

LONG DESCRIPTION: Upon ERCOT’s determination of the disposition of an Alternative Dispute Resolution (ADR) proceeding, Protocol Section 20.9 requires ERCOT to issue a Market Notice providing a brief description of the relevant facts, a list of the parties involved in the dispute, and ERCOT’s disposition of the proceeding and reasoning in support thereof.

Parties: ERCOT and East Texas Electric Co-op, Inc. (including certain of ETEC’s member distribution cooperatives described as the “Affected DCs” below).

Relevant Facts:

This ADR was filed by East Texas Electric Co-op, Inc. (ETEC) along with several of their member distribution cooperatives (the “Affected DCs”)¹ regarding disqualification of Pre-Assigned Congestion Revenue Rights (PCRRs) held by Tex-La Electric Cooperative of Texas, Inc. (Tex-La) on behalf of the Affected DCs.

In 1958, Tex-La entered into a power sales agreement with Southwestern Power Administration (SWPA)² for electric power from the hydroelectric power plant located at Denison Dam (the “864 Contract”). The 864 Contract recognized that Tex-La would be purchasing power for the service of the Affected DCs. The Affected DCs that benefit from the PCRRs have all been members of Tex-La since before September 1, 1999, to present. Tex-La was authorized by the Affected DCs to act as their agent in managing the PCRRs.

In 2017, Tex-La and ETEC pursued a merger arrangement in which Tex-La would merge into ETEC. ETEC sought approval from the Public Utility Commission of Texas (Commission) for its proposed merger with Tex-La, which was approved by the Commission on October 11, 2017. Effective January 1, 2018, Tex-La merged into ETEC. As a result, Tex-La no longer exists as a legal entity. ETEC has effectively taken Tex-La’s place as the Counter-Party to the 864 Contract, and agent to manage the PCRRs on behalf of the Affected DCs.

Following the merger, ERCOT determined that ETEC was no longer eligible for PCRRs because ERCOT believed that the merger constituted an impermissible assignment or transfer requiring termination of the PCRRs under Protocol Section 7.4.1.3.1(2)(b). On May 15, 2018, ETEC requested ADR for reinstatement of the PCRRs and compensation for the months during which ERCOT determined ETEC was ineligible to receive PCRRs.

ERCOT’s Disposition/Reasoning:

ERCOT has determined that the appropriate disposition of this ADR proceeding is to grant ETEC’s request for relief. Pursuant to Protocol Section 20.1(1), a Market Participant may seek relief through the ADR process by making a claim that “ERCOT has violated or misinterpreted

¹ The Affected DCs consist of the following seven distribution cooperatives: Cherokee County Electric Cooperative Association; Deep East Texas Electric Cooperative, Inc.; Houston County Electric Cooperative, Inc.; Jasper-Newton Electric Cooperative, Inc.; Rusk County Electric Cooperative, Inc.; Sam Houston Electric Cooperative, Inc.; and Wood County Electric Cooperative, Inc.

² SWPA is an Agency of the U.S. Department of the Interior and entered into the power sales agreement with Tex-La on behalf of the United States of America.

any law,” including the ERCOT Protocols. In this matter, for the reasons set forth herein, ERCOT misinterpreted the ERCOT Protocols when it determined that the merger event between ETEC and Tex-La constituted an impermissible assignment or transfer that would result in disqualification of the PCRRs.

Protocol Section 7.4(1) requires ERCOT to provide PCRRs to certain NOIEs that have a long-term contract for annual capacity from a specific Generation Resource that was entered into before September 1, 1999.³ NOIEs are permitted to designate an agent to manage their PCRRs. See ERCOT Protocol Section 7.4(2).

Protocol Section 7.4.1.1(1) limits PCRR eligibility to “pre-September 1, 1999 Generation Resources utilized by a NOIE to serve the Load in its service territory.” The Protocols further identify certain specific eligible Generation Resources that had existing long-term contracts with NOIEs. See Protocol Section 7.4.1.1. The Denison Dam hydroelectric power plant (which is the subject of the 864 Contract between Tex-La and SWPA) is recognized as one of the Generation Resources whose contractual allocation of annual capacity may be the basis for PCRR eligibility. That language, contained in Protocol Section 7.4.1.1(1)(c), describes the Denison Dam allocation as follows:

A federally-owned hydroelectric Generation Resource that is the subject of a series of sequential long-term contracts between the NOIE nominating the PCRR(s) and the federal government based upon a long-term (greater than five years) allocation from the federal government for annual capacity and energy produced at such federally-owned hydroelectric Generation Resource, and that allocation was in place prior to September 1, 1999.

There is no dispute that the Denison Dam hydroelectric power plant and the allocation in the 864 Contract are described in the above language, and there does not appear to be any language in the Protocols that is inconsistent with the post-merger continuation of the 864 Contract between ETEC and SWPA.

Protocol Section 7.4.1.3.1 sets forth PCRR disqualifying events. Specifically, Protocol Section 7.4.1.3.1(2) provides that a NOIE will be disqualified from PCRR eligibility if there is a “termination” of the long-term contract upon which the NOIE’s eligibility is based. Protocol Section 7.4.1.3.1(2)(b) contains the following language that further defines what might qualify as a “termination”:

³ Protocol Section 7.4(1) states: “ERCOT shall allocate a portion of available Congestion Revenue Rights (CRRs) as Pre-Assigned Congestion Revenue Rights (PCRRs) to Non-Opt-In Entities (NOIEs) that either have established ownership prior to September 1, 1999 in a specific Generation Resource or have a long-term (greater than five years) contractual commitment for annual capacity and energy that was entered into prior to September 1, 1999 from specific Generation Resources. For purposes of this Section 7.4, such Generation Resources shall be referred to as “pre-September 1, 1999 Generation Resources.”

Any change in control of the capacity under the contract, including, but not limited to, assignment of the contract to another Entity. The foregoing notwithstanding, a NOIE shall still be eligible to receive PCRRs if the capacity under the contract is transferred to another Entity or a generation and transmission EC for the benefit of the NOIE, the Entity or the generation and transmission EC continues to supply the NOIE under the same terms and conditions of the long-term contract, and the contract continues to meet all other relevant PCRR eligibility requirements.

ERCOT has determined that the merger between Tex-La and ETEC was not an impermissible transfer or assignment resulting in “termination” of the contract under Protocol Section 7.4.1.3.1(2)(b). No “termination” of the 864 Contract occurred because the contract remains in effect between SWPA and ETEC for the benefit of the Affected DCs. Since the merger, SWPA has confirmed that ETEC will continue to receive the same allotment of hydropower from Denison Dam previously received by Tex-La for use by the Affected DCs in accordance with federal regulations. Further, no transfer or assignment has occurred in connection with the merger, and no assignment agreement of the 864 Contract has been executed. Under Texas law, an assignment was not necessary for ETEC to assume Tex-La’s position under the contract.⁴

The Tex-La/ETEC merger should not have been construed as a disqualifying event, and ERCOT should not have voided ETEC’s PCRRs. Accordingly, ERCOT will grant ETEC relief for PCRRs that were voided from January 1, 2018 through November 30, 2018; ERCOT estimates that the amount of relief to be provided to ETEC to be approximately \$75,546.00 for amounts owed up

⁴ The Texas Business Organizations Code provides that when a merger occurs, “all rights, title, and interests to all real estate and other property owned by each organization that is a party to the merger is allocated to and vested, subject to any existing liens or other encumbrances on the property, in one or more of the surviving or new organizations as provided in the plan of merger without: (A) reversion or impairment; (B) any further act or deed; or (C) any transfer or assignment having occurred.” See Tex. Bus. Org. Code § 10.008(a)(2)(emphasis added). This provision of the statute supports a finding that the merger between ETEC and Tex-La did not result in any termination, transfer or assignment of the 864 Contract. Furthermore, Texas courts have interpreted the language mentioned above in Section 10.008 of the Texas Business Organizations Code (or its statutory predecessor) regarding contractual language that prohibits or limits the transfer or assignment of a contract and have held that general language prohibiting transfers are not effective in the case of mergers due to the automatic vesting provisions under Texas corporate statutes. See, e.g., TXO Production Co. v. M.D. Mark, Inc., 999 S.W.2d 137 (Tex. App.—Houston [14th Dist.] 1999, pet. denied); McAleer v. Eastman Kodak Co., 2002 WL 31686682 at *4 (Tex. App.—Amarillo 2002)(not pub.); Duke Energy Field Services Assets, LLC v. Nat. Union Fire Ins. Co. of Pittsburg, PA, 68 S.W.3d 848, 851 (Tex. App.—Texarkana 2002, pet. denied). It has been emphasized that such language will not be interpreted as applying to mergers unless the language expressly mentions a merger as being a type of transfer that is prohibited. See TXO Production Co., 999 S.W.2d at 143.

to October 21, 2018.⁵ ERCOT will also reinstate ETEC's PCRRs, beginning December 1, 2018, after the CRR Market User Interface project is fully implemented.⁶

Pursuant to Protocol Section 20.10.1(2), ERCOT will make the adjustment required to resolve this ADR Proceeding through a separate ADR invoice which will be issued to all affected Market Participants after ERCOT has estimated the total amount of relief to be provided to ETEC (in early December 2018). The payment to ETEC will be uplifted on the basis of the Monthly Load Ratio Shares (MLRS) applicable to the months of January 2018 through November 2018.

This Market Notice serves to conclude the ADR proceedings between ERCOT and ETEC.

⁵ ERCOT will not be able to calculate the precise final amount owed until the end of the month of November 2018. However, the amount listed above is the best approximation ERCOT can calculate as of October 21, 2018, without accounting for the approximately 40 days remaining in the months of October and November of 2018.

⁶ Due to technical concerns relating to completion of the CRR Market User Interface project, ERCOT will not reinstate the PCRRs until that project is complete. But the project is expected to be complete in mid-November. Thereafter, ETEC's PCRRs will be reinstated without interruption to the project.