.

PROPOSED CHANGES:

1. Retain the limitation of damages and liability provision but clarify the scope.
2. Delete provisions that do not reflect ERCOT's sovereign immunity.

SFA Section 8, Limitation of Damages & Liability

Section ~~89~~. Limitation of Damages and Liability ~~and Indemnification~~.

A. IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER FOR ANY SPECIAL, INDIRECT, PUNITIVE, EXEMPLARY, OR CONSEQUENTIAL DAMAGES (INCLUDING, BUT NOT LIMITED TO, LOSSES OF USE, INCOME, PROFIT, FINANCING, BUSINESS AND REPUTATION, PROPERTY DAMAGE), OR PERSONAL OR BODILY INJURY THAT MAY OCCUR, IN WHOLE OR IN PART, AS A RESULT OF ANY DEFAULT UNDER THIS AGREEMENT, VIOLATION OF PROTOCOL OR APPLICABLE LAW, BREACH OF WARRANTY, NEGLIGENCE OR OTHER TORT, OR ANY OTHER CAUSE, WHETHER OR NOT A PARTY HAD KNOWLEDGE OF THE CIRCUMSTANCES THAT RESULTED IN THE SPECIAL, INDIRECT, PUNITIVE, EXEMPLARY, OR CONSEQUENTIAL DAMAGES OR INJURY, OR COULD HAVE FORESEEN THAT SUCH DAMAGES OR INJURY WOULD OCCUR.

~~EXCEPT AS EXPRESSLY LIMITED IN THIS AGREEMENT OR THE ERCOT PROTOCOLS, ERCOT OR PARTICIPANT MAY SEEK FROM THE OTHER, THROUGH APPLICABLE DISPUTE RESOLUTION PROCEDURES SET FORTH IN THE ERCOT PROTOCOLS, ANY MONETARY DAMAGES OR OTHER REMEDY OTHERWISE ALLOWABLE UNDER TEXAS LAW, AS DAMAGES FOR DEFAULT OR BREACH OF THE OBLIGATIONS UNDER THIS AGREEMENT; PROVIDED, HOWEVER, THAT NEITHER PARTY IS LIABLE TO THE OTHER FOR ANY SPECIAL, INDIRECT, PUNITIVE OR CONSEQUENTIAL DAMAGES OR INJURY THAT MAY OCCUR, IN WHOLE OR IN PART, AS A RESULT OF A DEFAULT UNDER THIS AGREEMENT, A TORT, OR ANY OTHER CAUSE, WHETHER OR NOT A PARTY HAD KNOWLEDGE OF THE CIRCUMSTANCES THAT RESULTED IN THE SPECIAL, INDIRECT, PUNITIVE OR CONSEQUENTIAL DAMAGES OR INJURY, OR COULD HAVE FORESEEN THAT SUCH DAMAGES OR INJURY WOULD OCCUR.~~

← Revised to specify ERCOT's and the MP's scope of limited liability and damages.

SFA Section 8, Limitation of Damages & Liability

~~B. Duty to Mitigate. Except as expressly provided otherwise herein or in the Protocols, each Party shall use commercially reasonable efforts to mitigate any damages it may incur as a result of the other Party's Default or breach of its obligations under this Agreement.~~

Restated from
existing SFA
Section 8.D.

~~B. With respect to any dispute regarding a Default or breach by ERCOT of its obligations under this Agreement, ERCOT expressly waives any Limitation of Liability to which it may be entitled under the Charitable Immunity and Liability Act of 1987, Tex. Civ. Prac. & Rem. Code §84.006, or successor statute.~~

Deleted to align
with ERCOT's
sovereign
immunity ruling.

~~C. The Parties have expressly agreed that, other than subsections A and B of this Section, this Agreement shall not include any other limitations of liability or indemnification provisions, and that such issues shall be governed solely by applicable law, in a manner consistent with the Choice of Law and Venue subsection of this Agreement, regardless of any contrary provisions that may be included in or subsequently added to the ERCOT Protocols (outside of this Agreement).~~

CD. The Independent Market Monitor (IMM), and its directors, officers, employees, and agents, shall not be liable to any person or Entity for any act or omission, other than an act or omission constituting gross negligence or intentional misconduct, including but not limited to liability for any financial loss, loss of economic advantage, opportunity cost, or actual, direct, indirect, or consequential damages of any kind resulting from or attributable to any such act or omission of the IMM, as long as such act or omission arose from or is related to matters within the scope of the IMM's authority arising under or relating to PURA §39.1515 and P.U.C SUBST. R. 25.365, Independent Market Monitor.

SFA Section 9, Dispute Resolution

ISSUE: Overall, the existing dispute resolution language is effective but needs some clarification.

PROPOSED CHANGE: Revise language to clarify that the applicable dispute resolution procedures are only a prerequisite for claims brought by an MP against ERCOT.

Section 10. Dispute Resolution.

- A. ~~A Participant may only seek monetary or other relief against ERCOT through In the event of a dispute, including a dispute regarding a Default, under this Agreement, Parties to this Agreement shall first attempt resolution of the dispute using~~ the applicable dispute resolution procedures set forth in Section 20 of the ERCOT Protocols.
- B. In the event of a dispute, including a dispute regarding a Default, under this Agreement, each Party shall bear its own costs and fees, including, but not limited to attorneys' fees, court costs, and its share of any mediation or arbitration fees.

SFA Section 10, Miscellaneous re: Choice of Law and Venue

ISSUES:

1. The existing language does not reflect the *CPS* decision regarding ERCOT's sovereign immunity and the PUC's exclusive jurisdiction over ERCOT.
2. The venue clause should be strengthened to provide greater predictability about where venue is proper and to avoid venue disputes.

PROPOSED CHANGES:

1. Add language noting PUC's exclusive jurisdiction over claims against ERCOT and expressly stating ERCOT does not waive its sovereign immunity.
2. Add language acknowledging that the SFA constitutes a Major Transaction with a value equal to or greater than \$1 million under Tex. Civ. Prac. & Rem. Code § 15.020.

SFA Section 10, Miscellaneous re: Choice of Law and Venue

A. Choice of Law and Venue. Notwithstanding anything to the contrary in this Agreement, this Agreement shall be deemed entered into and performable solely in Texas and, with the exception of matters governed exclusively by federal law, shall be governed by and construed and interpreted in accordance with the laws of the State of Texas that apply to contracts executed in and performed entirely within the State of Texas, without reference to any rules of conflict of laws. The Participant acknowledges that, to the extent it files a claim relating to ERCOT's exercise of its responsibilities as the Independent Organization certified under PURA, the PUCT has exclusive jurisdiction over claims filed against ERCOT. Neither Party waives exclusive jurisdiction or primary jurisdiction as a defense; provided that any court suits regarding this Agreement, if allowed, shall be brought in a state, ~~or~~ federal, or business court located within Travis County, Texas, and the Parties hereby waive any defense of forum non-conveniens, ~~except defenses under Tex. Civ. Prac. & Rem. Code §15.002(b).~~ The Parties acknowledge that this Agreement constitutes a Major Transaction under Tex. Civ. Prac. & Rem. Code § 15.020, and waive any argument to the contrary.

A.B. No Waiver of Sovereign Immunity. ERCOT does not waive sovereign immunity by entering into this Agreement and specifically retains all immunities and all defenses available to it under the Constitution, the laws of the State of Texas, and the common law.

New language to reflect holding in *CPS*.

New language to ensure suits against ERCOT are filed in Travis County, Texas.

New language to reflect holding in *CPS*.

SFA Section 10, Miscellaneous re: Assignment

ISSUE: The existing Assignment clause does not reflect:

1. LSIPA requirements that an assignment/transfer of an MP's rights or obligations under the SFA may not be made to an LSIPA Designated Company; or
2. PUC's authority to decertify ERCOT and transfer its responsibilities and assets to a successor organization.

PROPOSED CHANGES:

1. Revise to prohibit an assignment or transfer if it would violate the Protocols or other applicable law.
2. Revise to explicitly state PUC's authority to decertify ERCOT and transfer ERCOT's responsibilities and assets to a successor organization as permitted under PURA § 39.151 and Rule 25.364.

SFA Section 10, Miscellaneous re: Assignment

CB. Assignment.

- (1) Notwithstanding anything herein to the contrary, a Party shall not assign or otherwise transfer all or any of its rights or obligations under this Agreement without the prior written consent of the other Party, which shall not be unreasonably withheld or delayed, except that a Party may assign or transfer its rights and obligations under this Agreement without the prior written consent of the other Party (if neither the assigning Party or the assignee is then in Default of any Agreement with ERCOT and if the assignment or transfer does not otherwise violate the Protocols or other applicable law):

...

- (3) The foregoing limitations on assignment do not limit the PUCT's authority to decertify ERCOT and/or transfer its responsibilities and/or assets to another organization or a successor organization as permitted in Tex. Util. Code Sec. 39.151 or 16 Tex. Admin. Code Sec. 25.364.

Section 11, Miscellaneous re: Amendment

ISSUE: The SFA does not set a deadline by which an MP is required to sign a new version of the SFA once it's been amended.

PROPOSED CHANGE: Revise to require that an MP sign a new version of the SFA within 10 Business Days of the amendment's approval by the PUC.

IH. Amendment. The standard form of this Agreement may only be modified through the procedure for modifying ERCOT Protocols described in the ERCOT Protocols. Any changes to the terms of the standard form of this Agreement shall not take effect until a new Agreement is executed between the Parties. A Participant is required to sign such a new Agreement within ten Business Days of its approval by the Public Utility Commission of Texas (PUCT).

SFA Section 11, Miscellaneous re: Right to Audit

ISSUE: Audit terms logically fit better in the Protocols than they do in the SFA. For example, Protocols § 1.4 provides: “The rights of Market Participants to audit ERCOT are limited to the Provisions in Section 1.4, Operational Audit.”

PROPOSED CHANGE: Move “ERCOT’s Right to Audit” subsection from the SFA to Protocols § 1.10 and delete “Participants Right to Audit ERCOT” subsection from the SFA as it is duplicative of Protocols § 1.4.

- ~~I. — ERCOT's Right to Audit Participant. Participant shall keep detailed records for a period of three years of all activities under this Agreement giving rise to any information, statement, charge, payment or computation delivered to ERCOT under the ERCOT Protocols. Such records shall be retained and shall be available for audit or examination by ERCOT as hereinafter provided. ERCOT has the right during Business Hours and upon reasonable written notice and for reasonable cause to examine the records of Participant as necessary to verify the accuracy of any such information, statement, charge, payment or computation made under this Agreement. If any such examination reveals any inaccuracy in any such information, statement, charge, payment or computation, the necessary adjustments in such information, statement, charge, payment, computation, or procedures used in supporting its ongoing accuracy will be promptly made.~~
- ~~J. — Participant's Right to Audit ERCOT. Participant's right to data and audit of ERCOT shall be as described in the ERCOT Protocols and shall not exceed the rights described in the ERCOT Protocols.~~

This section would move from the SFA to Protocols § 1.10 .

Deleted as duplicative of Protocols § 1.4.

Section 11, Miscellaneous re: Further Assurances

ISSUE: The Further Assurances clause is vague and creates ambiguity about the demands that the parties may make of one another.

PROPOSED CHANGE: Delete this clause in its entirety.

~~K. Further Assurances. Each Party agrees that during the term of this Agreement it will take such actions, provide such documents, do such things and provide such further assurances as may reasonably be requested by the other Party to permit performance of this Agreement.~~

SFA Section 11, Miscellaneous re: Conflicts

ISSUES:

1. The Conflicts subsection does not indicate that PUC's orders and rules prevail over ERCOT Protocols, although it addresses other conflicts-of-law issues.
2. The Conflicts subsection indicates that local laws, ordinances, etc. should prevail over the SFA in the event of a conflict which does not reflect the *CPS* decision that ERCOT is an arm/organ of state government.
3. The Conflicts subsection is duplicative of information set forth in Protocols § 1.1(6) regarding how the SFA will prevail over the Protocols in the event of a conflict.

PROPOSED CHANGES:

1. Revise to specify that PUC's orders and rules prevail over the Protocols and the SFA in the event of a conflict to reflect the PUC's supremacy over ERCOT.
2. Delete language indicating that local laws, ordinances, etc. would prevail over the SFA terms.
3. Delete duplicative sentence stating that the SFA prevails over the Protocols in the event of a conflict.

SFA Section 11, Miscellaneous re: Conflicts

JL. Conflicts. This Agreement is subject to applicable federal and state laws agency orders, and PUCT directives. Nothing in this Agreement may be construed as a waiver of any right to question or contest any federal or state law or order. In the event of a conflict between this Agreement and an applicable federal or state law agency order, or PUCT directives, the applicable federal or state law agency order, or PUCT directives shall prevail, provided that Participant shall give notice to ERCOT of any such conflict affecting Participant. In the event of a conflict between PUCT rules, orders, or directives and the Protocols, PUCT rules, orders, or directives shall prevail. ~~This Agreement is subject to applicable federal, state, and local laws, ordinances, rules, regulations, orders of any Governmental Authority and tariffs. Nothing in this Agreement may be construed as a waiver of any right to question or contest any federal, state and local law, ordinance, rule, regulation, order of any Governmental Authority, or tariff. In the event of a conflict between this Agreement and an applicable federal, state, and local law, ordinance, rule, regulation, order of any Governmental Authority or tariff, the applicable federal, state, and local law, ordinance, rule, regulation, order of any Governmental Authority or tariff shall prevail, provided that Participant shall give notice to ERCOT of any such conflict affecting Participant. In the event of a conflict between the ERCOT Protocols and this Agreement, the provisions expressly set forth in this Agreement shall control.~~

SFA Section 11, Miscellaneous re: No Partnership

ISSUE: The No Partnership clause provides that there is no partnership between ERCOT and the MP subject to the SFA, but it does not clarify that no other fiduciary relationship exists between the Parties due to the SFA.

PROPOSED CHANGE: Add language to clarify that the SFA does not create any fiduciary relationship between ERCOT and an MP.

KM. **No Partnership or Fiduciary Relationship.** This Agreement may not be interpreted or construed to create an association, joint venture, or partnership between the Parties or to impose any partnership obligation or liability upon either Party. Neither Party has any right, power, or authority to enter any agreement or undertaking for, or act on behalf of, or to act as or be an agent or representative of, or to otherwise bind, the other Party. **This Agreement does not create any fiduciary duties between the Parties.**

SFA Section 11, Miscellaneous re: Rules of Construction

ISSUE: Substantially similar Rules of Construction appear in both the SFA and Protocols § 1.7.

PROPOSED CHANGE: Delete the duplicative Rules of Construction in the SFA to promote consistency and standardization under Protocols § 1.7.

Additional Agreements to be Amended per NPRR1312

The Standard Form Black Start Agreement (Protocols § 22, Attach. D) and the Standard Form Reliability Must-Run Agreement (Protocols § 22, Attach. B):

1. Revise Notice section to align with the SFA changes re: notice.
2. Add definition of “Standard Form Agreement:”.

B. “Standard Form Agreement” shall mean the executed Section 22, Attachment A, Standard Form Market Participant Agreement between the Participant and ERCOT.

3. Delete definition of “ERCOT Protocols,” as proposed in the SFA.
4. Include “Other Binding Documents” to Sections 5 & 6 regarding Participant and ERCOT Obligations, as proposed in the SFA.
5. Incorporate by reference the following sections from the SFA, as discussed above:
 - Section 4, Representations, Warranties, and Covenants
 - Section 7, Default and Force Majeure (with additional terms)
 - Section 8, Limitations of Damages and Liability
 - Section 9, Dispute Resolution
 - Section 10, Miscellaneous

Black Start Agreement's Section 10, Default and Force Majeure

Section 10. Default and Force Majeure.

Section 7, Default and Force Majeure, of the Standard Form Agreement is hereby incorporated by reference into this Agreement and shall apply to the terms of this Agreement. In addition to the Default and Force Majeure provisions incorporated by reference from the Standard Form Agreement, the following provisions apply for purposes of Default and Force Majeure.

- (13) The occurrence and continuation of any of the following events shall constitute an automatic Default by Participant under this Agreement:
- (a) Participant becomes Bankrupt, except for the filing of a petition in involuntary bankruptcy, or similar involuntary proceeding, that is dismissed within 90 days thereafter;
 - (b) The Black Start Resource's operation is abandoned without an intent to return it to operation during the Full Term;
 - (c) At any time, the Black Start Service Hourly Rolling Equivalent Availability Factor (BSSHREAF) is equal to or less than 50%; or
 - (d) An Available Black Start Resource fails to perform successfully as required during a Partial Blackout or Blackout.
- (26) Notwithstanding anything to the contrary, if Participant uses a Switchable Generation Resource (SWGR) as the Black Start Resource, the requirements or instructions of another Control Area Operator shall not constitute a Force Majeure Event or otherwise excuse the Participant from providing BSS or performing its obligations under this Agreement.
- (3) Notwithstanding anything to the contrary, a Blackout does not constitute a Force Majeure Event or otherwise excuse the Participant from providing Black Start services.

New language reflecting universal SFA Default/Force Majeure provisions moved to the Protocols, as discussed above.

Existing language, no substantive change.

New language clarifying that a Blackout does not constitute a Force Majeure Event under the Black Start Agreement.

Must-Run Agreement's Section 10, Default and Force Majeure

Section 10. Default and Force Majeure.

Section 7, Default and Force Majeure, of the Standard Form Agreement is hereby incorporated by reference into this Agreement and shall apply to the terms of this Agreement. In addition to the Default provisions incorporated by reference from the Standard Form Agreement, the following provisions apply for purposes of Default. A Default or Material Breach of this Agreement by a Party shall not relieve either Party of the obligation to comply with the ERCOT Protocols and Other Binding Documents.

- (13) The occurrence and continuation of any of the following events shall constitute an automatic Default by Participant under this Agreement:
- (a) Participant becomes Bankrupt, except for the filing of a petition in involuntary bankruptcy, or similar involuntary proceedings, that is dismissed within 90 days thereafter;
 - (b) The RMR Unit's operation is abandoned without intent to return it to operation during the Term;
 - (c) At any time, the Actual Availability is equal to or less than 50% of the Target Availability as specified in Table 1 Section 1 (E)(1) of this Agreement; or
 - (d) Three or more unexcused Misconduct Events occur during a contract Term.

New language reflecting universal SFA Default/Force Majeure provisions moved to the Protocols, as discussed above.

Existing language, no substantive change.

Additional Form to be Amended per NPRR1312

- Notice of Change of Information (Protocols § 23, Form E):
 - Add Contact for Legal Notice Section as provided in the SFA
- **Contact for Legal Notice – The Market Participant's contact for legal notice as provided in the Standard Form Agreement in Section 22, Attachment A of the Protocols (*All Market Participant Types*)**

Questions?

