

PROJECT NO. 31937

RULEMAKING TO ESTABLISH A	§	PUBLIC UTILITY COMMISSION
CLASSIFICATION SYSTEM FOR THE	§	
ASSESSMENT OF ADMINISTRATIVE	§	OF TEXAS
PENALTIES	§	

**ORDER ADOPTING NEW §25.8
AS APPROVED AT THE SEPTEMBER 21, 2006 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts new §25.8, relating to Classification System for Violations of Statutes, Rules, and Orders Applicable to Electric Service Providers with changes to the proposed text as published in the April 28, 2006 issue of the *Texas Register* (31 TexReg 3463). The new section implements the Public Utility Regulatory Act (PURA) §15.023. The new section will establish a classification system for violations of PURA and related commission rules and orders, and establish a range of penalties that may be assessed for each class of violations. This new section is adopted under Project Number 31937.

The commission received comments on the proposed new section from AT&T Texas (“AT&T”), El Paso Electric Company (“EPE”), Retail Electric Provider Coalition (“REPC”), Entergy Gulf States, Inc. (“EGSI”), Joint TDUs, Econnergy Energy Company, Inc. (“Econnergy”), Joint Commenters, TXU Wholesale Company (“TXU Wholesale”), and Joint Retail Electric Providers (“Joint REPs”).

Subsection (a) - Purpose

Joint TDUs stated that Class A violations should require willful intent to act improperly and actions that are injurious to the wholesale marketplace or public health or safety; Class B

violations should be limited to recurring, unintentional violations or intentional violations that do not have a significant impact on the wholesale market or the public health or safety; Class C violations should include a broad range of proscribed activities that are marked by being unintentional and non-recurring.

Commission response

The commission disagrees with Joint TDUs. PURA §15.023 does not require that “intent” be a factor in designing a classification system of violations. Rather, the provision provides the commission with wide discretion to develop a classification system. The only limitation that the legislature placed on the design of the classification system was that only the highest class of violation could command a penalty in excess of \$5,000. The commission concludes that more objective factors should be used to determine the class of a violation, but that intent and other factors should be used to determine the severity of a penalty within each class, as discussed below. Accordingly, the commission declines to include intent as a factor in the classification of violations.

Intent can be a relevant factor in determining the appropriate size of a penalty on a case-specific basis. Indeed, PURA §§15.023(c)(1)-(6) require consideration of a number of factors in determining an appropriate penalty within a class for a particular violation, including such factors as the amount necessary to deter future violations, efforts to correct the violation, and any other matter that justice may require. Consideration of whether an action was intentionally or unintentionally committed may be an appropriate consideration

in evaluating these factors and determining the proper penalty, depending on the nature and severity of a violation.

For purposes of establishing the classification system, the commission believes that PURA §15.023 contemplates that only the most serious types of violations would be in Class A, irrespective of intent. However, the commission believes that the measurement of the seriousness of a violation is best measured by the harm that results or might result from a violation. The most serious violations are those that create significant economic harm to a person or persons, property, or the environment, or create a significant economic benefit to the violator; create a hazard or potential hazard to the health or safety of the public; or cause a risk to the reliability of a transmission or distribution system or a portion thereof. The commission finds that it is appropriate to limit Class A violations to those violations that meet one or more of these criteria and the commission has modified subsection (b)(3)(B) accordingly.

Joint TDUs, and EPE in its reply comments, suggested that the commission change the reference in the new section from “per day” to “per occurrence,” and state that the “occurrence” of a violation is defined elsewhere, *i.e.*, other rules must dictate whether a single violation has occurred or there have been multiple violations.

Commission response

PURA §15.023 is clear that “[e]ach day a violation continues or occurs is a separate violation for purposes of imposing an administrative penalty.” Changing the language

from “per violation per day,” to “per violation, per occurrence,” as requested by the commenters, would prevent the commission from assessing penalties for each day that a violation continues unremedied, and would instead allow the commission to impose penalties only for the initial violation, a result the commission believes is inconsistent with PURA §15.023. The commission therefore declines to make the change suggested by Joint TDUs and EPE.

Joint TDUs suggested that the commission should state that the rule does not prescribe or dictate what constitutes a violation.

Commission response

The commission agrees with Joint TDUs that this rule does not prescribe or dictate what constitutes a violation. Actions that constitute a violation are determined by reference to the particular statute, rule, or commission order that create the regulatory requirement, and not this rule. However, insertion of a statement to that effect in §25.8 is unnecessary. Accordingly, the commission declines to amend the rule as suggested by Joint TDUs.

Joint Commenters argued that the Commission incorrectly established penalty classes based on considerations other than the factors listed in PURA §15.023(c). In reply comments, TXU Wholesale agreed.

Commission response

PURA §15.023(c) reads, in part, “the commission by rule shall establish a classification system for violations that includes a range of administrative penalties that may be assessed for each class of violation based on [six enumerated factors].” Commenters appear to argue that the words “based on” refer to “classification system,” and conclude that the classification system must be based on the six factors in PURA §15.023(c). The commission interprets the words “based on” as referring to “a range of administrative penalties.” That is, the administrative penalty must be based on the six factors. The commission is adopting a classification system that is consistent with this understanding of PURA §15.023.

However, in response to the comments, the commission is modifying the rule, as described above, to limit Class A violations to only the most serious violations as measured by the harm that results or might result from the violation. The commission does not believe that all of the factors must be used in determining the class of a violation, and that relying on objective factors relating to the seriousness of a violation to classify violations will result in greater uniformity and predictability. In developing this limitation, the commission was guided by the two factors listed in PURA §15.023(c) that directly relate to the harm caused by the violation, PURA §§15.203(c)(1) and (c)(2), which specifically discuss hazards created to the health, safety or economic welfare of the public, and economic harm to property and the environment. Class A violations are limited to those violations that create significant harm, as measured by the economic harm created by the violation, the hazard or potential hazard created to public health or safety, or the risk to the reliability of a transmission or distribution system or a portion thereof. Within each classification, all of the statutory factors listed in PURA §15.023(c) will be used in determining the amount of the penalty.

Joint Commenters argued that the proposed rule is unconstitutionally vague and violates due process by failing to provide fair notice. As an example, Joint Commenters stated that in the proposed rule, repeat Class B violations of the same type become Class A violations, but Class B violations are never defined. Econnergy stated that the proposed rules describing Class B violations are too vague.

Commission response

The commission has modified the classification system to make the classification of penalties clearer and more predictable. The rule being adopted does not classify a repeated Class B violation as a Class A violation. The commission concludes that the rule provides fair notice, and is not vague. The rule provides generic descriptions of the violations that fall into each class. Attempting to list every rule or order that could be violated might imply that there could be no penalty assessed for a rule or order that was inadvertently omitted. In addition, the commission concludes that it is not practical to list every statute, rule, and order belonging to each penalty class because doing so would require frequent revisions to this rule and would provide minimal additional benefits.

Subsection (b)(1)(A)

REPC, and TXU Wholesale in its reply comments, suggested that there should be a minimum penalty of \$0 for all violations. Joint TDUs, and EPE in its reply comments, suggested that the commission should incorporate in the new section non-financial remedial actions such as agreed action plans. Econnergy stated that a collaborative approach is more appropriate than penalties.

Commission response

The commission agrees with commenters that there should be a minimum penalty of \$0 for all violations. However, allowance for \$0 penalties is already incorporated into the rule as proposed. For each class of violations, the rule establishes a maximum penalty amount for each class of violation. The phrase “may not exceed” allows for a \$0 penalty in the appropriate situation. The commission sees no benefit to expressly repeating what is already permitted under the rule. Therefore, the commission declines to make the requested change.

The commission agrees that “agreed action plans” could be part of a settlement or resolution of an enforcement proceeding. Additionally, two factors that the commission are required to consider in assessing a penalty, “efforts to correct the violation” and “the amount necessary to deter future violations,” would be affected by a market participant’s proactive development of an action plan to ameliorate the effects of a violation and to prevent future violations. However, this rulemaking concerns only the establishment of an appropriate classification system for administrative penalties. Therefore, the commission declines to change the rule at this time.

Finally, Econnergy’s suggestion that a collaborative approach is more appropriate than assessing administrative penalties is outside the scope of this rule. The commission agrees that a collaborative approach is generally preferable to litigation. This is one of the reasons each entity subject to an enforcement action has the option of requesting a settlement conference once a notice of violation is issued by the Executive Director. In

addition, settlement discussions may occur prior to issuance of a notice of violation during the investigation of a potential violation, which may result in a settlement of the enforcement case. However, the commission is required under PURA §15.023 to develop a classification system for administrative penalties. The commission believes that the administrative penalty classification system in this rule will assist both market participants and the commission in resolving enforcement matters.

Subsection (b)(1)(B)(i)

Econnergy stated that failure to file reports should not involve a monetary fine, unless negligent, in which case a fine much less than \$1,000 should be assessed. Econnergy stated that because such reporting violations would cause no monetary harm to the commission, no penalty should be imposed.

Commission response

The commission disagrees with Econnergy. For reasons stated in the commission's response to comments concerning subsection (a), above, the commission declines to impose a state of mind requirement other than strict liability. Econnergy's reason for suggesting no monetary penalty for "failure to file report" violations misses the point. The commission has no *monetary* interest in timely receiving the reports required by its rules, but is required to expend the commission's limited resources to obtain compliance with reporting requirements, even if no penalties are assessed. Additionally, the commission's concern in timely receiving reports is to obtain the information to timely perform its responsibilities under PURA and obtain information concerning compliance with its rules

and orders. If it were not able to assess penalties for failure to file required reports, the commission could be seriously hindered in its efforts to ensure that market participants comply with rules designed to protect the public. As discussed above, the penalty range of \$0 to \$1,000 for Class C violations is not intended to imply that all Class C violations will warrant a penalty of \$1,000.

Subsection (b)(1)(B)(ii)

Econnergy stated that failure by market participants to investigate customer complaints should be reviewed on a case-by-case basis.

Commission response

Econnergy's comment is directed more toward how the commission should assess administrative penalties in individual cases rather than the broader issue of developing a classification system for administrative penalties, which is the subject of this rulemaking. Accordingly, the commission declines to amend the rule as suggested by Econnergy.

Subsection (b)(3) - Class A violations

EPE stated that Class A should apply to service reliability standards "only in extreme circumstances of intentional disregard of the standards."

Commission response

First, EPE provides no explanation why "intentional disregard" is the appropriate state of mind for violations of service quality statutes, rules, or orders. In any event, the

commission disagrees with EPE. As explained above, the commission declines to impose a state of mind requirement in this rule. As is described above, the classification system that the commission is adopting focuses on the harm or potential harm to the public, rather than the state of mind of the violator.

Subsection (b)(3)(B)(i)

Econnergy stated that a penalty should be assessed only if the failure of the market participant to comply with ERCOT protocols resulted in financial harm to ERCOT or its members. Joint Commenters and TXU Wholesale in reply comments stated that “A violation related to the wholesale electric market” is overbroad because there would be no subset of related wholesale electric market rules (such as paperwork requirements) for which a violator would be subject to less than that maximum range of penalty. Joint Commenters stated that the proposed rule is discriminatory against wholesale market participants because it unreasonably classifies all potential violations that could be caused by wholesale market participants as being subject to the maximum penalties for all of their potential violations.

Commission response

The commission is adopting a rule that incorporates a requirement of serious harm, for a violation to be classified as a Class A violation and believes that this change appropriately addresses the concerns of Econnergy, Joint Commenters, and TXU Wholesale. The commission does not believe that it is appropriate to limit penalties for violations of ERCOT rules to cases in which financial harm has resulted. In the wholesale market, violations of market rules could threaten the reliability of the transmission system, without

immediate financial consequences, and the commission would need to be able to impose penalties to ensure compliance with the rules.

As to the comments of Joint Commenters and TXU Wholesale, simply because a violation is classified as Class A does not mean that the maximum penalty will apply. The range for a Class A violation will be from \$0 to \$25,000. However, the commission believes that a violation related to the wholesale market that results in or has the potential to cause significant harm should be included in the highest penalty range. Even the failure to submit a required report or other paper work requirement can have the potential to cause significant harm to the efficient and reliable operation of the electric network. For example, a failure to report an electric equipment outage correctly or to provide a generating unit's correct operating values could lead to an error in ERCOT's planning models, with serious consequences in times of stress on the system. The commission has not changed the rule to attempt to apply different classifications for failure to comply with different wholesale market rules, but it has added the "significant harm" standard to the description of Class A violations. This change appropriately addresses the discrimination issue raised by Joint Commenters and TXU Wholesale.

Subsection (b)(3)(B)(ii)

EPE stated that it would be inappropriate and inefficient to apply a Class A penalty to a service reliability violation on a "per day" basis given that the service reliability standards are applied on an annual basis to calendar year data.

Commission response

EPE's comment is directed toward how the commission should assess administrative penalties in individual cases rather than the broader issue of developing a classification system for administrative penalties, which is the subject of this rulemaking. Accordingly, the commission declines to amend the rule as suggested by EPE.

Subsection (b)(3)(B)(v)

REPC stated that the new section provides for no distinction between “inadvertent disconnections” and an improper disconnection committed willfully and knowingly. REPC stated that only the improper disconnection of a critical care or critical load customer should be Class A, all other improper disconnections should be Class B.

Commission response

As discussed above, the commission has modified the rule to limit Class A violations to those involving significant harm and declines to impose a state of mind requirement in this rule. Whether a violation is inadvertent could be considered in assessing the level of a penalty, as discussed above.

Subsections (b)(3)(B)(iv), (v), and (vi)

Econnergy stated that complaints of discrimination, improper disconnection, and fraudulent practices “all become a case of he said/she said.”

Commission response

Econnergy's comment relates to the evidentiary value of specific types of evidence, which is properly the subject matter of an evidentiary dispute within an enforcement proceeding, and not this rulemaking. Therefore the commission declines to change the rule in response to this comment.

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.

This new section is 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 §15.023, which requires the commission to establish by rule a classification system for violations.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §15.023.

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

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

(b) **Classification system.**

(1) **Class C violations.**

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

(B) The following violations are Class C violations:

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

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

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

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

(2) **Class B violations.**

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

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

(3) **Class A violations.**

(A) Penalties for Class A violations may not exceed \$25,000 per violation per day.

(B) The following types of violations are Class A violations if they (1) create economic harm in excess of \$5,000 to a person or persons, property, or the environment, or create an economic benefit to the violator in excess of \$5,000; (2) create a hazard or potential hazard to the health or safety of the public; or (3) cause a risk to the reliability of a transmission or distribution system or a portion thereof.

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

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

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

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

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

- (vi) A violation related to fraudulent, unfair, misleading, deceptive, or anticompetitive business practices;
 - (vii) Conducting business subject to the jurisdiction of the commission without proper commission authorization, registration, licensing, or certification;
 - (viii) A violation committed by ERCOT;
 - (ix) A violation not otherwise enumerated in this paragraph (3)(B) of this subsection that creates a hazard or potential hazard to the health or safety of the public;
 - (x) A violation not otherwise enumerated in this paragraph (3)(B) of this subsection that creates economic harm to a person or persons, property, or the environment in excess of \$5,000, or creates an economic benefit to the violator in excess of \$5,000; and
 - (xi) A violation not otherwise enumerated in this paragraph (3)(B) of this subsection that causes a risk to the reliability of a transmission or distribution system or a portion thereof.
- (c) **Application of enforcement provisions of other rules.** To the extent that PURA or other rules in this chapter establish a range of administrative penalties that are inconsistent with the penalty ranges provided for in subsection (b) of this section, the other provisions control with respect to violations of those rules.
- (d) **Assessment of administrative penalties.** In addition to the requirements of §22.246 of this title (relating to Administrative Penalties), a notice of violation recommending administrative penalties shall indicate the class of violation.

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 §25.8 relating to Classification System for Violations of Statutes, Rules and Orders applicable to Electric Service Providers is hereby adopted with changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE _____ DAY OF SEPTEMBER 2006.

PUBLIC UTILITY COMMISSION OF TEXAS

PAUL HUDSON, CHAIRMAN

JULIE PARSLEY, COMMISSIONER

BARRY T. SMITHERMAN, COMMISSIONER