

PROJECT NO. 33495

| | | |
|------------------------------------|----------|----------------------------------|
| RULEMAKING PROJECT TO AMEND | § | PUBLIC UTILITY COMMISSION |
| RULE RELATING TO THE | § | |
| INDEPENDENT MARKET MONITOR | § | OF TEXAS |
| FOR ERCOT | § | |

**PROPOSAL FOR PUBLICATION OF AMENDMENT TO §25.365
AS APPROVED AT THE DECEMBER 1, 2006 OPEN MEETING**

The Public Utility Commission of Texas (commission) proposes an amendment to §25.365, relating to Independent Market Monitor (IMM). The proposed amendment limits the liability of the IMM in the performance of its duties in monitoring the Wholesale Electric Market in the Electric Reliability Council of Texas (ERCOT). The proposed amendment is necessary to protect the independence of the market monitor and limit the costs that are incurred in providing market monitoring services. The market monitor provides essential services to the proper functioning of the ERCOT market, namely detecting and preventing market manipulation strategies, market rule violations, and market power abuses in the ERCOT wholesale electric market and by recommending measures to enhance the efficiency of the wholesale market. This rule is a competition rule subject to judicial review as specified in PURA §39.001(e). Project Number 33495 is assigned to this proceeding.

The proposed amendment, if adopted, will implement the requirements of Senate Bill 408, 79th Legislature, 1st Called Session (2005). The bill requires that the commission adopt rules that: (1) define the responsibilities and authority of the IMM, including reporting obligations and limitations; (2) establish the standards for funding the IMM; (3) specify the staffing requirements and qualifications for the IMM; and (4) establish ethics standards for the IMM. The commission adopted §25.365 to prescribe the terms of the IMM's service, and this amendment would address

the degree to which the IMM would be subject to a lawsuit in connection with its performance of its duties.

Ms. Danielle Jaussaud, Director of Market Analysis, Electric Industry Oversight Division, has determined that for each year of the first five-year period the proposed amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment.

Ms. Jaussaud has determined that for each year of the first five years the proposed amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be the facilitation of a more effective and efficient operation of the wholesale electric markets. The Texas Legislature has determined that Texas should change from a system in which electric power is fully regulated by the commission to a system in which competitive forces will determine the rates, operations, and services that are available to the public. The Legislature has directed that the commission put in place an independent market monitor to oversee the activities of market participants in the newly instituted wholesale electric market in ERCOT to ensure that the market remains free of strategic manipulations and market power abuses and brings the benefits of competition to electric customers. The public benefits anticipated as a result of the proposed amendment include the protection of customers and market participants from market manipulations, market rule violations, and market power abuses, and the increased efficiency of market operations. In particular, this proposed amendment will preserve the independence of the market monitor by protecting it from liability to market participants and will reduce the costs of providing the market monitoring function. In the absence of such protection from liability, the

IMM would probably have to incur significant expenses for insurance coverage and would seek to recover those costs from electric customers, as a part of the cost of providing the market monitoring services.

There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing the proposed amendment.

Ms. Jaussaud has also determined that for each year of the first five years the proposed amendment is in effect there should be no negative effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rulemaking under the Administrative Procedure Act, Texas Government Code §2001.029 at the commission's offices, located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701, on Tuesday, January 23, 2007, if a written request is made for a public hearing within 25 days after publication of the proposed amendment.

Comments on the proposed amendment (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas

78711-3326, within 25 days after publication. Reply comments may be submitted within 35 days after publication. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed amendment. The commission will consider the costs and benefits in deciding whether to adopt the proposed amendment. All comments should refer to Project Number 33495.

In addition to comments on the proposed rule language, the commission invites comment on the following question:

Is it more appropriate to implement the proposed limitation of liability provisions through a contract provision added to ERCOT's standard form agreements, or through changes to ERCOT's Protocols?

This amendment is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2006) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §39.1515, which authorizes the commission to adopt rules defining the monitoring responsibilities of the independent market monitor, including reporting obligations and limitations; PURA §35.004, which requires that the commission ensure that ancillary services necessary to facilitate the transmission of electric energy are available at reasonable prices with terms and conditions that are not unreasonably preferential, prejudicial, predatory, or anticompetitive; PURA §39.001, which establishes the Legislative policy to protect the public interest during the transition to and in the establishment of a fully competitive electric power industry; PURA §39.101, which establishes that customers

are entitled to protection from unfair, misleading, or deceptive practices and directs the commission to adopt and enforce rules to carry out this provision and to ensure that retail customer protections are established that afford customers safe, reliable, and reasonably priced electricity; PURA §39.151, which requires the commission to oversee and review the procedures established by an independent organization, directs market participants to comply with such procedures, and authorizes the commission to enforce such procedures; and PURA §39.157, which directs the commission to monitor market power associated with the generation, transmission, distribution, and sale of electricity and provides enforcement power to the commission to address any market power abuses.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 39.1515, 35.004, 39.001, 39.101, 39.151, and 39.157.

§25.365 Independent Market Monitor.

(a)-(m) (No change.)

(n) **Liability of the IMM.** The 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, arising under or relating to this section, 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 related to matters within the scope of the IMM's authority.

(o) **Contractual Provisions.** By no later than April 1, 2007, ERCOT shall include the following provision in any standard form agreement it has with an entity that engages in any activity that is in whole or in part the subject of the ERCOT Protocols:

The 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 Public Utility Commission Substantive Rule §25.365, relating to Independent Market Monitor.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

**ISSUED IN AUSTIN, TEXAS ON THE 1st DAY OF DECEMBER 2006 BY THE
PUBLIC UTILITY COMMISSION OF TEXAS
ADRIANA A. GONZALES**

Q:\CADM\TXR-Rules Management\Rules\Rulemaking Projects\Electric\33495\33495 publication.doc