PROJECT NO. 52312

REVIEW OF ADMINISTRATIVE PENALTY AUTHORITY	**§**	**PUBLIC UTILITY COMMISSION**
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	§	**OF TEXAS**

ORDER ADOPTING AMENDMENTS TO 16 TAC §22.246 AND §25.8 AS APPROVED AT THE FEBRUARY 25, 2022 OPEN MEETING

The Public Utility Commission of Texas (commission) adopts amendments to existing 16 Texas Administrative Code (TAC) §22.246, relating to Administrative Penalties, and §25.8, relating to a Classification System for Violations of Statutes, Rules, and Orders Applicable to Electric Service Providers. The commission adopts these rules with changes to the proposed rule as published in the September 3, 2021 issue of the *Texas Register* (46 TexReg 5517). These rules will implement an amendment to the Public Utility Regulatory Act (PURA) §15.023(b-1) enacted by the 87th Texas Legislature that establishes an administrative penalty not to exceed $1,000,000 for violations of PURA §35.0021 or §38.075, each relating to Weather Emergency Preparedness. In response to filed comments, these rules will also clarify the application of certain statutory provisions relating to the commission's penalty authority and applicable remedy periods.

The commission received comments on the proposed rule from AEP Texas Inc., CenterPoint Energy Houston Electric, LLC, Oncor Electric Delivery Company LLC, and Texas-New Mexico Power Company (collectively, the Joint ERCOT TDUs); Texas Electric Cooperatives, Inc. (TEC); Texas Competitive Power Advocates (TCPA); Texas Public Power Association

(TPPA); and Lower Colorado River Authority and Lower Colorado River Authority Transmission Services Corporation (collectively, LCRA).

General Comments

Statutory Interpretation of PURA §15.023(a), §15.024(c), §35.0021(g), and §38.075(d)

PURA §15.023(a) and §15.024(c) were in effect prior to the 87th session of the Texas Legislature and will be referred to as preexisting law. PURA §35.0021 and §38.075 were both enacted by the 87th Texas Legislature and will be referred to as the weather preparedness statutes. Rules adopted and orders issued under these statutes will be referred to as weather preparedness rules and weather preparedness orders respectively.

Commission Comment

Commenters have noted, either explicitly or by implication, several conflicts between the weather preparedness statutes and preexisting law. The commission addresses the specifics of these comments throughout this order where relevant. The statutory underpinnings for the resolution of these conflicts are discussed under this General Comments heading. The weather preparedness statutes were enacted after the preexisting statutes and are more specific in their application. Accordingly, under the Code Construction Act §311.025-31.026, the weather preparedness statutes prevail in any conflicts.

The first issue involving the interaction of preexisting law and the weather preparedness statutes relates to circumstances in which the commission has authority to issue an administrative penalty for a violation of a weather preparedness statute, rule, or order.

Under PURA §15.023(a), "[t]he commission may impose an administrative penalty against a person regulated under [PURA, Title II] who violates [PURA, Title II] or a rule or order adopted under [PURA, Title II]." Notably, the weather preparedness statutes are located in PURA, Title II. Under the Code Construction Act §311.016, "may" creates discretionary authority. Therefore, under preexisting law, the commission has general discretion to impose administrative penalties for violation of a weather preparedness statute, rule, or order.

Each of the weather preparedness statutes contains an identical provision that reads "[t]he commission shall impose an administrative penalty on an entity, including a municipally owned utility or an electric cooperative, that violates a [weather preparedness rule] and does not remedy that violation within a reasonable period of time." Under the Code Construction Act, "shall" imposes a duty. Accordingly, if an entity violates a weather preparedness rule, the commission is required to impose an administrative penalty.

In comments submitted on various provisions throughout the two proposed rules, TCPA, TEC, Joint ERCOT TDUs, and LCRA each interpret the language of the weather preparedness statutes to mean that the commission *cannot* impose an administrative penalty against an entity that violates a weather preparedness statute, rule, or order *unless* the entity fails to remedy the violation within a reasonable period of time.

Commission Response

The commission disagrees that it cannot impose an administrative penalty against an entity that violates a weather preparedness requirement unless the entity fails to remedy the violation within a reasonable period of time. As the commenters point out, each of the weather preparedness statutes indicate the commission *shall* impose a penalty if a violation is not remedied in a reasonable period of time. However, neither of the weather preparedness statutes impose or suggest any limitation on PURA §15.023(a), which provides the commission with discretionary authority to issue a penalty for a violation of PURA, Title II or a rule or order adopted under Title II.

The interpretation that the commission is prevented from issuing an administrative penalty without first giving an entity an opportunity to remedy the violation fails on a policy level as well, as such a limitation would create a significant compliance loophole. Under such an interpretation, an entity would be incentivized to delay implementing any costly weather preparedness measure until after it was identified by the Electric Reliability Council of Texas (ERCOT) or the commission, because the regulatory risk of noncompliance would be eliminated. If the violation is discovered, the entity would be assured a reasonable period of time to remedy the violation, regardless of the circumstances surrounding the violation. If it is not discovered, potentially costly upgrades could be avoided completely. Moreover, an entity could even fail to meet the same requirement multiple times, each time relying upon a built-in cure period to address any compliance issues.

The commission adopts amended §22.246(g)(5)(C) to clarify the commission's discretionary penalty authority under preexisting law.

The next interaction of potentially conflicting statutes involves potential exceptions to the commission's discretionary penalty authority under §15.023(a). The first exception originates from the aforementioned provision of the weather preparation statutes that requires the commission to impose a penalty if a weather preparation rule is violated and not remedied in a reasonable period of time. The second comes from PURA §15.024(c), which states that "[a] penalty may not be assessed under this section if the person against whom the penalty may be assessed remedies the violation before the 31st day after the date the person receives [a formal notice of violation]. A person who claims to have remedied an alleged violation has the burden of proving to the commission that the alleged violation was remedied and was accidental or inadvertent." Under the Code Construction Act §311.016, "may not" imposes a prohibition. Therefore, the commission is prohibited from imposing a penalty for a violation of Title II or a rule or order adopted under Title II if the entity can demonstrate that the violation was accidental or inadvertent and was remedied before the 31st day after receiving notice under Subsection (b).

Commission Response

The commission modifies §22.246 to reflect two exceptions to the commission's discretionary penalty authority. First, consistent with the weather preparedness statutes, under adopted §22.246(g)(5)(C)(ii), the commission is required to issue an administrative penalty for a violation of a weather preparedness rule that was not remedied within a specified timeframe. Second, consistent with PURA §15.024(c), under adopted

§22.246(g)(5)(C)(ii), the commission is prohibited from issuing an administrative penalty for a violation of a weather preparedness statute, rule, or order if the violation is remedied within a specified timeframe, and was accidental or inadvertent. In this instance, the alleged violator has the burden of proving that each of these conditions was met. Each of these exceptions to the commission's general discretionary authority is justified because under the Code Construction Act, the more specific provisions of PURA §15.024(c) and the weather preparedness statutes control over PURA §15.023(a). The commission addresses the specified timeframes below. The commission also modifies the rule to clarify that neither of the above exceptions apply to a violation that is not remediable.

The third potential conflict of laws relates to the appropriate remedy period for purposes of the exceptions to the commission's discretionary administrative authority. Under preexisting law, the general remedy period for any violation is 30 days after the receipt of a formal notice of violation. Under the weather preparedness statutes, the remedy period is a reasonable period of time. TPPA contends that these are two distinct remedy periods and argued that the commission should clarify that the two periods are different. Conversely, Joint ERCOT TDUs argue that the reasonable remedy period takes precedence over the generic 30-day remedy period, because the reasonable remedy period is specific to weather preparedness violations. Joint ERCOT TDUs further argue that a reasonable remedy period is "a fact question, dependent on the particular facts and circumstances attendant to the situation. A reasonable period of time for remedying a violation of a rule established pursuant to the Weatherization Statutes may not, therefore, be established by rule, or without any consideration of the particular facts and circumstances giving rise to a violation."

Commission Response

The commission agrees with Joint ERCOT TDUs – while acknowledging that Joint ERCOT TDUs were making this argument in support of a different ultimate position – that there is only a single, reasonability-based remedy period for violations of weather preparation requirements. Weather preparedness violations pose a serious risk to reliability of the bulk electric system, and an entity that violates these rules must remedy those violations as expediently as reasonably possible. Applying a generic remedy period, as provided by preexisting law, or two separate remedy periods, as recommended by TPPA, would lead to contradictory results and would undermine the effectiveness of the commission's statutorily mandated regulatory objectives. If, for example, the reasonable remedy period for a violation is 20 days, if an entity fails to remedy that violation within 20 days, the commission is required by the weather preparedness statutes to impose an administrative penalty. Affording that entity a second remedy period after it has received a formal notice of violation from the executive director clearly conflicts with the plain language of the weather preparedness statutes.

Under the adopted §22.246(g)(5)(C), the remedy period for both exceptions to the commission's discretionary penalty authority is a "reasonable" period of time. The commission agrees with Joint ERCOT TDUs that the weather preparedness statutes establish a remedy period that is dependent upon the particulars of the violation and, potentially, the circumstances surrounding the violation.

The final potential conflict between preexisting law and the weather preparedness statutes is the process and timing surrounding the remedy periods. Under preexisting law, the remedy period begins after the entity has received a formal notice of violation from the executive director. Under the weather preparedness statutes, the remedy period, in many cases, will begin when ERCOT provides the entity with the results of a weather preparedness inspection. This is a significant distinction, because §22.246 provides specific notice and process requirements that are not applicable to a remedy period that takes place prior to the issuance of a formal notice of violation.

Commission Response

The process surrounding the application of the period for remedying violations is determined by the applicable substantive weather preparedness rules. However, because the commission has not yet adopted its final Phase II weather preparedness rules, adopted §22.246(g)(5)(D) establishes default procedural rules surrounding remedying weather preparedness violations that supplement the other notice of violation provisions of that section. These procedural provisions mirror the preexisting process for the generic remedy period under §22.246(g)(1).

Specifically, under adopted §22.246(g)(5)(D) an entity that remedies a violation discovered during an ERCOT inspection by the deadline provided by ERCOT is deemed to have remedied that violation in a reasonable period of time. If ERCOT has not provided a deadline, the executive director will provide the entity with a written notice describing the violation and a deadline for remedying the violation. Finally, if the commission disagrees that the deadline provided by ERCOT or the executive director is reasonable, the

commission will determine what the deadline should have been. The commission will use this updated deadline to determine the applicability of the exceptions to the commission's discretionary penalty authority and, if appropriate, as a factor in determining the magnitude of the administrative penalty assessed against the entity for the violation. This updated deadline does not, however, guarantee that the entity will be provided additional time to remedy the violation in the future. Accordingly, an entity should continue its remedial efforts even after it misses the deadline provided by ERCOT or the executive director.

§22.246(b)(5), Definition of violation

§22.246(b)(5) defines the term "Violation" as "[a]ny activity or conduct prohibited by PURA…commission rule, or commission order."

TCPA recommended adding a subparagraph to §22.246(b)(5) that would clarify that with regard to weather preparedness standards, a violation does not occur until after ERCOT has conducted an inspection, found a potential violation, and provided the entity with a reasonable opportunity to cure the potential violation. TCPA argued this is required by PURA §35.0021(c).

Commission Response

The commission declines to modify the definition of violation as requested by TCPA. A violation occurs when an entity fails to comply with PURA, a commission rule, or a commission order. Whether ERCOT identifies this violation in one of its inspections or the entity eventually remedies the violation has no bearing on whether a violation occurred.

The plain language of PURA §35.0021 requires ERCOT to provide an entity with a reasonable period of time to "remedy any *violation*" and "report to the commission any *violation*" related to weather emergency preparedness. (Emphasis added). At no point does it refer to "potential violations" as suggested by TCPA. Moreover, acknowledging and documenting each failure to comply as a violation is important for establishing whether an entity has a history of violations, an important consideration in determining appropriate penalty amounts in any future enforcement proceedings related to that issue under §25.246(c)(3)(C).

§22.246(c), Penalty amounts

Existing §22.246(c) outlines the maximum penalty amounts that can be assessed for violations of PURA or a rule or order adopted under PURA and provides a list of penalty factors that the commission must consider when determining what level of penalty to impose for a particular violation. Proposed §22.246(c) clarifies that for violations of PURA §35.0021 and §38.075, or a rule or order adopted under those provisions, the commission may impose a penalty of up to §1,000,000 per violation per day.

LCRA recommended the addition of a new paragraph in §22.246(c) clarifying that the commission would not assess an administrative penalty for an entity's first violation of a weather preparedness requirement if the risk posed by the violation is low or if the entity cures the violation in a reasonable period of time.

Commission Response

The commission declines to limit its ability to assess an administrative penalty for an entity's first violation of a weather preparedness rule or statute. Neither PURA §35.002 or §38.075 include any penalty exemptions for first time offenders. The commission will consider the facts and circumstances surrounding each violation in determining whether to assess an administrative penalty, including the history of previous violations and efforts made to correct the violation, as required by this subsection.

§22.246(c)(1), Separate violations

Under paragraph §22.246(c)(1), each day a violation continues is a separate violation for which an administrative penalty can be assessed.

TCPA requested that the commission insert language clarifying that an administrative penalty will not be assessed until after the entity has been provided a reasonable period of time to remedy a violation discovered in an inspection or to appeal the inspector's determination that a violation has occurred. TCPA also requested language that a violation would not be assessed if a generation resource is following the process to mothball or retire a resource.

Commission Response

The commission declines to add language to §22.246(c)(1) that a penalty will not be assessed until after the entity has been provided a reasonable amount of time to remedy any potential violation discovered in an inspection or to appeal the inspection. Remedy periods are discussed in the commission's response to general comments above. With regard to the ability of an entity to appeal the results of an ERCOT inspection before a penalty is issued,

the commission, not ERCOT, retains authority to determine whether a violation has occurred, whether the violation was remedied in a reasonable amount of time, and whether the assessment of an administrative penalty is appropriate. The commission will not assess any administrative penalties without providing the entity an opportunity to request a hearing on any contested issues.

The commission also declines to specify that a violation will not be assessed if a generation resource is following the process to mothball or retire a resource as requested by TCPA. Whether a particular fact pattern constitutes a violation of the commission's weather preparedness rules or which scenarios might excuse such a violation is beyond the scope of this rulemaking.

§22.246(c)(2), Maximum penalties

Proposed paragraph §22.246(c)(2) identifies the maximum administrative penalty of $1,000,000 for violations of PURA §35.002 and §38.075 and maximum administrative penalty of $25,000 for all other violations of PURA and commission rules.

TPPA pointed out typographical errors in citations of PURA §35.002 and §38.075 in §22.246(c)(2).

Commission Response

The commission makes the recommended changes.

TEC and LCRA each recommended modifying §22.246(c)(2) to limit the imposition of penalties to "continuing violations." TEC's suggested language appears to only permit penalties for continuing violations, and the LCRA's proposed language only allows for a penalty of over $5,000 for a violation "that is a continuing violation that was not accidental or inadvertent and was not remedied within a reasonable period of time."

TCPA made general comments regarding §22.246(c)(2) requesting that the commission clarify what constitutes a "separate violation" and proper metrics for consideration of a violation of the weatherization rule to mitigate the risk of loss by a respondent facing a prospective violation.

Commission Response

TEC and LCRA misconstrue the meaning of the defined term "continuing violation." A continuing violation is not, as these parties suggest, merely an ongoing violation after parties have had an opportunity to remedy. A continuing violation is "any instance in which the person alleged to have committed a violation attests that the 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." In other words, if an entity attempts to avail itself of the provisions under §22.246(g)(1)(B) by attesting that a violation has been remedied and was accidental, but that attestation was invalid, that violation becomes a continuing violation. Under §22.246(g)(1)(E), the executive director will institute further proceedings against the entity, rather than permit the entity an opportunity to remedy the violation.

The commission adds adopted §22.246(g)(2)(D)(vii), which requires the executive director to institute further proceedings if the executive director determines a violation is a continuing violation.

§22.246(c)(3), Penalty factors

§22.246(c)(3) identifies aggravating and mitigating factors that the commission must consider when assessing a penalty for an administrative violation.

TCPA and LCRA recommended additional mitigating and aggravating factors be added to §22.246(c)(3) to inform the commission's assessment of an administrative penalty. TCPA specifically recommended the addition of whether the violation was attributable to mechanical or electrical failures, whether the violation could have been reasonably anticipated and avoided, and whether the asset owner demonstrated good faith, including preventive or corrective actions.

LCRA recommended new penalty factors that account for "risk, severity, and repeat offenses" when assessing penalties for weatherization.

Commission Response

The commission declines to implement the specific recommendations of TCPA and general recommendations of LCRA regarding the addition of new penalty factors to §22.246(c)(3). Paragraph §22.246(c)(3) is intended to mirror penalty factors the commission is required to consider when establishing its penalty classification system under PURA §15.023(c). Further, the additional factors proposed by commenters are already encompassed by

§22.246(c)(3)(A), (C), (E) and (F), which specify that the amount of an administrative penalty must be based on the seriousness of the violation, history of previous violations, efforts to correct the violation, and any other matter that justice may require.

§22.246(f)(2), Notice of report

Existing §22.246(f) allows the executive director to initiate an enforcement proceeding by providing the commission a report alleging a violation by a specific entity. Subparagraph §22.246(f)(2)(A) requires the executive director to provide notice of this report to the entity alleged to have committed the violation by regular or certified mail.

TCPA, citing concerns related to increased remote work due to the pandemic, recommended that §22.246(f)(2)(A) require e-mail notice of the report from the executive director regarding the violation in addition to regular or certified mail.

Commission Response

PURA §15.024(b) requires that this notice be given by regular or certified mail and (b-1) specifies that notice is deemed to have been received on the fifth day after the commission sends written notice *by mail* addressed to the person's mailing address as maintained in commission records or, if sent by certified mail, on the date the written notice is received, or delivery is refused. Therefore, the commission cannot, by rule, materially alter the conditions upon which notice is deemed to have been received by imposing additional e-mail requirements. The executive director is not, however, prohibited from sending email notice in addition to notice by mail.

§22.246(g), Options for response

Subsection §22.246(g) provides a list of options for a respondent who has been issued a notice of violation or notice of continuing violation. The options consist of an opportunity to remedy the violation, pay the administrative penalty or disgorge excess revenue, or both, or request a hearing. The rule also identifies the consequences for failure to respond to a notice of violation or notice of continuing violation.

LCRA recommended the addition of a new paragraph under this subsection that would prohibit the commission from issuing an administrative penalty for violations of weather preparedness standards if a person self-reports the violation and certifies that the violation has been remedied. LCRA's proposed new paragraph would also require the self-report to submitted in writing, under oath, supported by necessary documentation, and delivered to the executive director by certified mail.

Commission Response

The commission declines to restrict its penalty authority in circumstances where an entity self-reports and corrects a violation as requested by LCRA. Such a restriction on the commission's penalty authority would create a compliance loophole that would allow an entity to strategically delay compliance without consequence. Under §22.246(c)(3), when establishing the appropriateness and magnitude of an administrative penalty, the commission will consider efforts to correct the violation and any other matter that justice

may require, including the manner in which the respondent has cooperated with the commission during an investigation of the alleged violation.

TPPA and Joint ERCOT TDUs each commented that §22.246(g)(1) did not properly apply to weather preparedness violations. TPPA recommended that the commission clarify that the 31-day cure period provided by §22.246(g) was not the same as the reasonable period of time that an entity has to remedy a weather preparedness violation under the weather preparedness statutes. TPPA argued that if ERCOT did not give entities a 31-day period following an inspection, it could conflict with this procedural rule.

Joint ERCOT TDUs, on the other hand, argued that all of §22.246(g) should not apply to weather preparedness violations and instead proposed an entirely new section applicable to such violations. Joint ERCOT TDUs proposal mirrors §22.246(g) and imposes an extremely detailed regulatory structure for the commission's processing of weather preparedness violations, including timelines and specific standards for responses and mitigation plans. Joint TDUs' full proposal will not be fully detailed in this preamble.

Commission Response

The commission agrees with TPPA and Joint ERCOT TDUs that §22.246(g) does not fully align with the weather preparedness statutes with regards to the applicable remedy period. As discussed in the commission's response to General Comments above, this is primarily due to a conflict of laws between the weather preparedness statutes and preexisting law. As detailed above, the commission modifies §22.246(g)(1) to clarify that it does not apply to

weather preparedness violations and adopts new §22.246(g)(5). This new paragraph clarifies the commission's penalty authority and adapts the procedural requirements of §22.246(g) to the requirements of the weather preparedness statutes. The commission declines to adopt TPPA's recommended approach for reasons discussed under General Comments. The commission declines to adopt Joint ERCOT TDU's approach, because it is unnecessarily detailed. The commission will further address the process surrounding weather preparedness violations in its Phase II weather preparedness rulemaking.

§22.246(g)(1)(C), Grace period

Under §22.246(g)(1)(C), if the executive director determines that an alleged violation was remedied within 30 days and the violation was accidental or inadvertent, no administrative penalty will be assessed.

LCRA recommended that §22.246(g)(1)(C) be amended to specify that no administrative penalty will be assessed for weather preparedness violations if the executive director determines that the violation was remedied within a reasonable period of time.

Commission Response

The commission declines to amend subparagraph §22.246(g)(1)(C) to specify that no administrative penalty will be assessed for weather preparedness violations if the executive director determines that the violation was remedied within a reasonable period of time. The commission addressed this issue of remediation in its response to general comments above.

§25.8, Classification system for violations of statutes, rules, and orders applicable to electric service providers.

§25.8(b), Classification system

Subsection 25.8(b) classifies violations of PURA and commission rules into C, B, and A class violations, in increasing order of severity and maximum assignable administrative penalty amount. The proposed rule added language to §25.8(b)(3)(A), which addresses class A violations, that a violation of PURA §35.0021, PURA §38.075. or a commission rule or commission order adopted under PURA §35.0021 or PURA §38.075, is a Class A violation and the administrative penalty will not exceed $1,000,000 per violation per day. The proposed rule further clarifies that other class A violations retain the prior maximum assignable penalty amount of $25,000 per violation per day.

TPPA, TEC, and LCRA each criticized the proposed rule's grouping of all weather preparedness violations as class A violations with a million-dollar penalty ceiling. TPPA argued that two tiers of class A violations is confusing and that establishing separate tiers for weather preparedness violations would set expectations and "provide valuable instruction to the market before any violations occur."

Each of these commenters argued that non-material violations, such as failure to file a report, should not result in million-dollar penalties. TEC and LCRA suggested that paperwork violations should be classified as class C violations, and LCRA further specified that a weather-preparedness violation should only be a class A violation if it "creates economic harm in excess of $5,000 to a

person or persons, property, or the environment, or creates an economic benefit to the violator in excess of $5,000; creates a hazard or potential hazard to the health or safety of the public; or causes a risk to the reliability of a transmission or distribution system or a portion thereof."

Commission Response

The commission declines to classify "paperwork violations" as class C violations or otherwise adopt any language that would limit the commission's ability to assign significant administrative penalties for any violation of its weather preparedness rules or orders. As has been repeatedly pointed out by commenters, the weather preparedness statutes create a *preparation* standard, not a *performance* standard, and couple this standard with a million-dollar penalty ceiling. Therefore, it is clear that the commission is to utilize the increased penalty authority *prior* to the occurrence of any actual weather-related performance failures – not after it is too late to prevent any human suffering, loss of life, or property damage caused by those failures. Furthermore, even violations such as "paperwork violations," could materially interfere with the commission's and ERCOT's compliance regimen, which may require the inspection of hundreds of facilities and the review and evaluation of remediation plans for any instances of noncompliance identified during these inspections. Seemingly minor violations, such as missing submission deadlines or errors in those submissions, could impede the timely completion and review of inspections or otherwise interfere with the commission's and ERCOT's ability to evaluate and ensure the weather-readiness of the grid.

The commission disagrees with TPPA that having two tiers of class A violations is confusing. The language of the rule articulates, with precision, the maximum penalty associated with each type of violation.

The commission also disagrees with TPPA's argument that more nuanced penalty classifications of weather-preparedness violations would provide meaningful guidance to market participants. Establishing penalty categories for certain types of violations only provides meaningful guidance to an entity that is evaluating *whether* to comply with a particular rule based on the severity of the penalty for each class of infraction. The commission expects all entities to fully comply with all applicable weather-preparedness rules to ensure the reliability of the grid. The specter of significant administrative penalties is specifically meant to deter any economic calculation that might distract an entity from directing its full efforts to achieving compliance with these standards.

TPPA argued that the commission should create a separate tiering system for weatherization-related violations. TPPA noted that the "chief author" of SB 3, Senator Charles Schwertner, produced an explanatory document that clarified that it was his intent that the commission create a penalty matrix, "to ensure that the $1 million penalty cap is focus on extreme violations and not simple violations like paperwork errors."

Commission Response

The commission also declines to create a separate penalty classification system for weather-preparedness violations as requested by TPPA. The commission is not persuaded by TPPA's

argument that a summary document distributed by one of the bill's authors prior to a committee hearing on the bill constitutes definitive legislative intent for how the statute should be interpreted. Moreover, the Legislature explicitly required creation of penalty classification systems in sections 6, 20, and 31 of SB 3, each addressing other issues. Had the Legislature intended the creation of a penalty classification system for electric weather-preparedness violations, it would have included a similar requirement. Finally, under PURA §15.023(d), a classification system established under PURA §15.023(c) "shall provide that 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." Categorically limiting any type of weather-preparedness violation to $5,000 per violation per day is inappropriate, given the extremely high priority that both the commission and the Legislature places on compliance in this area.

TEC argued that a violation should only be a class A violation if it was a "continuing violation" and there had been "notice and a reasonable opportunity to cure the violation." TCPA argued that §25.8(b)(3)(A) should incorporate text reflecting that separate violations mean a company's distinct action or inaction that directly results in a violation, rather than a resource-by-resource, unit-by-unit, or other duplicative violation that results in the "stacking of penalties where a single action or inaction results in multiple units or resources failing to abide by the commission rule or commission order."

Commission Response

The commission disagrees with TEC for the reasons discussed in its response to §22.246(c)(2). and TCPA for the reasons discussed in its response to §22.246(c)(1).

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this rule, the commission makes other minor modifications for the purpose of clarifying its intent.

These rule amendments are adopted under the following provision of PURA: §14.001, which provides the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by PURA that is necessary and convenient to the exercise of that power and jurisdiction; §14.002, which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; §15.023, which establishes that the penalty for a violation of a provision of PURA §35.0021 or PURA §38.075 may be in an amount not to exceed $1,000,000 for a violation and that each day a violation continues is a separate violation for purposes of imposing a penalty.

Cross reference to statutes: PURA §§14.001, 14.002, and 15.023, 35.0021, and 38.075.

§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.

(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.

(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 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.

(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 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.

§25.8. Classification System for Violations of Statutes, Rules, and Orders Applicable to Electric Service Providers.

(a) **Purpose.** The purpose of this rule is to establish a classification system for violations of the Public Utility Regulatory Act (PURA) and related commission rules and orders, and to establish a range of penalties that may be assessed for each class of violations.

(b) **Classification system.**

(1) **Class C violations.**

(A) Penalties for Class C violations may not exceed $1,000 per violation per day.

(B) The following violations are Class C violations:

(i) failure to file a report or provide information required to be submitted to the commission under this chapter within the timeline required;

(ii) failure by an electric utility, retail electric provider, or aggregator to investigate a customer complaint and appropriately report the results within the timeline required;

(iii) failure to update information relating to a registration or certificate by the commission within the timeline required; and

(iv) a violation of the Electric no-call list.

(2) **Class B violations.**

(A) Penalties for Class B violations may not exceed $5,000 per violation per day.

(B) All violations not specifically enumerated as a Class C or Class A violation are Class B violations.

(3) **Class A violations.**

(A) 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 is a Class A violation and the administrative penalty will not exceed $1,000,000 per violation per day. Penalties for all other Class A violations will not exceed $25,000 per violation per day.

(B) The following types of violations are Class A violations if they create economic harm in excess of $5,000 to a person or persons, property, or the environment, or create an economic benefit to the violator in excess of $5,000; create a hazard or potential hazard to the health or safety of the public; or cause a risk to the reliability of a transmission or distribution system or a portion thereof.

(i) A violation related to the wholesale electric market, including protocols and other requirements established by an independent organization;

(ii) A violation related to electric service quality standards or reliability standards established by the commission or an independent organization;

(iii) A violation related to the code of conduct between electric utilities and their competitive affiliates;

(iv) A violation related to prohibited discrimination in the provision of electric service;

(v) A violation related to improper disconnection of electric service;

(vi) A violation related to fraudulent, unfair, misleading, deceptive, or anticompetitive business practices;

(vii) Conducting business subject to the jurisdiction of the commission without proper commission authorization, registration, licensing, or certification;

(viii) A violation committed by ERCOT;

(ix) A violation not otherwise enumerated in this paragraph (3)(B) of this subsection that creates a hazard or potential hazard to the health or safety of the public;

(x) A violation not otherwise enumerated in this paragraph (3)(B) of this subsection that creates economic harm to a person or persons, property, or the environment in excess of $5,000, or creates an economic benefit to the violator in excess of $5,000; and

(xi) A violation not otherwise enumerated in this paragraph (3)(B) of this subsection that causes a risk to the reliability of a transmission or distribution system or a portion thereof.

(c) **Application of enforcement provisions of other rules.** To the extent that PURA or other rules in this chapter establish a range of administrative penalties that are inconsistent with the penalty ranges provided for in subsection (b) of this section, the other provisions control with respect to violations of those rules.

(d) **Assessment of administrative penalties.** In addition to the requirements of §22.246 of this title (relating to Administrative Penalties), a notice of violation recommending administrative penalties will indicate the class of violation.

This agency 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 §25.53, electric service emergency operations planning, is hereby adopted with changes to the text as proposed.

Signed at Austin, Texas the _____ day of February 2022.

PUBLIC UTILITY COMMISSION OF TEXAS

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PETER LAKE, CHAIRMAN

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WILL MCADAMS, COMMISSIONER

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LORI COBOS, COMMISSIONER

_____

JIMMY GLOTFELTY, COMMISSIONER