

PROJECT NO. 40073

RULEMAKING TO IMPLEMENT HB	§	PUBLIC UTILITY COMMISSION
2133 BY AMENDING PUC SUBST. R.	§	
§25.503 AND PUC PROC. RULE §22.246	§	OF TEXAS
	§	

**PROPOSAL FOR PUBLICATION OF AMENDMENT TO §22.246
AS APPROVED AT THE APRIL 27, 2012 OPEN MEETING**

The Public Utility Commission of Texas (commission) proposes an amendment to §22.246, relating to Administrative Penalties. The proposed amendment, coupled with substantive amendments proposed to §25.503, establishes procedures to return excess revenues to affected wholesale electricity market participants when the commission has ordered disgorgement of those excess revenues in an enforcement proceeding. House Bill (HB) 2133 requires the commission to adopt rules to establish such a procedure. This rule is a competition rule subject to judicial review as specified in PURA §39.001(e). Project Number 40073 is assigned to this proceeding.

Evan Rowe, Deputy Division Director of the Oversight and Enforcement 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.

Mr. Rowe has determined that for each year of the first five years the proposed amendment is in effect, the anticipated public benefit will be that the authority granted to the commission by HB 2133, including the return of improperly garnered excess revenue to affected wholesale electric market participants, will be reflected in the commission's substantive rules. There are no

economic costs to persons who are required to comply with the amendment. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this amendment. Therefore, no regulatory flexibility analysis is required.

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

Commission staff will conduct a public hearing on this rulemaking, if requested pursuant to 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 at 10:00 a.m. on Monday, July 9, 2012. The request for a public hearing must be received by Thursday, June 28, 2012.

Comments on the proposed amendment may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, on or before Monday, June 11, 2012. Sixteen copies of comments on the proposed amendment are required to be filed pursuant to §22.71(c) of this title. Reply comments may be submitted on or before Monday, June 25, 2012. Comments should be organized in a manner consistent with the organization of the amended rule(s). 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 amendment. All comments should refer to Project Number 40073.

This amendment is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (West 2007 and Supp. 2011) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. Specifically, PURA §15.023 requires the commission to order disgorgement of excess revenues acquired by a market participant by violation of PURA §39.157 and grants the commission discretion to order disgorgement of excess revenues for wholesale electric market violations of other PURA sections, commission rules, or wholesale electricity market protocols. Also, PURA §15.024 limits the parties to an administrative penalty proceeding to the person alleged to have committed the violation and the commission. PURA §15.025 requires the commission to adopt rules proscribing the return of disgorged excess revenues to affected wholesale electric market participants, which shall be used to reduce costs or fees incurred by retail electric customers. PURA §35.004 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 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 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 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. PURA §39.157 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. PURA §39.356 allows the commission to revoke certain certifications and registrations for violation of an independent organization's procedures, statutory provisions, or the commission's rules. Finally, PURA §39.357 authorizes the commission to impose administrative penalties in addition to revocation, suspension, or amendment of certificates and registrations.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 15.023, 15.024, 15.025, 35.004, 39.001, 39.101, 39.151, 39.157, 39.356, and 39.357.

§22.246. Administrative Penalties

(a) **Scope.** This section is intended to address 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, shall have the following meanings unless the context clearly indicates otherwise:

(1) **Affected Wholesale Electric Market Participants** -- An entity, including a retail electric provider (REP), municipally owned utility (MOU), and electric cooperative, that sells energy to retail customers and served load during the period of the violation, excluding any affiliate of the person from which excess revenue is disgorged.

(2) **Excess Revenue** -- As defined in §25.503 (relating to Oversight of Wholesale Market Participants).

(3)(4) **Executive director** -- The executive director of the commission or the executive director's designee.

(4)(2) **Person** — Includes a natural person, partnership of two or more persons having a joint or common interest, mutual or cooperative association, and corporation.

(5)(3) **Violation** — Any activity or conduct prohibited by the Public Utility Regulatory Act (PURA), commission rule or commission order.

(6)(4) **Continuing violation** — Except for a violation of PURA Chapter 17, 55, or 64, and commission rules or commission orders pursuant to 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.**

- (1) Each day a violation continues or occurs is a separate violation for which an administrative ~~a~~ 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 \$25,000 per day, provided that an administrative ~~a~~ 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 shall be based on:
(A)-(F) (No change.)

(d) (No change.)

(e) **Report of violation or continuing violation.** If, based on the investigation undertaken pursuant to subsection (d) 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 shall state the facts on which the determination is based and a recommendation on the imposition of a penalty, including a recommendation on the amount of the penalty and, if applicable

pursuant to §25.503 of this title (relating to Oversight of Wholesale Market Participants), a recommendation that excess revenue be disgorged.

- (2) **Notice of report.** Within 14 days after the report is issued, the executive director shall, 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. The notice must include:

(A) - (B) (No change.)

(C) a statement recommending disgorgement of excess revenue, if applicable, pursuant to §25.503 of this title;

~~(D)(E)~~ 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 penalty, or both the occurrence of the violation or continuing violation and the amount of the penalty;

~~(E)(F)~~ a copy of the report issued to the commission pursuant to this subsection; and

~~(F)(G)~~ a copy of this section, §22.246 of this title (relating to Administrative Penalties).

(f) **Options for response to notice of violation or continuing violation.**

(1) **Opportunity to remedy.**

(A) (No change.)

(B) Within 40 days of the date of receipt of a notice of violation set out in subsection (e)(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 shall be evidenced in writing, under oath, and supported by necessary documentation.

(C) - (E) (No change.)

- (2) **Payment of administrative penalty and/or disgorged excess revenue.** Within 30 days after the date the person receives the notice set out in subsection (e)(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 shall take all corrective action required by the commission. The commission by written order shall approve the determination and impose the recommended administrative penalty and, if applicable, recommended disgorged excess revenue.
- (3) **Request for hearing.** Not later than the 20th day after the date the person receives the notice set out in subsection (e)(2) of this section, the person may submit to the executive director a written request for a hearing on the occurrence

of the violation or continuing violation, the amount of the administrative penalty, the amount of disgorged excess revenue, or both the occurrence of the violation or continuing violation and the amount of the penalty or disgorged excess revenue, if applicable.

- (g) **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) - (2) (No change.)

- (h) **Hearing.** If a person requests a hearing under subsection (f)(3) of this section, or fails to respond timely to the notice of the report of violation or continuing violation provided pursuant to subsection (e)(2) of this section, or if the executive director determines that further proceedings are necessary, the executive director shall set a hearing, provide notice of the hearing to the person, and refer the case to SOAH pursuant to §22.207 of this title (relating to Referral to State Office of Administrative Hearings). The case shall then proceed as set forth in paragraphs (1)-(5) of this subsection.

(1) - (2) (No change.)

- (3) The SOAH administrative law judge shall promptly issue to the commission a proposal for decision, including findings of fact and conclusions of law, about:

(A) – (B) (No change.)

- (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 revenuea penalty;
- (B) - (C) (No change.)
- (5) (No change.)

(i) **Parties to a proceeding.** The parties to a proceeding relating to administrative penalties or disgorgement of excess revenue shall be limited to the person and the commission, including the independent market monitor.

(i) **Distribution of Disgorged Excess Revenues.** Disgorged excess revenues shall be remitted to an independent organization, as defined in PURA §39.151. The independent organization shall distribute the excess revenue to affected wholesale electric market participants in proportion to their load during the intervals when the violation occurred. However, if the commission determines other wholesale electric market participants are affected or a different distribution method is appropriate, the commission may direct staff to open a subsequent proceeding to address those issues.

No later than 90 days after the disgorged excess revenues are remitted to the independent organization the monies shall be distributed to affected wholesale electric market participants active at the time of distribution, or the independent organization shall notify

the commission of the date by which the funds will be distributed. The independent organization shall include with the distributed monies a communication that explains the docket number in which the commission ordered the disgorged excess revenues and any other information the commission orders.

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

**ISSUED IN AUSTIN, TEXAS ON THE 27th DAY OF APRIL 2012 BY THE
PUBLIC UTILITY COMMISSION OF TEXAS
ADRIANA A. GONZALES**