

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 §25.362
AS APPROVED AT THE NOVEMBER 23, 2004, OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts an amendment to §25.362, relating to Electric Reliability Council of Texas (ERCOT) Governance, with changes to the proposed text as published in the September 17, 2004 edition of the *Texas Register* (29 TexReg 8981). The amendment requires ERCOT to immediately report to the commission any event or situation that could reasonably be anticipated to adversely affect the reliability of the regional electric network; the accounting procedures applicable to ERCOT or the ERCOT market; ERCOT's performance of activities related to the customer registration function; or the public's confidence in the ERCOT market or in ERCOT's performance of its duties. The amendment enhances the commission's ability to execute its statutory duties in overseeing the operations of ERCOT. This is a competition rule subject to judicial review as specified in PURA §39.001(e). The amendment is adopted under Project Number 29855.

In addition, the commission, under a separate order, also adopts an amendment to procedural rule §22.252 of this title, (relating to Procedures for Approval of ERCOT Fees and Rates), concerning a presumption that an application for an increase in ERCOT's fees is deemed denied unless the commission acts within the 120-day time period. The procedural 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. The Texas Ratepayers' Organization to Save Energy (Texas ROSE) and ERCOT provided comments on the substantive rule amendment at the public hearing.

The commission received written comments on the proposed amendments on October 8, 2004 from FPL Energy, LLC (FPL), AEP Texas Central Company and AEP Texas North Company (AEP Companies), Texas Legal Services Center (TLSC) and 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 for the purpose of clarifying its intent and for format and grammatical purposes.

FPL raised concerns that the proposed rule language was too broad and requested that the commission clarify the language to indicate that the reporting requirements only apply to significant or urgent matters that warrant an emergency report. A similar comment was submitted by ERCOT in which it suggested that the amendment should be clarified to state that it only applied to a situation that could "materially" affect ERCOT's performance of its duties.

Commission response

The commission disagrees with these comments and has not included the materiality standard suggested by ERCOT. The commission wants to be immediately notified of any

event that could adversely affect the network, the market or ERCOT's operations and believes that adding a "materiality" standard could potentially delay the required notification while ERCOT tries to first determine if the event could have great consequences or only minor impacts. If the event could have adverse consequences, the commission needs the information as quickly as possible because a delay could affect the commission's ability to take effective corrective action. If it is later determined that the consequences are not material, the only impact to the commission's oversight responsibility is that it has received more information than was needed. The commission would rather have too much information in some instances than risk having insufficient or delayed information when it is needed.

FPL also requested that the rule clarify that the written report of the facts, as required by the rule, referred to additional reports, rather than the preliminary report filed by ERCOT immediately after notifying the commission's Executive Director. FPL argued that, because of the short response time, the initial report is likely to be incomplete or inaccurate. Any references to third parties contained in the initial report could unjustifiably question their actions and thereby damage their reputation, their investors, or their financing efforts. FPL suggested that the public interest is served if the public is given access to a completed report rather than to a preliminary report and cited to the Public Information Act for support. Finally, FPL expressed concern that the proposed amendment provided less protection of third parties than the protection provided by §25.503(1)(2) of this title (relating to Oversight of Wholesale Market Participants).

Commission response

The commission agrees with FPL that the requirement for a report that fully explains the facts and ERCOT's responses was intended to refer to any additional report required by the commission. The commission has clarified the language as requested by FPL. The commission does not believe that the rule provides any lesser protection of the rights of third parties than other commission rules. A report by ERCOT that contains allegations of inappropriate conduct by a third party does not constitute a finding by the commission that such conduct occurred or that the third party's alleged action or inaction was in violation of the Public Utility Regulatory Act (PURA), the commission's rules, or ERCOT's Protocols. If the commission feels that further investigation is warranted, the third party would have an opportunity to present its position during the investigation and could protect its rights at that time.

AEP Companies stated that the rule was too broad and would require that ERCOT report activities of market participants, even though the market participants are already subject to reporting requirements under ERCOT's Protocols and the commission's rules. AEP Companies felt that the rule was intended to only refer to the operations and activities of ERCOT itself, its employees and its contractors. AEP Companies suggested language to limit the rule in this manner.

Commission response

The commission disagrees with the limitation proposed by AEP Companies. Although the particular situation that led to the initiation of this project concerned the alleged criminal activities of some ERCOT employees, the commission did not intend to limit the scope of this rule in that fashion. The commission wants to ensure that it is immediately notified of any emergency described by the rule, regardless of whether it is caused by the activities of ERCOT employees or by action or inaction of others, including market participants or even persons who have no relationship to the market. Timely reporting is necessary for the commission to make a determination of whether any additional action is necessary to protect the ERCOT market and Texas ratepayers. The ability to obtain that information should not be compromised by the need to first determine whether the emergency is caused by ERCOT's employees or by a market participant. The commission intends that ERCOT will immediately notify it of any event or situation described by the rule, regardless of whether the event is accidental or intentional, regardless of whether it is local or national in scope, and regardless of whether it involves ERCOT or one or more market participants.

ERCOT suggested that rather than requiring an initial written report within 24 hours, the rule should require the report to be filed by the end of the following business day.

Commission response

The commission agrees with this suggestion and has revised the rule.

TLSC and Texas ROSE supported the proposed amendment. They argued that ERCOT's failure to be forthcoming concerning recent allegations of criminal activity by some ERCOT employees indicate the need for the rule. They argued that, except for information made confidential by law, information in a report filed by ERCOT should be made public and they encouraged the commission to establish a project in which the reports would be filed. These commenters also suggested that the requirement for a follow-up report should be mandatory rather than discretionary. They also encouraged the commission to keep this project open in order to address other concerns about ERCOT's behavior.

Commission response

The commission declines to keep this project open at this time. The commission's practice is to open a new project to address a new rulemaking initiative. The commission intends to continue its on-going review of the situation that led to this project and may also initiate a broader review of ERCOT than is contemplated in the current rulemaking project. If the commission determines that additional rule changes are necessary following this review, it will initiate a new rulemaking project at that time. The commission also declines to make the filing of an additional report a mandatory requirement of the rule. There may be situations in which the initial report is sufficient to identify and cure the problem or the problem is transitory and cured without further action. In those cases, there would be no need for any additional reports. The commission believes that it is more appropriate, at this time, to determine on a case-by-case basis whether any additional reports are

necessary. As requested, the commission will establish a project in which the reports will be filed.

At the public hearing, Texas ROSE stated that the rule did not address what would happen if ERCOT failed to file a report as required by the rule. Texas ROSE thought that such a provision was a necessary component of the rule. Texas ROSE also expressed concern that the rule does not provide for active intervention by the commission in the event a problem was reported. They indicated that it was more appropriate for the commission to take action rather than waiting for ERCOT to fix the problem and complained that ERCOT's general response has been to add new employees to address the problem. Texas ROSE felt that it took too long to obtain results and encouraged the commission to take action quickly in response to problems with ERCOT. ERCOT responded to Texas ROSE's comments, commending the commission for acting quickly to establish audits in response to the recent allegations concerning ERCOT employees. ERCOT insisted that addressing the audits was one of its highest priorities and that it was not avoiding the issue. ERCOT stated that it could do a better job of publicly disclosing its efforts in order to remove the perception that it was not actively addressing the concerns to be addressed in the audits.

Commission response

The commission disagrees that this rule needs to specify the consequences of non-compliance with the rule. Existing subsection (i) of this section already specifies the potential actions that may be taken in the event that ERCOT fails to comply with any rule

or order of the commission. The commission notes that subsection (i) authorizes the commission to order additional reports, implement audits, initiate an enforcement action, impose administrative penalties, or revoke ERCOT's certification as an independent organization under PURA §39.151(c). This subsection provides sufficient tools to the commission to enable it to take effective action if ERCOT should violate the new reporting requirement added by this amendment.

The amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (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; and specifically, PURA §39.151, which grants the commission oversight and review authority over independent organizations, like ERCOT.

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

§25.362. Electric Reliability Council of Texas (ERCOT) Governance.

(a) – (g) (No change.)

(h) **Required reports.**

(1) – (2) (No change.)

(3) **Emergency reports.** If ERCOT management becomes aware of any event or situation that could reasonably be anticipated to adversely affect the reliability of the regional electric network; the accounting procedures applicable to ERCOT or the ERCOT market; ERCOT's performance of activities related to the customer registration function; or the public's confidence in the ERCOT market or in ERCOT's performance of its duties, ERCOT management shall immediately notify the Executive Director of the commission, or the Executive Director's designee, by telephone. Additionally, ERCOT shall file a written report of the facts involved by the end of the following business day after becoming aware of such event or situation, unless the Executive Director specifies, in writing, that the report may be delayed. The Executive Director may not authorize a delay of more than 30 days for filing the required written report. For good cause, the commission may grant further delays in filing the required report. If it determines that additional reports are necessary, the commission may establish a schedule for the filing of additional reports after the initial written report by ERCOT. As a part of any additional written report, ERCOT may be required to fully explain the facts and to disclose any actions it has taken, or will take, in order to prevent a recurrence of the events that led to the need for filing an emergency report. If ERCOT contends that any of the information contained in an emergency report is

“Protected Information” under the ERCOT Protocols, or is otherwise subject to protection from disclosure under the TPIA, the report will be subject to the requirements of subsection (e) of this section.

(i) – (k) (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 §25.362, relating to Electric Reliability Council of Texas (ERCOT) Governance, 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