

PROJECT NO. 56705

**REVIEW OF §§ 22.123, 22.181, AND
22.262**

**§
§
§**

**PUBLIC UTILITY COMMISSION

OF TEXAS**

ORDER ADOPTING AMENDMENTS TO 16 TAC §§22.123, 22.181, AND 22.262

The Public Utility Commission of Texas (commission) adopts amendments to 16 Texas Administrative Code (TAC) §22.123, relating to Appeal of an Interim Order and Motions for Reconsideration of Interim Order Issued by the Commission; §22.181, relating to Dismissal of a Proceeding; and §22.262, relating to Commission Action After a Proposal for Decision. The commission adopts §22.123 and §22.181 with changes and §22.262 with no changes to the proposed text as published in the June 28, 2024 issue of the *Texas Register* (49 TexReg 4667).

Amended §22.123 clarifies that appeals for evidentiary rulings are prohibited and replaces service for an appeal or motion of reconsideration from facsimile transmission to service by electronic mail. Amended §22.123 increases the timeframe before an appeal or motion for reconsideration is denied if not placed on an open meeting agenda from ten days to 20 days. Amended §22.123 also expressly indicates the commission will either rule on an appeal or motion for reconsideration, or extend time to act on it.

Amended §22.181 specifies that the 20-day default timeline to respond to a motion to dismiss may be revised by the presiding officer and adds failure to prosecute or failure to amend an application as grounds for an administrative law judge to dismiss a proceeding without issuing a proposal for decision. Amended §22.181 also clarifies that an order from an administrative law judge dismissing a proceeding under the revised provisions is a final order of the commission and is

subject to motions for rehearing under §22.264 of this title, relating to Rehearing, and clarifies the authority of the presiding officer to grant a request to withdraw an application in certain instances.

Amended §22.262 specifies that a request for oral argument must be filed no later than seven days – as opposed to seven working days – before the open meeting at which the commission is scheduled to consider the case, and that two days prior to an open meeting, the Office of Policy and Docket Management will file a notice to the parties regarding whether the request for oral argument has been granted.

The amended rules also revise each instance of “Policy Development Division” to properly refer to the “Office of Policy and Docket Management” and make minor and conforming changes consistent with the commission’s current drafting practices.

The commission received comments on the proposed rule from: the Alliance for Retail Markets and the Texas Energy Association for Marketers, filing collectively as REP Coalition, and the Texas Rural Water Association (TRWA).

Proposed §22.123(a)(7)(A) and (b)(6)(A)

REP Coalition recommended revising proposed §22.123(a)(7)(A) and (b)(6)(A) by extending the proposed 20-day timeline for placing an appeal or motion for reconsideration of an interim order on the agenda of an open meeting to 30 days or more if the additional time would be helpful for the commission. REP Coalition also recommended the commission provide more specific information regarding when the commission will review an appeal that has not been denied. REP

Coalition explained that 30 days would provide the commission with one or two additional open meetings if a decision is not ready. Moreover, REP Coalition argued that a longer deadline would appropriately balance administrative efficiency without causing undue delay. REP Coalition provided draft language consistent with its recommendation.

Commission Response

The commission declines to further increase the deadline for a commissioner to place an appeal or motion for reconsideration on the agenda of an open meeting because the commission already handles appeals and motions for reconsideration expeditiously. Extending the initial ballot timeline from 10 days to 20 days, as proposed, is therefore sufficient and will enable a more thorough and efficient analysis of such filings.

Proposed §22.123(a)(7)(B) and (b)(6)(B)

REP Coalition recommended revising proposed §22.123(a)(7)(B) and (b)(6)(B) such that an appeal and motion for reconsideration be placed on the open meeting agenda ballot unless that open meeting is less than seven days away from the date of the agenda ballot, in which case it will be placed on the agenda for the next scheduled open meeting. REP Coalition commented that its proposed language clarifies that the applicable open meeting timing does not conflict with the seven-day posting requirement for open meetings prescribed by Texas Government Code §551.044. REP Coalition provided draft language consistent with its recommendation.

Commission Response

The commission declines to implement REP Coalition’s proposed change because it is unnecessary. The statutory requirements related to the posting of items on open meetings are binding on the commission and taken into account during the balloting and scheduling of open meeting items.

REP Coalition and TRWA recommended preserving the three-day default timeline for the commission to issue an order on an interim appeal or motion for reconsideration and the general authorization for the commission to extend that timeline. REP Coalition also recommended language limiting the commission from extending agency action beyond 30 days from the date the interim order was initially considered. REP Coalition noted that the proposed language removes “all reference to expiration of the time for ruling on the appeal or motion for reconsideration or extensions.” REP Coalition commented that it would be beneficial to have a streamlined and uniform process for the processing of such appeals and motions. REP Coalition provided draft language consistent with its recommendation. TRWA opposed the changes to proposed §22.123(a)(7)(B) and (b)(6)(B) and recommended the commission preserve the three-day deadline for the commission to rule on an appeal or motion for rehearing on an interim order for efficiency and timely resolution of commission proceedings. TRWA contended that the revisions “indefinitely extends the time” the commission can consider such an appeal or motion for rehearing and therefore significantly prolong the hearing process. TRWA commented that such a change could significantly extend costly legal proceedings and create regulatory uncertainty among PUC regulated utilities, particularly small water and wastewater utilities. TRWA explained that the small water and wastewater utilities it represents typically have an average of 1,500

connections and, therefore, the high cost of legal fees for proceedings before the commission are burdensome and disproportional to any benefit received and negatively impact customers by requiring increased rates to cover such costs. TRWA concluded that the proposed change would exacerbate this issue. TRWA also recommended that the commission streamline processes for small utilities to ensure that funds that would be spent on legal fees could instead be invested in infrastructure and compliance.

Commission Response

The commission declines to preserve the three-day deadline for the commission to rule on an appeal of, or motion for reconsideration of, an interim order as recommended by commenters. The commission also declines to add further constraints on commission extensions of such deadlines as proposed by REP Coalition because the existing rule contains no such limitations. However, to address both commenters' concerns, the commission adds to both §22.123(a)(7)(B) and (b)(6)(B) language that states the commission will either rule on the appeal or motion for reconsideration at the scheduled open meeting or extend time to act on the appeal or motion.

Proposed §22.181(e)

REP Coalition recommended that the standards for dismissal under the Texas Rules of Civil Procedure be incorporated by reference in proposed §22.181(e) to establish “a reasonable, uniform, and easily accessible standard for proceedings” before the commission.

Commission Response

The commission declines to implement REP Coalition’s proposed change because it is unnecessary, overly broad, and likely to create, not eliminate, confusion. The grounds for dismissal under §22.181 are different in many respects from the grounds for dismissal contemplated in the Texas Rules of Civil Procedure (TRCP). For example, TRCP Rule 162 is far less specific than §22.181. Accordingly, the change sought by the REP Coalition—a statement in §22.181 that dismissal will be governed by the same standards for dismissal of a proceeding as are applied by Texas courts under the Texas Rules of Civil Procedure—will create more confusion and uncertainty than it eliminates.

The amended rules are adopted under the following provisions of PURA: §14.001, which provides the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by PURA that is necessary and convenient to the exercise of that power and jurisdiction; §14.002, which provides the commission with the authority to make adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction; §14.052, which requires the commission to adopt and enforce rules governing practice and procedure before the commission and, as applicable, practice and procedure before the State Office of Administrative Hearings. The amended rules are also adopted under the following provisions of the Texas Water Code: §13.004, which prescribes the jurisdiction of the commission over certain water supply or sewer service corporations; §13.041(a) which generally authorizes the commission to regulate and supervise the business of each water and sewer utility within its jurisdiction, including ratemaking and other economic regulation; §13.041(b) which authorizes the commission to adopt and enforce rules reasonably required in the

exercise of its powers and jurisdiction, including rules of practice and procedure; §13.042 which prescribes the scope of the commission's jurisdiction over municipalities, and §13.043 which provides for the commission's general appellate authority.

Cross Reference to Statute: Public Utility Regulatory Act §§ 14.001, 14.002, 14.052.

§22.123. Appeal of an Interim Order and Motions for Reconsideration of Interim Order Issued by the Commission.

(a) **Appeal of an interim order.**

- (1) **Availability of appeal.** Appeals are available for any interim order of the presiding officer that immediately prejudices a substantial or material right of a party or materially affects the course of the hearing. Appeals are not available for evidentiary rulings. Interim orders are not subject to exceptions or motions for rehearing.
- (2) **Procedure for appeal.** If the presiding officer intends to reduce an oral ruling to a written order, the presiding officer must so indicate on the record at the time of the oral ruling and must promptly issue the written order. Any appeal to the commission from an interim order must be filed within ten days of the issuance of the written order or the appealable oral ruling when no written order is to be issued. The appeal must be served on all parties by hand delivery, electronic mail, or by overnight courier delivery.
- (3) **Contents.** An appeal must specify the reasons why the interim order is unjustified or improper and how it immediately prejudices a substantial or material right of a party or materially affects the course of the hearing.
- (4) **Responses.** Any response to an appeal must be filed within five working days of the filing of the appeal.
- (5) **Motion for stay.** Pending a ruling by the commissioners, the presiding officer may, upon motion, grant a stay of the interim order. A motion for a stay must specify the basis for a stay. Good cause must be shown for granting a stay. The

mere filing of an appeal does not stay the interim order or any applicable procedural schedule.

- (6) **Agenda ballot.** Upon the filing of an appeal, the Office of Policy and Docket Management must send a separate ballot to each commissioner to determine whether the commission will consider the appeal at an open meeting. Untimely motions will not be balloted. The Office of Policy and Docket Management must notify the parties whether a commissioner by individual ballot has added the appeal to an open meeting agenda but will not identify the requesting commissioner or commissioners.
- (7) **Denial or granting of appeal.**
 - (A) If no commissioner has placed an appeal on the agenda of an open meeting by agenda ballot within 20 days after the filing of an appeal, the appeal is deemed denied.
 - (B) If any commissioner has voted by agenda ballot in favor of considering the appeal, the appeal will be placed on the agenda of the next regularly scheduled open meeting or such other meeting as the commissioner may direct by the agenda ballot. If two or more commissioners vote to consider the appeal, but differ as to the date the appeal will be heard, the appeal must be placed on the latest of the dates specified by the ballots. At the open meeting, the commission will either rule on the appeal or extend time to act on it.
- (8) **Reconsideration of appeal by presiding officer.** The presiding officer may treat an appeal as a motion for reconsideration and may withdraw or modify the

order under appeal before a commission decision on the appeal. The presiding officer must notify the commission of its decision to treat the appeal as a motion for reconsideration.

(b) **Motion for reconsideration of interim order issued by the commission.**

- (1) **Availability of motion for reconsideration.** Motions for reconsideration are available for any interim order of the commission that immediately prejudices a substantial or material right of a party or materially affects the course of the hearing. Motions for reconsideration may only be filed by a party to the proceeding and are not available for evidentiary rulings. Interim orders are not subject to exceptions or motions for rehearing.
- (2) **Procedure for motion for reconsideration.** If the commission does not intend to reduce an oral ruling to a written order, the commission will so indicate on the record at the time of the oral ruling. A motion for reconsideration of an interim order issued by the commission must be filed within five working days of the issuance of the written interim order or the oral interim ruling. The motion for reconsideration must be served on all parties by delivery, electronic mail, or by overnight courier delivery.
- (3) **Content.** A motion for reconsideration must specify the reasons why the interim order is unjustified or improper.
- (4) **Responses.** Any response to a motion for reconsideration must be filed within five working days of the filing of the motion.

- (5) **Agenda ballot.** Upon the filing of a motion for reconsideration, the Office of Policy and Docket Management must send a separate ballot to each commissioner to determine whether the commission will consider the motion at an open meeting. The Office of Policy and Docket Management must notify the parties whether a commissioner by individual ballot has added the motion to an open meeting agenda but will not identify the requesting commissioner or commissioners.
- (6) **Denial or granting of motion.**
- (A) If no commissioner has placed a motion for reconsideration on the agenda for an open meeting by agenda ballot within 20 days after the filing of the motion, the motion is deemed denied.
- (B) If any commissioner has voted by agenda ballot in favor of considering the motion, the motion will be placed on the agenda for the next regularly scheduled open meeting or such other meeting as the commissioner may direct by the agenda ballot. If two or more commissioners vote to consider the motion, but differ as to the date the motion will be heard, the motion must be placed on the latest of the dates specified by the ballots. At the open meeting, the commission will either rule on the motion or extend time to act on it.

§22.181. Dismissal of a Proceeding.

- (a) **Dismissal of a proceeding.** Upon the motion of the presiding officer or the motion of any party, the presiding officer may recommend that the commission dismiss, with or without prejudice, any proceeding for any reason specified in this section.
- (b) **Dismissal of issues within a proceeding.** Upon the motion of the presiding officer or the motion of any party, the presiding officer may dismiss or may recommend that the commission dismiss, with or without prejudice, one or more issues within a proceeding for any reason specified in this section.
- (c) **Dismissal without hearing.** A dismissal under this section requires a hearing unless the facts necessary to support the dismissal are uncontested or are established as a matter of law.
- (d) **Reasons for dismissal.** Dismissal of a proceeding or one or more issues within a proceeding may be based on one or more of the following reasons:
- (1) lack of jurisdiction;
 - (2) moot questions or obsolete petitions;
 - (3) res judicata;
 - (4) collateral estoppel;
 - (5) unnecessary duplication of proceedings;
 - (6) failure to prosecute;

- (7) failure to amend an application such that it is sufficient after repeated determinations that the application is insufficient;
 - (8) failure to state a claim for which relief can be granted;
 - (9) gross abuse of discovery consistent with §22.161(b)(2) of this title (relating to Sanctions);
 - (10) withdrawal of an application consistent with subsection (g) of this section; or
 - (11) other good cause shown.
- (e) **Motion for dismissal, responses, and replies.** Dismissal of a proceeding or one or more issues within a proceeding may be made upon the motion of the presiding officer or the motion of any party.
- (1) A party's motion for dismissal must specify at least one of the grounds for dismissal identified in subsection (d) of this section. The motion must include a statement that explains the basis for the dismissal and if necessary:
 - (A) A statement that sets forth the material facts that support the motion; and
 - (B) An affidavit that supports the motion and that includes evidence that is not found in the then-existing record.
 - (2) A presiding officer's motion must be provided by written order or stated in the record and must specify one or more grounds for dismissal identified in subsection (d) of this section and a clear and concise statement of the material facts supporting the dismissal.
 - (3) The party that initiated the proceeding and any other party has 20 days from the date of receipt to respond to a motion to dismiss unless the presiding officer

specifies otherwise. The response must contain a statement of reasons the party contends the motion to dismiss should not be granted, and if necessary

(A) A statement that refers to each material fact identified in the motion to dismiss as uncontested that the responding party contends is contested; and

(B) An affidavit that supports the response to the motion to dismiss and that includes evidence the party relies upon to establish contested issues of fact. The affidavit may include evidence that is not found in the then-existing record.

(4) Replies to a response to a motion to dismiss may be made only by leave of and as directed by the presiding officer.

(f) **Action on a motion to dismiss.** Action on a motion to dismiss must conform to this subsection.

(1) If a hearing on the motion to dismiss is held, that hearing must be confined to the issues raised by the motion to dismiss.

(2) If the administrative law judge determines that all issues within a proceeding should be dismissed, the administrative law judge must prepare a proposal for decision in accordance with §22.261 of this title (relating to Proposals for Decision) to that effect, unless the reason for dismissal is solely one of the following:

(A) the withdrawal of an application under subsection (g)(1), (2), or (3) of this section; or

- (B) either failure to prosecute under subsection (d)(6) of this section or failure to amend an application such that it is sufficient after repeated determinations that the application is insufficient under subsection (d)(7) of this section, or both, and the dismissal is without prejudice.
- (3) For dismissal under paragraphs (2)(A) and (2)(B) of this subsection, the administrative law judge may issue an order dismissing the proceeding. An order issued under this paragraph is a final order of the commission and is subject to motions for rehearing under §22.264 of this title (relating to Rehearing).
- (4) The commission will consider a proposal for decision recommending dismissal as soon as is practicable.
- (5) If the commission determines that all issues within a proceeding should be dismissed, the commission will issue an order subject to motions for rehearing under §22.264 of this title.
- (6) If the administrative law judge determines that one or more, but not all, issues within a proceeding should be dismissed, the administrative law judge may issue a proposal for interim decision or an interim order dismissing such issues. An interim order issued by the administrative law judge resulting in partial dismissal is subject to appeal or reconsideration under §22.123 of this title (relating to Appeal of an Interim Order and Motions for Reconsideration of Interim Order Issued by the Commission). If the commission determines that one or more, but not all, issues within a proceeding should be dismissed, the commission may issue an interim order dismissing such issues. An interim order issued by the

commission resulting in partial dismissal is subject to appeal or reconsideration under §22.123 of this title.

- (g) **Withdrawal of application.** An application may be withdrawn only in accordance with this subsection.
- (1) A party that initiated a proceeding may withdraw its application without prejudice to refiling of same, at any time before that party has presented its direct case. A party may agree to withdraw its application with prejudice.
 - (2) After the presentation of its direct case, but prior to the issuance of a proposed order or proposal for decision, a party may request to withdraw its application with or without prejudice, and withdrawal may be granted only upon a finding of good cause by the presiding officer.
 - (3) The presiding officer may grant a request to withdraw an application with or without prejudice after a proposed order or proposal for decision has been issued if the request to withdraw is filed by the applicant and the applicant's application would be granted by the proposed order or proposal for decision.
 - (4) A request to withdraw an application with or without prejudice after a proposed order or proposal for decision has been issued that is filed by an applicant to whom the result of the proposed order or proposal for decision is adverse may be granted only upon a finding of good cause by the commission. In ruling on the request, the commission will weigh the importance of the matter being addressed to the jurisprudence of the commission and the public interest.

- (5) A request to withdraw an application with or without prejudice after the application has been placed on an open meeting agenda for consideration of an appeal of an interim order, a request for certified issues, or a preliminary order with threshold legal or policy issues may be granted only upon a finding of good cause by the commission. In ruling on the request, the commission will weigh the importance of the matter being addressed to the jurisprudence of the commission and the public interest.
- (6) If a request to withdraw an application is granted, the presiding officer must issue an order of dismissal stating whether the dismissal is with or without prejudice. If the presiding officer finds good cause, the order of dismissal under this paragraph must not be with prejudice, unless the applicant requests dismissal with prejudice. Such order must, if applicable, specify the facts on which good cause is based and the basis of the dismissal and is the final order of the commission subject to motions for rehearing under §22.264 of this title.

§22.262. Commission Action After a Proposal for Decision.

- (a) **Commission Action.** The commission may change a finding of fact or conclusion of law made by the administrative law judge or vacate or modify an order issued by the administrative law judge only if the commission:
- (1) determines that the administrative law judge:
 - (A) did not properly apply or interpret applicable law, commission rules or policies, or prior administrative decisions; or
 - (B) issued a finding of fact that is not supported by a preponderance of the evidence; or
 - (2) determines that a commission policy or a prior administrative decision on which the administrative law judge relied is incorrect or should be changed.
- (b) **Reasons to Be in Writing.** The commission will state in writing the specific reason and legal basis for its determination under subsection (a) of this section.
- (c) **Remand.** The commission may remand the proceeding for further consideration.
- (1) The commission may direct that further consideration by an administrative law judge be accomplished with or without reopening the hearing and may limit the issues to be considered.
 - (2) If additional evidence is admitted on remand that results in a substantial revision of the proposed decision or the underlying facts, an amended or supplemental proposal for decision or proposed order must be filed. If an amended or supplemental proposal for decision is filed, the provisions of §22.261(d) of this title (relating to

Proposal for Decision) apply. Exceptions and replies must be limited to discussions, proposals, and recommendations in the supplemental proposal for decision.

(d) Oral Argument Before the Commission.

- (1) Any party may request oral argument before the commission before the final disposition of any proceeding.
- (2) Oral argument may be allowed at the commission's discretion. The commission may limit the scope and duration of oral argument. The party bearing the burden of proof has the right to open and close oral argument.
- (3) A request for oral argument must be filed as a separate written pleading. The request must be filed no later than 3:00 p.m. seven days before the open meeting at which the commission is scheduled to consider the case.
- (4) Upon the filing of a motion for oral argument, the Office of Policy and Docket Management must send a separate ballot to each commissioner to determine whether the commission will hear oral argument at an open meeting. An affirmative vote by one commissioner is required to grant oral argument. Two days before the commission is scheduled to consider the case, the Office of Policy and Docket Management will file a notice to the parties regarding whether a request for oral argument has been granted.
- (5) The absence or denial of a request for oral argument does not preclude the commissioners from asking questions of any party present at the open meeting.

- (e) **Commission Not Limited.** This section does not limit the commission in the conduct of its meetings to the specific types of action outlined in this section.

This agency 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 §22.123, relating to Appeal of an Interim Order and Motions for Reconsideration of Interim Order Issued by the Commission and §22.181, relating to Dismissal of a Proceeding are hereby adopted with changes to the text as proposed and that; §22.262, relating to Commission Action After a Proposal for Decision, is hereby adopted with no changes to the text as proposed

Signed at Austin, Texas the _____ day of _AUGUST 2024.

PUBLIC UTILITY COMMISSION OF TEXAS

THOMAS GLEESON, CHAIRMAN

LORI COBOS, COMMISSIONER

JIMMY GLOTFELTY, COMMISSIONER

KATHLEEN JACKSON, COMMISSIONER

COURTNEY HJALTMAN, COMMISSIONER