

PROJECT NO. 25959

**RULEMAKING ON OVERSIGHT OF § PUBLIC UTILITY COMMISSION
INDEPENDENT ORGANIZATIONS IN §
THE COMPETITIVE ELECTRIC § OF TEXAS
MARKET §**

**PROPOSAL FOR PUBLICATION OF NEW §22.251
AS APPROVED AT THE SEPTEMBER 25, 2002 OPEN MEETING**

The Public Utility Commission of Texas (commission) proposes new §22.251, relating to Review of Electric Reliability Council of Texas (ERCOT) Action. The proposed new section is necessary to establish procedures for affected persons to make written complaints to the commission regarding decisions or acts, committed or omitted, by ERCOT. The scope of permitted complaints includes ERCOT's performance as an independent organization under the Public Utility Regulatory Act (PURA) and ERCOT's promulgation and enforcement of rules relating to reliability, transmission access, customer registration, and settlement. Project Number 25959 is assigned to this proceeding.

In addition to this proposed new section the commission is also proposing under Project Number 25959 the following substantive rules in Chapter 25 of this title (relating to Substantive Rules Applicable to Electric Service Providers): an amendment to §25.361, relating to Electric Reliability Council of Texas (ERCOT), and new §25.362, relating to Electric Reliability Council of Texas (ERCOT) Governance. While commenters may file comments on all sections proposed under Project Number 25959 in one document, commenters are requested to separate in the document their discussions on proposed Procedural Rule §22.251 from their discussions on the substantive rules.

When commenting on specific subsections of the proposed rules, parties are encouraged to describe "best practice" examples of regulatory policies, and their rationale, that have been proposed or implemented successfully in other states already undergoing electric industry restructuring, if the parties believe that Texas would benefit from application of the same policies. The commission is only interested in receiving "leading edge" examples which are specifically related and directly applicable to the Texas statute, rather than broad citations to other state restructuring efforts.

Marc H. Burns, Administrative Law Judge, Policy Development Division, has determined that, for each year of the first five-year period the proposed section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Burns has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be standard procedures for the review of ERCOT actions that will result in more efficient processing of these proceedings. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Mr. Burns has also determined that for each year of the first five years the proposed section 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 §2001.022.

The commission staff will conduct a public hearing on this rulemaking under 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, on Tuesday, December 3, 2002, at 9:30 a.m. in the Commissioners' Hearing Room.

Comments on the proposed new section (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326, within 31 days after publication. Reply comments may be submitted within 45 days after publication.

The commission specifically requests that interested persons comment on the following questions:

1. Does the requirement in the Administrative Procedure Act, Texas Government Code §2003.049(b) that the utility division of the State Office of Administrative Hearings "conduct hearings related to contested cases" bar a commission administrative law judge (ALJ) from conducting a hearing to determine whether to grant a request for suspension of enforcement, as contemplated by proposed §22.251(f) (relating to Suspension of Enforcement)?

2. Does the requirement in the Administrative Procedure Act, Texas Government Code §2003.049(b) that the utility division of the State Office of Administrative Hearings "conduct hearings related to contested cases" bar a commission ALJ from conducting binding mini-trials and moderated settlement conferences by agreement of the parties as contemplated by proposed §22.251(m) (relating to Availability of Alternative Dispute Resolution)?
3. Should proposed §22.251(b) be modified to clarify that all appeals and complaints of ERCOT decisions shall be heard by the commission pursuant to this section prior to an appeal to any court of competent jurisdiction?
4. Should §22.251(c)(1)(E) be deleted because it is duplicative of the flexibility contained in the good cause exception provision, §22.251(c)(2)?

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 section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 25959.

This new section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998, Supplement 2002) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of

practice and procedure; and specifically, PURA §39.151, which grants the commission authority to establish the terms and conditions for the exercise of ERCOT's authority.

Cross Reference to Statutes: Public Utility Regulatory Act §35.004 and §39.151.

§22.251. Review of Electric Reliability Council of Texas (ERCOT) Action.

- (a) **Purpose.** This section prescribes the procedure by which a party, including the commission staff and the Office of Public Utility Counsel, may appeal a decision made by ERCOT or any successor in interest to ERCOT.
- (b) **Scope of complaints.** Any affected person may complain to the commission in writing, setting forth any decision made or act or thing done or omitted to be done by ERCOT in violation or claimed violation of any law that the commission has jurisdiction to administer, of any order, ordinance, rule, or regulation of the commission, or of any protocol or rule adopted or revised by ERCOT pursuant to any law that the commission has jurisdiction to administer. The scope of permitted complaints includes ERCOT's performance as an independent organization under the Public Utility Regulatory Act (PURA) including, but not limited to, ERCOT's promulgation and enforcement of rules relating to reliability, transmission access, customer registration, and settlement.
- (c) **Requirement of compliance with ERCOT Protocols.** A person who is aggrieved by the conduct or a decision of ERCOT must comply with Section 20 of the ERCOT Protocols (Alternative Dispute Resolution Procedures), or Section 21 of the Protocols (Process for Protocol Revision), if applicable, or other applicable sections of the ERCOT Protocols, before presenting the complaint to the commission.

- (1) A complainant may present a formal complaint to the commission, without first complying with applicable ERCOT Protocols requiring a party to engage in alternative dispute resolution (ADR) or satisfying other prerequisites, if:
 - (A) the complainant is commission staff or the Office of Public Utility Counsel;
 - (B) the complainant is not an ERCOT member or otherwise bound to engage in the ERCOT ADR process;
 - (C) the complainant seeks emergency relief necessary to resolve health or safety issues or where compliance with ERCOT ADR procedures or other prerequisites would inhibit the ability of the affected party to provide continuous and adequate service;
 - (D) the complaint relates to the adoption of a protocol or revision of a protocol; or
 - (E) the complainant shows that compliance with applicable ERCOT protocols requiring a party to engage in ADR or satisfying other prerequisites would be futile.
- (2) For any complaint that is not listed in paragraph (1) of this subsection, the complainant may submit to the commission a written request for waiver of the requirement for compliance with ERCOT's ADR procedures or other prerequisites. The complainant shall clearly state the reasons why ADR or any other otherwise applicable procedure is not appropriate. The commission may grant the request for good cause.

- (3) For complaints brought by the Office of Public Utility Counsel or a party that is not an ERCOT member or otherwise bound to engage in the ERCOT ADR process, the presiding officer may require informal dispute resolution.

- (d) **Formal complaint.** Except for appeals of ERCOT Protocol revisions approved by the ERCOT Board, which must be appealed within 35 days, a complaint shall be filed within 90 days of the date of the action or decision complained of, unless an ERCOT ADR procedure required by this section has been timely commenced and it is not completed within 90 days of the date of the action or decision complained of, in which case the complaint shall be filed within 60 days of the completion of the ERCOT ADR procedure. The presiding officer may also extend the deadline, upon a showing of good cause, including the parties' agreement to extend the deadline to accommodate ongoing efforts to resolve the matter informally, and the complainant's failure to timely discover through reasonable efforts the injury giving rise to the complaint.
 - (1) The complaint shall include the following information:
 - (A) a complete list of all complainants and the parties or persons against whom the complainant seeks relief and the addresses, and facsimile transmission number and e-mail address, if available, of the parties' counsel or other representative;

- (B) a statement of the case that ordinarily should not exceed two pages and should not discuss the facts. The statement must contain the following:
- (i) a concise description of any underlying proceeding or any prior or pending related proceedings;
 - (ii) the identity of all persons who would be directly affected by the commission's decision;
 - (iii) a concise description of the action or decision from which the complainant seeks relief;
 - (iv) a statement of the ERCOT Protocols, By-Laws, Articles of Incorporation, or law applicable to resolution of the dispute and whether the complainant has complied with the applicable ERCOT Protocols and, if not, the provision of subsection (b) of this section upon which the complainant relies;
 - (v) a statement of whether the complainant seeks suspension of enforcement of the decision or action complained of; and
 - (vi) a statement without argument of the basis of the commission's jurisdiction.
- (C) a concise statement of all issues or points presented for commission review;
- (D) a concise statement without argument of the pertinent facts. Each fact shall be supported by references to the record, if any;

- (E) a clear and concise argument for the contentions made, with appropriate citation to authorities and to the record, if any;
 - (F) a statement of all questions of fact, if any, that the complainant contends require an evidentiary hearing;
 - (G) a short conclusion that states the nature of the relief sought; and
 - (H) a record consisting of a certified or sworn copy of any order, decision, or other document constituting or evidencing the matter complained of. The record may also contain any other item pertinent to the issues or points presented for review, including affidavits or other evidence on which the party relies.
- (2) If the complainant seeks to suspend enforcement of the decision or action complained of while the complaint is pending and all parties or persons against whom the complainant seeks relief do not agree to the suspension, the complaint shall include a statement of the harm that is likely to result to the complainant if enforcement is not suspended. Harm may include deprivation of a party's ability to obtain meaningful or timely relief if a suspension is not entered.
- (3) All factual statements in the complaint shall be verified by affidavit made on personal knowledge by an affiant competent to testify to the matters stated.
- (4) A complainant shall file the required number of copies of the formal complaint, pursuant to §22.71 of this title (relating to Filing of Pleadings, Documents, and Other Materials). At or before the time of a document's

filing, including the complaint, the filing party shall provide a copy of the document to ERCOT and every other person from whom relief is sought and any other party. A complainant shall also serve the Office of Public Utility Counsel.

- (e) **Notice.** Within 14 days of receipt of the complaint, ERCOT shall provide notice of the complaint by email to all qualified scheduling entities and, in ERCOT's discretion, all relevant ERCOT committees and subcommittees. Notice shall consist of a copy of the complaint (excluding the record of prior proceedings) that includes the docket number.
- (f) **Response to complaint.** A response to a complaint shall be due within 28 days after receipt of the complaint and shall conform to the requirements for the complaint set forth in subsection (d) of this section except that:
- (1) the list of parties and counsel is not required unless necessary to supplement or correct the list contained in the complaint;
 - (2) the response need not include a statement of the case, a statement of the issues or points presented for commission review, or a statement of the facts, unless the responding party contests that portion of the complaint;
 - (3) a statement of jurisdiction should be omitted unless the complaint fails to assert valid grounds for jurisdiction, in which case the reasons why the commission lacks jurisdiction shall be concisely stated;

- (4) the argument shall be confined to the issues or points raised in the complaint;
 - (5) the appendix need not include any item already contained in an appendix filed by another party; and
 - (6) if the complainant seeks suspension of the decision or action complained of, the response shall state whether the respondent opposes suspension and, if so, the basis for the opposition, specifically stating the harm likely to result if enforcement is suspended.
- (g) **Comments by commission staff and motions to intervene.** Commission staff representing the public interest shall file comments within 42 days after the date on which the complaint was filed. In addition, any party desiring to intervene pursuant to §22.103 of this Title (relating to Standing to Intervene) shall file a motion to intervene within 42 days after the date on which the complaint was filed. Motions to intervene shall be accompanied by the intervenor's response to the complaint.
- (h) **Reply.** The complainant may file a reply addressing any matter in a party's response or commission staff's comments. A reply, if any, must be filed within 52 days after the date on which the complaint was filed. However, the commission may consider and decide the matter before a reply is filed.

- (i) **Suspension of enforcement.** If the complainant seeks to suspend enforcement of the decision or action complained of while the complaint is pending and all parties or persons against whom the complainant seeks relief do not agree to the suspension, the presiding officer shall determine whether to suspend enforcement, taking into account the harm that is likely to result to the complainant if enforcement is not suspended, and the harm that is likely to result to others if enforcement is suspended, and any other relevant factors as determined by the commission or the presiding officer.
- (1) The presiding officer shall convene a hearing as quickly as reasonably possible to determine whether to suspend enforcement. The parties shall be prepared to offer relevant evidence and argument regarding the requested suspension of enforcement.
- (2) The presiding officer may issue an order, for good cause, on such terms as may be reasonable to preserve the rights and protect the interests of the parties during the processing of the complaint, including requiring the complainant to provide reasonable security, assurances, or to take certain actions, as a condition for granting the requested suspension of enforcement.
- (j) **Oral argument.** If the facts are such that the commission may decide the matter without an evidentiary hearing on the merits, a party desiring oral argument shall comply with the procedures set forth in §22.262(d) of this title (relating to Oral Argument Before the Commission). In its discretion, the commission may decide

a case without oral argument if the argument would not significantly aid the commission in determining the legal and factual issues presented in the complaint.

(k) **Extension or shortening of time limits.** The time limits established by this section are intended to facilitate the expeditious resolution of complaints brought pursuant to this section.

(1) The presiding officer may grant a request to extend or shorten the time periods established by this rule for good cause shown. Any request or motion to extend or shorten the schedule must be filed prior to the date on which any affected filing would otherwise be due. A request to modify the schedule shall include a representation of whether all other parties agree with the request, and a proposed schedule.

(2) For cases to be determined after the making of factual determinations or through commission ADR as provided for in subsection (m) of this section, the presiding officer or State Office of Administrative Hearings administrative law judge shall issue a procedural schedule.

(l) **Standard for review.** If the decision or action complained of is based on findings of fact made by an impartial third party under circumstances that are consistent with the guarantees of due process inherent in the procedures described in the Texas Government Code Chapter 2001 (Administrative Procedure Act), including an arbitration conducted pursuant to ERCOT Protocol Section 20.4

(Arbitration Procedures), the commission will reverse a factual finding only if it is not supported by substantial evidence or is arbitrary and capricious. If factual determinations made in connection with the action or decision complained of do not meet these procedural standards, or factual determinations necessary to the resolution of the matter have not been made, the commission will resolve such factual disputes on a *de novo* basis.

(m) **Referral to the State Office of Administrative Hearings.** If resolution of a complaint does not require determination of any factual issues, the commission may decide the issues raised by the complaint on the basis of the complaint and the response(s). If factual determinations must be made to resolve a complaint brought under this section, and the parties do not agree to the making of all such determinations pursuant to a procedure described in subsection (n) of this section, the matter may be referred to the State Office of Administrative Hearings for the making of all necessary factual determinations and the preparation of a proposal for decision, including findings of fact and conclusions of law, unless the commissioners decide to serve as the finders of fact.

(n) **Availability of alternative dispute resolution.** Pursuant to Texas Government Code Chapter 2009 (Governmental Dispute Resolution Act), the commission shall make available to the parties alternative dispute resolution procedures described by Civil Practices and Remedies Code Chapter 154, as well as combinations of those procedures. The use of these procedures before the

commission for cases brought under this section shall be by agreement of the parties only. The methods of dispute resolution that are available include:

- (1) mediation;
- (2) binding mini-trials; and
- (3) moderated settlement conferences.

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

**ISSUED IN AUSTIN, TEXAS ON THE 27th DAY OF SEPTEMBER 2002 BY THE
PUBLIC UTILITY COMMISSION OF TEXAS
RHONDA G. DEMPSEY**