

1 PROJECT NO. 29855

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

6 (STAFF RECOMMENDATION) ORDER ADOPTING
7 AMENDMENT TO PROCEDURAL RULE §22.252
8 FOR CONSIDERATION AT THE NOVEMBER 23, 2004 OPEN MEETING

9 The Public Utility Commission of Texas (commission) adopts an amendment to §22.252,
10 relating to Procedures for Approval of ERCOT Fees and Rates, with changes to the
11 proposed text as published in the September 17, 2004 edition of the *Texas Register* (29
12 TexReg 8979). The amendment revises the appropriate procedures parties shall follow in
13 a proceeding related to the fees and rates charged by the Electric Reliability Council of
14 Texas (ERCOT). The amendment provides public benefits by enhancing the
15 commission's ability to oversee the level of rates and the timing of changes to the rates
16 charged by ERCOT. The previous rule potentially allowed ERCOT to implement a
17 proposed rate change after 120 days even if the commission has not completed its review
18 of those rates. The previous rule amounted to a presumption that it is appropriate for
19 such a rate change to take effect prior to the commission's review of the rate change.
20 The amendment eliminates this presumption; under the amended rule, a requested rate
21 change will not take effect until the commission acts. The public will benefit from this
22 procedural change since changes in ERCOT fees are generally reflected in changes to the
23 rates that customers pay to their retail electric service provider. The amendment will
24 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

1 disclosure in ERCOT's fee filing package since any delays in providing information
2 could result in a delay in implementation of a fee increase. The commission finds that
3 the amendment supports the public interest by providing greater regulatory certainty,
4 increasing the efficiency of the commission's review process and helping to maintain
5 reasonable fees for ERCOT's services. The amendment is adopted under Project Number
6 29855.

7

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

13

14 The commission staff conducted a public hearing on the proposed amendment on October
15 21, 2004. Although public comment was invited, no person provided comments on the
16 procedural rule amendment at the public hearing.

17

18 The commission received written comments on the proposed amendments on October 8,
19 2004 from Texas Legal Services Center (TLSC) and the Texas Ratepayers' Organization
20 to Save Energy (Texas ROSE), and from ERCOT. Reply comments were submitted by
21 ERCOT and by TLSC and Texas ROSE on October 18 and 19, 2004. All comments,
22 including any not specifically referenced herein, have been fully considered by the

1 commission. The commission has made other minor modifications to the proposed rule
2 for the purpose of clarifying its intent and for format and grammatical purposes.

3

4 TLSC and Texas ROSE supported the proposed amendment. They argued that the
5 previous rule gave ERCOT an incentive to not provide full information with its fee
6 requests and to force other parties to use discovery to obtain the information that should
7 have been supplied with the application. By amending the rule to include a presumption
8 of denial rather than a presumption of approval (if the fee case is not completed within
9 120 days), they reasoned that the amendment correctly shifts the burden in fee cases to
10 ERCOT. This would create an incentive for ERCOT to put forward its complete case at
11 the outset and give the other parties more time to analyze the case instead of conducting
12 discovery.

13

14 ERCOT stated that it did not object to the removal of language granting a presumptive
15 interim approval of its fee requests, but it disagreed with a presumptive denial of the
16 request. ERCOT asserted that this presumption could create a “Catch-22” in which the
17 commission would be forced to make a premature determination in order to avoid
18 triggering the automatic denial provision. ERCOT argued that this would unnecessarily
19 complicate the fee-review process. ERCOT also questioned whether the commission
20 could deem an application denied in the absence of specific statutory authority for such
21 procedure. ERCOT was concerned that the potential *res judicata* effects of a commission
22 ruling that a request was “deemed denied” could lead it to file an appeal of such ruling.
23 If the dismissal was appealed, ERCOT asserted that the court would find that the

1 commission's decision was not supported by substantial evidence and remand the case to
2 the commission. However, if ERCOT failed to appeal the ruling, it would run the risk
3 that a court would find that ERCOT was then prevented from litigating, or re-litigating,
4 the facts supporting the fee request. To avoid this result, ERCOT requested that the
5 amendment be revised to eliminate the language that the application is denied if the
6 commission fails to act within the 120-day time period. ERCOT suggested that the
7 commission substitute language indicating that, "No fee or rate change shall be effective
8 until approved by the commission."

9

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

19

20 In its reply comments, ERCOT objected to the suggestion that it treats the commission or
21 any party with disdain. ERCOT acknowledged that there had been significant
22 disagreement in the past concerning the nature of the fee proceedings, but, after those
23 matters were decided, it had complied with the requirements established by the

1 commission. ERCOT accepted that it has the burden of proof in fee filing cases and
2 stated that it attempts to provide all of the information required by the commission to
3 evaluate its fee requests. Although its past efforts may not have been sufficient, ERCOT
4 maintained that it had been sincere in its efforts to provide the necessary information and
5 it was committed to meeting the commission's expectations in the future. ERCOT stated
6 that it did not object to elimination of the previous presumption of fee approval, but it
7 objected to substituting a presumption that the fee is "deemed denied." ERCOT noted
8 that the proposed language would limit the commission's discretion in considering fee
9 requests by limiting the commission's ability to extend the time for review of a fee
10 request.

11

12 *Commission response*

13 **The commission believes that it is appropriate to eliminate the previous**
14 **presumption that the fee request is approved if the commission is unable to**
15 **complete its review within the allotted time. The commission agrees with ERCOT**
16 **that creating a presumption of denial could interfere with the commission's**
17 **processing of a fee request and have other unintended consequences. By eliminating**
18 **the previous presumption, the time limit for commission action becomes directory**
19 **rather than mandatory and there is no need to specify the consequences if the**
20 **commission fails to act within the time limit. To clarify that the time limit is**
21 **directory, the commission is also adding language to indicate that the commission**
22 **will act as soon as practicable. The commission also agrees with ERCOT's**
23 **suggestion that it substitute language indicating that a fee request is not effective**

1 **until approved by the commission. The commission disagrees with the comments of**
2 **TLSC and Texas ROSE suggesting that elimination of the “deemed denied”**
3 **language gives ERCOT an incentive to withhold information from the commission**
4 **or other parties. Because ERCOT’s rate change will not be effective until the**
5 **commission approves it, ERCOT has an incentive to provide complete information**
6 **to the commission as early as possible, in order to expedite its fee request.**

7

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

15

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

1 **§22.252. Procedures for Approval of ERCOT Fees and Rates.**

2

3 (a) – (f) (No change.)

4

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

9 (1) If a motion to intervene objecting to the fee and rate application is
10 filed, the commission shall review the motion to determine whether it
11 raises any disputed issues of fact, law or policy. If the motion does not
12 raise factual issues, the commission may resolve any disputed issues of
13 law or policy on the basis of briefing, if briefing is requested by the
14 commission.

15 (2) If factual issues must be resolved, the matter shall be referred to
16 the State Office of Administrative Hearings for the making of all
17 necessary factual determinations and the preparation of a proposal for
18 decision, including findings of fact and conclusions of law, unless the
19 commission or a commissioner serves as the finder of facts.

20 (3) The commission shall endeavor to render a final decision
21 approving or denying a fee application under this section within 120 days
22 of the date of filing of the application or as soon as practicable thereafter.
23 No fee or rate change shall be effective until approved by the commission.

1

2 (h) (No change.)

1 This agency hereby certifies that the adoption has been reviewed by legal counsel
2 and found to be a valid exercise of the agency's legal authority. It is therefore ordered by
3 the Public Utility Commission of Texas that §22.252, relating to Procedures for Approval
4 of ERCOT Fees and Rates, is hereby adopted with changes to the text as proposed.

5

6 **ISSUED IN AUSTIN, TEXAS ON THE _____ DAY OF _____ 2004.**

7

PUBLIC UTILITY COMMISSION OF TEXAS

8

9

10

JULIE PARSLEY, COMMISSIONER

11

12

13

PAUL HUDSON, CHAIRMAN

14

15

16

BARRY T. SMITHERMAN, COMMISSIONER

17