

PROJECT NO. 28884

**TRANSMISSION PLANNING, § PUBLIC UTILITY COMMISSION
LICENSING AND COST-RECOVERY §
RULEMAKING § OF TEXAS**

**ORDER ADOPTING NEW §25.199 AND AMENDMENT TO §25.231
AS APPROVED AT THE FEBRUARY 10, 2005 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts new §25.199 relating to Transmission Planning, Licensing and Cost-Recovery and an amendment to §25.231 relating to Cost of Service with changes to the proposed text as published in the October 29, 2004 issue of the *Texas Register* (29 TexReg 9953). The amendment and new rule are necessary to implement provisions of the Public Utility Regulatory Act (PURA) §35.004(d) and §39.203(e), as amended by House Bill 2548, 78th Leg., R.S., ch. 295, §3 (2003) (HB 2548). New §25.199 prescribes the procedures and criteria under which the commission may require an electric utility or a transmission and distribution utility to construct or enlarge facilities to reduce transmission constraints in the Electric Reliability Council of Texas (ERCOT) in a cost-effective manner. The amendment to §25.231 prescribes additional criteria the commission would consider in authorizing construction work in progress, a special form of rate relief, for a transmission utility that is ordered to build facilities under §25.199. This new §25.199 and amendment to §25.231 are adopted under Project Number 28884.

No party requested a public hearing on proposed new §25.199 and the amendment to §25.231.

The commission received comments on the proposed new §25.199 and amendment to §25.231 from San Antonio City Public Service (CPS), Brazos Electric Power Cooperative, Inc. (Brazos),

Reliant Energy, Inc. (Reliant), CenterPoint Energy Houston Electric, LLC (CenterPoint), LCRA Transmission Services Corporation (LCRA TSC), TXU Electric Delivery Company (TXU Delivery), American Electric Power Company, Inc. (AEP), Texas Industrial Energy Consumers (TIEC), ERCOT, FPL Energy, LLC (FPLE), the Wind Coalition and Texas State Representative Phil King. In its comments, the Wind Coalition represented the views of FPL Energy, PPM Energy, GE Wind Energy, Vestas-Americas, Inc., Gamesa Energy Southwest, Cielo Wind Power, Environmental Defense, Public Citizen's Texas Office and the American Wind Energy Association.

Several commenters criticized §25.199, expressing the view that the rule did not go far enough to promote the development of wind resources in Texas. LCRA TSC, AEP, FPLE, and the Wind Coalition all commented that the rule addressed the reliability and economic aspects of transmission constraints, but that the rule did little to achieve the renewable goal set forth in PURA §39.904(a). LCRA TSC said that the rule did not even consider the renewable goal as authorized by HB 2548. One often-repeated concern was that the ERCOT transmission process did not adequately address the particular needs of wind generation. Parties explained that the development of wind generation facilities takes far less time than the development of fossil fuel generation and that the current ERCOT planning process for transmission was better suited to meeting the needs of fossil fuel generation. Parties explained that the current ERCOT process requires that collateralized interconnection agreements be signed with ERCOT before it would consider upgrading the transmission system to accommodate the energy. Wind facilities take far less time to develop than transmission capacity and parties noted that there can be a significant time lag between when the wind facility is operational and when the transmission upgrades can

be made to accommodate the wind energy. Parties claimed that the experience with the heavily curtailed wind projects in the McCamey, Texas area have caused bankers to be unwilling to commit capital investment for wind facilities significantly in advance of the necessary transmission capacity to move the energy to market. Parties argued that, without specific language in the rule to accommodate this disconnect in the transmission expansion process, financing of new wind construction would become harder to achieve. TIEC, on the other hand, suggested that the real problem with the recent dearth of wind development investment was the absence of the federal production tax credit which has since been reinstated.

LCRA TSC, AEP, FPLE, and the Wind Coalition all complained that the proposed new rule did nothing to address consideration of proposed transmission projects to be built in anticipation of future wind development to reduce the time lag between the construction of the wind facility and the upgrades to the transmission system needed to accommodate the facility's energy. AEP suggested that the requirement that all projects go through the regular ERCOT transmission planning process "merely codifies the normal evaluation and approval process that all potential transmission improvement would undergo at ERCOT." AEP argued that, if the legislation was intended to help Texas meet its renewable capacity goal, then requiring that applicants first avail themselves of the ERCOT planning process would be unwieldy, inefficient, and potentially could result in numerous procedural traps once the certificate of convenience and necessity (CCN) is filed. AEP suggested one such procedural trap could be a possible conflict in a subsequent CCN proceeding if ERCOT declined to approve a project but the commission later determined the project was necessary. AEP viewed that concern as additional justification to bypass the ERCOT process.

TIEC disagreed with LCRA TSC, AEP, FPLE, and the Wind Coalition, and commented that the rule provided a feasible framework for developing additional transmission expansion without ignoring the processes already existing in the ERCOT stakeholder process and the CCN process. Reliant, in its initial comments, and TXU Delivery, in its reply comments, agreed with TIEC that projects brought to the commission under the requirements of PURA §39.203(e) must have previously been considered in the ERCOT planning process and not be the subject of a pending CCN proceeding. TIEC emphasized that the collaborative ERCOT stakeholder process is the best way to ensure efficient development of transmission resources. TIEC reminded the commission that, in its initial comments in Project 28884, it pointed out that the legislative intent was for the process envisioned by PURA §39.203(e) to be used as a last resort when the ERCOT and CCN processes have failed to resolve acute transmission constraint issues.

AEP suggested a process whereby the commission staff would determine, from information submitted by interested parties, where significant potential for wind development existed but could not be realized due to a lack of transmission infrastructure. AEP recommended that, after an area was identified, the commission initiate a proceeding to determine the amount of renewable energy for which transmission capacity should be provided. ERCOT would then provide cost and other project development information to the commission, after which the commission could determine whether to order the construction of the facilities. AEP reasoned that this was a thoughtful and cost-effective way to get out in front of the wind development and circumvent the time lag issues. TXU Delivery replied that suggesting that the commission's rule language be broadened to include consideration of future development of generating resources

could make the rule inconsistent with the existing requirements of PURA Chapter 37 regarding the need for transmission facility construction. Representative King supported AEP's proposal. In reply comments, the Wind Coalition urged the commission to adopt rule language that more proactively addresses future constraints. The Wind Coalition argued that the commission was empowered by HB 2548 to consider current as well as future transmission constraints when considering ordering transmission facilities under this section.

Commission response

The language of PURA §39.203(e) is clear: “The commission may require an electric utility or a transmission and distribution utility to construct or enlarge facilities to ensure safe and reliable service for the state’s electric markets and to reduce transmission constraints within ERCOT in a cost-effective manner where the constraints are such that they are *not* being resolved through Chapter 37 or the ERCOT transmission planning process.” (Emphasis added.) PURA contemplates that the commission would order the construction of transmission facilities if transmission service issues are not being adequately addressed by the CCN and ERCOT processes.

The commission agrees with commenters that the ERCOT transmission planning process does not always accommodate the particular needs of wind development. An argument made by an applicant that building transmission in anticipation of wind generation is a cost-effective means by which to circumvent transmission constraints and achieve an important policy goal is likely to be rejected by the ERCOT process. The process that the

commission is establishing in the rule would give parties who are dissatisfied with the outcome of the ERCOT planning process an opportunity for commission review, and the commission would have the authority to order a utility to construct new transmission facilities if it concluded that legitimate concerns about transmission service have not been adequately addressed.

The commission disagrees with LCRA TSC that the rule ignores the goal of renewable development in HB 2548. House Bill 2548 included the consideration of the state's renewable goal as part of an amendment to PURA §37.056(c), which delineates the factors the commission must consider in a CCN proceeding. PUC Substantive Rule §25.101(c)(6)(D) (relating to Certification Criteria) refers to the statutory requirements of PURA §37.056(c). The commission rules thus adopt the statutory criteria for granting a CCN by reference, including the state's renewable goal.

The amended PURA §39.203(e) clarifies that the commission has the authority to order the construction of transmission to relieve constraints in ERCOT in a cost-effective manner. This section does not specifically refer to congestion caused by renewable energy generation (including wind generation). The treatment of various transmission needs under the new §25.199 tracks the statute: the new section establishes a process in which a party that has a concern about any transmission-service need that it believes is not being addressed can raise the matter with the commission.

The commission declines to adopt AEP's specific process for identifying areas where significant potential for wind development exists for several reasons: the commission believes that the rule, as proposed, is adequate to address any legitimate concerns about the ERCOT planning process and the commission believes that the rule should not put transmission needs related to the renewable energy goal ahead of other transmission needs, such as those related to reliable service to customers and generators' access to loads. The commission is not precluded from facilitating or conducting fact-finding to identify areas conducive to wind facility development. In fact, the commission believes that it is an appropriate forum in which to develop information on the location of favorable renewable resource areas and the costs of building transmission to facilitate their exploitation. However, for the reasons set forth above, the commission declines mandating by rule the specific process outlined by AEP.

In response to AEP, the Wind Coalition, and others' assertion that the rule relies on the existing ERCOT planning process, the commission notes that the process outlined in the rule is entirely consistent with amended PURA §39.203(e). As is noted above, the statute contemplates commission action where the ERCOT and Chapter 37 processes do not resolve the problem.

The commission also does not anticipate the same conflict during the CCN process that AEP does. PURA §39.203(e) states that in any proceeding brought under chapter 37, an applicant need not prove that the construction ordered is necessary for the service, accommodation, convenience, or safety of the public. This provision means that "need"

issues would be resolved in a proceeding under PURA §39.203(e), and that other routing and impact issues would be resolved in the subsequent chapter 37 proceeding.

The commission agrees with the Wind Coalition and other parties that it can consider current and future transmission constraints and believes the rule language does not limit its ability to do so. The commission does not believe that it is necessary to include the adjectives “current” or “future” when referring to constraints that it may address under this section.

CPS submitted comments arguing that the commission lacks the jurisdiction to order a municipality to order the construction of transmission facilities to address safety and reliability or to address the cost-effective reduction in congestion. CPS argued that because PURA §39.203(e) does not apply to municipalities, new §25.199 cannot apply to San Antonio.

Commission response

Prior to the last legislative session, PURA included provisions that authorized the commission to require that municipal utilities construct transmission facilities where the commission determined that there was a transmission need that warranted the construction of the new facilities. PURA §35.005(b) provides: “The commission may require transmission service at wholesale, including the construction or enlargement of a facility.” This section clearly applies to municipal utilities because PURA §35.005 applies to electric utilities, which is defined in PURA §35.001 to include municipal utilities, for the

purposes of Chapter 35, Subchapter A. The 2003 amendment of PURA, which amended §39.203(e), did not impair the pre-existing commission authority to require the construction or enlargement of facilities that was set out in §35.005(b). This rule is primarily intended to implement the 2003 legislation but it is not adopted in a vacuum. Powers of the commission arising from other sections of PURA may be relied on in adopting this rule, and the commission identified PURA §35.005 as one of the authorities for the adoption of the rule.

In its initial comments, LCRA TSC stated that the rule should only apply to transmission and distribution utilities and that all references to electric utilities should be removed. LCRA TSC later clarified that its initial comment was not an indication of LCRA TSC's position on the commission's jurisdiction over municipally-owned utilities but rather LCRA TSC meant to point out that the rule was not consistent throughout in using the terms "electric utility" and "transmission and distribution utility" in every instance.

Commission response

The commission agrees with LCRA TSC that the proposed new rule did not use the terms consistently throughout and amends the rule language accordingly.

Reliant commented that both subsection (b) and (d) of §25.199 are titled "Application." To minimize confusion Reliant recommended renaming subsection (b) to "Applicability" and subsection (d) to "Filing requirements."

Commission response

The commission agrees with Reliant and makes the recommended changes to §25.199.

Brazos commented that allowing any “interested party” to file a request under new §25.199 was too broad and would allow a person to file if it claims to have an interest in the ERCOT electric market. Brazos believed the commission should consider limiting who can make a request and suggested revising the term “interested party” to “market participant” as defined in the ERCOT protocols.

Commission response

The commission disagrees that allowing “interested parties” to file requests under the proposed new rule is too broad. Brazos’ suggestion to use the term “market participant” as defined by the ERCOT protocols does not allow for the flexibility and scope the commission expects to achieve in the proposed new rule. “Market participant” is defined in the ERCOT protocols as “An Entity that engages in any activity that is in whole or in part the subject of these Protocols, regardless of whether such Entity has executed an Agreement with ERCOT.” The commission prefers to allow entities such as prospective investors in the ERCOT electric market and other parties not contemplated within ERCOT protocol’s definition of “market participant” to file applications under new

§25.199. The commission's precedent includes broad standards for standing to participate in a contested case and it believes that those standards are appropriate in this context.

Brazos also submitted suggestions for clarifying the distinction between transmission upgrades addressing safety and reliability upgrades addressing constraints. Brazos interpreted the two situations as separate and concluded that the cost-effectiveness requirement was only applicable to the situation where the facility upgrade was to address a transmission constraint.

Commission response

The commission believes that Brazos' suggested revision is not necessary. The provision as proposed applies the cost-effectiveness requirement only to the elimination of transmission constraints.

CenterPoint and the Wind Coalition expressed concern that the rule did not give parties seeking relief under §25.199 the ability to file an application with the commission if a transmission project was neither accepted nor rejected in the ERCOT process. CenterPoint suggested that language be added imposing a time limit on ERCOT so an aggrieved party could use the commission's process in the event that ERCOT fails to take any action on the request within a prescribed time period. CenterPoint suggested that, since the ERCOT process requires up to 139 days for evaluation of a project, allowing 140 days was reasonable.

The Wind Coalition and FPLE concurred with CenterPoint that the amount of time ERCOT has to review a transmission project should be limited. The Wind Coalition commented that the commission should retain the right to monitor and intervene in the ERCOT planning process, especially when the ERCOT process has stalled, and that PURA §39.203(e) supported this position. The Wind Coalition stated that this would provide additional incentive for the ERCOT process to review transmission projects in a timely manner. The Wind Coalition suggested that language be added to subsection §25.199(e)(2)(b) allowing an applicant to petition the commission under §25.199 if the project under question had been submitted to ERCOT and had not been approved or rejected within 180 days of submission.

In reply comments, TIEC voiced its reluctance to have new §25.199 contain language imposing explicit time limits on the ERCOT planning process. TIEC stated that this limitation on the ERCOT planning process, as well as suggestions by parties that the ERCOT planning process should be bypassed altogether, turns the transmission planning process on its head. TIEC wrote that such “limitations on the ERCOT planning process would undermine the holistic, cooperative process that is vital to the efficient development of transmission facilities.”

The Wind Coalition also proposed language whereby an applicant could request that the commission order a transmission provider to prepare and file a CCN for facilities that had been approved through the ERCOT process, but had seen no subsequent activity by the electric or transmission and distribution utility assigned to build the line.

Commission response

The commission agrees with CenterPoint, FPLE, and the Wind Coalition that the ERCOT process should not be open-ended. However, the commission is not prepared to establish a fixed time limit for the ERCOT or CCN process. Instead, the commission can assess the facts surrounding ERCOT's consideration of a transmission-service need or surrounding a utility's progress in preparing a CCN application and decide whether it is appropriate for the commission to order new facilities to be built. If the ERCOT process breaks down and does not accomplish its goal of addressing a proposed project in a reasonable amount of time, the commission has the authority to address an application under this section. The commission modified the new section in response to the comments of CenterPoint and the Wind Coalition to provide that, where an applicant believes that an ERCOT decision imposes a condition on the approval of a transmission project that is tantamount to rejection, it may treat the ERCOT action as a rejection and challenge it through the process set out in new §25.199. In response to concerns regarding a utility's progress in the CCN process, the commission modified the rule to require that the electric utility or transmission and distribution utility present evidence regarding a reasonable time for submitting its CCN application and that it present evidence in the CCN proceeding regarding reasonable times for planning, licensing and constructing the line, so that an appropriate timeline may be included in any commission final order granting the CCN.

TIEC commented that the commission should clarify the requirements for filing a complaint under new §25.199 to require applicants to demonstrate that their transmission issues were not

being addressed through an individual utility's transmission planning process prior to the utility filing a CCN application. TIEC stated that it believed that the commission intended for this language to preserve the integrity of the CCN process, but it is concerned that the rule could be used to undercut a utility's own internal transmission planning process.

TIEC commented that utilities must be able to evaluate their transmission resources and needs on a system-wide basis and then allocate resources accordingly. TIEC expressed concern that utilities could be threatened with contested case proceedings prior to the utility being able to file its CCN application. TIEC went on to state that this could preclude a utility from conducting the type of open evaluation of its system transmission needs essential to viable transmission planning. TIEC feared this could result in inefficient deployment of transmission resources, potentially resulting in higher consumer costs and lower reliability.

Commission response

The commission does not believe that there is a significant risk that parties would use §25.199 to circumvent an electric or transmission and distribution utility's planning process. TIEC's suggested modification could create an opportunity for a utility to use its "individual" planning process to prevent a party from petitioning the commission for relief under §25.199. The rule requires that an applicant demonstrate that the facilities are not the subject of a current CCN proceeding and the facilities have been presented to and considered in the ERCOT planning process and have been rejected. TIEC would also require that an applicant who comes to the commission with a proposal for new

transmission facilities under the rule demonstrate that the facilities are not under development in the utility's planning process. Most of the major projects that other market participants have an interest in also have a regional impact and are evaluated in the ERCOT planning process, rather than exclusively in the utility planning process. For this reason, the commission believes that TIEC's suggested modification is unnecessary.

ERCOT submitted reply comments suggesting that there may be a situation where one project is rejected in favor of another that is better for ERCOT as a whole. ERCOT expressed concern that the sponsor of a project not chosen could come to the commission and ask that its project be ordered built. ERCOT supplied the commission with suggested language that specifically requires the applicant to provide information showing that its alternative is less expensive than ERCOT's approved project.

Commission response

The commission agrees with ERCOT that this scenario is a possibility. However, the rule cannot anticipate every eventuality. Contested proceedings provide a workable venue for parties to air issues such as the one ERCOT has described. The commission expects ERCOT or any other concerned party to intervene and present arguments to the commission regarding the different projects considered by the planning process and associated costs. Therefore, the commission declines to make ERCOT's suggested changes.

The Wind Coalition commented that placing the burden of proof on the applicant reduces the level of the commission's participation in the decision-making process and is undue and onerous for the applicant. The Wind Coalition suggested that the rule be changed to "permit the commission to make findings, independent of anything an applicant has submitted." The Wind Coalition also suggested that if ERCOT opposed the applicant, it should be required to present a reasonable comprehensive cost benefit analysis with regard to the facilities.

Commission response

The commission modified the new section to address the Wind Coalition comments. Contested proceedings at the commission typically place the burden of proof on the applicant and the rule, as modified, will still place the burden of persuasion on the applicant. Where the proposed new rule also implicitly placed a burden of production of evidence on the applicant, the modifications to the procedure should assist an applicant in developing evidence to present its case. In this regard, the commission recognizes that some information relating to a transmission proposal may not be available to an applicant. To this end, the commission is making a proceeding filed under §25.199 subject to certain provisions of PUC Procedural Rule §22.251 (relating to Review of ERCOT Conduct). These provisions require that ERCOT file a response to the allegations in a complaint. The commission also addressed the Wind Coalition's concerns about the resources required by a proceeding filed under §25.199, by establishing a threshold review that would avoid the expenses of a contested case, if the commission concludes that, for legal and policy reasons, a review under the new section is not warranted.

Under the procedure set out in the new section, the applicant would file an application containing the information required in §22.251(d). A copy would be served upon ERCOT's General Counsel, every other entity from whom relief is sought, the Office of Public Utility Counsel and any other appropriate party. Within 14 days of receipt, ERCOT would file a response, as required under §22.251(f). ERCOT would also be required to provide notice of the application under §22.251(e) and the notice would be provided to all transmission service providers in ERCOT. The presiding officer would review the responses to the application, as a part of the commission's threshold review. The presiding officer would make an initial recommendation within 20 days of the date ERCOT's response is filed as to whether the applicant's request should be allowed to proceed. The presiding officer's recommendation would be reviewed by the commission, and the commission would decide whether or not a cost-benefit analysis should be undertaken. This process would require that ERCOT would be a party to any proceeding under this section and should permit an applicant to conduct discovery, if needed, to develop additional information. The threshold review would also obviate the expenditure of extensive resources on a proceeding if the commission concludes that it is not warranted, for legal and policy reasons.

AEP suggested that the commission narrow the rule's language as it relates to the commission's choice of a transmission and distribution utility ordered to build the transmission facility. AEP preferred that the commission adopt ERCOT's concepts from the Power System Planning Charter and Process which is similar to the process used in §25.195(c) (relating to Terms and

Conditions for Transmission Service). In reply comments, the Wind Coalition echoed AEP's concerns and added that merchant transmission developers also should be considered if that was the most cost-effective means by which to expediently build the transmission facilities.

Commission response

The commission agrees with AEP that the process described in §25.195(c), in most cases, is the logical procedure to follow when choosing the electric or transmission and distribution utility which will be ordered to build the facilities. However, there might be instances where another utility or a merchant transmission developer (as suggested by the Wind Coalition) is better suited to build the facilities in a cost-effective expeditious manner. The commission will retain its authority to make that determination during the proceeding.

TXU Delivery commented that the requirement that a final order issued pursuant to new §25.199 include a date certain for the transmission service provider to file a CCN at the commission had theoretical benefits but that there were several practical problems with the requirement. TXU Delivery stated that it had concerns that the method of establishing that date was uncertain and that no specific time frame is appropriate for every transmission project. TXU Delivery suggested that such a determination be made only with input from the utility ordered to build the line.

TXU Delivery stated that, even after developing a reasonable timeframe consistent with the information submitted by the utility, there are circumstances outside the control of the utility that

may preclude it from filing a CCN by the date ordered. TXU Delivery urged the commission to include language in the new rule that allows for the extension of the deadline if the utility shows good cause. TXU Delivery expressed fears that, if a good cause exception were not allowed, the utility might be forced to file an incomplete CCN that could be challenged by interveners and ultimately have to be rejected by the commission, frustrating the purpose of the deadline.

Commission response

The commission agrees that every transmission project has different requirements and that those requirements impact the time required to develop the CCN filing. The commission expects that a utility that has an interest in a particular project would intervene as an active participant in the proceeding, especially in light of the fact that ERCOT is required to provide notice to all transmission service providers within ERCOT, and provide the relevant data crucial to a commission determination of an appropriate deadline for filing a CCN. The commission believes that the utility input is crucial in determining a CCN filing deadline that makes sense. The commission also agrees with TXU Delivery that there could be circumstances beyond the utility's control that should lead to a reasonable extension of the ordered deadline and, therefore, modifies the new rule accordingly.

CPS commented that, in the case of a municipally-owned utility, the rule language regarding an order issued under this new section as it pertains to the subsequent CCN requirements is inapplicable.

Commission response

The commission agrees with CPS that municipally-owned utilities are not required to file for a CCN and amends the language accordingly.

The commission's proposed new rule provided that construction work in progress (CWIP) could be available if there would be a significant delay between initial investment and the initial cost recovery for a transmission project. AEP asserted that the commission's failure to define the term "significant" will be a matter of much unnecessary controversy. CenterPoint recommended clarifying the rule to indicate that a "significant delay" would be 12 months. AEP was not opposed to this suggestion should its own suggestion not be adopted. AEP argued that §25.231 should not contain a threshold test for inclusion of CWIP associated with projects ordered pursuant to §25.199. Instead, if a utility is ordered to undertake transmission improvements, project costs classified as CWIP should be expeditiously included in the utility's rate base. AEP asserted that this would likely reduce the total cost to the transmission customers of the project over the life of the transmission line and might lower a utility's financing costs, improve a utility's cash flow and minimize the impact of future rate adjustments. AEP further argued that the commission should authorize inclusion of CWIP in any transmission cost of service filing, including the annual update filings permitted under §25.192(g) (relating to Transmission Service Rates). AEP, LCRA TSC, CenterPoint and TXU Delivery suggested that §25.192(g) be amended to allow for recovery of CWIP in an interim update proceeding with a complete review of the costs in the utility's next rate proceeding. TXU Delivery similarly argued that there should be no threshold test for inclusion of CWIP, stating that requiring a utility to certificate

and construct what is likely to be a lengthy 345-kV transmission project will, by definition, constitute an exceptional circumstance. CenterPoint also argued that otherwise applicable criteria for inclusion of CWIP do not apply for transmission projects ordered under new §25.199. LCRA TSC stated that the new rule does not change the existing standard for recovery of CWIP and that the Legislature likely intended a lesser burden when enacting HB 2548. LCRA TSC argued that the commission should allow all approved transmission projects to be eligible for CWIP recovery to encourage utilities to proceed expeditiously to build transmission in the ERCOT region.

TIEC suggested that the rule include a requirement that the utility show that the project is not being imprudently planned or managed. AEP disagreed. It argued that PURA §35.004(d) authorizes the inclusion of CWIP if conditions warrant the action but does not require the specific prudence showing contained in PURA §36.054(b).

Brazos argued that it would be more appropriate to include the CWIP-related provision in §25.192 which pertains to a utility's transmission service rates as opposed to §25.231 which pertains to an electric utility's cost of service. TXU Delivery made a similar argument.

Commission response

Pursuant to PURA §36.054(a), the inclusion of CWIP is an exceptional form of rate relief which may be granted only if the utility demonstrates that inclusion is necessary to the utility's financial integrity. Under PURA §36.054(b), CWIP cannot be included in the rate base for a major project under construction to the extent that the project has been

inefficiently or imprudently planned or managed. House Bill 2548 revised PURA §35.004(d) to provide that, notwithstanding PURA §36.054(a), if the commission determines that conditions warrant the action, the commission may authorize the inclusion of CWIP in the rate base for transmission investment required by the commission under PURA §39.203(e). The requirements in PURA §36.054(b) regarding efficient and prudent planning and management are still applicable. The commission agrees with TIEC's position regarding this requirement and amends the rule accordingly. In light of this modification, the commission declines to amend §25.192(g) to authorize inclusion of CWIP in an annual update filing as a prudence examination is not appropriate in such a proceeding.

The commission declines to automatically allow CWIP for all projects ordered under new §25.199. The Legislature specified that the commission could allow recovery CWIP "if conditions warrant;" therefore, the commission believes that it must examine the circumstances underlying a utility's request for CWIP. Furthermore, if utilities are assured of obtaining CWIP in such instances, they would have an incentive to avoid applying for a CCN until ordered to do so. With regard to the question of what constitutes a "significant delay," the commission declines to adopt a specific definition for this term, such as the 12 months suggested by CenterPoint. The need for CWIP is likely to be different for different utilities and different projects.

Finally, the commission declines to move the proposed amendment from §25.231 to §25.192 on procedural grounds. The amendment was proposed in §25.231, and the commission

does not have the ability, under the Administrative Procedures Act, to amend a different section, without issuing a new proposal to amend that section.

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

The new §25.199 and the amendment to §25.231 are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2005) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction and specifically: PURA §35.004 which requires a transmission and distribution utility to provide transmission services at non-discriminatory rates and terms and permits the commission to allow a utility to include construction work in progress related to transmission investment in its rate base; PURA §35.005 which grants the commission the authority to order transmission service to include the construction or enlargement of a facility; PURA §37.056 which delineates the criteria the commission will consider to grant or deny a certificate of convenience and necessity; PURA §39.203 which grants the commission authority to require transmission facilities to be built to ensure safe and reliable service, and to relieve congestion in a cost-effective manner where the constraints are not being resolved through Chapter 37 or the ERCOT planning process.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 35.004, 35.005, 37.056 and 39.203.

§25.199. Transmission Planning, Licensing and Cost-Recovery for Utilities within the Electric Reliability Council of Texas.

- (a) **Purpose.** The purpose of this section is to prescribe the procedures and criteria under which the commission may require an electric utility or a transmission and distribution utility to construct or enlarge facilities to ensure safe, reliable service and to reduce transmission constraints within the Electric Reliability Council of Texas (ERCOT) in a cost-effective manner.
- (b) **Applicability.** This section applies to all electric utilities, transmission and distribution utilities and ERCOT. This section does not apply to an electric utility or transmission and distribution utility located outside of the ERCOT region. For the purpose of this section, an electric utility includes a municipally-owned utility and an electric cooperative.
- (c) **Eligibility for filing a request under this section.** Any interested party in the ERCOT electric market may file a request for an order under this section.
- (d) **Filing requirements.** Sections 22.251(d) – (f) of this title (relating to Review of ERCOT Conduct) shall apply to proceedings under this section, except as otherwise provided. In accordance with §22.251(f) of this title, ERCOT shall file a response to the application within 14 days after it receives the notice required under subsection (g) of this section. ERCOT shall include as part of the response all existing, non-privileged documents that support ERCOT's position on the issues identified by the applicant.
- (e) **Standard for review.** The commission may require an electric utility or a transmission and distribution utility to construct or enlarge transmission facilities to ensure safe and reliable service for the state's electric markets and to reduce transmission constraints within ERCOT in a cost-effective manner where the constraints are such that they are not

being resolved through Chapter 37 or the ERCOT transmission planning process. An applicant bears the burden of persuading the commission that the facilities are necessary to ensure safe and reliable service for the state's electric markets or to reduce transmission constraints within ERCOT in a cost-effective manner.

- (f) **Threshold requirements.** In its request, the applicant must plead facts that are sufficient, if proven, to show that the request is likely to be granted under the standards of this section.
- (1) The applicant must provide sufficient information for the presiding officer to determine that the transmission constraints are not being resolved through Chapter 37 or the ERCOT transmission planning process. In particular, the applicant shall demonstrate that:
- (A) the facilities are not the subject of a pending application for a certificate of convenience and necessity; and
- (B) the facilities have been presented to and considered in the ERCOT transmission planning process and have been rejected, or have been approved with one or more conditions that are tantamount to rejection, either in the regional planning process or by the board of directors, or ERCOT has not acted upon the application within a reasonable amount of time.
- (2) Within 20 days after ERCOT has filed its response to the complaint pursuant to subsection (d) of this section, the presiding officer shall make a recommendation as to whether the applicant has shown that the facts alleged, if proved, would

warrant granting the application. The recommendation shall be submitted to the commission for its consideration and action at an open meeting.

- (g) **Notice.** An applicant shall serve copies of its complaint and other documents, in accordance with §22.74 of this title (relating to Service of Pleadings and Documents), and in particular shall serve a copy of the complaint on ERCOT's General Counsel, every other entity from whom relief is sought, the Office of Public Utility Counsel, and any other party as may be appropriate. The notice required by ERCOT under §22.251(e) of this title shall also be provided to all transmission service providers in ERCOT.
- (h) **Cost effectiveness.** Prior to granting a request filed pursuant to this section, the commission, together with the applicant or other parties as appropriate, may undertake a comprehensive cost-benefit analysis to consider both quantitative and qualitative costs and benefits of the proposed facilities. The analysis should consider at a minimum:
- (1) capital costs;
 - (2) projected operation and maintenance costs;
 - (3) carrying costs of the proposed upgrade;
 - (4) a comparison of the cost of the proposed transmission project to other congestion-management techniques, such as system re-dispatch;
 - (5) system reliability; and
 - (6) impact on wholesale power costs in the ERCOT region.
- (i) **Commission order.** If the commission concludes that the applicant has demonstrated that the facilities are needed to ensure safe and reliable service for the state's electric markets or to reduce transmission constraints within ERCOT in a cost-effective manner and that the constraints are not being resolved through Chapter 37 or the ERCOT

transmission planning process, it shall order an electric or transmission and distribution utility or utilities to construct or enlarge the requested facilities.

- (1) The commission shall issue the final order in a proceeding initiated under this section not later than the 180th day after the filing of a complete, non-deficient request. Notwithstanding the foregoing, however, the 180-day deadline may be extended by the commission for good cause.
- (2) An order adopted under this section:
 - (A) except in the case of a municipally-owned utility, shall be contingent on the successful outcome of the subsequent certificate of convenience and necessity proceeding for the proposed facilities;
 - (B) except in the case of a municipally-owned utility, shall include a date, appropriate for the required construction, by which the electric utility or transmission and distribution utility ordered to construct the facilities will be required to file an application for a certificate of convenience and necessity, which may be extended by the commission for good cause;
 - (C) shall provide that the electric utility or transmission and distribution utility need not prove in any proceeding filed under PURA Chapter 37 that the construction or upgrade ordered is necessary for the convenience, accommodation, convenience or safety of the public, and need not address the factors listed in PURA §§37.056(c)(1)-(3) and (4)(E);
 - (D) except in the case of a municipally-owned utility, shall provide that in any proceeding filed under PURA Chapter 37 the electric utility or transmission and distribution utility shall present evidence regarding

reasonable times for planning, licensing and constructing the line, so that an appropriate timeline may be included in any commission final order granting a certificate for a line; and,

- (E) shall provide that the electric utility or transmission and distribution utility ordered to construct or enlarge the requested facilities may request the inclusion of construction work in progress (CWIP) in the electric utility or transmission and distribution utility's transmission cost of service rate proceeding. The commission will grant CWIP in accordance with §25.231 of this title (relating to Cost of Service).

§25.231. Cost of Service.

(a) - (b) (No change.)

(c) **Return on invested capital.** The return on invested capital is the rate of return times invested capital.

(1) (No change.)

(2) **Invested capital; rate base.** The rate of return is applied to the rate base. The rate base, sometimes referred to as invested capital, includes as a major component the original cost of plant, property, and equipment, less accumulated depreciation, used and useful in rendering service to the public. Components to be included in determining the overall rate base are as set out in subparagraphs (A) - (F) of this paragraph.

(A) - (C) (No change.)

(D) Construction work in progress (CWIP). The inclusion of construction work in progress is an exceptional form of rate relief. Under ordinary circumstances the rate base shall consist only of those items which are used and useful in providing service to the public. Under exceptional circumstances, the commission will include construction work in progress in rate base to the extent that:

(i) the electric utility has proven that:

(I) the inclusion is necessary to the financial integrity of the electric utility; and

(II) major projects under construction have been efficiently and prudently planned and managed. However, construction

work in progress shall not be allowed for any portion of a major project which the electric utility has failed to prove was efficiently and prudently planned and managed; or

- (ii) for a project ordered by the commission under §25.199 of this title (relating to Transmission Planning, Licensing and Cost-recovery for Utilities within the Electric Reliability Council of Texas), if the commission determines that conditions warrant the inclusion of CWIP in rate base, the project is being efficiently and prudently planned and managed, and there will be a significant delay between initial investment and the initial cost recovery for a transmission project.

(E) - (F) (No change.)

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 new §25.199 relating to Transmission Planning, Licensing and Cost-Recovery and the amendment to §25.231 relating to Cost of Service are hereby adopted with changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE _____ DAY OF MARCH 2005.

PUBLIC UTILITY COMMISSION OF TEXAS

JULIE PARSLEY, COMMISSIONER

PAUL HUDSON, CHAIRMAN

BARRY T. SMITHERMAN, COMMISSIONER