

PROJECT NO. 34038

RULEMAKING PROCEEDING TO	§	PUBLIC UTILITY COMMISSION
AMEND PUC SUBSTANTIVE RULES	§	
RELATING TO NOTIFICATION OF	§	OF TEXAS
TRANSACTIONS AFFECTING THE	§	
OWNERSHIP OF ELECTRIC	§	
UTILITIES	§	

**ORDER ADOPTING AN AMENDMENT TO §25.74 AND REPEAL OF §25.75
AS APPROVED AT THE SEPTEMBER 13, 2007 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts an amendment to §25.74, relating to Report on Change in Control, Sale of Property, Purchase of Stock, or Loan, with changes to the proposed text, and the repeal of §25.75, relating to Reports on Sale of 50% or More of Stock, with no changes, as published in the April 13, 2007 issue of the *Texas Register* (32 TexReg 2080). The amendment and repeal will require an electric utility to report to the commission in advance of the closing of certain transactions. The amendment and repeal will enable the commission to better regulate and supervise the business of each electric utility. This amendment and repeal are adopted under Project Number 34038.

The commission received comments from AEP Texas Central Company, AEP Texas North Company, and Southwestern Electric Power Company (collectively AEP), CenterPoint Energy Houston Electric, LLC (CenterPoint), El Paso Electric Company (EPE), Entergy Gulf States, Inc. (EGSI), Lower Colorado River Authority Transmission Services Corporation (LCRA), Oncor Electric Delivery Company (Oncor), Texas Industrial Energy Consumers (TIEC), TXU Cities Steering Committee (TXU Cities), and Xcel Energy, Inc. on behalf of Southwestern Public Service Company (Xcel). TIEC and TXU Cities supported the adoption of the amendment of

§25.74 and repeal of §25.75. AEP, CenterPoint, EPE, LCRA, Oncor, and Xcel opposed the adoption of the amendment of §25.74. However, CenterPoint agreed that if §25.74 is amended, the repeal of §25.75 is appropriate. EGSI stated that, while the amendment may be premature, §25.74 should be clarified to specifically exclude a jurisdictional separation pursuant to Public Utility Regulatory Act (PURA) §39.452(e).

EPE, Oncor, and Xcel commented that because the Texas legislature was considering changes to PURA concerning notice and approval of certain transactions, the commission should delay consideration of the amendment and repeal until the legislature completed its work.

CenterPoint objected that the amendment of §25.74, specifically the requirement of reporting certain transactions “not later than six months prior to the earliest date the transaction could occur,” should comport with the form of the bill enacted by the legislature. That bill read “within 180 days” in the House versions of the Senate bills 482 and 483, and not “six months” as it did in the proposed amendment. TIEC disagreed with CenterPoint, stating that the commission has the authority to adopt the amendment without any further legislative changes.

Several commenters disputed the commission’s statutory authority to adopt the amendment. AEP asserted that the commission’s statutory authority to require the reporting of sale, transfer, and merger transactions six months prior to closing is uncertain. AEP cited to PURA §14.101, which provides that such transactions must be reported within “a reasonable time,” but does not, in its view, authorize the commission to delay the closing of such transactions. EPE agreed with AEP’s argument. Oncor also objected to the amendment on statutory grounds, stating that

extending the reach of PURA to “direct or indirect” transfers of controlling interests in “direct or indirect” owners of an electric utility exceeds the statute’s reach. LCRA agreed with Oncor’s objection. TXU Cities disagreed with these comments, and stated that the amendment to §25.74 grants invaluable time to ensure that the commission can adequately review details of complex financial transactions that have potentially long-term public interest implications. In addition, TXU Cities disagreed with AEP’s claim that PURA §14.101 does not give the commission authority to interpret “within a reasonable time,” stating that while the legislature did not expressly limit the commission’s authority in this regard, it did expressly provide broad authority to the commission to do “anything ... necessary and convenient” to exercise its regulatory power. TIEC agreed that the commission has this power.

AEP and Xcel further objected to the amendment requiring pre-closing filing on the grounds that many entities already elect to seek voluntary pre-approval of sale, transfer, and merger transactions. TXU Cities disagreed with Xcel and AEP, stating that if entities already engage in pre-reporting as part of their business practice, memorializing the requirement will not impose any additional burden.

Oncor and LCRA argued that the six-month advance notice requirement would create an unreasonable burden effectively preventing certain transactions from occurring. Oncor asserted that the current timeframes offer entities necessary flexibility while also giving the commission adequate review time. LCRA agreed. AEP added that not only could the amendment delay a wide range of transactions, but also it could add damaging costs and impair the ability and willingness of parties to enter into many smaller transactions. TIEC disagreed with these

objections, stating that the consumers' interests mandate that the commission have the authority to ensure that a transaction is consistent with the public interest. TXU Cities agreed with TIEC.

Commission response

Since the publication of the proposed amendment and repeal, Texas House Bill 624 §1, 80th Legislature, Regular Session (2007) (HB 624; effective June 15, 2007; to be codified at PURA §39.262(l)-(o)) and Texas House Bill 3693 §25, 80th Legislature, Regular Session (2007) (HB 3693; effective September 1, 2007; to be codified at PURA §39.915), have been adopted, and both will be in effect by the time the rule amendments take effect. PURA §39.262(l)-(o) and §39.915 require the commission to approve or deny certain transactions involving the merger, consolidation, stock, or control of an electric utility. The commission has changed the amendment to conform to these PURA provisions, and they are specifically addressed in adopted subsections (a) and (f). These PURA provisions refer to an electric utility or transmission and distribution utility. The amendment refers only to an electric utility, because the term "electric utility" includes a transmission and distribution utility. Many of the commenters' concerns about the proposed amendment were resolved by the adoption of these PURA provisions.

Adopted subsection (b) requires that the electric utility report a transaction addressed by PURA §14.101(a)(1) at least one commission working day before the transaction closes. However, adopted subsection (b) also references PURA §37.154, which requires that an electric utility obtain commission approval of a transfer of a certificate of convenience and necessity. For a transaction reported pursuant to adopted subsection (b) that is also

subject to PURA §37.154, PURA effectively requires commission review of the transaction before it closes. In contrast, for a transaction reported pursuant to adopted subsection (b) that is not also subject to PURA §37.154, PURA does not require commission review of the transaction before it closes. The commission concludes that adopted subsection (b) appropriately distinguishes between those transactions that should be reviewed by the commission before they close and those for which commission review before closing should not be categorically required.

Subsections (c) and (d) address transactions that are less likely to have substantial and prompt impacts on utilities' service in comparison to transactions addressed by subsection (a) or transactions addressed by subsection (b) and subject to PURA §37.154. As a result, adopted subsections (c) and (d) require that a utility report a transaction addressed by subsections (c) or (d) at least one commission working day before the transaction closes, instead of not later than six months prior to the earliest date that the transaction could occur as provided in the proposed amendment. In addition, the commission has added a 5% stock ownership materiality threshold to adopted subsection (d).

LCRA objected to proposed §25.74(a) requiring transactions involving "more than \$100,000" be reported, stating that a more objective transaction dollar value allowing oversight over more significant transactions would be appropriate and would cause ratepayers to bear fewer costs. AEP agreed, noting that \$100,000 is a relatively small amount in the electric business.

Commission response

The threshold for review specified by PURA §14.101(a)(1) is \$100,000.

Oncor argued that the commission should not adopt any rule amendment that would apply retroactively to any transaction reported to the commission, stating that such an action would amount to “changing the rules in the middle of the game.” TIEC disagreed and argued that the commission is well within its power to modify procedural requirements and apply them to pending transactions.

Commission response

With one exception, PURA §39.262(l)-(o) apply to any transaction described by subsection (l) that had not closed before June 15, 2007, the effective date of HB 624. The exception, pursuant to subsection (n), is a transaction for which a definitive agreement was executed before April 1, 2007, if the electric utility or a person seeking to acquire or merge with the electric utility made a filing for review of the transaction under PURA §14.101 before May 1, 2007, and the resulting proceeding is not withdrawn. PURA §39.915 contains the same provisions, but is effective on September 1, 2007. Proposed subsection (i), now adopted subsection (f), has been changed to conform to these new PURA provisions. The commission has also deleted proposed subsection (g), which provided that a transaction like those addressed by PURA §39.262(l) shall not occur before the commission completes its review of the transaction as proposed, regardless of the amount of time that has transpired since the report of the transaction to the commission was made. Any issue concerning the closing of a transaction addressed by PURA §39.262(n) can be addressed in the pending

commission proceeding in which the transaction is being considered, including whether the commission has authority to delay or prohibit the closing of the transaction.

EGSI recommended that the proposed rule be clarified to specifically exclude jurisdictional separation and certain Chapter 39-related transactions from the scope of the rule. TXU Cities disagreed with EGSI's proposal, stating that jurisdictional separation transactions could have a significant impact on consumers in Texas and should be subject to oversight. TIEC, on the other hand, replied that the rules do not implicate EGSI's jurisdictional separation issue and need not be specifically addressed in the rule.

Commission response

The commission agrees that the rule should not apply to activities covered by PURA §14.101(d) and §39.452(e), and has amended the rule accordingly. PURA §14.101(d) lists activities that are excluded from PURA §14.101. In addition, PURA does not contemplate mandatory, pre-closing review by the commission of the reasonableness of the manner in which jurisdictional separation done pursuant to PURA §39.452(e) is accomplished.

LCRA asserted that §25.74(i) is unclear as to when a "transaction" actually occurs, arguing that the proposed rule could be interpreted to mean a point in time when a contract for sale is executed or a later point in time, when actual title is set to transfer.

Commission response

The rule has been amended to refer to when a transaction closes, which is consistent with HB 624 and HB 3693.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting amended §25.74, the commission makes other changes to clarify its intent and conform the rule to current law.

The amendment and repeal are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007) (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 §14.001, which gives the commission the general power to regulate and supervise the business of each electric utility; PURA §14.201, which requires the commission to keep itself informed as to the manner and method in which each electric utility is managed and its affairs are conducted; PURA §14.101, which requires the commission to review certain transactions of electric utilities; PURA §37.154, which requires the commission to review the transfer of a certificate of convenience and necessity of an electric utility; and Texas House Bill 624 §1, 80th Legislature, Regular Session (2007) (effective June 15, 2007; to be codified at PURA §39.262(l)-(o)) and Texas House Bill 3693 §25, 80th Legislature, Regular Session (2007) (effective September 1, 2007; to be codified at PURA §39.915), which require an electric utility to report to and obtain approval of the commission before closing certain transactions.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.001, 14.002, 14.101, and 37.154; Texas House Bill 624 §1, 80th Legislature, Regular Session (2007) (effective June 15, 2007; to be codified at PURA §39.262(1)-(o)); and Texas House Bill 3693 §25, 80th Legislature, Regular Session (2007) (effective September 1, 2007; to be codified at PURA §39.915).

§25.74. Report on Change in Control, Sale of Property, Purchase of Stock, or Loan.

- (a) Pursuant to Public Utility Regulatory Act (PURA) §39.262(l)-(m) and §39.915, an electric utility must report to and obtain approval of the commission before closing any transaction in which:
- (1) the electric utility will be merged or consolidated with another electric utility;
 - (2) at least 50% of the stock of the electric utility will be transferred or sold; or
 - (3) a controlling interest or operational control of the electric utility will be transferred.
- (b) Pursuant to PURA §14.101(a)(1), an electric utility shall not sell, acquire, or lease a plant as an operating unit or system in the State of Texas for a total consideration of more than \$100,000 unless the electric utility reports such transaction to the commission at least one commission working day before the transaction closes. Pursuant to PURA §37.154, if the transaction involves the sale, assignment, or lease of a certificate of convenience and necessity (CCN) or a right obtained under a CCN, the electric utility must obtain commission approval of such CCN transfer.
- (c) An electric utility shall not purchase voting stock in another public utility doing business in the State of Texas unless the electric utility reports such purchase to the commission at least one commission working day before the transaction closes.
- (d) An electric utility shall not loan money, stocks, bonds, notes, or other evidence of indebtedness to any person who directly or indirectly owns or holds 5% or more of the

stock of the electric utility unless the electric utility reports such transaction to the commission at least one commission working day before the transaction closes. A properly filed tariff or energy efficiency plan with respect to energy conservation loans available to customers will be considered adequate reporting to the commission.

- (e) This section does not apply to activities addressed by PURA §14.101(d) and §39.452(e).
- (f) This section applies to any transaction addressed by this section that has not closed, except for a transaction addressed by PURA §39.262(n) or §39.915(c).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority. It is therefore ordered by the Public Utility Commission of Texas that §25.74, relating to Report on Change in Control, Sale of Property, Purchase of Stock, or Loan, is hereby adopted with changes to the text as proposed and §25.75, relating to Reports on Sale of 50% or More of Stock, is hereby repealed with no changes as proposed.

ISSUED IN AUSTIN, TEXAS ON THE 18th DAY OF SEPTEMBER 2007.

PUBLIC UTILITY COMMISSION OF TEXAS

PAUL HUDSON, CHAIRMAN

JULIE PARSLEY, COMMISSIONER

BARRY T. SMITHERMAN, COMMISSIONER