

The Public Utility Commission of Texas (the commission) adopts amendments to §22.246 relating to Administrative Penalties with no changes to the proposed text as published in the November 12, 1999 *Texas Register* (24 TexReg 9916). The amendments implement the Public Utility Regulatory Act (PURA), Texas Utilities Code Annotated, §15.024(c) (Vernon 1999 Supp.) These amendments were adopted under Project Number 21420.

The new provision in PURA §15.024(c) eliminates the 30-day "cure" period for violations of PURA Chapters 17, 55, and 64.

Upon publication of the proposed rule in the November 12, 1999 *Texas Register* (24 TexReg 9916), the commission requested written comments from all interested parties regarding this rulemaking. The commission received comments on the proposed amendments from only Texas Statewide Telephone Cooperative, Inc. (TSTCI) which expressed the organization's support for the proposed amendments.

A public hearing on the proposed amendments was held at the commission offices on January 18, 2000, at 9:00 a.m. Representatives from TSTCI, AT&T, GTE, SWBT, Reliant Energy, John Staurulakis, Inc., and Clark Thomas & Winters attended the hearing; however, no one participated in the proceedings and, therefore, there were no comments.

The adopted amendments:

1. Eliminate the 30-day "cure" period for violations of PURA Chapters 17, 55, and 64;
2. Clarify that a violator may not opt to pay a penalty without also taking appropriate corrective action; and
3. Clarify that the term, "continuing violation," which is defined in the rule, is used in conjunction with the term, "violation," wherever it is appropriate throughout the amended rule.

The amendments are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1999Supp.) (PURA), which provides the Public Utility Commission with the authority to adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction; under PURA §14.052, which provides the Public Utility Commission with the authority to adopt and enforce rules governing practice and procedure before the Commission and, as applicable, before the State Office of Administrative Hearings; and under PURA §15.024(c) which eliminates the 30-day "cure" period for violations of PURA Chapters 17, 55, and 64.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 14.052, and 15.024(c), and Chapters 17, 55, and 64.

**§22.246. Administrative Penalties.**

- (a) **Scope.** This section is intended to address enforcement actions related to administrative penalties only and does not apply to any other enforcement actions that may be undertaken by the commission or the commission staff.
- (b) **Definitions.** The following words and terms, when used in this section, shall have the following meanings unless the context clearly indicates otherwise:
- (1) **Executive director** — The executive director of the commission or the executive director's designee.
  - (2) **Person** — Includes a natural person, partnership of two or more persons having a joint or common interest, mutual or cooperative association, and corporation.
  - (3) **Violation** — Any activity or conduct prohibited by the Public Utility Regulatory Act (PURA), commission rule or commission order.
  - (4) **Continuing violation** — Except for a violation of PURA Chapter 17, 55, or 64, and commission rules or commission orders pursuant to those chapters, any instance in which the person alleged to have committed a violation attests that a violation has been remedied and was accidental or inadvertent and subsequent investigation reveals that the violation has not been remedied or was not accidental or inadvertent.
- (c) **Amount of penalty.**

- (1) Each day a violation continues or occurs is a separate violation for which a penalty can be levied, regardless of the status of any administrative procedures that are initiated under this subsection.
- (2) The penalty for each separate violation may be in an amount not to exceed \$5,000.00 per day.
- (3) The amount of the penalty shall be based on:
  - (A) the seriousness of the violation, including the nature, circumstances, extent, and gravity of any prohibited acts, and the hazard or potential hazard created to the health, safety, or economic welfare of the public;
  - (B) the economic harm to property or the environment caused by the violation;
  - (C) the history of previous violations;
  - (D) the amount necessary to deter future violations;
  - (E) efforts to correct the violation; and
  - (F) any other matter that justice may require, including, but not limited to, the respondent's timely compliance with requests for information, completeness of responses, and the manner in which the respondent has cooperated with the commission during the investigation of the alleged violation.
- (d) **Initiation of investigation.** Upon receiving an allegation of a violation or of a continuing violation, the executive director shall determine whether an investigation should be initiated.

- (e) **Report of violation or continuing violation.** If, based on the investigation undertaken pursuant to subsection (d) of this section, the executive director determines that a violation or a continuing violation has occurred, the executive director may issue a report to the commission.
- (1) **Contents of the report.** The report shall state the facts on which the determination is based and a recommendation on the imposition of a penalty, including a recommendation on the amount of the penalty.
- (2) **Notice of report.** Within 14 days after the report is issued, the executive director shall, by certified mail, return receipt requested, give written notice of the report to the person who is alleged to have committed the violation or continuing violation which is the subject of the report. The notice must include:
- (A) a brief summary of the alleged violation or continuing violation;
  - (B) a statement of the amount of the recommended penalty;
  - (C) a statement that the person who is alleged to have committed the violation or continuing violation has a right to a hearing on the occurrence of the violation or continuing violation, the amount of the penalty, or both the occurrence of the violation or continuing violation and the amount of the penalty;
  - (D) a copy of the report issued to the commission pursuant to this subsection; and,
  - (E) a copy of this section, §22.246 of this title (relating to Administrative Penalties).
- (f) **Options for response to notice of violation or continuing violation.**
- (1) **Opportunity to remedy.**

- (A) This paragraph does not apply to a violation of PURA Chapters 17, 55, or 64, or of a commission rule or commission order pursuant to those chapters.
- (B) Within 40 days of the date of receipt of a notice of violation set out in subsection (e)(2) of this section, the person against whom the penalty may be assessed may file with the commission proof that the alleged violation has been remedied and that the alleged violation was accidental or inadvertent. A person who claims to have remedied an alleged violation has the burden of proving to the commission both that an alleged violation was remedied before the 31st day after the date the person received the report of violation and that the alleged violation was accidental or inadvertent. Proof that an alleged violation has been remedied and that the alleged violation was accidental or inadvertent shall be evidenced in writing, under oath, and supported by necessary documentation.
- (C) If the executive director determines that the alleged violation has been remedied, was remedied within 30 days, and that the alleged violation was accidental or inadvertent, no penalty will be assessed against the person who is alleged to have committed the violation.
- (D) If the executive director determines that the alleged violation was not remedied or was not accidental or inadvertent, the executive director shall make a determination as to what further proceedings are necessary.

- (E) If the executive director determines that the alleged violation is a continuing violation, the executive director shall institute further proceedings, including referral of the matter for hearing pursuant to subsection (h) of this section.
- (2) **Payment of penalty.** Within 30 days after the date the person receives the notice set out in subsection (e)(2) of this section, the person may accept the determination and recommended penalty through a written statement sent to the executive director. If this option is selected, the person shall take all corrective action required by the commission. The commission by written order shall approve the determination and impose the recommended penalty.
- (3) **Request for hearing.** Not later than the 20th day after the date the person receives the notice set out in subsection (e)(2) of this section, the person may submit to the executive director a written request for a hearing on the occurrence of the violation or continuing violation, the amount of the penalty, or both the occurrence of the violation or continuing violation and the amount of the penalty.
- (g) **Settlement conference.** A settlement conference may be requested by any party to discuss the occurrence of the violation or continuing violation, the amount of the penalty, and the possibility of reaching a settlement prior to hearing. A settlement conference is not subject to the Texas Rules of Evidence or the Texas Rules of Civil Procedure; however, the discussions are subject to Texas Rules of Civil Evidence 408, concerning compromise and offers to compromise.

- (1) If a settlement is reached:
    - (A) the parties shall file a report with the executive director setting forth the factual basis for the settlement;
    - (B) the executive director shall issue the report of settlement to the commission; and
    - (C) the commission by written order will approve the settlement.
  - (2) If a settlement is reached after the matter has been referred to SOAH, the matter shall be returned to the commission. If the settlement is approved, the commission shall issue an order memorializing commission approval and setting forth commission orders associated with the settlement agreement.
- (h) **Hearing.** If a person requests a hearing under subsection (f)(3) of this section, or fails to respond timely to the notice of the report of violation or continuing violation provided pursuant to subsection (e)(2) of this section, or if the executive director determines that further proceedings are necessary, the executive director shall set a hearing, provide notice of the hearing to the person, and refer the case to SOAH pursuant to §22.207 of this title (relating to Referral to State Office of Administrative Hearings). The case shall then proceed as set forth in paragraphs (1)-(5) of this subsection.
- (1) The commission shall provide the SOAH administrative law judge a list of issues or areas that must be addressed.
  - (2) The hearing shall be conducted in accordance with the provisions of this chapter.



- (3) The SOAH administrative law judge shall promptly issue to the commission a proposal for decision, including findings of fact and conclusions of law, about:
  - (A) the occurrence of the alleged violation or continuing violation;
  - (B) whether the alleged violation was cured and was accidental or inadvertent for a violation of any chapter other than PURA Chapters 17, 55, or 64, or of a commission rule or commission order pursuant to those chapters; and
  - (C) the amount of the proposed penalty.
- (4) Based on the SOAH administrative law judge's proposal for decision, the commission may:
  - (A) determine that a violation or continuing violation has occurred and impose a penalty;
  - (B) determine that a violation occurred but that, pursuant to subsection (f)(1) of this section, the person remedied the violation within 30 days and proved that the violation was accidental or inadvertent, and that no penalty will be imposed; or
  - (C) determine that no violation or continuing violation has occurred.
- (5) Notice of the commission's order issued pursuant to paragraph (4) of this subsection shall be provided under the Government Code, Chapter 2001 and §22.263 of this title (relating to Final Orders) and shall include a statement that the person has a right to judicial review of the order.

This agency hereby certifies that the rule, as adopted, 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 amendments to §22.246 relating to Administrative Penalties are hereby adopted with no changes to the text as proposed.

**ISSUED IN AUSTIN, TEXAS ON THE 22nd DAY OF FEBRUARY 2000.**

**PUBLIC UTILITY COMMISSION OF TEXAS**

---

**Chairman Pat Wood, III**

---

**Commissioner Judy Walsh**

---

**Commissioner Brett A. Perlman**