

PROJECT NO. 44650

RULEMAKING PROCEEDING TO	§	PUBLIC UTILITY COMMISSION
AMEND P.U.C. SUBST. R. 25.503	§	
RELATING TO OVERSIGHT OF	§	OF TEXAS
WHOLESALE MARKET	§	
PARTICIPANTS	§	

**ORDER ADOPTING AMENDMENT OF § 25.503 AS ADOPTED
AT THE AUGUST 14, 2015 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts amendments to §25.503, relating to Oversight of Wholesale Market Participants, with changes to the proposed text as published in the June 5, 2015 issue of the *Texas Register* (40 *TexReg* 3294). The primary purpose of the amendments is to update the process used by the Electric Reliability Council of Texas (ERCOT) to meet its obligation to monitor compliance by market participants with the ERCOT wholesale market reliability-related requirements. The rule as originally adopted by the commission required ERCOT to develop and submit for commission approval an internal process to monitor occurrences of non-compliance with the ERCOT Protocols that could impede ERCOT operations or represent a risk to system security. In response to this requirement, ERCOT staff developed the ERCOT Compliance Process. The Compliance Process was approved by the commission in 2006. The Compliance Process was originally overseen by the ERCOT Compliance Office (ERCOT Compliance). Based on developments since 2006, ERCOT Compliance was eliminated as part of ERCOT. The functions formerly overseen by ERCOT Compliance were assigned to the Texas Reliability Entity (Texas RE), which was formed as a stand-alone, Texas non-profit corporation in 2010. ERCOT and the Texas RE continue to follow the relevant portions of the

ERCOT Compliance Process. It is necessary to amend §25.503 to reflect the changes that have occurred since the rule was adopted in 2004.

PURA §39.151(d) permits the commission to delegate monitoring and enforcement of rules related to the reliability of the regional electrical network to the ERCOT independent system operator. The rule as adopted will continue the delegation that exists under the current rule, but will restructure it by requiring ERCOT and the commission to contract with an independent third party to ensure that the actions of the ERCOT independent system operator itself are reviewed in the same objective manner as the actions of other market participants. In order to ensure transparency, the commission will utilize applicable state contracting procedures in selecting the Reliability Monitor

Under the rule as adopted, the commission and ERCOT will enter in a contract with an entity selected by the commission to be the commission's Reliability Monitor. While ERCOT will continue to fund the operations of the Reliability Monitor from the system administrative fee, the amendments clarify that the Reliability Monitor works under the direction and supervision of the commission. The adopted rule also outlines the criteria to be used by the commission in selecting the Reliability Monitor.

The commission received comments on the proposed amendments from Luminant Energy Company, LLC, Luminant Generation Company, LLC and Exelon Corp. (collectively Joint Commenters), Texas Competitive Power Advocates (TCPA), the Lower Colorado River

Authority (LCRA), LCRA Transmission Services Corporation (LCRA TSC), CPS Energy (CPS), and CenterPoint Energy Houston Electric, LLC (CenterPoint Energy).

Summary of Comments

The Joint Commenters, TCPA, LCRA, LCRA TSC, CPS and CenterPoint Energy, all supported the overall goal of updating and clarifying the existing oversight and enforcement process. LCRA, LCRA TSC and CPS supported the commission's purpose in revising the rule and noted that the rule should accurately reflect the responsibilities of the entities that perform oversight functions. The Joint Commenters provided the most detailed and comprehensive comments. TCPA, LCRA, LCRA TSC, CPS and CenterPoint Energy all generally supported the comments made by the Joint Commenters.

Comments on subsection (c)

LCRA, LCRA TSC and CPS recommended that the definition of "Reliability Monitor" be modified to recognize that market participants are only required to comply with binding ERCOT procedures and not standards that are merely advisory. Similarly, the Joint Commenters also recommended that the definition of "Reliability Monitor" be changed to state that the Reliability Monitor is only responsible for monitoring compliance with the ERCOT Protocols and Operating Guides rather than "ERCOT procedures including protocols, processes and any other operating standards" as originally proposed. Joint Commenters noted that the ERCOT Protocols and Operating Guides are the ERCOT requirements primarily related to reliability and that the reference to other ERCOT procedures in the proposed rule is potentially overbroad and could be read to include documents not directly related to reliability.

Joint Commenters also suggested that the definitions in subsection (c) be reorganized in alphabetical order.

Finally, Joint Commenters also recommended that an outdated reference to “loads acting as resources” be stricken in favor of a reference to “generation and load” resources, which is consistent with current Nodal Protocols.

Commission Response

The commission declines to adopt the suggestion by LCRA, LCRA TSC CPS and Joint Commenters to limit the duties of the “Reliability Monitor” to monitoring compliance with the ERCOT Protocols and Operating Guides rather than “ERCOT procedures including protocols, processes and any other operating standards” as originally proposed because subsection (d) instructs the commission to monitor the activities of market entities to determine if such activities are consistent with ERCOT procedures. The commission finds that use of the term “ERCOT procedures” is appropriate because it mirrors the language in subsection (d) that describes the scope of activities that the commission is tasked with monitoring. The Reliability Monitor’s duties include more than enforcement; they include oversight as well. Monitoring the activities of market participants may include examining market activities beyond the ERCOT Protocols and Operating Guides to allow the Reliability Monitor to evaluate the reliability of the market as a whole.

Furthermore, subsection (c) defines ERCOT Procedures as:

Documents that contain the scheduling, operating, planning, reliability, and settlement procedures, standards, and criteria that are public and in effect in the ERCOT power region, including the ERCOT Protocols and ERCOT Operating

Guides as amended from time to time but excluding ERCOT's internal administrative procedures. The Protocols generally govern when there are inconsistencies between the Protocols and the Operating Guides, except when ERCOT staff, consistent with subsection (i) of this section, determines that a provision contained in the Operating Guides is technically superior for the efficient and reliable operation of the electric network.

The commission concludes that this existing definition addresses the concerns raised by commenters and should alleviate any concerns about the rule's reference to "other ERCOT procedures" being overbroad.

The commission agrees with Joint Commenters' suggestion to reorganize the definitions in alphabetical order and has made this change. The commission also agrees with Joint Commenters' proposal to delete the reference to "loads acting as resources." The commission agrees that the language suggested by Joint Commenters is a more accurate description of this service and has also made this change in the rule as adopted.

Comments on subsection (j)

Joint Commenters suggested minor changes to the list of examples of potential material occurrences of non-compliance in subsection (j)(1). Joint Commenters also recommended that the term "Reliability Monitor" be capitalized throughout §25.503.

Commission Response

The commission adopts the changes to subsection (j) suggested by Joint Commenters. The commission agrees the new language eliminates references to obsolete terms and appropriately capitalizes Reliability Monitor as a defined term.

Comments on subsection (k)

Joint Commenters, TCPA, LCRA, LCRA TSC, CPS and CenterPoint Energy recommended that confidentiality language be added to subsection (k) to expressly require the Reliability Monitor to protect competitively sensitive information that they may obtain from market participants during the course of their monitoring and investigating activities. TCPA supported adding language in this rule that mirrors the confidentiality provisions applicable to the Independent Market Monitor (IMM) found in §25.365, relating to Independent Market Monitor.

Joint Commenters further suggested that the reference to laws, rules and ERCOT procedures in subsection (k)(1) should be changed to mirror Joint Commenters' suggested language in subsection (c)(6) to describe the responsibilities of the Reliability Monitor. Finally, Joint Commenters recommended that subsection (k)(1) be revised to reflect that the Reliability Monitor will monitor, investigate, audit, report to the commission only "material occurrences of non-compliance" consistent with Joint Commenters' suggested changes to the list of non-compliance indicators in subsection (j).

Commission Response

The commission agrees with those commenters suggesting the addition of confidentiality language to subsection (k) and has added the language suggested by Joint Commenters in the rule as adopted.

The commission declines to adopt Joint Commenters' suggested change to subsection (k)(1) regarding ERCOT procedures because ERCOT procedures is a defined term in §25.503(c).

The commission declines to adopt Joint Commenters' recommended change to subsection (k)(1) limiting the Reliability Monitor to monitoring, investigating, auditing, and reporting on only material occurrences of non-compliance. The ability of the Reliability Monitor to conduct overarching compliance monitoring and auditing is a necessary component of identifying material instances of non-compliance. The broad monitoring function is also necessary for the Reliability Monitor to carry out the requirement in §25.503(k)(2) to provide reliability-related subject matter advice, expertise, and assistance to the commission's oversight activities, such as monitoring the general effectiveness of compliance standards. Industry practice often informs the interpretation of the protocols and widespread non-compliance may indicate the need for a change in the rules.

Additionally, whether an occurrence of non-compliance rises to a level of materiality is a determination for the commission to make when considering the facts surrounding the violation and weighing each of the penalty factors set out in PURA and commission rules. For example, determination of materiality is not defined by the type of violation that occurred. Materiality may be influenced by situational elements, such as whether a violation occurred during an emergency event, or continued over an extended period of time, or had a system-wide impact versus a geographically isolated impact. Similarly, multiple instances of immaterial non-compliance could rise to the level of material non-compliance, especially where a market participant has been previously notified of the issue. If the Reliability Monitor only monitored, investigated, and audited material instances of non-compliance, these repeated instances of non-material non-compliance might go undetected. While the Reliability Monitor functions as a resource for staff

in making a determination about materiality, the commission finds the ultimate determination of materiality lies with the commission.

Comments on subsection (l)

LCRA, LCRA TSC, and CPS urged the commission to adopt rigorous standards for the approval of the Reliability Monitor and proposed that the criteria listed in subsection (l) should not be merely suggested criteria to be considered, but should be mandatory requirements for the selection of the Reliability Monitor. LCRA, LCRA TSC and CPS further suggested changes to subsection (l) designed to insure the selection of a Reliability Monitor with demonstrated technical qualifications and infrastructure as well as specific knowledge and understanding of the ERCOT market, the types and configuration of facilities in ERCOT and the ERCOT stakeholder committees and processes. Joint Commenters suggested the term “Reliability Monitor” be capitalized in subsection (l).

Commission Response

The commission agrees with LCRA, LCRA TSC, and CPS that the criteria listed in (l) should be mandatory considerations for selection of the Reliability Monitor and adopts the suggested language. The commission also agrees with Joint Commenters’ request to capitalize the term “Reliability Monitor” throughout the rule.

Comments on subsection (m)

Joint Commenters recommended that the term “Reliability Monitor” be capitalized in subsection (m).

Commission Response

As noted previously, the commission agrees with the Joint Commenters' recommendation and has made this change in the rule as adopted.

Comments on subsection (n)

Joint Commenters recommended several clarifying changes to make terminology used in the rule consistent with terminology in the current ERCOT Nodal Protocols.

Commission Response

The commission agrees with the revisions to subsection (n) suggested by Joint Commenters and has made these changes in the adopted rule.

Comments on subsection (o)

Joint Commenters suggested that two provisions of the existing rule recognize that formal enforcement is not always appropriate and that these two provisions be incorporated into subsection (o) as adopted and should be considered by commission staff in deciding whether to pursue formal enforcement against a market participant. One of these provisions is subsection (j)(4), which was deleted in the proposed rule, and which allows ERCOT to treat non-compliance issues as resolved if they are discontinued and not repeated more than once over a six-month period. Joint Commenters' suggest that this indicates that the robustness of a market participant's compliance program is relevant to pursuit of an enforcement action. The other subsection referenced by Joint Commenters is §25.503(d) which requires the commission to consider whether a market participant's activity adversely affected specific aspects of the market.

Joint Commenters, TCPA and LCRA, LCRA TSC, and CPS argued that market participants will be incented to invest in internal systems and controls for monitoring and correcting problems if staff, ERCOT and the Reliability Monitor work with market participants to promptly remediate immaterial non-compliance issues rather than pursuing formal enforcement action and that the rule should expressly authorize staff to do this. The Joint Commenters also noted that perfection is not a realistic standard, regardless of how strong a company's internal compliance program may be.

The Joint Commenters asserted that the criteria in subsection (d) of the rule are consistent with PURA provisions to foster and protect competition, to ensure reliability and to protect customers from abusive practices. The Joint Commenters cited to PURA §§35.004(e), 39.001(a), 39.151 and 39.157 as examples of these responsibilities. Joint Commenters requested that subsection (o) be revised to clarify that the process described in this subsection applies when commission staff learns of potential material issues of non-compliance from ERCOT, the Reliability Monitor or the IMM. Joint Commenters argued that this process should be used by commission staff regardless of how staff learns about the potential violation and even if there has already been a preliminary determination made by ERCOT, the Reliability Monitor, or the IMM regarding an occurrence of material non-compliance. Joint Commenters suggest that a report from ERCOT, the Reliability Monitor, or IMM should not substitute for a separate fact finding investigation by staff to determine whether to pursue enforcement. Joint Commenters recommended that staff take into account the criteria in subsection (d) and the robustness of a market participant's compliance program in determining whether a formal enforcement action is necessary. LCRA, LCRA TSC and CPS stated that inclusion of the criteria of subsection (d) into subsection (o) will

enhance administrative efficiency and will promote a compliance culture for ERCOT market participants. Additionally, LCRA, LCRA TSC, and CPS argued that inclusion of the criteria of subsection (d) in subsection (o) of the rule would increase transparency of both the enforcement process and market participants' compliance processes.

Commission Response

The commission adopts in part and declines to adopt in part the revisions to subsection (o) suggested by Joint Commenters, LCRA, LCRA TSC, CPS and which were generally supported by TCPA and CenterPoint Energy. The commission agrees with those commenters who asserted that a formal enforcement action is not always appropriate when violations occur and adopts suggested language to expressly authorize staff to work with a market participant for whom formal enforcement is not warranted. This reflects current practices in which commission staff routinely resolves instances of immaterial non-compliance without recommending administrative penalties or other formal enforcement actions.

The commission declines to adopt the recommendation to incorporate §25.503(d) and the robustness of a market participant's compliance program into the determination of whether to pursue formal enforcement. PURA §15.023(c) identifies the following factors for the commission to consider when imposing an administrative penalty:

- (1) The seriousness of the violation;
- (2) The economic harm to property or the environment caused by the violation;
- (3) The history of previous violations;
- (4) The amount necessary to deter future violations;

- (5) Efforts to correct the violation; and
- (6) Other matters that justice may require.

Additionally, the commission is required to consider the multiple guidelines set out in all of §25.503, including subsection (d), but also including subsection (f) which examines whether the market participant had a duty to comply with the ERCOT procedure and subsection (g) which governs whether the conduct of the market participant constituted a prohibited activity. Identifying substantive rule §25.503(d) as the singular consideration implies that these other relevant sections of PURA and commission rules are excluded from the evaluation of whether to bring a formal enforcement action. Therefore, the commission declines to incorporate a reference to subsection (d) into subsection (o).

Similarly, while the commission agrees with commenters that the robustness of a market participant's compliance program is a factor to consider in the enforcement process, the commission finds that the current enforcement framework established in PURA §15.023 and commission rules effectively provides for consideration of a market participant's compliance program as it relates to the violation at hand. Evaluating the robustness of a market participant's compliance program is inherent in considering an entity's history of previous violations, the amount of administrative penalties necessary to deter future violations, and an entity's efforts to correct its violations. Requiring consideration of a market participant's overall compliance program in the absence of its effect on the individual violation is unnecessary and inefficient. In a market as complex as the ERCOT wholesale market, nearly all market participants have robust, well-established compliance programs. However, the robustness of a market participant's overall

compliance program may not be relevant to the compliance of a specific matter. Considering the robustness of a compliance program's relevance to a particular violation as one factor in the commission's overall determination, as required by PURA and current commission rules, is the more tailored and appropriate methodology for use in an enforcement context. For these reasons, the commission declines to adopt the recommended language.

The commission recognizes the concerns expressed by Joint Commenters regarding perfection as an unrealistic standard. The current rules and protocols provide existing avenues for a market participant should something beyond their control contribute to an instance of non-compliance. For example, §25.503(f)(2)(C) provides circumstances in which non-compliance is excused, such as when the violation is due to equipment failure beyond the reasonable control of the market participant, or if compliance would jeopardize public health and safety or the reliability of the electric grid. Additionally, subsection (h)(2) of the rule establishes affirmative defenses that may be asserted by a party that conducted an act or practice that is a prohibited activity. The commission finds that the existing statutory administrative penalty framework and commission rules, as well as the adopted language recognizing an alternative to formal enforcement adequately address the concerns of the Joint Commenters regarding perfection as a compliance standard.

The commission declines to adopt the Joint Commenters recommended language authorizing staff to initiate an investigation following a report regarding material instances of non-compliance received from ERCOT, the Reliability Monitor, or the Independent Market Monitor. These circumstances are effectively included within the umbrella of staff opening an

investigation upon its own initiative. For the previously discussed reasons, the commission finds that the determination of what constitutes material non-compliance is best made by the commission. The commission agrees that while staff may rely upon the facts and analysis disclosed in such reports to form an initial determination of whether a violation has occurred, a report from ERCOT, the Reliability Monitor, or the IMM does not preclude staff from conducting a further fact finding investigation, nor does it preclude a market participant from being afforded the opportunity to respond to allegations that have been made. The commission agrees with the Joint Commenters that the process outlined in subsection (o) should be followed regardless of the manner in which staff learns of a potential violation and finds that the existing rule language sufficiently encompasses this concept.

These amendments are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (West 2007 and Supp. 2014) (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, and specifically, PURA §39.151 which grants the commission authority to adopt and enforce rules concerning the reliability of the regional electrical network. Section 39.151 further provides that the commission may delegate to an independent organization responsibilities for establishing or enforcing such rules, which are subject to commission oversight and review.

Cross Reference to Statutes: Public Utility Regulatory Act §§ 14.002, 39.151.

- (a) **Purpose.** The purpose of this section is to establish the standards that the commission will apply in monitoring the activities of entities participating in the wholesale electricity markets, including markets administered by the Electric Reliability Council of Texas (ERCOT), and enforcing the Public Utility Regulatory Act (PURA) and ERCOT procedures relating to wholesale markets. The standards contained in this rule are necessary to:
- (1) protect customers from unfair, misleading, and deceptive practices in the wholesale markets, including ERCOT-administered markets;
 - (2) ensure that ancillary services necessary to facilitate the reliable transmission of electric energy are available at reasonable prices;
 - (3) afford customers safe, reliable, and reasonably priced electricity;
 - (4) ensure that all wholesale market participants observe all scheduling, operating, reliability, and settlement policies, rules, guidelines, and procedures established in the ERCOT procedures;
 - (5) clarify prohibited activities in the wholesale markets, including ERCOT-administered markets;
 - (6) monitor and mitigate market power as authorized by the Public Utility Regulatory Act (PURA) §39.157(a) and prevent market power abuses;
 - (7) clarify the standards and criteria the commission will use when reviewing wholesale market activities;
 - (8) clarify the remedies for non-compliance with the Protocols relating to wholesale markets; and

- (9) prescribe ERCOT's role in enforcing ERCOT procedures relating to the reliability of the regional electric network and accounting for the production and delivery among generators and all other market participants, and monitoring and obtaining compliance with operating standards within the ERCOT regional network.
- (b) **Application.** This section applies to all market entities, as defined in subsection (c) of this section.
- (c) **Definitions.** The following words and terms when used in this section shall have the following meaning, unless the context indicates otherwise:
- (1) **Artificial congestion** -- Congestion created when multiple foreseeable options exist for scheduling, dispatching, or operating a resource, and a market participant chooses an option that is not the most economical, that foreseeably creates or exacerbates transmission congestion, and that results in the market participant being paid to relieve the congestion it caused.
 - (2) **Efficient operation of the market** -- Operation of the markets administered by ERCOT, consistent with reliability standards, that is characterized by the fullest use of competitive auctions to procure ancillary services, minimal cost socialization, and the most economical utilization of resources, subject to necessary operational and other constraints.
 - (3) **ERCOT procedures** -- Documents that contain the scheduling, operating, planning, reliability, and settlement procedures, standards, and criteria that are public and in effect in the ERCOT power region, including the ERCOT Protocols and ERCOT Operating Guides as amended from time to time but excluding ERCOT's internal administrative procedures. The Protocols generally govern

when there are inconsistencies between the Protocols and the Operating Guides, except when ERCOT staff, consistent with subsection (i) of this section, determines that a provision contained in the Operating Guides is technically superior for the efficient and reliable operation of the electric network.

- (4) **Excess Revenue** -- Revenue in excess of the revenue that would have occurred absent a violation of PURA §39.157 or this section.
 - (5) **Market entity** -- Any person or entity participating in the ERCOT-administered wholesale market, including, but not limited to, a load serving entity (including a municipally owned utility and an electric cooperative,) a power marketer, a transmission and distribution utility, a power generation company, a qualifying facility, an exempt wholesale generator, ERCOT, and any entity conducting planning, scheduling, or operating activities on behalf of, or controlling the activities of, such market entities.
 - (6) **Market participant** -- A market entity other than ERCOT.
 - (7) **Reliability Monitor** -- A person or entity selected by the commission to monitor compliance with all state reliability-related laws, rules, and ERCOT procedures including protocols, processes and any other operating standards applicable to the ERCOT Region.
 - (8) **Resource** -- Facilities capable of providing electrical energy or load capable of reducing or increasing the need for electrical energy or providing short-term reserves into the ERCOT system. This includes generation and load resources.
- (d) **Standards and criteria for enforcement of ERCOT procedures and PURA.** The commission will monitor the activities of market entities to determine if such activities

are consistent with ERCOT procedures; whether they constitute market power abuses or are unfair, misleading, or deceptive practices affecting customers; and whether they are consistent with the proper accounting for the production and delivery of electricity among generators and other market participants. When reviewing the activities of a market entity, the commission will consider whether the activity was conducted in a manner that:

- (1) adversely affected customers in a material way through the use of unfair, misleading, or deceptive practices;
 - (2) materially reduced the competitiveness of the market, including whether the activity unfairly impacted other market participants in a way that restricts competition;
 - (3) disregarded its effect on the reliability of the ERCOT electric system; or
 - (4) interfered with the efficient operation of the market.
- (e) **Guiding ethical standards.** Each market participant is expected to:
- (1) observe all applicable laws and rules;
 - (2) schedule, bid, and operate its resources in a manner consistent with ERCOT procedures to support the efficient and reliable operation of the ERCOT electric system; and
 - (3) not engage in activities and transactions that create artificial congestion or artificial supply shortages, artificially inflate revenues or volumes, or manipulate the market or market prices in any way.
- (f) **Duties of market entities.**
- (1) Each market participant shall be knowledgeable about ERCOT procedures.

- (2) A market participant shall comply with ERCOT procedures and any official interpretation of the Protocols issued by ERCOT or the commission.
- (A) If a market participant disagrees with any provision of the Protocols or any official interpretation of the Protocols, it may seek an amendment of the Protocols as provided for in the Protocols, appeal an ERCOT official interpretation to the commission, or both.
- (B) A market participant appealing an official interpretation of the Protocols or seeking an amendment to the Protocols shall comply with the Protocols unless and until the interpretation is officially changed or the amendment is officially adopted.
- (C) A market participant may be excused from compliance with ERCOT instructions or Protocol requirements only if such non-compliance is due to communication or equipment failure beyond the reasonable control of the market participant; if compliance would jeopardize public health and safety or the reliability of the ERCOT transmission grid, or create risk of bodily harm or damage to the equipment; if compliance would be inconsistent with facility licensing, environmental, or legal requirements; if required by applicable law; or for other good cause. A market participant is excused under this subparagraph only for so long as the condition continues.
- (3) Whenever the Protocols require that a market participant make its “best effort” or a “good faith effort” to meet a requirement, or similar language, the market participant shall act in accordance with the requirement unless:

- (A) it is not technically possible to do so;
 - (B) doing so would jeopardize public health and safety or the reliability of the ERCOT transmission grid, or would create a risk of bodily harm or damage to the equipment;
 - (C) doing so would be inconsistent with facility licensing, environmental, or legal requirements; or
 - (D) other good cause exists for excusing the requirement.
- (4) When a market participant is not able to comply with a Protocol requirement or official interpretation of a requirement, or honor a formal commitment to ERCOT, the market participant has an obligation to notify ERCOT immediately upon learning of such constraints and to notify ERCOT when the problem ceases. A market participant who does not comply with a Protocol requirement or official interpretation of a requirement, or honor a formal commitment to ERCOT, has the burden to demonstrate, in any commission proceeding in which the failure to comply is raised, why it cannot comply with the Protocol requirement or official interpretation of the requirement, or honor the commitment.
- (5) The commission staff may request information from a market participant concerning a notification of failure to comply with a Protocol requirement or official interpretation of a requirement, or honor a formal commitment to ERCOT. The market participant shall provide a response that is detailed and reasonably complete, explaining the circumstances surrounding the alleged failure, and shall provide documents and other materials relating to such alleged failure to comply. The response shall be submitted to the commission staff within five business days

of a written request for information, unless commission staff agrees to an extension.

- (6) A market participant's bids of energy and ancillary services shall be from resources that are available and capable of performing, and shall be feasible within the limits of the operating characteristics indicated in the resource plan, as defined in the Protocols, and consistent with the applicable ramp rate, as specified in the Protocols.
- (7) All statements, data and information provided by a market participant to market publications and publishers of surveys and market indices for the computation of an industry price index shall be true, accurate, reasonably complete, and shall be consistent with the market participant's activities, subject to generally accepted standards of confidentiality and industry standards. Market participants shall exercise due diligence to prevent the release of materially inaccurate or misleading information.
- (8) A market entity has an obligation to provide accurate and factual information and shall not submit false or misleading information, or omit material information, in any communication with ERCOT or with the commission. Market entities shall exercise due diligence to ensure adherence to this provision throughout the entity.
- (9) A market participant shall comply with all reporting requirements governing the availability and maintenance of a generating unit or transmission facility, including outage scheduling reporting requirements. A market participant shall immediately notify ERCOT when capacity changes or resource limitations occur

that materially affect the availability of a unit or facility, the anticipated operation of its resources, or the ability to comply with ERCOT dispatch instructions.

- (10) A market participant shall comply with requests for information or data by ERCOT as specified by the Protocols or ERCOT instructions within the time specified by ERCOT instructions, or such other time agreed to by ERCOT and the market participant.
- (11) When a Protocol provision or its applicability is unclear, or when a situation arises that is not contemplated under the Protocols, a market entity seeking clarification of the Protocols shall use the Protocol Revision Request (PRR) process provided in the Protocols. If the PRR process is impractical or inappropriate under the circumstances, the market entity may use the process for requesting formal Protocol clarifications or interpretations described in subsection (i) of this section. This provision is not intended to discourage day to day informal communication between market participants and ERCOT staff.
- (12) A market participant operating in the ERCOT markets or a member of the ERCOT staff who identifies a provision in the ERCOT procedures that produces an outcome inconsistent with the efficient and reliable operation of the ERCOT-administered markets shall call the provision to the attention of ERCOT staff and the appropriate ERCOT subcommittee. All market participants shall cooperate with the ERCOT subcommittees, ERCOT staff, and the commission staff to develop Protocols that are clear and consistent.
- (13) A market participant shall establish and document internal procedures that instruct its affected personnel on how to implement ERCOT procedures according to the

standards delineated in this section. Each market participant shall establish clear lines of accountability for its market practices.

(g) **Prohibited activities.** Any act or practice of a market participant that materially and adversely affects the reliability of the regional electric network or the proper accounting for the production and delivery of electricity among market participants is considered a “prohibited activity.” The term “prohibited activity” in this subsection excludes acts or practices expressly allowed by the Protocols or by official interpretations of the Protocols and acts or practices conducted in compliance with express directions from ERCOT or commission rule or order or other legal authority. The term “prohibited activity” includes, but is not limited to, the following acts and practices that have been found to cause prices that are not reflective of competitive market forces or to adversely affect the reliability of the electric network:

- (1) A market participant shall not schedule, operate, or dispatch its generating units in a way that creates artificial congestion.
- (2) A market participant shall not execute pre-arranged offsetting trades of the same product among the same parties, or through third party arrangements, which involve no economic risk and no material net change in beneficial ownership.
- (3) A market participant shall not offer reliability products to the market that cannot or will not be provided if selected.
- (4) A market participant shall not conduct trades that result in a misrepresentation of the financial condition of the organization.
- (5) A market participant shall not engage in fraudulent behavior related to its participation in the wholesale market.

- (6) A market participant shall not collude with other market participants to manipulate the price or supply of power, allocate territories, customers or products, or otherwise unlawfully restrain competition. This provision should be interpreted in accordance with federal and state antitrust statutes and judicially-developed standards under such statutes regarding collusion.
- (7) A market participant shall not engage in market power abuse. Withholding of production, whether economic withholding or physical withholding, by a market participant who has market power, constitutes an abuse of market power.
- (h) **Defenses.** The term “prohibited activity” in subsection (g) of this section excludes acts or practices that would otherwise be included, if the market entity establishes that its conduct served a legitimate business purpose consistent with prices set by competitive market forces; and that it did not know, and could not reasonably anticipate, that its actions would inflate prices, adversely affect the reliability of the regional electric network, or adversely affect the proper accounting for the production and delivery of electricity; or, if applicable, that it exercised due diligence to prevent the excluded act or practice. The defenses established in this subsection may also be asserted in instances in which a market participant is alleged to have violated subsection (f) of this section. A market entity claiming an exclusion or defense under this subsection, or any other type of affirmative defense, has the burden of proof to establish all of the elements of such exclusion or defense.
- (i) **Official interpretations and clarifications regarding the Protocols.** A market entity seeking an interpretation or clarification of the Protocols shall use the PRR process contained in the Protocols whenever possible. If an interpretation or clarification is

needed to address an unforeseen situation and there is not sufficient time to submit the issue to the PRR process, a market entity may seek an official Protocol interpretation or clarification from ERCOT in accordance with this subsection.

- (1) ERCOT shall develop a process for formally addressing requests for clarification of the Protocols submitted by market participants or issuing official interpretations regarding the application of Protocol provisions and requirements. ERCOT shall respond to the requestor within ten business days of ERCOT's receipt of the request for interpretation or clarification with either an official Protocol interpretation or a recommendation that the requestor take the request through the PRR process.
- (2) ERCOT shall designate one or more ERCOT officials who will be authorized to receive requests for clarification from, and issue responses to market participants, and to issue official interpretations on behalf of ERCOT regarding the application of Protocol provisions and requirements.
- (3) The designated ERCOT official shall provide a copy of the clarification request to commission staff upon receipt. The ERCOT official shall consult with ERCOT operational or legal staff as appropriate and with commission staff before issuing an official Protocol clarification or interpretation.
- (4) The designated ERCOT official may decide, in consultation with the commission staff, that the language for which a clarification is requested is ambiguous or for other reason beyond ERCOT's ability to clarify, in which case the ERCOT official shall inform the requestor, who may take the request through the PRR process provided for in the Protocols.

- (5) All official Protocol clarifications or interpretations that ERCOT issues in response to a market participant's formal request or upon ERCOT's own initiative shall be sent out in a market bulletin with the appropriate effective date specified to inform all market participants, and a copy of the clarification or interpretation shall be maintained in a manner that is accessible to market participants. Such response shall not contain information that would identify the requesting market participant.
- (6) A market participant may freely communicate informally with ERCOT employees, however, the opinion of an individual ERCOT staff member not issued as an official interpretation of ERCOT pursuant to this subsection may not be relied upon as an affirmative defense by a market participant.

(j) **Role of ERCOT in enforcing operating standards.**

ERCOT shall monitor material occurrences of non-compliance with ERCOT procedures, which shall mean occurrences that have the potential to impede ERCOT operations, or represent a risk to system reliability. Non-compliance indicators monitored by ERCOT shall include, but shall not be limited to, material occurrences of failing resource performance measures as established by ERCOT, failure to follow dispatch instructions within the required time, failure to meet ancillary services obligations, failure to submit mandatory bids or offers, and other instances of non-compliance of a similar magnitude.

- (1) ERCOT shall keep a record of all such material occurrences of non-compliance with ERCOT procedures and shall develop a system for tracking recurrence of such material occurrences of non-compliance.

- (2) ERCOT shall promptly provide information to and respond to questions from market participants to allow the market participant to understand and respond to alleged material occurrences of non-compliance with ERCOT procedures. However, this requirement does not relieve the market participant's operator from responding to the ERCOT operator's instruction in a timely manner and shall not be interpreted as allowing the market participant's operator to argue with the ERCOT operator as to the need for compliance.
 - (3) ERCOT shall keep a record of the resolution of such material occurrences of non-compliance and of remedial actions taken by the market participant in each instance.
 - (4) ERCOT shall promptly provide information to and respond to questions posed by the Reliability Monitor and the commission;
 - (5) ERCOT shall provide to the Reliability Monitor and the commission the support and cooperation the commission determines is necessary for the Reliability Monitor and the commission to perform their functions.
- (k) **Responsibilities of the Reliability Monitor.** The Reliability Monitor shall gather and analyze information and data as needed for its reliability monitoring activities. The Reliability Monitor works under the direction and supervision of the commission. The Reliability Monitor shall protect confidential information and data in accordance with the confidentiality standards established in PURA, the ERCOT protocols, commission rules, and other applicable laws. The requirements related to the level of protection to be afforded information protected by these laws and rules are incorporated into this section.

The duties and responsibilities of the Reliability Monitor may include, but are not limited to:

- (1) Monitoring, investigating, auditing, and reporting to the commission regarding compliance with reliability-related ERCOT procedures, including Protocols and Operating Guides, the reliability-related provisions of the commission's rules, and reliability-related provisions of PURA by Market Entities;
- (2) Providing reliability-related subject-matter advice, expertise, and assistance to the commission in the conduct of the commission's oversight and enforcement activities; and
- (3) Providing expert advice, analysis, reports, and testimony services relating to the Reliability Monitor's analysis and findings as part of the commission staff's case in enforcement proceedings.

- (1) **Selection of the Reliability Monitor.** The commission and ERCOT shall contract with an entity selected by the commission to act as the commission's Reliability Monitor. The Reliability Monitor shall be independent from ERCOT and is not subject to the supervision of ERCOT with respect to its monitoring and investigative activities. In selecting the Reliability Monitor, the commission must consider whether the Reliability Monitor satisfies the following criteria:

- (1) Independent, objective, and without conflicts of interest;
- (2) Experience performing compliance monitoring of reliability-related laws;
- (3) Familiarity with the ERCOT Region and demonstrated understanding in reliability-related ERCOT protocols, procedures, and other operating standards;

- (4) Demonstrated ability to manage confidential information appropriately; and
 - (5) Cost effectiveness.
- (m) **Funding of the Reliability Monitor.** ERCOT shall fund the operations of Reliability Monitor from the fee authorized by PURA § 39.151.
- (n) **Standards for record keeping.**
- (1) A market participant who schedules through a qualified scheduling entity (QSE) that submits schedules to ERCOT on behalf of more than one market participants shall maintain records to show scheduling, offer, and bidding information for all schedules, offers, and bids that its QSE has submitted to ERCOT on its behalf, by interval.
 - (2) All market participants and ERCOT shall maintain records relative to market participants' activities in the ERCOT-administered markets to show:
 - (A) information on transactions, as defined in §25.93(c)(3) of this title (relating to Quarterly Wholesale Electricity Transaction Reports), including the date, type of transaction, amount of transaction, and entities involved;
 - (B) information and documentation of all planned, maintenance, and forced generation and transmission outages including all documentation necessary to document the reason for the outage;
 - (C) information described under this subsection including transaction information, information on pricing, settlement information, and other information that would be relevant to an investigation under this section, and that has been disclosed to market publications and publishers of surveys and price indices, including the date, information disclosed, and the name of the employees

involved in providing the information as well as the publisher to whom it was provided; and

(D) reports of the market participant's financial information given to external parties, including the date, financial results reported, and the party to whom financial information was reported, if applicable.

- (3) After the effective date of this section, all records referred to in this subsection except verbally dispatch instructions (VDIs) shall be kept for a minimum of three years from the date of the event. ERCOT shall keep VDI records for a minimum of two years. All records shall be made available to the commission for inspection upon request.
- (4) A market participant shall, upon request from the commission, provide the information referred to in this subsection to the commission, and may, if applicable, provide it under a confidentiality agreement or protective order pursuant to §22.71(d) of this title (relating to Filing of Pleadings, Documents, and Other Material).
- (o) **Investigation.** The commission staff may initiate an informal fact-finding review based on a complaint or upon its own initiative to obtain information regarding facts, conditions, practices, or matters that it may find necessary or proper to ascertain in order to evaluate whether any market entity has violated any provision of this section.
- (1) The commission staff will contact the market entity whose activities are in question to provide the market entity an opportunity to explain its activities. The commission staff may require the market entity to provide information reasonably necessary for the purposes described in this subsection.

- (2) If the market entity asserts that the information requested by commission staff is confidential, the information shall be provided to commission staff as confidential information related to settlement negotiations or other asserted bases for confidentiality pursuant to §22.71(d)(4) of this title.
- (3) If after conducting its fact-finding review, the commission staff determines that a market entity may have violated this section, the commission staff may request that the commission initiate a formal investigation against the market entity pursuant to §22.241 of this title (relating to Investigations).
- (4) If, as a result of its investigation, commission staff determines that there is evidence of a violation of this section by a market entity, the commission staff may request that the commission initiate appropriate enforcement action against the market entity. A notice of violation requesting administrative penalties or disgorgement of excess revenues shall comply with the requirements of §22.246 of this title (relating to Administrative Penalties). Adjudication of a notice of violation requesting both an administrative penalty and disgorgement of excess revenues may be conducted within a single contested case proceeding. Additionally, for alleged violations that have been reviewed in the informal procedure established by this subsection, the commission staff shall include as part of its prima facie case:
 - (A) a statement either that –
 - (i) the commission staff has conducted the investigation allowed by this section; or

- (ii) the market entity has failed to comply with the requirements of paragraph (5) of this subsection;
 - (B) a summary of the evidence indicating to the commission staff that the market entity has violated one of the provisions of this section;
 - (C) a summary of any evidence indicating to the commission staff that the market entity benefited from the alleged violation or materially harmed the market; and
 - (D) a statement that the staff has concluded that the market entity failed to demonstrate, in the course of the investigation, the applicability of an exclusion or affirmative defense under subsection (h) of this section.
- (5) A market entity subject to an informal fact-finding review or a formal investigation by the commission staff has an obligation to fully cooperate with the investigation, to make its company representatives available within a reasonable period of time to discuss the subject of the investigation with the commission staff, and to respond to the commission staff's requests for information within a reasonable time frame as requested by the commission staff.
- (6) The procedure for informal fact-finding review established in this subsection does not prevent any person or commission staff from filing a formal complaint with the commission pursuant to §22.242 of this title (relating to Complaints) or pursuing other relief available by law.
- (7) If, in the course of its investigation under this subsection, commission staff determines that formal enforcement action is not warranted, the commission staff

may work with the market entity to ensure any issues of concern are addressed and appropriate remedial actions have been taken.

- (p) **Remedies.** If the commission finds that a market entity is in violation of this section, the commission may seek or impose any legal remedy it determines appropriate for the violation involved, provided that the remedy of disgorgement of excess revenues shall be imposed for violations and continuing violations of PURA §39.157 and may be imposed for other violations of this section.

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 §25.503, relating to relating to Oversight of Wholesale Market Participants, is hereby adopted with changes to the text as proposed.

SIGNED AT AUSTIN, TEXAS the _____ day of _____ 2015.

PUBLIC UTILITY COMMISSION OF TEXAS

DONNA L. NELSON, CHAIRMAN

KENNETH W. ANDERSON, JR., COMMISSIONER

BRANDY MARTY MARQUEZ, COMMISSIONER