

## CHAPTER 24. PROCEDURAL RULES.

### Subchapter M. PROCEDURES AND FILING REQUIREMENTS IN PARTICULAR COMMISSION PROCEEDINGS.

#### §22.246. Administrative Penalties.

- (a) **Scope.** This section addresses enforcement actions related to administrative penalties or disgorgement of excess revenues only and does not apply to any other enforcement actions that may be undertaken by the commission or the commission staff.
- (b) **Definitions.** The following words and terms, when used in this section, have the following meanings unless the context indicates otherwise:
- (1) **Affected wholesale electric market participant** -- An entity, including a retail electric provider (REP), municipally owned utility (MOU), or electric cooperative, that sells energy to retail customers and served load during the period of the violation.
  - (2) **Excess revenue** -- As defined in §25.503 of this title (relating to Oversight of Wholesale Market Participants).
  - (3) **Executive director** -- The executive director of the commission or the executive director's designee.
  - (4) **Person** -- Includes a natural person, partnership of two or more persons having a joint or common interest, mutual or cooperative association, and corporation.
  - (5) **Violation** -- Any activity or conduct prohibited by the Public Utility Regulatory Act (PURA), the Texas Water Code (TWC), commission rule, or commission order.
  - (6) **Continuing violation** -- Except for a violation of PURA chapter 17, 55, or 64, and commission rules or commission orders adopted or issued under those chapters, any instance in which the person alleged to have committed a violation attests that a violation has been remedied and was accidental or inadvertent and subsequent investigation reveals that the violation has not been remedied or was not accidental or inadvertent.
- (c) **Amount of administrative penalty for violations of PURA or a rule or order adopted under PURA.**
- (1) Each day a violation continues or occurs is a separate violation for which an administrative penalty can be levied, regardless of the status of any administrative procedures that are initiated under this subsection.
  - (2) The administrative penalty for each separate violation of PURA §35.0021, PURA §38.075, or a commission rule or commission order adopted under PURA §35.0021 or PURA §38.075 will be in an amount not to exceed \$1,000,000 per violation per day. For all other violations, the administrative penalty for each separate violation will be in an amount not to exceed \$25,000 per violation per day. An administrative penalty in an amount that exceeds \$5,000 may be assessed only if the violation is included in the highest class of violations in the classification system.
  - (3) The amount of the administrative penalty must be based on:
    - (A) the seriousness of the violation, including the nature, circumstances, extent, and gravity of any prohibited acts, and the hazard or potential hazard created to the health, safety, or economic welfare of the public;
    - (B) the economic harm to property or the environment caused by the violation;
    - (C) the history of previous violations;
    - (D) the amount necessary to deter future violations;
    - (E) efforts to correct the violation; and
    - (F) any other matter that justice may require, including, but not limited to, the respondent's timely compliance with requests for information, completeness of responses, and the manner in which the respondent has cooperated with the commission during the investigation of the alleged violation.
- (d) **Amount of administrative penalty for violations of the TWC or a rule or order adopted under chapter 13 of the TWC.**
- (1) Each day a violation continues may be considered a separate violation for which an administrative penalty can be levied, regardless of the status of any administrative procedures that are initiated under this subsection.
  - (2) The administrative penalty for each separate violation may be in an amount not to exceed \$5,000 per day.

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- (3) The amount of the penalty must be based on:
  - (A) the nature, circumstances, extent, duration, and gravity of the prohibited acts or omissions;
  - (B) the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;
  - (C) the demonstrated good faith, including actions taken by the person, affiliated interest, or entity to correct the cause of the violation;
  - (D) any economic benefit gained through the violations;
  - (E) the amount necessary to deter future violations; and
  - (F) any other matters that justice requires.
- (e) **Initiation of investigation.** Upon receiving an allegation of a violation or of a continuing violation, the executive director will determine whether an investigation should be initiated.
- (f) **Report of violation or continuing violation.** If, based on the investigation undertaken in accordance with subsection (e) of this section, the executive director determines that a violation or a continuing violation has occurred, the executive director may issue a report to the commission.
  - (1) **Contents of the report.** The report must state the facts on which the determination is based and a recommendation on the imposition of an administrative penalty, including a recommendation on the amount of the administrative penalty and, if applicable under §25.503 of this title, a recommendation that excess revenue be disgorged.
  - (2) **Notice of report.**
    - (A) Within 14 days after the report is issued, the executive director will give written notice of the report to the person who is alleged to have committed the violation or continuing violation which is the subject of the report. The notice may be given by regular or certified mail.
    - (B) For violations of the TWC or a rule or order adopted under chapter 13 of the TWC, within ten days after the report is issued, the executive director will, by certified mail, return receipt requested, give written notice of the report to the person who is alleged to have committed the violation or continuing violation which is the subject of the report.
    - (C) The notice must include:
      - (i) a brief summary of the alleged violation or continuing violation;
      - (ii) a statement of the amount of the recommended administrative penalty;
      - (iii) a statement recommending disgorgement of excess revenue, if applicable, under §25.503 of this title;
      - (iv) a statement that the person who is alleged to have committed the violation or continuing violation has a right to a hearing on the occurrence of the violation or continuing violation, the amount of the administrative penalty, or both the occurrence of the violation or continuing violation and the amount of the administrative penalty;
      - (v) a copy of the report issued to the commission under this subsection; and
      - (vi) a copy of this section, §22.246 of this title (relating to Administrative Penalties).
  - (D) If the commission sends written notice to a person by mail addressed to the person's mailing address as maintained in the commission's records, the person is deemed to have received notice:
    - (i) on the fifth day after the date that the commission sent the written notice, for notice sent by regular mail; or
    - (ii) on the date the written notice is received or delivery is refused, for notice sent by certified mail.
- (g) **Options for response to notice of violation or continuing violation.**
  - (1) **Opportunity to remedy.**
    - (A) This paragraph does not apply to a violation of PURA chapters 17, 55, or 64; PURA §35.0021 or §38.075; or chapter 13 of the TWC; or of a commission rule or commission order adopted or issued under those chapters or sections.

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- (B) Within 40 days of the date of receipt of a notice of violation set out in subsection (f)(2) of this section, the person against whom the administrative penalty or disgorgement may be assessed may file with the commission proof that the alleged violation has been remedied and that the alleged violation was accidental or inadvertent. A person who claims to have remedied an alleged violation has the burden of proving to the commission both that an alleged violation was remedied before the 31st day after the date the person received the report of violation and that the alleged violation was accidental or inadvertent. Proof that an alleged violation has been remedied and that the alleged violation was accidental or inadvertent must be evidenced in writing, under oath, and supported by necessary documentation.
  - (C) If the executive director determines that the alleged violation has been remedied, was remedied within 30 days, and that the alleged violation was accidental or inadvertent, no administrative penalty will be assessed against the person who is alleged to have committed the violation.
  - (D) If the executive director determines that the alleged violation was not remedied or was not accidental or inadvertent, the executive director will make a determination as to what further proceedings are necessary.
  - (E) If the executive director determines that the alleged violation is a continuing violation, the executive director will institute further proceedings, including referral of the matter for hearing under subsection (i) of this section.
- (2) **Payment of administrative penalty, disgorged excess revenue, or both.** Within 20 days after the date the person receives the notice set out in subsection (f)(2) of this section, the person may accept the determination and recommended administrative penalty and, if applicable, the recommended excess revenue to be disgorged through a written statement sent to the executive director. If this option is selected, the person must take all corrective action required by the commission. The commission by written order will approve the determination and impose the recommended administrative penalty and, if applicable, recommended disgorged excess revenue or order a hearing on the determination and the recommended penalty.
- (3) **Request for hearing.** Not later than the 20th day after the date the person receives the notice set out in subsection (f)(2) of this section, the person may submit to the executive director a written request for a hearing on any or all of the following:
- (A) the occurrence of the violation or continuing violation;
  - (B) the amount of the administrative penalty; and
  - (C) the amount of disgorged excess revenue, if applicable.
- (4) **Failure to respond.** If the person fails to timely respond to the notice set out in subsection (f)(2) of this section, the commission by order will approve the determination and impose the recommended penalty or order a hearing on the determination and the recommended penalty.
- (5) **Opportunity to remedy a weather preparedness violation.**
- (A) This paragraph applies to a violation of PURA §35.0021, §38.075, or a commission rule or order adopted or issued under those sections.
  - (B) PURA §15.024(c), as written, does not apply to a violation of PURA §35.0021, §38.075, or a commission rule or order adopted or issued under those sections. This paragraph implements PURA §15.024(c), as modified by PURA §15.023(a), §35.0021(g), and §38.075(d), for violations of PURA §35.0021, §38.075, or a commission rule or order adopted or issued under those sections.
  - (C) The commission may impose an administrative penalty against an entity regulated under PURA §35.0021 or §38.075 that violates those sections, or a commission rule or order adopted under those sections, except:
    - (i) the commission will assess a penalty for a violation of PURA §35.0021, §38.075, or a commission rule adopted under those sections if the entity against which the penalty may be assessed does not remedy the violation within a reasonable amount of time; and,
    - (ii) the commission will not assess a penalty for a violation of PURA §35.0021, §38.075, or a commission rule or order adopted or issued under those sections if

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- the violation was accidental or inadvertent, and the entity against which the penalty may be assessed remedies the violation within a reasonable period of time.
- (D) For purposes of this paragraph, the following provisions apply unless a provision conflicts with a commission rule or order adopted under PURA §35.0021 or §38.075, in which case, the commission rule or order applies.
- (i) Not all violations to which this paragraph applies can be remedied. Clauses (C)(i) and (C)(ii) of this paragraph do not apply to a violation that cannot be remedied.
  - (ii) For purposes of clauses (C)(i) and (C)(ii) of this paragraph, an entity that claims to have remedied an alleged violation and, if applicable, that the alleged violation was accidental or inadvertent has the burden of proving its claim to the commission. Proof that an alleged violation has been remedied and, if applicable, that the alleged violation was accidental or inadvertent must be evidenced in writing, under oath, and supported by necessary documentation.
  - (iii) An entity that remedies a violation that is discovered during an inspection by the independent organization certified under PURA §39.151 for the ERCOT power region prior to the deadline provided to that entity by the independent organization in accordance with PURA §35.0021 or §38.075 is deemed to have remedied that violation in a reasonable period of time.
  - (iv) If the independent organization certified under PURA §39.151 has not provided an entity with a deadline, the executive director will determine whether the deadline can be remedied and, if so, the deadline for remedying a violation within a reasonable period of time. The executive director will provide the entity with written notice of the violation and the deadline for remedying the violation within a reasonable period of time. This notice does not constitute notice under paragraph (f)(2) of this section unless it fulfills the other requirements of that subsection. However, the provisions of subparagraph (f)(2)(D) of this section apply to notice under this clause.
  - (v) The executive director will determine if and when a report should be issued to the commission under subsection (f) of this section and will make a determination as to what further proceedings are necessary.
  - (vi) If the executive director determines that the alleged violation was not remedied within a reasonable period of time or is a continuing violation, the executive director will issue a report to the commission under subsection (f) of this section and will institute further proceedings, including referral of the matter for hearing under subsection (i) of this section.
  - (vii) If the commission determines that the deadline for remedying a violation provided by the independent organization certified under PURA §39.151 or determined by the executive director is unreasonable, the commission will determine what the deadline should have been. The commission will use this updated deadline to determine the applicability of subclauses (C)(i) and (C)(ii) of this paragraph and, if appropriate, as a factor in determining the magnitude of administrative penalty to impose against the entity for the violation.
- (h) **Settlement conference.** A settlement conference may be requested by any party to discuss the occurrence of the violation or continuing violation, the amount of the administrative penalty, disgorged excess revenue if applicable, and the possibility of reaching a settlement prior to hearing. A settlement conference is not subject to the Texas Rules of Evidence or the Texas Rules of Civil Procedure; however, the discussions are subject to Texas Rules of Civil Evidence 408, concerning compromise and offers to compromise.
- (1) If a settlement is reached:
    - (A) the parties must file a report with the executive director setting forth the factual basis for the settlement;
    - (B) the executive director will issue the report of settlement to the commission; and
    - (C) the commission by written order will approve the settlement.

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- (2) If a settlement is reached after the matter has been referred to the State Office of Administrative Hearings, the matter will be returned to the commission. If the settlement is approved, the commission will issue an order memorializing commission approval and setting forth commission orders associated with the settlement agreement.
- (i) **Hearing.** If a person requests a hearing under subsection (g)(3) of this section, or the commission orders a hearing under subsection (g)(4) of this section, the commission will refer the case to SOAH under §22.207 of this title (relating to Referral to State Office of Administrative Hearings) and give notice of the referral to the person. For violations of the TWC or a rule or order adopted under chapter 13 of the TWC, if the person charged with the violation fails to timely respond to the notice, the commission by order will assess the recommended penalty or order a hearing to be held on the findings and recommendations in the report. If the commission orders a hearing, the case will then proceed as set forth in paragraphs (1)-(5) of this subsection.
- (1) The commission will provide the SOAH administrative law judge a list of issues or areas that must be addressed.
- (2) The hearing must be conducted in accordance with the provisions of this chapter and notice of the hearing must be provided in accordance with the Administrative Procedure Act.
- (3) The SOAH administrative law judge will promptly issue to the commission a proposal for decision, including findings of fact and conclusions of law, about:
- (A) the occurrence of the alleged violation or continuing violation;
- (B) whether the alleged violation was cured and was accidental or inadvertent for a violation of any chapter other than PURA chapters 17, 55, or 64; of a commission rule or commission order adopted or issued under those chapters; or of chapter 13 of the TWC; and
- (C) the amount of the proposed administrative penalty and, if applicable, disgorged excess revenue.
- (4) Based on the SOAH administrative law judge's proposal for decision, the commission may:
- (A) determine that a violation or continuing violation has occurred and impose an administrative penalty and, if applicable, disgorged excess revenue;
- (B) if applicable, determine that a violation occurred but that, as permitted by subsection (g)(1) of this section, the person remedied the violation within 30 days and proved that the violation was accidental or inadvertent, and that no administrative penalty will be imposed; or
- (C) determine that no violation or continuing violation has occurred.
- (5) Notice of the commission's order issued under paragraph (4) of this subsection must be provided under the Government Code, chapter 2001 and §22.263 of this title (relating to Final Orders) and must include a statement that the person has a right to judicial review of the order.
- (j) **Parties to a proceeding.** The parties to a proceeding under chapter 15 of PURA relating to administrative penalties or disgorgement of excess revenue will be limited to the person who is alleged to have committed the violation or continuing violation and the commission, including the independent market monitor. This does not apply to a subsequent proceeding under subsection (k) of this section.
- (k) **Distribution of Disgorged Excess Revenues.** Disgorged excess revenues must be remitted to an independent organization, as defined in PURA §39.151. The independent organization must distribute the excess revenue to affected wholesale electric market participants in proportion to their load during the intervals when the violation occurred to be used to reduce costs or fees incurred by retail electric customers. The load of any market participants that are no longer active at the time of the distribution will be removed prior to calculating the load proportions of the affected wholesale electric market participants that are still active. However, if the commission determines other wholesale electric market participants are affected or a different distribution method is appropriate, the commission may direct commission staff to open a subsequent proceeding to address those issues.
- (1) No later than 90 days after the disgorged excess revenues are remitted to the independent organization, the monies must be distributed to affected wholesale electric market participants active at the time of distribution, or the independent organization must, by that date, notify the commission of the date by which the funds will be distributed. The independent organization must include with

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- the distributed monies a communication that explains the docket number in which the commission ordered the disgorged excess revenues, an instruction that the monies must be used to reduce costs or fees incurred by retail electric customers, and any other information the commission orders.
- (2) The commission may require any affected wholesale electric market participants receiving disgorged funds to demonstrate how the funds were used to reduce the costs or fees incurred by retail electric customers.
  - (3) Any affected wholesale electric market participant receiving disgorged funds that is affiliated with the person from whom the excess revenue is disgorged must distribute all of the disgorged excess revenues directly to its retail customers and must provide certification under oath to the commission that the entirety of the revenues was distributed to its retail electric customers.