

**PROJECT NO. 49875**

**RULEMAKING RELATING TO § PUBLIC UTILITY COMMISSION  
ADMINISTRATIVE PENALTIES §  
§ OF TEXAS**

**PROPOSAL FOR PUBLICATION OF AMENDMENTS TO § 22.246  
AS APPROVED AT THE SEPTEMBER 26, 2019 OPEN MEETING**

The Public Utility Commission of Texas (commission) proposes amendments to §22.246, relating to Administrative Penalties. The proposed amendments will implement Senate Bill 1358, 86th Legislature, Regular Session, which modified requirements for notices of violation issued under Public Utility Regulatory Act (PURA) §15.024 in cases where the person to whom the notice was issued does not respond. The amendments also make stylistic updates.

***Growth Impact Statement***

The commission provides the following governmental growth impact statement for the proposed rule, as required by Texas Government Code §2001.0221. The commission has determined that for each year of the first five years that the proposed rule is in effect, the following statements will apply:

- (1) the proposed rule will not create a government program and will not eliminate a government program;
- (2) implementation of the proposed rule will not require the creation of new employee positions and will not require the elimination of existing employee positions;
- (3) implementation of the proposed rule will not require an increase and will not require a decrease in future legislative appropriations to the commission;

- (4) the proposed rule will not require an increase and will not require a decrease in fees paid to the commission;
- (5) the proposed rule will not create a new regulation;
- (6) the proposed rule will limit an existing regulation by eliminating a requirement that certain cases must be sent to the State Office of Administrative Hearings;
- (7) the proposed rule will not change the number of individuals subject to the rule's applicability; and
- (8) the proposed rule will not affect this state's economy.

#### ***Fiscal Impact on Small and Micro-Businesses and Rural Communities***

There is no adverse economic effect anticipated for small businesses, micro-businesses, or rural communities as a result of implementing the proposed rule. Accordingly, no economic impact statement or regulatory flexibility analysis is required under Texas Government Code §2006.002(c).

#### ***Takings Impact Analysis***

The commission has determined that the proposed rule will not be a taking of private property as defined in chapter 2007 of the Texas Government Code.

#### ***Fiscal Impact on State and Local Government***

Taylor Kilroy, Managing Attorney for the Oversight and Enforcement Division, has determined that for the first five-year period the proposed amendments are in effect, there will be no fiscal implications for the state or for units of local government under Texas Government Code §2001.024(a)(4) as a result of enforcing or administering the sections.

***Public Benefits***

Mr. Kilroy has also determined that for each year of the first five years the proposed section is in effect, the anticipated public benefits expected as a result of the adoption of the proposed rule will be increased efficiency due to elimination of unneeded hearings. There will be no probable economic cost to persons required to comply with the rule under Texas Government Code §2001.024(a)(5).

***Local Employment Impact Statement***

For each year of the first five years the proposed section is in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under Texas Government Code §2001.022.

***Costs to Regulated Persons***

Texas Government Code §2001.0045(b) does not apply to this rulemaking because the Public Utility Commission is expressly excluded under subsection §2001.0045(c)(7).

***Public Hearing***

The commission staff will conduct a public hearing on this rulemaking, if requested in accordance with 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 Thursday, October 25, 2019 at 9:00 a.m. The request for a public hearing must be received within 14 days after publication. If no request for a public hearing is received and the commission staff cancels the hearing, it will make a filing in this project prior to the scheduled date for the hearing.

***Public Comments***

Comments on the proposed amendments may be filed with the commission's filing clerk at 1701 North Congress Avenue, Austin, Texas or mailed to P.O. Box 13326, Austin, TX 78711-3326, within 14 days after publication. Sixteen copies of comments to the proposed amendment are required to be filed by §22.71(c) of 16 Texas Administrative Code. Reply comments may be submitted within 28 days after publication. Comments should be organized in a manner consistent with the organization of the proposed rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed rule. The commission will consider the costs and benefits in deciding whether to adopt the rule. All comments should refer to project number 49875.

***Statutory Authority***

This amendment is proposed under §14.002 and §14.052 of the Public Utility Regulatory Act, Tex. Util. Code (West 2016 and Supp. 2017) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross reference to statutes: Public Utility Regulatory Act §§ 14.002 and 14.052.

**§22.246. Administrative Penalties.**

- (a) (No change.)
- (b) **Definitions.** The following words and terms, when used in this section, ~~shall~~ have the following meanings unless the context ~~clearly~~ indicates otherwise:
- (1)-(6) (No change.)
- (c) **Amount of administrative penalty for violations of PURA or a rule or order adopted under PURA.**
- (1) (No change.)
- (2) (No change.)
- (3) The amount of the administrative penalty must~~shall~~ be based on:
- (A)-(F) (No change.)
- (d) **Amount of administrative penalty for violations of the TWC or a rule or order adopted under chapter 13 of the TWC.**
- (1) (No change.)
- (2) (No change.)
- (3) The amount of the penalty must~~shall~~ be based on:
- (A)-(F) (No change.)
- (e) **Initiation of investigation.** Upon receiving an allegation of a violation or of a continuing violation, the executive director will~~shall~~ 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~~<sup>shall</sup> 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~~<sup>shall</sup>, ~~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 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~~<sup>shall</sup>, 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) (No change.)

(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) (No change.)

(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~~ shall be evidenced in writing, under oath, and supported by necessary documentation.

(C) (No change.)

(D) If the executive director determines that the alleged violation was not remedied or was not accidental or inadvertent, the executive director ~~will~~ shall 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~~ shall institute further proceedings, including referral of the matter for hearing under subsection (i) of this section.

(2) **Payment of administrative penalty, ~~and/or 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~~shall take all corrective action required by the commission. The commission by written order ~~will~~shall 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) (No change.)

(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.

(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~~shall file a report with the executive director setting forth the factual basis for the settlement;



(B) the executive director ~~will~~shall issue the report of settlement to the commission; and

(C) (No change.)

(2) If a settlement is reached after the matter has been referred to ~~SOAH~~the State Office of Administrative Hearings, the matter ~~will~~shall be returned to the commission. If the settlement is approved, the commission ~~will~~shall 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~~fails to respond timely to the notice of the report of violation or continuing violation provided~~ under subsection (g)(4)(f)(2) of this section, the commission will~~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 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~~shall 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 ~~or the executive director sets a hearing~~, the case ~~will~~shall then proceed as set forth in paragraphs (1)-(5) of this subsection.~~

(1) The commission ~~will~~shall provide the SOAH administrative law judge a list of issues or areas that must be addressed.

- (2) The hearing ~~must~~ shall 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~~ shall promptly issue to the commission a proposal for decision, including findings of fact and conclusions of law, about:
- (A)-(C) (No change.)
- (4) (No change.)
- (5) Notice of the commission's order issued under paragraph (4) of this subsection ~~must~~ shall be provided under the Government Code, chapter 2001 and §22.263 of this title (relating to Final Orders) and ~~must~~ shall 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~~ shall 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~~ shall be remitted to an independent organization, as defined in PURA §39.151. The independent organization ~~must~~ shall 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~~ shall 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~~shall be distributed to affected wholesale electric market participants active at the time of distribution, or the independent organization ~~must~~shall, by that date, notify the commission of the date by which the funds will be distributed. The independent organization ~~must~~shall include with 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~~shall be used to reduce costs or fees incurred by retail electric customers, and any other information the commission orders.

(2) (No change.)

(3) Any affected wholesale electric market participant receiving disgorged funds that is affiliated with the person from whom the excess revenue is disgorged ~~must~~shall distribute all of the disgorged excess revenues directly to its retail customers and ~~must~~shall provide certification under oath to the commission that the entirety of the revenues ~~was~~were distributed to its retail electric customers.

This agency 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 SEPTEMBER 2019 BY THE  
PUBLIC UTILITY COMMISSION OF TEXAS  
ANDREA GONZALEZ**

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