

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 SUBSTANTIVE RULE §25.362**
8 **FOR CONSIDERATION AT THE NOVEMBER 23, 2004 OPEN MEETING**

9 The Public Utility Commission of Texas (commission) adopts an amendment to §25.362,
10 relating to Electric Reliability Council of Texas (ERCOT) Governance, with changes to
11 the proposed text as published in the September 17, 2004 edition of the *Texas Register*
12 (29 TexReg 8982). The amendment requires ERCOT to immediately report to the
13 commission any event or situation that could reasonably be anticipated to adversely
14 affect the reliability of the regional electric network; the accounting procedures
15 applicable to ERCOT or the ERCOT market; ERCOT's performance of activities related
16 to the customer registration function; or the public's confidence in the ERCOT market or
17 in ERCOT's performance of its duties. The amendment enhances the commission's
18 ability to execute its statutory duties in overseeing the operations of ERCOT. This is a
19 competition rule subject to judicial review as specified in PURA §39.001(e). The
20 amendment is adopted under Project Number 29855.

21 In addition, the commission, under a separate order, also adopts an amendment to
22 procedural rule §22.252 of this title, (relating to Procedures for Approval of ERCOT Fees
23 and Rates), concerning a presumption that an application for an increase in ERCOT's
24 fees is deemed denied unless the commission acts within the 120-day time period. The

1 procedural rule amendment is being published separately in this issue of the *Texas*
2 *Register* but was adopted as part of Project Number 29855.

3

4 The commission staff conducted a public hearing on the proposed amendment on October
5 21, 2004. The Texas Ratepayers' Organization to Save Energy (Texas ROSE), and
6 ERCOT provided comments on the substantive rule amendment at the public hearing.

7

8 The commission received written comments on the proposed amendments on October 8,
9 2004 from FPL Energy, LLC (FPL), AEP Texas Central Company and AEP Texas North
10 Company (AEP Companies), Texas Legal Services Center (TLSC) and Texas ROSE, and
11 from ERCOT. Reply comments were submitted by ERCOT and by TLSC and Texas
12 ROSE on October 18 and 19, 2004. All comments, including any not specifically
13 referenced herein, have been fully considered by the commission. The commission has
14 made other minor modifications for the purpose of clarifying its intent and for format and
15 grammatical purposes.

16

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

23

1 *Commission Response*

2 **The commission agrees with these comments and has revised the language to**
3 **include the materiality standard suggested by ERCOT.**

4

5 FPL also requested that the rule clarify that the written report of the facts, as required by
6 the rule, referred to additional reports, rather than the preliminary report filed by ERCOT
7 immediately after notifying the commission's Executive Director. FPL argued that,
8 because of the short response time, the initial report is likely to be incomplete or
9 inaccurate. Any references to third parties contained in the initial report could
10 unjustifiably question their actions and thereby damage their reputation, their investors,
11 or their financing efforts. FPL suggested that the public interest is served if the public is
12 given access to a completed report rather than to a preliminary report and cited to the
13 Public Information Act for support. Finally, FPL expressed concern that the proposed
14 amendment provided less protection of third parties than the protection provided by
15 §25.503(1)(2) of this title (relating to Oversight of Wholesale Market Participants).

16

17 *Commission Response*

18 **The commission agrees with FPL that the requirement for a report that fully**
19 **explains the facts and ERCOT's responses was intended to refer to any additional**
20 **report required by the commission. The commission has clarified the language as**
21 **requested by FPL. The commission does not believe that the rule provides any**
22 **lesser protection of the rights of third parties than other commission rules. A report**
23 **by ERCOT that contains allegations of inappropriate conduct by a third party does**

1 **not constitute a finding by the commission that such conduct occurred or that the**
2 **third party's alleged action or inaction was in violation of the Public Utility**
3 **Regulatory Act (PURA), the commission's rules, or ERCOT's Protocols. If the**
4 **commission felt that further investigation was warranted, the third party would**
5 **have an opportunity to present its position during the investigation and could**
6 **protect its rights at that time.**

7

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

14

15 *Commission Response*

16 **The commission disagrees with the limitation proposed by AEP Companies.**
17 **Although the particular situation that led to the initiation of this project concerned**
18 **the alleged criminal activities of some ERCOT employees, the commission did not**
19 **intend to limit the scope of this rule in that fashion. The commission wants to insure**
20 **that it is immediately notified of any emergency described by the rule, regardless of**
21 **whether it is caused by the activities of ERCOT employees or by action or inaction**
22 **of others, including market participants or even persons who have no relationship**
23 **to the market. Timely reporting is necessary for the commission to make a**

1 **determination of whether any additional action is necessary to protect the ERCOT**
2 **market and Texas ratepayers. The ability to obtain that information should not be**
3 **compromised by the need to first determine whether the emergency is caused by**
4 **ERCOT's employees or by a market participant. The commission intends that**
5 **ERCOT will immediately notify it of any event or situation described by the rule,**
6 **regardless of whether the event is accidental or intentional, regardless of whether it**
7 **is local or national in scope, and regardless of whether it involves ERCOT or one or**
8 **more market participants.**

9

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

12

13 *Commission Response*

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

15

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

1 the commission to keep this project open in order to address other concerns about
2 ERCOT's behavior.

3

4 *Commission Response*

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

19

20 At the public hearing, Texas ROSE stated that the rule did not address what would
21 happen if ERCOT failed to file a report as required by the rule. Texas ROSE thought that
22 such a provision was a necessary component of the rule. Texas ROSE also expressed
23 concern that the rule does not provide for active intervention by the commission in the

1 event a problem was reported. They indicated that it was more appropriate for the
2 commission to take action rather than waiting for ERCOT to fix the problem and
3 complained that ERCOT's general response has been to add new employees to address
4 the problem. Texas ROSE felt that it took too long to obtain results and encouraged the
5 commission to take action quickly in response to problems with ERCOT. ERCOT
6 responded to Texas Rose's comments, commending the commission for acting quickly to
7 establish audits in response to the recent allegations concerning ERCOT employees.
8 ERCOT insisted that addressing the audits was one of its highest priorities and that it was
9 not avoiding the issue. ERCOT stated that it could do a better job of publicly disclosing
10 its efforts in order to remove the perception that it was not actively addressing the
11 concerns to be addressed in the audits.

12

13 *Commission response*

14 **The commission disagrees that this rule needs to specify the consequences of non-**
15 **compliance with the rule. Existing subsection (i) of this section already specifies the**
16 **potential actions that may be taken in the event that ERCOT fails to comply with**
17 **any rule or order of the commission. The commission notes that subsection (i)**
18 **authorizes the commission to order additional reports, implement audits, initiate an**
19 **enforcement action, impose administrative penalties, or revoke ERCOT's**
20 **certification as an independent organization under PURA §39.151(c). This**
21 **subsection provides sufficient tools to the commission to enable it to take effective**
22 **action if ERCOT should violate the new reporting requirement added by this**
23 **amendment.**

1

2 The amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code
3 Annotated §14.002 (Vernon 1998, Supplement 2005) (PURA), which provides the Public
4 Utility Commission with the authority to make and enforce rules reasonably required in
5 the exercise of its powers and jurisdiction; and specifically, PURA §39.151, which grants
6 the commission oversight and review authority over independent organizations, like
7 ERCOT.

8

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

1 **§25.362. Electric Reliability Council of Texas (ERCOT) Governance.**

2 (a) – (g) (No change.)

3

4 (h) **Required reports.**

5 (1) – (2) (No change.)

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

1 an emergency report. If ERCOT contends that any of the information contained
2 in an emergency report is “Protected Information” under the ERCOT Protocols,
3 or is otherwise subject to protection from disclosure under the TPIA, the report
4 will be subject to the requirements of subsection (e) of this section.

5

6 (i) – (k) (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 §25.362, relating to Electric Reliability
4 Council of Texas (ERCOT) Governance, is hereby adopted with changes to the text as
5 proposed.

6

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

8

PUBLIC UTILITY COMMISSION OF TEXAS

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JULIE PARSLEY, COMMISSIONER

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PAUL HUDSON, CHAIRMAN

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BARRY T. SMITHERMAN, COMMISSIONER

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