

PROJECT NO. 29855

PUC RULEMAKING PROCEEDING	§	PUBLIC UTILITY COMMISSION
CONCERNING OVERSIGHT OF THE	§	
ELECTRIC RELIABILITY COUNCIL	§	OF TEXAS
OF TEXAS (ERCOT)	§	

**ORDER ADOPTING AMENDMENT TO §22.252
AS APPROVED AT THE NOVEMBER 23, 2004, OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts an amendment to §22.252, relating to Procedures for Approval of ERCOT Fees and Rates, with changes to the proposed text as published in the September 17, 2004 edition of the *Texas Register* (29 TexReg 8979). The amendment revises the appropriate procedures parties shall follow in a proceeding related to the fees and rates charged by the Electric Reliability Council of Texas (ERCOT). The amendment provides public benefits by enhancing the commission's ability to oversee the level of rates and the timing of changes to the rates charged by ERCOT. The previous rule potentially allowed ERCOT to implement a proposed rate change after 120 days even if the commission had not completed its review of those rates. The previous rule amounted to a presumption that it is appropriate for such a rate change to take effect prior to the commission's review of the rate change. The amendment eliminates this presumption; under the amended rule, a requested rate change will be deemed denied if the commission fails to act before the date for final decision.

The public will benefit from this procedural change since changes in ERCOT fees are generally reflected in changes to the rates that customers pay to their retail electric service provider. The amendment will assist the commission in fulfilling its statutory duty to ensure that ERCOT's fees and rates are reasonable and nondiscriminatory. The amendment will also encourage a full disclosure in ERCOT's fee filing package since any delays in providing information could result

in a denial of a fee increase. The commission finds that the amendment supports the public interest by providing greater regulatory certainty, increasing the efficiency of the commission's review process and helping to maintain reasonable fees for ERCOT's services. The amendment is adopted under Project Number 29855.

In addition, the commission, under a separate order, also adopts an amendment to substantive rule §25.362 of this title (relating to Electric Reliability Council of Texas (ERCOT) Governance) concerning the implementation of an explicit reporting requirement. The substantive rule amendment is being published separately in this issue of the *Texas Register* but was adopted as part of Project Number 29855.

The commission staff conducted a public hearing on the proposed amendment on October 21, 2004. Although public comment was invited, no person provided comments on the procedural rule amendment at the public hearing.

The commission received written comments on the proposed amendments on October 8, 2004 from Texas Legal Services Center (TLSC) and the Texas Ratepayers' Organization to Save Energy (Texas ROSE), and from ERCOT. Reply comments were submitted by ERCOT and by TLSC and Texas ROSE on October 18 and 19, 2004. All comments, including any not specifically referenced herein, have been fully considered by the commission. The commission has made other minor modifications to the proposed rule for the purpose of clarifying its intent and for format and grammatical purposes.

TLSC and Texas ROSE supported the proposed amendment. They argued that the previous rule gave ERCOT an incentive to not provide full information with its fee requests and to force other parties to use discovery to obtain the information that should have been supplied with the application. By amending the rule to include a presumption of denial rather than a presumption of approval (if the fee case is not completed within 120 days), they reasoned that the amendment correctly shifts the burden in fee cases to ERCOT. This would create an incentive for ERCOT to put forward its complete case at the outset and give the other parties more time to analyze the case instead of conducting discovery.

ERCOT stated that it did not object to the removal of language granting a presumptive interim approval of its fee requests, but it disagreed with a presumptive denial of the request. ERCOT asserted that this presumption could create a “Catch-22” in which the commission would be forced to make a premature determination in order to avoid triggering the automatic denial provision. ERCOT argued that this would unnecessarily complicate the fee-review process. ERCOT also questioned whether the commission could deem an application denied in the absence of specific statutory authority for such procedure. ERCOT was concerned that the potential *res judicata* effects of a commission ruling that a request was “deemed denied” could lead it to file an appeal of such ruling. If the dismissal was appealed, ERCOT asserted that the court would find that the commission’s decision was not supported by substantial evidence and remand the case to the commission. However, if ERCOT failed to appeal the ruling, it would run the risk that a court would find that ERCOT was then prevented from litigating, or re-litigating, the facts supporting the fee request. To avoid this result, ERCOT requested that the amendment be revised to eliminate the language that the application is denied if the commission

fails to act within the 120-day time period. ERCOT suggested that the commission substitute language indicating that, “No fee or rate change shall be effective until approved by the commission.” ERCOT also noted that there were inconsistencies in the rule language which allowed the commission to extend “the time for a final decision,” but tied the denial to failure to act before the “effective date.”

In reply comments, TLSC and Texas ROSE urged the commission to reject ERCOT’s proposed changes. They stated that the commission should be vigorous in exercising its oversight authority and that, since ERCOT has the burden of proof, the proposed amendment would motivate ERCOT to put forward its best case at the start of the proceeding. The commenters also noted that the rule allows the commission to extend the time to rule on the fee request and that ERCOT could always file a new application if its request is “deemed denied.” They argued that retaining the proposed language about denial of the application would serve to focus parties on the review process rather than having to fight to get adequate information about a fee request.

In its reply comments, ERCOT objected to the suggestion that it treats the commission or any party with disdain. ERCOT acknowledged that there had been significant disagreement in the past concerning the nature of the fee proceedings, but, after those matters were decided, it had complied with the requirements established by the commission. ERCOT accepted that it has the burden of proof in fee filing cases and stated that it attempts to provide all of the information required by the commission to evaluate its fee requests. Although its past efforts may not have been sufficient, ERCOT maintained that it had been sincere in its efforts to provide the necessary information and it was committed to meeting the commission’s expectations in the future.

ERCOT stated that it did not object to elimination of the previous presumption of fee approval, but it objected to substituting a presumption that the fee is “deemed denied.” ERCOT noted that the proposed language would limit the commission’s discretion in considering fee requests by limiting the commission’s ability to extend the time for review of a fee request.

Commission response

The commission believes that it is appropriate to eliminate the previous presumption that the fee request is approved if the commission is unable to complete its review within the allotted time. The commission adopts the proposed language that would result in a denial of the application if the commission fails to act before the date for final decision, but has revised the language in order to address comments by ERCOT. The commission believes that it is appropriate for the rule to indicate what happens in the event the commission is unable to complete its review within the allotted time. The previous version of the rule, which contained a presumption that the application is approved, could provide an incentive for ERCOT to delay the proceeding by being slow or non-responsive to requests for information. By specifying that the application is denied if the commission has not reached a decision within the appropriate time limit, this incentive is eliminated and a strong incentive for ERCOT to provide complete and thorough information at the earliest stage of the proceeding is created. The commission does not agree that denial of the application would have the “Catch-22” concerns raised by ERCOT.

In response to ERCOT’s comment that the amendment unnecessarily limits the commission’s discretion, the commission has made additional changes to prevent such a result. The commission notes that other language in the current rule allows the commission to extend the 120-day time period for reaching a final decision, thereby extending the time for considering any rate change. This provision allows the commission to retain authority to consider a fee request beyond the 120-day period, if necessary, without limiting its discretion. As adopted, the rule also allows an administrative law judge to extend the time for final decision, thereby avoiding the scheduling problems noted by ERCOT. The commission also clarifies the rule by adding language that an extension may be made for good cause and by referring to the “date for final decision” rather than “effective date.”

The commission agrees with ERCOT’s suggestion that it include language indicating that a fee request is not effective until approved by the commission.

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998, Supplement 2005) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure; and specifically, PURA §39.151 which grants the commission the authority to establish the reasonable and competitively neutral rates for an independent organization, like ERCOT.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 14.052, and 39.151.

§22.252. Procedures for Approval of ERCOT Fees and Rates.

(a) - (f)(No change.)

(g) **Processing of the application.** If no motion to intervene is filed by the intervention deadline, and no statement of position objecting to the fee and rate application is filed by the commission staff, the fee and rate application shall be presented to the commission for consideration of approval.

- (1) If a motion to intervene objecting to the fee and rate application is filed, the commission shall review the motion to determine whether it raises any disputed issues of fact, law or policy. If the motion does not raise factual issues, the commission may resolve any disputed issues of law or policy on the basis of briefing, if briefing is requested by the commission.
- (2) If factual issues must be resolved, the matter shall be referred to the State Office of Administrative Hearings for the making of all necessary factual determinations and the preparation of a proposal for decision, including findings of fact and conclusions of law, unless the commission or a commissioner serves as the finder of facts.
- (3) The commission shall endeavor to render a final decision approving or denying a fee application under this section within 120 days of the date of filing of the application, unless, for good cause, the commission or the administrative law judge extends the date for final decision. If the commission does not rule regarding a fee application before the date for

final decision, the fee application shall be deemed denied. No fee or rate change shall be effective until approved by the commission.

(h) (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 §22.252, relating to Procedures for Approval of ERCOT Fees and Rates, is hereby adopted with changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE 7th DAY OF DECEMBER 2004.

PUBLIC UTILITY COMMISSION OF TEXAS

JULIE PARSLEY, COMMISSIONER

PAUL HUDSON, CHAIRMAN

BARRY T. SMITHERMAN, COMMISSIONER