21-1421-16

CAUSE NO. _____

THE CITY OF DENTON, *Plaintiff*, v. ELECTRIC RELIABILITY COUNCIL OF TEXAS, MARK CARPENTER, LORI COBOS, KEITH EMERY, NICK FEHRENBACH, KEVIN GRESHAM, SAM HARPER, CLIFTON KARNEI, BILL MAGNESS, JACQUELINE SARGENT, DeANN WALKER, Members of the Board of Directors, BILL MAGNESS, Chief Executive Officer, JEYANT TAMBY, Senior Vice President and Chief Administrative Officer, and WOODY RICKERSON, Vice President, Grid Planning and Operations, in their official capacities as Directors and Officers of ELECTRIC RELIABILITY COUNCIL OF TEXAS, *Defendants*.	§ §	IN THE DISTRICT COURT OF DENTON COUNTY, TEXAS _____ JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION AND APPLICATION FOR TEMPORARY RESTRAINING ORDER, TEMPORARY INJUNCTION, AND PERMANENT INJUNCTION

TO THE HONORABLE JUDGE OF SAID COURT:

The City of Denton (the "City") operating its municipally owned electric utility as Denton Municipal Electric ("DME") files its Original Petition.[1]

[1] Due to the urgency of this Application for Temporary Restraining Order, Plaintiff filed this Petition without evidence. The exhibits cited in this Petition will be submitted to the Court by way of a Supplement to Plaintiff's Original Petition and Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction, which will be filed

I.
EXECUTIVE SUMMARY

1. This suit is brought to stop an illegal and unconstitutional raid by the Electric Reliability Council of Texas ("ERCOT") on the credit of cities that operate electric utilities. While the City is ready and willing to pay its own debts, ERCOT now expects it to pay the debts of other market participants. ERCOT has a severe cash and credit crunch. But it cannot lean on cities to cover other parties' debts because cities are constitutionally prohibited from lending their credit to any person or entity.

2. In the wake of the historic Valentine's week winter storm and the tremendous strain on the electric generation and distribution system in Texas, ERCOT set record-high prices for electricity. The price for wholesale electricity, which is capped by rule set by the Public Utility Commission of Texas ("PUC"), remained at the maximum price of $9,000 per MWh for more than four days. In addition, ERCOT-imposed ancillary fees skyrocketed to more than $25,000 per MWh.

3. This extreme price caused numerous retail electric providers located in the areas of ERCOT open to retail competition to incur such enormous obligations as to render them insolvent, unable to pay the amount owed for that power. ERCOT will not be receiving payment from those providers for power that they received, resulting in a shortfall of billions of dollars.

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with the Court within one hour of this filing and is incorporated by reference as though fully set forth herein.

4. To make up that shortfall, ERCOT is using a mechanism embedded within its Protocols called "uplift," which in the simplest terms, spreads the cost of those defaulted obligations among other market participants, including the City. The remaining market participants will be assessed a share of the "uplift" cost—which is nothing more than covering other parties' bad debts and providing cash to ERCOT to improve ERCOT's liquidity—based on a formula that generally reflects their percentage participation in the market. For the City, that uplift cost would be tens of millions of dollars.

5. Cities are barred from making such payments. Article III, section 52(a) of the Texas Constitution provides that a city has no power "to lend its credit or to grant public money or a thing of value in aid of, or to any individual, association, or corporation whatsoever . . . " Article XI, section 3 of the Texas Constitution further provides that no city shall "in anywise loan its credit . . . "

6. The City notes that these uplift payments are aside and apart from the payments and credits owed by and to the City regarding power it consumed or generated. The City does not dispute in this suit any such obligations in either direction.

7. The City therefore asks this Court to issue a clear and direct decision: the City may not lend its credit to ERCOT or to/on behalf of defaulting market participants, and ERCOT cannot demand that it do so in violation of the Constitution. The City should and will pay for its own power, and pay its own debts. It is literally prohibited by the Constitution from paying anyone else's debts.

II.
PARTIES

8. Denton is a home-rule city. Its principal office and electric utility operations are in Denton County, Texas. Denton owns and operates its municipally-owned utility under the name of Denton Municipal Electric Utility ("DME").

9. ERCOT is a membership-based 501(c)(4) nonprofit corporation governed by its Board of Directors and subject to the oversight of the Public Utility Commission of Texas ("PUC") and the Texas Legislature. It is the independent system operator for all the transmission and generation facilities within the boundaries of ERCOT, which is located entirely within Texas. It may be served with process at its principal place of business, 7620 Metro Center Drive, Austin, Texas 78744.

10. Mark Carptenter, Lori Cobos, Keith Emergy, Nick Fehrenbach, Kevin Gresham, Sam Harper, Cliften Karnei, Jacqueline Sargent, DeAnn Walker, and Bill Magness are members of the Board of Directors of ERCOT. Defendants Mark Carptenter, Lori Cobos, Keith Emergy, Nick Fehrenbach, Kevin Gresham, Sam Harper, Cliften Karnei, Jacqueline Sargent, DeAnn Walker, and Bill Magness may be served with process at ERCOT's principal place of business, 7620 Metro Center Drive, Austin, Texas 78744.

11. Defendant Bill Magness is Chief Executive Officer of ERCOT. Defendant Magness is sued in his official capacity. Defendant Magness may be served with process at ERCOT's principal place of business, 7620 Metro Center Drive, Austin, Texas 78744.

12. Defendant Jeyant Tamby is Senior Vice President and Chief Administrative Officer of ERCOT. Defendant Tamby is sued in her official capacity. Defendant Tamby may be served with process at ERCOT's principal place of business, 7620 Metro Center Drive, Austin, Texas 78744.

13. Defendant Woody Rickerson is Vice President, Grid Planning and Operations. Defendant Rickerson is sued in his official capacity. Defendant Rickerson may be served with process at ERCOT's principal place of business, 7620 Metro Center Drive, Austin, Texas 78744.

III.
DISCOVERY CONTROL PLAN

14. Discovery in this case shall be conducted under Level 3, as provided for in TEX. R. CIV. P. 190.4.

IV.
VENUE AND JURISDICTION

15. Denton County, Texas, is the proper venue for this lawsuit because all or a substantial part of the events or omissions giving rise to the claim occurred in Denton County. Tex. Civ. Prac. & Rem. Code § 15.002(a).

16. The amount in controversy at issue in this lawsuit is within the jurisdictional limits of this Court.

V.
RULE 47 STATEMENT

17. Pursuant to Texas Rule of Civil Procedure 47(c), the City states that it does not seek monetary relief. The City seeks purely non-monetary relief as set forth herein.

VI.
FACTS

A. The City is a municipally-owned electric utility.

18. The City provides retail electric service to customers within its service area. (Ex. A.) The City owns electric transmission and distribution facilities to provide electric service to its electric customers. (Ex. A.)

19. The City also owns and operates an electric-generation facility known as the Denton Energy Center (DEC). (Ex. A.) The City buys electricity from the ERCOT wholesale market, and sells energy from the DEC and Power Purchase Agreements to the wholesale market. Ideally, the energy demand from customers ("load") is approximately equal to energy sold in the wholesale market. The DEC and the City's Power Purchase Agreements are the primary hedge against the demand for energy. Other hedging options are also used, but generally when the demand cannot be balanced with energy sold, the City purchases the rest of the electricity it needs for its customers through the Day Ahead Market (DAM) or the Real-Time Market (RTM). (Ex. A.)

B. ERCOT manages the financial settlement of electricity-market transactions.

20. ERCOT is the independent system operator for all the transmission and generation facilities within the boundaries of ERCOT, which is located entirely within Texas. While parts of Texas—including portions of East Texas, the Panhandle, and the Transpecos—are outside ERCOT, approximately 90% of the state's electric load is within ERCOT. The City is located within the ERCOT grid.

21. As the independent system operator and reliability coordinator, ERCOT operates the market where Qualified Scheduling Entities (QSE) schedule generation of power and ERCOT manages transmission facilities on its electric grid. It also performs financial settlement for the competitive wholesale bulk-power market.

22. All of the wholesale electric market participants in ERCOT are required to conduct business under a set of rules known as the ERCOT Protocols. Transmission and Distribution Services Providers (TDSPs), Load Serving Entities (LSEs), and Resource Entities (REs) are all characterized as market participants. All market participants are required to abide by the ERCOT Protocols. The Nodal Protocols are available on ERCOT's website at http://www.ercot.com/mktrules/nProtocols/current.

C. The ERCOT Nodal Protocols establish a transaction system for electricity on the wholesale market.

23. As set forth in Section 9 of the Nodal Protocols, ERCOT operates two markets for electricity purchases—the Day-Ahead Market and the Real-Time Market are commonly used by the City. Both markets are settled daily. (Ex. A.)

24. Settlement statements are generated for the Day-Ahead Market two business days after the operating day. (Ex. A.) For the Real-Time Market, statements are generated five business days after the operating day. (Ex. A.) Underlying market Settlement Extract data is published when the statements are generated. Invoices may combine multiple activities. (Ex. A.)

25. Settlement Statements are generated for both the Day Ahead Market and the Real Time Market for every Operating Day. (Ex. A.) Each Settlement

Statement represents the charges and credits incurred in that market for that Operating Day. (Ex. A.) Settlement Statements are published and invoiced on a schedule defined in the ERCOT Protocols. (Ex. A.) The total Charge or Credit amount for each Statement is invoiced on a Settlement Invoice published the same day as the Statement. Multiple Settlement Statements for both Day Ahead and Real Time Market Operating Days may be included on a single Settlement Invoice. For a Load Serving Entity, such as the City, the Settlement Invoice includes an amount payable reflecting the amount due for electricity consumed. The Settlement Invoice must be paid within two days. (Ex. A.)

26. The payments made by the Load Serving Entities are then distributed by ERCOT to Resource Entities, which are entities that generated the electricity used by the customers of the Load Serving Entities. In the ERCOT marketplace, the City is both a Load Serving Entity and a Resource Entity. (Ex. A.)

27. That means that ERCOT issues the City a Settlement Invoice for the previous electricity usage. The City pays the Settlement Invoice two days later. The following day, ERCOT credits the City the amount due to it for the electricity it generated in its capacity as a Resource Entity. (Ex. A.)

28. This system works so long as Load Serving Entities pay for their electricity usage every day. In the event a Load Serving Entity fails to pay for the electricity it has used, Section 9.19 of the Nodal Protocols provides for "Default Uplift Invoices"—ERCOT issues to other market participants to pay their share of the debt owed by the defaulting party or parties that "short paid" the amounts they owed to

ERCOT for power consumed. (Ex. A.) In other words, if a Load Serving Entity defaults, other market participants—whether they be a private entity or a municipal provider—will be called upon by ERCOT to make up for the shortfall.

D. The Valentines' week winter storm and the ERCOT power crisis.

29. The Court (and the entire world) is aware of the magnitude and effects of the Valentines' week winter storm in Texas. Temperatures plunged to below zero over a large swath of the state, and stayed below freezing in many areas of the state for over a week. Electric generation equipment froze. Natural gas pipelines froze. Snow and ice covered the state. The available generation within ERCOT—generation needed to provide power to Texans—plummeted. "Rolling" blackouts were implemented that, in reality, were just blackouts, plunging many Texans into the freezing dark for days. *See* Catherine Traywick, Mark Chediak, Naureen Malik, & Josh Saul, *The Two Hours that Nearly Destroyed Texas's Electric Grid*, BLOOMBERG, (Feb. 20, 2021, 7:00 AM), https://www.bloomberg.com/news/features/2021-02-20/texas-blackout-how-the-electrical-grid-failed.

30. In an ill-advised attempt to use "market forces" to address a scarcity that was caused by nature and by poor planning, the PUC, and in turn, ERCOT, extended the maximum price of electricity to over $9,000 per MWh, starting on February 15, 2021. Because the weather and generation conditions persisted, the price stayed at that level for more than four days. At the same time, ancillary costs rose to more than $25,000 per MWh. (Ex. A.)

31. As a result, every entity that was buying electricity within ERCOT was paying an unprecedented high price. Billions upon billions of dollars of electricity

was purchased at that price, in a matter of days. Much of that power was purchased by Retail Electric Providers ("REPs") that had to serve their customers. But now, not surprisingly, some REPs cannot pay their bills. (Ex. A.) In fact, based on filings made at the PUC, at least one REP believes that "[t]he exorbitant and extraordinary costs expected to be passed on to REPs in billings for charges for the past week can be expected to drive many REPs from the marketplace."[2] One REP stated, "reports suggest as many as 22 retailers may be eliminated if things are left without action."[3] The ERCOT clearinghouse will never see any material payment from those REPs.

32. ERCOT did not require those REPs to deposit sufficient collateral to cover their obligations in such an event. So, the money to pay those defaulted accounts simply is not there. But ERCOT thinks it has found a "bottomless well" of such money: cities, including their significant assets and strong borrowing power.

33. Under the Protocols as written, if there is an uplift short paid amount greater than $2,500,000 (that is, if a market participant(s) has bad debt to ERCOT greater than that amount), ERCOT cannot issue more than $2,500,000 in Default Uplift Invoices per month. But regardless of that cap, any Default Uplift amount assessed against a city is illegal, because a city cannot lend its credit to any other entity.

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[2] *See* Docket No. 51812, Young Energy LLC's Request for Emergency Action (Feb. 23, 2021), http://interchange.puc.texas.gov/search/documents/?controlNumber=51812&itemNumber=15.

[3] *See* Docket No. 51812, ATG Clean Energy Holdings, Inc. d/b/a Green Energy Exchange's Letter to PUCT to Discuss Impacts from Arctic Storm Events (Feb. 19, 2021), http://interchange.puc.texas.gov/Documents/51812_4_1111214.PDF.

34. But the situation here is much more profound. The Default Uplift amount currently pending in the market is estimated to be in the **billions** of dollars. And ERCOT will not even be following its Protocols, which would require it to spread the Default Uplift Invoices out over time in $2,500,000 increments. Instead, by virtue of PUC order[4], ERCOT now claims essentially unlimited power to change how it settles accounts, charges Default Uplift amounts, and the like.

35. So, what is ERCOT doing? It is attempting to take unconstitutional debt payments out of city pockets, and city accounts, before the City ever sees it.

36. As mentioned in the Executive Summary above, the City buys and sells power through ERCOT. Thus, the City 1) pays for power through ERCOT, and 2) gets paid for power through ERCOT. These sums are typically handled through a process of ERCOT "settlements." For example, a city may owe ERCOT $50 million for power it purchased, and may be owed $45 million from ERCOT for power that it sold. In normal operations, the city pays $50 million into ERCOT, and a day later, is paid $45 million. Thus, the city's net cost for power is $5 million, taken care of in two transactions. But that is not what will happen should the unconstitutional "uplift" be applied.

37. First, ERCOT has already deviated from the Protocols, and has delayed its payments to the City. (Ex. A.) Payments that the City expected on Tuesday, February 23, 2021 have rolled to Wednesday, February 24. (Ex. A.) And payments

[4] *Issues Related to the State of Disaster for the February 2021 Winter Weather Event*, Project No. 51812, Order Directing ERCOT to Take Action and Granting Exception to ERCOT Protocols (Feb. 21, 2021) https://www.puc.texas.gov/51812ERCOTProtocolActions.pdf.

expected on Wednesday have rolled to Thursday, February 25. (Ex. A.) But of course, the City have been required to continue making payments to ERCOT. So what is now happening is apparent to anyone familiar with the general workings of a Ponzi scheme.

E. ERCOT intends to take money directly from the City's account to pay the debts of defaulting retail electric providers.

38. Based on numerous conversations with ERCOT representatives, ERCOT is collecting money from payors (including the City), but is not guaranteeing that funds owed to those payors will be paid in full. Instead of issuing Default Uplift Invoices, ERCOT intends to simply apply a massive Default Uplift charge—many orders of magnitude larger than the $2,500,000 cap in the Protocols—to the funds in its possession (that have been settled and paid) that it should be delivering to payees, including the City.

39. The City currently has $155,662,097.67 in its ERCOT account. (Ex. A.) On an immediate basis, ERCOT's departure from its Protocols means that ERCOT will debit the City's account $156,254,231.93 on Thursday, February 25, 2021, for electricity used by the City during Valentine's week. (Ex. A.) Denton has initiated a wire transfer for the small additional amount necessary to pay that invoice. (Ex. A.)

40. While that is a large sum, it would be partially offset by the payments that the Protocols require ERCOT to make to the City in the amount of $78,664,612.70 on Friday, February 26, 2021. (Ex. A.) However, ERCOT will not pay the $78,664,612.70 on Friday. (Ex. A.) Instead, it intends to withhold some portion (or conceivably the entirety) of that $78,664,612.70 payment for the Default Uplift

charge—essentially seizing the City's public funds to pay the private debts of other retail electric providers. (Ex. A.)

41. Cities are responsible for their own debts. And to that end, the City has tendered or will tender the net amount it owes to ERCOT (that is, the net of the cost of the power it purchased vs. the cost of the power it sold). But cities are not and cannot be responsible for covering the debts of third parties who were undercapitalized and undercollateralized. The Constitution prohibits cities from operating as lenders or as insurers of the risk of a third party. ERCOT cannot be allowed to extract sums from the City to accomplish an unconstitutional purpose.

VII.
SUIT FOR DECLARATORY JUDGMENT

42. The City hereby incorporates paragraphs 1-41 above as if fully set forth herein.

A. ERCOT's actions violate Article XI, Section 3 and Article III, Section 52(a) by requiring the City to pay funds and lend its credit to cover private debts.

43. The Texas Constitution limits municipalities' power to transfer funds to any other entity. Specifically, the Constitution provides "[n]o county, city, or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in anywise loan its credit . . . ." Tex. Const. art. XI, § 3. Elsewhere, the Constitution makes clear that "the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its

credit or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever . . . ." Tex. Const. art. III, § 52(a).

44. The constitutional prohibition means "that the Legislature cannot require *gratuitous* payments to individuals, associations, or corporations." *Tex. Mun. League Intergovernmental Risk Pool v Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 383 (Tex. 2002). A payment is "gratuitous" when the municipality receives no consideration. *See id.*

45. The distinction between gratuitous and non-gratuitous payments is demonstrated within the ERCOT Nodal Protocols. Various charges set forth in the Settlement Invoice (identified at Sections 9.2.3 and 9.5.3 of the Nodal Protocols)—including for payments for measured electricity delivered, congestion charges, and various service fees—reflect charges for services rendered and received by the municipality. Such charges are non-gratuitous.

46. In contrast, ERCOT's "Default Uplift Invoices" (set forth in Section 9.19.1 of the Nodal Protocols) require payment for services rendered and received by another entity or entities. In the event a market participant does not pay its Settlement Invoice, the unpaid amount is invoiced to all other market participants, based on a complicated formula that attempts to allocate the cost based on the size of the market participant relative to the total market. The payments of these Default Uplift Invoices are then paid to the entity(ies) that were short paid by the defaulting market participant—typically generators. The result is that when a municipality pays a Default Uplift Invoice, it is paying money to generators for the electricity

received—and debt incurred by—a defaulting third-party entity. The municipality receives no consideration for this payment, which is entirely gratuitous.

47. The Constitution "does not prohibit payments to individuals, corporations, or associations so long as the statute requiring such payments (1) serves a legitimate public purpose; and (2) affords clear public benefit in return." *Tex. Mun. League Intergovernmental Risk Pool*, 74 S.W.3d at 383–84. "A three-part test determines if a statute accomplishes a public purpose consistent with section 52(a):" (1) the predominant purpose must accomplish a public purpose, not to benefit private parties; (2) public control over the funds must be retained to ensure that the public purpose is accomplished and to protect the public's investment; and (3) that the political subdivision must receive a return benefit. *Id.*

48. None of the three elements of the test set forth by the Supreme Court are met here.

a) The predominant purpose of the Default Uplift Invoice is not to accomplish a public purpose; it is to ensure that private entities receive full payment, notwithstanding the default of one of their customers. In the instance of the Valentines' week winter storm, that means that the purpose is to ensure that generators reap the windfall profits associated with a $9,000/MWh rate for electricity and the exorbitant rates charged for ancillary services that were in place for more than four days.

b) Public control over the funds is not retained. ERCOT is not a governmental unit. *See ERCOT v. Panda Power Gen. Infrastructure Fund, LLC*, 552 S.W.3d 297, 309 (Tex. App.—Dallas 2018, pet. filed). And in any event, ERCOT does not retain control of the funds. It acts merely as a pass-through clearinghouse to pay the funds through to other market participants.

c) Finally, the City do not retain any return benefit. The defaulting market participant receives a benefit—its default is covered by other market participants. And the short-paid market participant receives a benefit—it has no risk from a defaulting payor. But it is impossible to see how providing gratuitous insurance to cover the risk of other market participants' default provides benefit to the City.

49. Acting pursuant to authority granted to it by the Legislature, ERCOT has violated Article III, Section 52 of the Constitution by requiring gratuitous payments of public funds to private entities, which, if paid, would violate Article XI, Section 3 of the Constitution.

50. Moreover, in purporting to require such payments, ERCOT's Board members and officers have acted outside their legal authority granted to them under the Public Utility Regulatory Act ("PURA"), Tex. Util. Code § 1.001, *et seq.*, and the Texas Constitution.

B. The City's payment of a Default Uplift Invoice would violate Article XI, Section 5 because it is an unfunded liability.

51. The Texas Constitution also limits municipalities' ability to incur future liabilities. Under Article XI, Section 5, "no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and creating a sinking fund of at least two per cent. thereon . . . ." Tex. Const. art. XI, § 5(a).

52. The purpose of this provision is to protect cities' financial standing and the interests of its other creditors. *See City of Terrell v. Dissaint*, 9 S.W. 593, 593–94 (Tex. 1988); *City of San Antonio v. San Antonio Firefighters' Ass'n, Local 624*, 533 S.W.3d 527, 534 (Tex. App.—San Antonio 2017, pet. denied). "The drafters intended to require local governments to operate on a cash basis and to limit their ability to pledge future revenues for current debts." *San Antonio Firefighters' Ass'n*, 533 S.W.3d at 534.

53. A "debt" for purposes of the constitutional provision is any unfunded liability—that is, "a pecuniary liability that would not be satisfied either out of the current revenues of the city or out of other funds within the city's control and lawfully applicable to the liability." *Id.* Hence and for example, indemnity provisions (which would require a city to be liable for an unknown future amount) are generally unconstitutional. *See id.; accord T. & N. O. R.R. Co. v. Galveston Cnty.*, 169 S.W.3d 713, 716 (Tex. App. 1943).

54. The City has not created a sinking fund, nor has it made provision to assess and annually collect a sufficient sum to pay the interest on debt created by the

issuance of a Default Uplift Invoice. Instead, the payment of other market participants' debts would be tantamount to an unconstitutional indemnity. Accordingly, any obligation on the part of the City to pay a Default Uplift Invoice would be *per se* unconstitutional, and cannot be enforced.

VIII.
DEFENDANTS DO NOT HAVE SOVEREIGN IMMUNITY

55. To the extent that ERCOT may have sovereign immunity, such immunity does not bar claims alleging constitutional violations and seeking equitable remedies. *See City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995). In requiring the City to make gratuitous payments, ERCOT violates the Constitution. The City seek only equitable relief.

56. Moreover, this ultra vires action against ERCOT's defendant officers and directors does not implicate that immunity. In attempting to collect unconstitutional sums from the City, the defendant officers and directors are acting outside of their legal authority, and may be enjoined from taking such ultra vires actions.

IX.
ATTORNEY'S FEES

57. The City has found it necessary to employ an attorney to bring this suit. Pursuant to the Declaratory Judgments Act, the City is entitled to, and hereby seeks, recovery of its reasonable and necessary attorney's fees incurred in the prosecution of its claims herein.

X.
CONDITIONS PRECEDENT

58. Pursuant to Rule 54 of the Texas Rules of Civil Procedure, the City avers that all conditions precedent to the filing of this lawsuit have been performed or have occurred.

XI.
APPLICATION FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION

59. The City hereby incorporates by reference Paragraphs 1 through 55 as though fully set forth herein.

60. As set forth above, requiring the City to pay the Default Uplift Invoice would violate the Constitution. Hence, the City can demonstrate a probable right to relief.

61. The City will suffer a probable and imminent injury from ERCOT's demand that it pay the Default Uplift Invoice. The Invoice is likely to be in the tens (or possibly in the hundreds) of millions of dollars. The payment of the Default Uplift Invoice will therefore impose a severe injury on the City's finances.

62. That probable and imminent injury is irreparable. Once the Default Uplift Invoice is paid—which ERCOT will effectuate unilaterally by withholding payments from the City—it would be impossible to claw the funds back. The reason for that is two-fold. First, due to the vagaries of the electricity market that ERCOT operates and because of the fungibility of money, it would be impossible to deconstruct the transaction to determine exactly which entities received how much of the City's money. Second, even if the money could be traced, it could not be

recovered because many of the payees will be insolvent, irrespective of whether the City pays the Default Uplift Invoice, due to the default of so many other market participants. In short, if the City pays the Default Uplift Invoice, its money is gone forever and cannot be recovered.

63. The City's inability to recover any amounts paid under a Default Uplift Invoice reflects that it does not have an adequate remedy at law. The injury to the City, moreover, is not limited solely to the financial cost of the invoices. Rather, the payment of such significant sums would adversely affect the City's financial standing and credit. The City would very likely have to issue public debt to pay the Default Uplift Invoices, which would impair its ability in the future to issue additional debt to pay for needed municipal capital improvements. The City lacks any recourse at law that would be adequate to remedy this harm.

64. Moreover, because the City will suffer an irreparable injury to its personal property (i.e., its finances and credit rating), it does not need to show the lack of an adequate remedy at law in order to obtain injunction. *See* Tex. Civ. Prac. & Rem. Code § 65.011(5).

65. Accordingly, the Court should grant a temporary restraining order and, set a hearing on temporary injunction. Following such hearing, the Court should grant a temporary injunction pending trial enjoining ERCOT from:

a) Requiring the City to pay any Default Uplift Invoice, short-pay statement, or mechanism of similar effect;

b) Accepting payment from the City for any Default Uplift Invoice, short-pay statement, or mechanism of similar effect;

c) Applying any funds otherwise due and owed to the City to the payment of any Default Uplift Invoice, short-pay statement, or mechanism of similar effect;

d) Requiring the collateralization of the City's alleged obligation for any Default Uplift Invoice, short-pay statement, or mechanism of similar effect;

e) Restricting the City's access to the wholesale electric market, including the day-ahead or real-time markets; or

f) Taking any action against the City for non-payment of any Default Uplift Invoice, short-pay statement, or mechanism of similar effect.

XII.
APPLICATION FOR PERMANENT INJUNCTION

66. The City hereby incorporates by reference Paragraphs 1 through 62 as though fully set forth herein.

67. The City respectfully applies to the Court for permanent injunction enjoining ERCOT from:

a) Requiring the City to pay any Default Uplift Invoice, short-pay statement, or mechanism of similar effect;

b) Accepting payment from the City for any Default Uplift Invoice, short-pay statement, or mechanism of similar effect;

c) Applying any funds otherwise due and owed to the City to the payment of any Default Uplift Invoice, short-pay statement, or mechanism of similar effect;

d) Requiring the collateralization of the City's alleged obligation for any Default Uplift Invoice, short-pay statement, or mechanism of similar effect;

e) Restricting the City's access to the wholesale electric market, including the day-ahead or real-time markets; or

f) Taking any action against the City for non-payment of any Default Uplift Invoice, short-pay statement, or mechanism of similar effect.

XIII.
BOND

68. The City is willing to post reasonable bond as set by the Court. The City observes, however, that ERCOT will suffer no injury from the preservation of the status quo through temporary restraining order and temporary injunction and has no pecuniary interest in the suit. ERCOT itself is a nonprofit entity, which serves merely as a clearinghouse for payments between market participants. Accordingly, the Court should, in the exercise of its discretion, fix the amount of the bond at $0 or, in the alternative, in a nominal amount. *See* Tex. R. Civ. P. 684.

XIV.
CONCLUSION & PRAYER

69. The City, therefore, prays the Court to exercise jurisdiction over Defendants and, in addition to the temporary restraining order and temporary injunction outlined above, grant them final judgment following trial on the merits:

1. Issue permanent injunction enjoining ERCOT from:
    a) Requiring the City to pay any Default Uplift Invoice, short-pay statement, or mechanism of similar effect;
    b) Accepting payment from the City for any Default Uplift Invoice, short-pay statement, or mechanism of similar effect;
    c) Applying any funds otherwise due and owed to the City to the payment of any Default Uplift Invoice, short-pay statement, or mechanism of similar effect;
    d) Requiring the collateralization of the City's alleged obligation for any Default Uplift Invoice, short-pay statement, or mechanism of similar effect;
    e) Restricting the City's access to the wholesale electric market, including the day-ahead or real-time markets; or
    f) Taking any action against the City for non-payment of any Default Uplift Invoice, short-pay statement, or mechanism of similar effect.
2. Award the City its reasonable attorneys' fees for the preparation and prosecution of this action as well as for any and all appeals; and
3. Award the City its costs of court incurred and expended.

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