

**PROJECT NO. 45115**

<b>PROJECT TO AMEND CHAPTERS 22</b>	<b>§</b>	<b>PUBLIC UTILITY COMMISSION</b>
<b>AND 24 - IMPLEMENTATION OF</b>	<b>§</b>	
<b>SENATE BILL 1148 (VARIOUS WATER</b>	<b>§</b>	<b>OF TEXAS</b>
<b>REGULATIONS MODIFICATIONS)</b>	<b>§</b>	

**ORDER ADOPTING AMENDMENTS TO §22.291, §22.292, §22.293, §22.295, §22.296, §22.297, §22.298, AND §22.299 AND REPEAL OF §22.294 AS APPROVED AT THE JUNE 9, 2016 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts amendments to §22.291, relating to Purpose and Applicability; §22.292, relating to Definitions; §22.293, relating to Notification of Emergency Order; §22.295, relating to Request for Emergency Order; §22.296, relating to Additional Requirements for Emergency Rate Increases; §22.297, relating to Notice and Opportunity for Hearing; §22.298, relating to Contents of Emergency Order; and §22.299, relating to Hearing Required to Affirm, Modify, or Set Aside, and repeal of §22.294, relating to Emergency Orders and Emergency Rates, with changes to the proposed text as published in the March 18, 2016 issue of the *Texas Register* (41 TexReg 2050). The amendments and repeal will allow the commission's procedural rules relating to emergency orders to conform to §§2, 3, 5, 6, and 8–10 of Senate Bill 1148 (SB 1148) of the 84<sup>th</sup> Legislature, Regular Session, which amended chapters 5 and 13 of the Texas Water Code Annotated (West 2008 & Supp. 2015) (TWC). These amendments and repeal are adopted under Project Number 45115. Consistent with 1 Tex. Admin. Code §91.36(e), the commission also adopts amendments to chapter 24 of the commission's rules in a separate order as part of this project.

The commission received comments on the proposed amendments and repeal from the Office of Public Utility Counsel (OPUC).

OPUC proposed deletion of the language in §22.297(d) regarding requesting a hearing to affirm, modify, or set aside an emergency order issued pursuant to §22.299. OPUC commented that TWC §13.454 appears to require a hearing, regardless of whether one is requested, and a hearing can only be avoided if it is waived. OPUC stated that, as a result, the language regarding requesting a hearing is surplusage and possibly confusing.

OPUC also commented on the language in §22.297(d)(2) that states an affected person may, consistent with the Administrative Procedure Act, Tex. Gov't Code Ann. (Vernon 2008 & Supp. 2015) (APA), request an evidentiary hearing or waive the right to a hearing. OPUC commented that the proposed language may be confusing. OPUC proposed that the rule should state that a hearing must be conducted in accordance with the APA because the proposed language could be read to state that a request for or a waiver of a hearing must be consistent with the APA.

Based on the above comments, OPUC proposed that §22.297(d) be modified to read as follows: If the commission's executive director issues an emergency order without a hearing, a hearing must be held, consistent with the APA, to affirm, modify, or set aside the emergency order, unless the person affected by the order waives the right to a hearing. The commission shall provide notice of a hearing to affirm, modify, or set aside an emergency order pursuant to §22.299 of this title (relating to Hearing Required to Affirm, Modify, or Set Aside) not later than the tenth day before the date set for the hearing, except as otherwise provided by this subchapter. The notice shall provide that an affected person may waive his or her right to a hearing, if applicable. The notice shall explain how such waiver may occur.

*Commission response*

The commission agrees with the concerns expressed by OPUC but declines to adopt OPUC's proposed version of §22.297(d). In particular, OPUC's proposed language states that the commission's executive director will issue an emergency order without a prior hearing, but does not acknowledge that such authority can be exercised by the commission itself. The commission finds that the adopted wording better expresses the commission's intent in adopting the amended section.

To address OPUC's concerns and better express the commission's intent, the commission makes the following modifications to the proposed §22.297 as published in the Texas Register. The commission amends subsection (d) to remove discussion of a person's request for a hearing. The commission also declines to adopt the proposed subsection (e) from the commission's proposed rule text as published in the Texas Register. These modifications reflect the fact that, regardless of whether a hearing is requested, the commission will schedule and hold a hearing to affirm, modify, or set aside an emergency order issued without a prior hearing.

In addition, as proposed by OPUC, the commission removes "consistent with the APA" from subsection (d). Instead, the commission rearranges subsection (d)(1) and (2) to more clearly indicate when the APA does and does not apply and inserts a sentence in subsection (d)(2) stating that a hearing will be conducted in accordance with the APA. This change adopts the clarification proposed by OPUC.

Consistent with these modifications, §22.297(d), as adopted, states:

- (d) **If notice and opportunity for a hearing is not practicable, an emergency order may be issued under this section without a hearing.**
- (1) **An emergency order issued without a hearing under this section is not subject to the requirements of the APA.**
- (2) **If an emergency order is issued without a hearing under this section, the commission shall schedule a hearing to affirm, modify, or set aside the emergency order pursuant to §22.299 of this title (relating to Hearing Required to Affirm, Modify, or Set Aside). Such a hearing will be conducted in accordance with the APA. Notice of such a hearing shall be given no later than the tenth day before the date of the hearing and shall provide that an affected person may:**
- (A) **participate in an evidentiary hearing to affirm, modify, or set aside the emergency order; and**
- (B) **waive the right to a hearing. The notice shall explain how such waiver may occur.**

The commission also adopts modifications to §22.298(6)–(7) that conform to the above discussion and reflect that waiver of a hearing to affirm, modify, or set aside an emergency order is only an issue if an emergency order is issued without a prior hearing.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting these sections, the commission makes nonsubstantive changes to the wording of §22.296(d) and makes other minor modifications for the purpose of clarifying its intent.

These amendments and repeal are adopted under TWC §13.041(b), 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; and specifically, TWC §13.451(f), which grants the commission the authority to adopt rules necessary to administer subchapter K-1 of the TWC, and SB 1148.

Cross Reference to Statutes: TWC §13.041 and §13.451 and SB 1148.

**§22.291. Purpose and Applicability.**

(a) The purpose of this subchapter is to prescribe procedures to implement the commission's authority under the Texas Water Code to issue emergency orders or to authorize emergency rates.

(b) This subchapter applies to any request under the Texas Water Code for an emergency order or emergency rates.

**§22.292. Definitions.**

The following words and terms, when used in this subchapter, shall have the following meaning unless the context clearly indicates otherwise:

- (1) **Emergency order** -- An order which must be issued immediately for one of the reasons provided in §24.14(a) of this title (relating to Emergency Orders and Emergency Rates).
  
- (2) **TCEQ** -- Texas Commission on Environmental Quality.

**§22.293. Notification of Emergency Order.**

- (a) A retail public utility that requests, obtains, or is subject to an emergency order issued by the TCEQ shall notify the commission and all regulatory authorities having original jurisdiction over the retail public utility's rates and service policies as soon as reasonably possible by:
- (1) filing with the commission and all regulatory authorities having original jurisdiction over the retail public utility's rates and service policies a copy of the request or order; or
  - (2) if the request or order is not available to the retail public utility, filing with the commission and all regulatory authorities having original jurisdiction over the retail public utility's rates and service policies a letter describing the facts and circumstances relating to the request or order.
- (b) A retail public utility may comply with subsection (a) of this section by providing the information required by subsection (a) of this section as part of a request for an emergency order under §22.295 of this title (relating to Request for Emergency Order) and by providing notice, if applicable, to all other regulatory authorities having original jurisdiction over the retail public utility's rates and service policies.
- (c) Upon issuance of an emergency order by the commission, the commission shall provide notice of issuance of the order to the affected retail public utility as soon as practicable. Notice of the commission's action under this subchapter is adequate if the notice or

emergency order is delivered by registered or certified mail, return receipt requested, or hand-delivered, to the last known address of the retail public utility's headquarters.

- (d) After a retail public utility receives notice of the issuance of an emergency order by the commission under this subchapter, the retail public utility shall provide notice of issuance of the emergency order to all affected ratepayers, the TCEQ, and all regulatory authorities having original jurisdiction over the retail public utility's rates and service policies. If the emergency order is for a rate change pursuant to §24.14(a)(4) of this title (relating to Emergency Orders and Emergency Rates), the retail public utility will provide the notice within ten days of the issuance of the emergency order or before the next billing cycle in which the new rate will be imposed, whichever is first. Otherwise, the retail public utility will provide the notice within ten days of the issuance of the emergency order. A copy of the notice shall also be filed with the commission along with a signed affidavit as proof that the notice was provided. The notice shall include:

- (1) The name of the retail public utility for which the emergency order was issued, its corresponding certificate of public convenience and necessity number(s), and all relevant TCEQ-issued public water system name(s) and identification number(s) and wastewater discharge permit name and identification number(s), if applicable;
- (2) The address of the office for the retail public utility identified in paragraph (1) of this subsection;
- (3) An emergency contact name and phone number(s) for the retail public utility identified in paragraph (1) of this subsection;
- (4) The start and end date of the emergency order; and

- (5) A brief statement explaining how the customers of the retail public utility identified in paragraph (1) of this subsection will be affected by the issuance of the emergency order.
- (e) If a retail public utility required to provide notice pursuant to subsection (d) of this section has abandoned operation of its facilities or the owner of such a retail public utility has abandoned the system, as described in Texas Water Code §13.412(a)(1)-(2) and (f), then the retail public utility's receiver appointed pursuant to Texas Water Code §13.412 or temporary manager authorized pursuant to Texas Water Code §13.4132 shall provide notice as required by subsection (d) of this section. If no receiver or temporary manager has been appointed or authorized, commission staff shall take reasonable efforts to ensure that customers are provided the notice required by subsection (d) of this section or other reasonable notice.

**§22.294. Emergency Orders and Emergency Rates. – REPEALED****§22.295. Request for Emergency Order.**

- (a) A person seeking an emergency order under this subchapter shall submit a written request to the commission.
  
- (b) For a requesting person other than commission staff, the request must:
  - (1) be sworn;
  - (2) state whether the requesting person is also seeking or has obtained an emergency order from the TCEQ;
  - (3) state the name, address, and telephone number of the requesting person, the person submitting the request on the requesting person's behalf, and the person signing the request on the requesting person's behalf;
  - (4) state the name of the retail public utility, its corresponding certificate of public convenience and necessity number(s), and its corresponding TCEQ-issued public water system name(s) and identification number(s) and wastewater discharge permit name and identification number(s), if applicable;
  - (5) contain information sufficient to identify the facility(ies) and location(s) to be affected by the order;
  - (6) describe the condition(s) of emergency or other condition(s) justifying the issuance of the order;
  - (7) allege facts to support any findings required under this subchapter;

- (8) estimate the dates on which the proposed order should begin and end and the dates on which the activity proposed to be allowed, mandated, or prohibited should begin and end;
- (9) describe the action sought and the activity proposed to be allowed, mandated, or prohibited;
- (10) include any other statement or information required by this subchapter; and
- (11) shall be signed as follows:
  - (A) For a corporation, the request shall be signed by an executive officer or by a corporate official who has been delegated appropriate authority by an executive officer.
  - (B) For a partnership or sole proprietorship, the request shall be signed by a general partner or the proprietor, respectively.
  - (C) For a municipality, state, federal, or other public agency, the request shall be signed by a person authorized to make the representation(s) contained in the request on behalf of the municipality or agency.
  - (D) A person signing a request shall make the following certification: "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based on my inquiry of the person or persons who manage the retail water or sewer system(s) or the retail public utility, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true,

accurate, and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

- (c) For a request by commission staff, the request must:
  - (1) contain the items specified in subsection (b)(2) - (10) of this section; and
  - (2) be signed by commission staff.

**§22.296. Additional Requirements for Emergency Rate Increases.**

- (a) If an emergency rate increase is granted pursuant to §24.14(a)(4) of this title (relating to Emergency Orders and Emergency Rates), the commission shall schedule a hearing and establish a final rate prior to the expiration of the emergency rate order. The final rate must be established and implemented no more than 15 months after the emergency rate increase takes effect.
- (b) A utility is required to provide notice of the hearing to establish a final rate set pursuant to subsection (a) of this section to all customers at least ten days before the date of the hearing. A copy of the notice shall also be filed with the commission along with a signed affidavit as proof that the notice was provided.
- (c) A request for an emergency rate increase must be filed by the utility in accordance with, and must contain the information required by §22.295 of this title (relating to Request for Emergency Order) and must also contain the following:
  - (1) the effective date of the rate increase;
  - (2) sufficient information to support the computation of the proposed rates; and
  - (3) any other information requested by the commission.
- (d) A utility receiving authorization for an emergency rate increase shall provide notice of the increase to each ratepayer within ten days of issuance of the order, or before the next billing cycle in which the rate will be in effect, whichever is first. The notice shall comply with

the notice requirements set forth in §22.293(d) of this title (relating to Notification of Emergency Order) and shall also contain the following:

- (1) the utility's name and address, the previous rates, the emergency rates, the effective date of the rate increase, and the classes of utility customers affected; and
- (2) this statement: "This emergency rate increase has been approved by the Public Utility Commission of Texas under authority granted by the Texas Water Code §13.4133 to ensure the provision of continuous and adequate service to the utility's customers. The commission is also required to schedule a hearing to establish a final rate within 15 months after the date on which the emergency rates take effect. The utility is required to provide notice of the hearing to all customers at least ten days before the date of the hearing. The additional revenues collected under this emergency rate increase are subject to refund if the commission finds that the rate increase was larger than necessary to ensure continuous and adequate service."

**§22.297. Notice and Opportunity for Hearing.**

- (a) An emergency order under this subchapter may be issued with or without notice and an opportunity for hearing in accordance with this subchapter.
- (b) A law under which the commission acts that requires notice of hearing or that prescribes procedures for the issuance of emergency orders does not apply to a hearing on an emergency order issued pursuant to the Texas Water Code, Chapter 13, Subchapter K-1 unless the law specifically requires notice for an emergency order. The commission shall give notice of the hearing as it determines is practicable under the circumstances.
- (c) If notice and opportunity for a hearing is practicable, the commission shall provide the notice not later than the tenth day before the date set for the hearing.
- (d) If notice and opportunity for a hearing is not practicable, an emergency order may be issued under this section without a hearing.
  - (1) An emergency order issued without a hearing under this section is not subject to the requirements of the APA.
  - (2) If an emergency order is issued without a hearing under this section, the commission shall schedule a hearing to affirm, modify, or set aside the emergency order pursuant to §22.299 of this title (relating to Hearing Required to Affirm, Modify, or Set Aside). Such a hearing will be conducted in accordance with the

APA. Notice of such a hearing shall be given no later than the tenth day before the date of the hearing and shall provide that an affected person may:

- (A) participate in an evidentiary hearing to affirm, modify, or set aside the emergency order; and
- (B) waive the right to a hearing. The notice shall explain how such waiver may occur.

**§22.298. Contents of Emergency Order.**

An emergency order issued under this subchapter shall contain at least the following:

- (1) the name and address of the requesting person, if any, and information sufficient to identify the facility(ies) or location(s) affected by the order;
- (2) a description of the condition(s) justifying the issuance of the order;
- (3) any finding(s) of fact(s) required under this subchapter;
- (4) a statement of the term of the order, including the dates on which it shall begin and end, in accordance with §24.14 of this title (relating to Emergency Orders and Emergency Rates);
- (5) a description of the action sought;
- (6) if the order was issued without a hearing, a statement to that effect and the procedure by which a person waives a right to a hearing, and if the emergency order was issued pursuant to §24.14(a)(2)-(3) of this title, a provision setting a time and place for a hearing before the commission or SOAH; and
- (7) any other statement or information required by this subchapter.

**§22.299. Hearing Required to Affirm, Modify, or Set Aside.**

- (a) A hearing shall be held either before or after the issuance of each emergency order, unless all persons affected by the order waive the right to a hearing. Notice of a hearing to affirm, modify, or set aside an emergency order shall be given in accordance with §22.297(d) of this title (relating to Notice and Opportunity for Hearing).
- (b) A hearing to affirm, modify, or set aside an emergency order under this subchapter is subject to the APA.
- (c) In a hearing to affirm, modify, or set aside an emergency order under this subchapter, the applicant shall be given the opportunity to:
  - (1) present evidence under oath;
  - (2) present rebuttal evidence under oath; and
  - (3) cross-examine witnesses under oath.
- (d) If no hearing is held before the issuance of an emergency order, the commission or the executive director shall set a time and place for a hearing to be held before the commission or SOAH to affirm, modify, or set aside the order as soon as practicable after the order is issued. For emergency orders issued pursuant to §24.14(a)(2) or §24.14(a)(3) of this title (relating to Emergency Orders and Emergency Rates) without a hearing, the order shall set a time and place for a hearing before the commission or SOAH to affirm, modify, or set aside the order as soon as practicable after the order is issued.

- (e) At a hearing required under this section, or within a reasonable time after the hearing, the commission shall affirm, modify, or set aside the emergency order.

This agency hereby 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 §22.291, relating to Purpose and Applicability; §22.292, relating to Definitions; §22.293, relating to Notification of Emergency Order; §22.295, relating to Request for Emergency Order; §22.296, relating to Additional Requirements for Emergency Rate Increases; §22.297, relating to Notice and Opportunity for Hearing; §22.298, relating to Contents of Emergency Order; and §22.299, relating to Hearing Required to Affirm, Modify, or Set Aside, and repeal of §22.294, relating to Emergency Orders and Emergency Rates, are hereby adopted with changes to the text as proposed.

**SIGNED AT AUSTIN, TEXAS the \_\_\_\_\_ day of JUNE 2016.**

**PUBLIC UTILITY COMMISSION OF TEXAS**

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**DONNA L. NELSON, CHAIRMAN**

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**KENNETH W. ANDERSON, JR., COMMISSIONER**

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**BRANDY MARTY MARQUEZ, COMMISSIONER**