PROJECT NO. 25959

RULEMAKING ON OVERSIGHT OF INDEPENDENT ORGANIZATIONS IN THE COMPETITIVE ELECTRIC MARKET	**§ § § §**	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER ADOPTING NEW PROCEDURAL RULE §22.251
AS APPROVED AT THE FEBRUARY 13, 2003 OPEN MEETING

The Public Utility Commission of Texas (commission) adopts new §22.251, relating to Review of Electric Reliability Council of Texas (ERCOT) Conduct, with changes to the proposed text as published in the October 11, 2002 *Texas Register* (27 TexReg 9521). The new section is necessary to establish procedures for affected entities to make written complaints to the commission regarding decisions or acts, committed or omitted, by ERCOT. The scope of permitted complaints includes ERCOT's performance as an independent organization under the Public Utility Regulatory Act (PURA) and ERCOT's promulgation and enforcement of protocols and procedures relating to reliability, transmission access, customer registration, and settlement. The new section is adopted under Project Number 25959.

In addition to this new section, the commission is also adopting under Project Number 25959 the following substantive rules in Chapter 25 of this title (relating to Substantive Rules Applicable to Electric Service Providers): an amendment to §25.361, relating to Electric Reliability Council of Texas (ERCOT), and new §25.362, relating to Electric Reliability Council of Texas (ERCOT) Governance.

The commission staff conducted a public hearing on the proposed new section on December 3, 2002, at which an ERCOT representative offered oral comments. These comments have been summarized herein, together with ERCOT's written comments.

The commission received comments on the proposed amendments on November 12, 2002 from the Alliance for Retail Marketers, an association consisting of the retail electric providers Constellation New Energy, Inc., Green Mountain Energy Co., and Strategic Energy Co. (ARM); American Electric Power (AEP); the City of Austin, doing business as Austin Energy, and the City of San Antonio, acting by and through the San Antonio City Public Service Board (City Utilities); CenterPoint Energy, Inc. (CenterPoint); a coalition of consumer organizations consisting of Texas Ratepayers' Organization to Save Energy, Texas Legal Services Center, Consumers Union Southwest Regional Office, and Public Citizen Texas Office (Consumers); ERCOT; and TXU Energy Trading Company L.P., TXU Energy Retail Company L.P., and Oncor Electric Delivery Co. (collectively, TXU). Reply comments were submitted by ERCOT, TXU and the Center for Public Policy Dispute Resolution (CPPDR). All comments have been fully considered by the commission.

The commission specifically requested comments on the following questions:

1. Does the requirement in the Administrative Procedure Act, Texas Government Code §2003.049(b), that the utility division of the State Office of Administrative Hearings "conduct hearings related to contested cases" bar a commission administrative law judge (ALJ) from conducting a hearing to determine whether

to grant a request for suspension of enforcement, as contemplated by proposed §22.251(i) (relating to Suspension of Enforcement)? (Note that the proposed rule contained a mistaken reference in this question to §22.251(f), but correctly identified the title and substance of the referenced subsection.)

2. Does the requirement in the Administrative Procedure Act, Texas Government Code §2003.049(b), that the utility division of the State Office of Administrative Hearings "conduct hearings related to contested cases" bar a commission ALJ from conducting binding mini-trials and moderated settlement conferences by agreement of the parties as contemplated by proposed §22.251(n) (relating to Availability of Alternative Dispute Resolution)? (Note that the proposed rule contained a mistaken reference in this question to §22.251(m), but correctly identified the title and substance of the referenced subsection.)
3. Should proposed §22.251(b) be modified to clarify that all appeals and complaints of ERCOT decisions shall be heard by the commission pursuant to this section prior to an appeal to any court of competent jurisdiction?
4. Should §22.251(c)(1)(E) be deleted because it is duplicative of the flexibility contained in the good cause exception provision, §22.251(c)(2)?

Because each of the questions relates to a specific subsection of the new rule, the comments submitted in response to these questions are summarized together with the comments on the subsection to which they pertain.

ARM, in written comments, and ERCOT, in oral comments at the public hearing, generally supported the adoption of this rule.

§22.251(a) Purpose

City Utilities commented that the term "entity" should be employed where the new rule identifies those who may avail themselves of the procedures established by the rule. City Utilities represented that municipally owned utilities are not included within the definitions of persons, or affected persons contained in PURA, the Texas Government Code, and the commission's rules, or the definition of public utilities contained in PURA. CenterPoint, by contrast, commented the use of the term "party" is too broad, and should be changed to "Market Participant directly subject to the ERCOT Protocols and directly affected by ERCOT's decisions." Centerpoint also commented that commission Staff and the Office of Public Counsel (OPC) can represent the public interest and interests of residential and small business customers.

In response to CenterPoint's comments, the commission declines to make non-market participants dependent on others to safeguard their rights. Instead, the new rule is intended to ensure that those who are or would be harmed by ERCOT actions have recourse to the commission for relief. Foreclosing an interested person from challenging an ERCOT action before the commission is likely to result in challenges in other forums, such as the courts, that are less well equipped to resolve them. The commission adopts the change proposed by City Utilities, that the word "entity" be substituted for "party" in

the new rule, except where the term is used to refer to a participant in a proceeding at the commission.

§22.251(b) Scope of complaints

AEP, TXU, and ERCOT commented that, based on both the commission's statutory duty under PURA and the commission's substantive expertise, the commission should hear initial appeals of ERCOT issues, to the extent the appeal involves issues over which the commission has jurisdiction. Both AEP and Consumers commented that the commission could not determine the scope of its jurisdiction through this rulemaking. CenterPoint commented that the procedural path for review of ERCOT decisions should be made clearer.

The commission acknowledges that it is not empowered to carve out for itself areas of exclusive jurisdiction. The question posed in connection with this subsection of the proposed rule was intended to solicit input regarding whether the commission should make express the requirement that issues over which the commission has jurisdiction be brought first to the commission. The benefits that the commission envisioned of including such a requirement included limiting the exercise of concurrent jurisdiction and the inefficiencies attendant to cases pending simultaneously on an administrative and judicial level, helping to limit the cases in which courts are called upon to rule on areas involving technical issues without the benefit of the commission's expertise, and reducing confusion. Based on the comments and its own legal analysis, the commission is not

including in the new rule a requirement that complaints about, and appeals of, ERCOT actions that are subject to commission jurisdiction must be made to the commission before the complaining or appealing entity seeks relief from Texas state courts. Nevertheless, the commission has an interest in court cases that construe ERCOT's protocols and ERCOT's obligations in the electricity market. In order that the commission gets prompt notice of any such lawsuits, it is adding a new subsection (p) that requires ERCOT to provide prompt notice that a lawsuit has been filed against it or that a proceeding against it has been initiated at the Federal Energy Regulatory Commission.

ERCOT suggested that the rule should refer to ERCOT "procedures" instead of ERCOT "rules," so as to avoid possible confusion with commission rules. ERCOT also commented that the term "settlement" in the proposed rule is a term of art and suggested the use instead of the statutory language that encompasses settlement issues: "accounting for the production and delivery of electricity among generators and all other market participants."

The commission agrees with ERCOT's suggestion and changes the references to ERCOT rules throughout the new rule to refer to ERCOT protocols and procedures, instead of rules. The commission also agrees with ERCOT's comment regarding the use of the term settlement, and the new rule therefore includes ERCOT's proposed language, instead of the term "settlement" that was included in the proposed rule.

§22.251(c) Requirement of compliance with ERCOT Protocols

ERCOT commented that language should be added to provide that the commission will dismiss complaints or appeals if the complainant has failed to comply with applicable ERCOT processes, including timely submittal to ERCOT of written comments on proposed protocols or protocol revisions, unless the commission finds good cause for the failure to comply with such procedures. ERCOT commented that language should be added to subsection (c)(1) and (c)(1)(B) of the new rule to expressly include the requirement that a complainant comply with the ERCOT protocol revision process or other applicable ERCOT prerequisites.

The commission agrees that complaints filed by entities that have not used the relevant ERCOT procedures are subject to dismissal or abatement, absent a showing of satisfaction of one of the conditions established by the rule for avoiding the necessity of complying with ERCOT procedures, and the rule has been clarified to that effect. The commission believes that an entity should participate in ERCOT processes prior to appealing to the commission the board's decision on that matter, unless there is good cause for not so participating. Of course, the rule also provides that the commission staff and OPC are excused from this requirement.

CenterPoint commented that subsection (c)(1) and (c)(1)(B) should be deleted. According to CenterPoint, only a market participant, Staff, or OPC should be allowed to bring a complaint.

The commission declines to exclude non-market participants from the procedures established by the new rule. As explained in connection with §22.251(a), the new rule is intended to ensure that those who are or would be harmed by ERCOT actions have recourse to the commission for relief.

ERCOT also commented that the language "bound to engage in" included in subsection (c)(1)(B) is subject to interpretation and proposed substituting "required to comply with."

The commission agrees that the proposed language was not very clear. The commission is revising §22.251(c)(1)(B) as suggested by ERCOT.

ERCOT commented on one of the exceptions to the requirement that an entity first attempt to resolve an issue in the ERCOT deliberative processes: the use of the standard of whether compliance with ERCOT procedures would ***inhibit*** the ability of the affected entity to provide continuous and adequate service, as included in subsection (c)(1)(C) of the proposed rule. ERCOT argued that this standard is vague and should be replaced by the more concrete and exacting standard of whether compliance with ERCOT procedures would ***prevent*** the ability of the affected entity to provide continuous and adequate service.

The commission believes that the use of the term "prevent" creates a standard that is too difficult to meet. Moreover, the commission's use of the term "inhibit" is based on the

ERCOT's protocols. Section 20.1(3)(c) of the ERCOT Protocols reads: "Nothing in this ADR Procedure is intended to limit or restrict . . . [t]he right of a Market Participant or ERCOT to file a petition seeking direct relief from the PUCT or any other Governmental Authority without first utilizing this ADR Procedure where an action by ERCOT or a Market Participant *might inhibit the ability of the affected party to provide continuous and adequate electric service*." (Emphasis supplied.) For all of these reasons, the commission declines to incorporate ERCOT's proposed change.

TXU commented that §22.251(c)(1)(D) should be deleted. According to TXU, ERCOT protocol processes are adequate, and it would be detrimental to allow complaints regarding the protocol adoption or revision process directly to the commission. ERCOT commented that §22.251(c)(1)(D) should be modified to better reflect what ERCOT understood to be Staff's interest in ensuring that a complainant not be required to engage in additional ERCOT processes prior to complaining to the commission.

Generally, the commission supports the use of ERCOT's protocol processes, except where the complaining entity can show good cause for not complying with those processes. Therefore, the commission has not included proposed subsection (c)(1)(D) in the new rule.

TXU and ERCOT commented generally that the new rule appropriately acknowledges the ERCOT ADR and Protocol Revision processes. However, both TXU and ERCOT commented that §22.251(c)(1)(E) could be used to avoid the employment of those

ERCOT processes, and therefore suggested that §22.251(c)(1)(E) be deleted. CenterPoint and Consumers commented that inclusion of the futility exception in subsection (c)(1)(E) of the proposed rule is both duplicative of the not appropriate/good cause exception in subsection (c)(2), and creates an inconsistent, second standard for bypassing ERCOT's processes.

The commission agrees with the commenters that §22.251(c)(1)(E) of the proposed rule is unnecessary. A complainant contending that compliance with ERCOT processes would be futile can make such a claim pursuant to §22.251(c)(2), arguing that good cause exists for excusing compliance with ERCOT ADR or other applicable processes. Therefore, the commission has not included proposed subsection (c)(1)(E) in the new rule.

§22.251(d) Formal complaint

ERCOT commented that the timelines in the new rule should be shortened. ERCOT noted that most complaints would have already been subject to some process and that prompt resolution of the issues is desirable. ERCOT also commented that it appreciated the commission's adoption of the 35-day appeal period for complaints related to protocol revisions, but suggested more general language to embrace other ERCOT processes with specific timelines. Finally, ERCOT commented that issues for which a docket has already been established be excluded from the timeline established by subsection (d).

The deadlines in the proposed rule were intended to provide for prompt but orderly resolution of disputes, recognizing that interested parties must have an opportunity to prepare information to present their position to the commission and for the commission to consider it. The commission is adopting a uniform deadline of 35 days for filing appeals of ERCOT actions. Having more than one deadline for appeal might engender confusion, in some cases, about what the applicable deadline is. This confusion can be avoided by a uniform deadline for filing complaints. The commission is not shortening the other procedural deadlines in the rules. The commission does not believe that it is realistic to shorten the other procedural deadlines, if it is to afford parties a fair opportunity to present their position. The commission also declines to adopt ERCOT's proposed language to accommodate cases in which a deadline is established by ERCOT protocols. ERCOT's proposed language would allow ERCOT to unilaterally change the applicable timelines and might allow ERCOT to establish unreasonably short deadlines for filing a complaint.

With respect to ERCOT's comment that issues for which a docket has already been established should be excluded from the timeline established by subsection (d), ERCOT did not explain how such a docket might have already been established. Regardless, §22.251(d) of the new rule affords the presiding officer the flexibility to extend the deadline upon a showing of good cause. In addition, §22.251(k) allows the presiding officer to extend or shorten the time periods established by the new rule. The commission concludes that this flexibility is sufficient to accommodate the situations

apparently contemplated by ERCOT and that the proposed change is therefore unnecessary.

Consumers commented that complainants may not be able to identify all persons who would be directly affected by the commission's decision, as required by proposed §22.251(d)(1)(B)(ii). Consumers suggested that the language therefore be modified to require the identification of all classes of persons who would be directly affected, to the extent those classes of persons can be identified.

The commission agrees that it may not always be possible for a complainant to name all persons who will be directly affected as a result of the commission's decision. Therefore, the new rule includes language requiring a complainant to identify all entities or classes of entities who will be affected, to the extent those entities or classes of entities can reasonably be identified.

ERCOT commented that §22.251(d)(1)(B)(iv) should have language added to clarify the applicable ERCOT protocols referred to, and to make clearer that the complainant must specify the provision of subsection (c) upon which the complainant relies to excuse its compliance with applicable ERCOT procedures.

The commission notes that the proposed rule contained a mistaken reference to subsection (b) and the new rule corrects that reference. The commission also agrees with the sentiment of ERCOT's comment and has added language clarifying the reference to

ERCOT protocols and the statement required of complainants who contended that they are not required to use the ERCOT procedures pursuant to §22.251(c).

ERCOT commented that §22.251(d)(1)(C) should be modified to require complainants to provide a detailed and specific statement of the issues presented for commission review.

The commission agrees with ERCOT's proposed change and the new rule includes ERCOT's proposed language.

ERCOT commented that §22.251(d)(2) should make explicit reference to review of requests for suspension of enforcement under §22.251(i).

The commission agrees that the reference proposed by ERCOT might make the new rule clearer. The new rule is therefore modified to include a reference to §22.251(i).

ERCOT recommended that the rule require service of a copy of a complaint on ERCOT's General Counsel.

ERCOT's comment was unopposed and does not appear to impose any undue hardship on an entity. Therefore, ERCOT's proposed language is included in the new rule.

§22.251(e) Notice

ERCOT commented that it is standard practice, and the new rule should therefore expressly allow notice to be provided to Qualified Scheduling Entities (QSEs) and ERCOT committees and subcommittees through electronic and website posting. ERCOT also suggested that the rule allow it to use electronic email attachments to serve a copy of the complaint on interested entities, as ERCOT is required to do. ERCOT also proposed that the requirement that the docket number be included in the notice be modified to apply only if a docket number has been assigned to the complaint.

The commission agrees that notice to QSEs and ERCOT committees and subcommittees through electronic and website posting is standard practice for ERCOT market participants. The language of the proposed rule was intended to authorize this practice. ERCOT's proposed change to more explicitly authorize such notice does not seem necessary. Regarding ERCOT's proposed clarification that the copy of the complaint ERCOT is required to provide may be an electronic copy, the commission had contemplated that the copy would be an attached electronic copy, and ERCOT's proposed clarification is consistent with the commission's intent and is therefore adopted. Finally, the requirement that the docket number be provided is retained in the rule. This is an important piece of information for entities who wish to participate in a proceeding and is normally available shortly after a complaint is filed.

§22.251(f) Response to complaint

ERCOT proposed that the response to a complaint be due in 20 days, instead of the 28 days allowed for in the proposed rule.

As is noted above, the rule retains essentially the same procedural timeline as was included in the proposed rule, to allow entities adequate time to prepare information to present their position to the commission.

§22.251(g) Comments by commission staff and motions to intervene

ERCOT proposed that comments by commission staff representing the public interest and motions to intervene be due in 30 days, instead of the 42 days allowed for in the proposed rule.

As is noted above, the rule retains essentially the same procedural timeline as was included in the proposed rule, to allow entities adequate time to prepare information to present their position to the commission.

§22.251(h) Reply

ERCOT commented that the new rule should require that a reply, if any, be filed within 40 days, instead of the 52 days allowed for in the proposed rule.

As is noted above, the rule retains essentially the same procedural timeline as was included in the proposed rule, to allow entities adequate time to prepare information to present their position to the commission.

§22.251(i) Suspension of enforcement

AEP, TXU, CenterPoint, and Consumers commented that the Administrative Procedure Act (APA), Texas Government Code Annotated §2003.049(b), requires that the utility division of the State Office of Administrative Hearings (SOAH) conduct hearings related to contested cases before the commission, unless a hearing is conducted by one or more commissioners. These commenters quoted §2001.003(1) of the APA for the proposition that a "contested case" is "a proceeding . . . in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing." Therefore, according to these commenters, a commission administrative law judge (ALJ) cannot conduct a hearing to determine whether to grant a request for suspension of enforcement. AEP commented that a determination cannot be made regarding a request for suspension of enforcement until after a hearing is held by either a SOAH ALJ or one or more of the commissioners.

ERCOT commented that the commission should favor prospective relief unless the commissioners find good cause exists for suspending enforcement. ERCOT commented that good cause should be found only in the most extraordinary of instances, such as

where an entity's financial stability is threatened. ERCOT also commented that the APA does not prohibit, and ERCOT does not oppose, a commission ALJ conducting an evidentiary proceeding for the limited purpose of developing an evidentiary record to aid the commissioners in deciding whether to grant a requested suspension of enforcement.

The commission agrees with AEP, TXU, CenterPoint, and Consumers that the commission ALJ may not conduct a hearing in a contested case proceeding. Therefore, the new rule omits proposed §22.251(i)(1) that would have allowed a commission ALJ to convene a hearing to adduce evidence as to whether to suspend enforcement of the ERCOT action or decision that is the source of a complaint. The commission does not agree with AEP, however, that a hearing must always be held before a decision can made as to whether to grant a request to suspend enforcement. The new rule establishes a good cause standard for granting a request for suspension of enforcement and places the burden of proof on the complainant. The description of the good cause standard has been modified to correspond more closely to the standard that courts apply in deciding whether to grant an injunction. The commission also agrees that relief should generally be prospective.

§22.251(l) Standard for review

ERCOT commented that the commission should avoid directly ordering specific changes to the ERCOT protocols and ERCOT systems and proposed instead that, when the commission finds merit to a complaint, the commission instead issue only orders

providing guidance to ERCOT for further action, including developing and implementing protocol revisions. CenterPoint commented that, because §22.251(l) would give deference only to ERCOT decisions made under procedures equivalent to those required under the APA, and because ERCOT does not employ such procedures, the commission would review virtually all complaints on a *de novo* basis. CenterPoint commented that this would be a cumbersome process that would cause uncertainty as to the effect and enforceability of ERCOT decisions and delay implementation of market corrections.

The commission agrees that it will generally be preferable for the commission to direct ERCOT to make necessary changes. However, there may be instances in which other relief is more appropriate. Consequently, the new rule includes language similar to that proposed by ERCOT, but reserves to the commission the discretion to order such relief as the commission deems appropriate. The provision concerning the granting of relief has been moved from subsection (l), which establishes the standard for review, to new subsection (o).

The commission disagrees with CenterPoint's characterization of the new rule, ERCOT's current processes, and the likely effect of the new rule. First, the new rule does not contemplate a *de novo* review of virtually all ERCOT actions or decisions. Indeed, §22.251(l) specifically refers to ERCOT ADR procedures that include processes in which a neutral arbiter makes findings of fact and due process guarantees are observed. The use of such a procedure in the ERCOT ADR proceeding would result in the application of a substantial evidence, arbitrary and capricious standard at the commission. Complaints

requiring *de novo* resolution by the commission will be limited to those in which parties have not been afforded adequate process, or necessary factual determinations have not yet been made.

§22.251(n) Availability of alternative dispute resolution

In response to question number 2 posed by the commission, AEP commented that the APA does not prohibit a commission ALJ from conducting mini-trials and moderated settlement conferences, provided such proceedings are either non-binding or by agreement of the parties. TXU and ERCOT commented that the proceedings described in §22.251(n) may be conducted by a commission ALJ, provided the parties participate voluntarily. City Utilities, Consumers, and CPPDR commented that the language of §22.251(n) varies slightly from the language of Civil Remedies and Practices Code Chapter 154 (which authorizes the use of ADR procedures), particularly with respect to the proposed use of binding mini-trials.

The Texas Government Code provides that "[i]t is the policy of this state that disputes before governmental bodies be resolved as fairly and expeditiously as possible and that each governmental body support this policy by developing and using alternative dispute resolution (ADR) procedures in appropriate aspects of the governmental body's operations and programs." Texas Government Code Annotated §2009.002. ADR processes include both the procedures described by Chapter 154, Civil Practice and

Remedies Code, and combinations of the procedures described by Chapter 154. Texas Government Code Annotated §2009.003(1).

Chapter 154 of the Civil Practices and Remedies Code lists the following ADR procedures: mediations, mini-trials, moderated settlement conferences, summary jury trials, and arbitrations. Texas Civil Practices and Remedies Code Annotated §§154.023-154.027. Parties may agree in advance that an award issued in an arbitration will be binding and enforceable. Texas Civil Practices and Remedies Code Annotated §154.027(b). Therefore, the commission concludes that a binding mini-trial, if agreed to by the parties in advance, is a combination of procedures described by Chapter 154 of the Texas Civil Practices and Remedies Code. Moreover, the use of a binding mini-trial, where agreed to by the parties, may provide expeditious resolution of certain disputes and is therefore appropriate under Texas Government Code Annotated §2009.002.

However, the commission agrees that the rule can adequately embrace the range of permitted ADR processes by referring to the relevant statutes and omitting examples of available ADR processes and combinations. Accordingly, the new rule omits the list of examples included in the proposed rule.

All comments, including any not specifically discussed herein, were fully considered by the commission. In adopting this section, the commission makes other minor modifications for the purpose of clarifying the rule.

This new section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998, Supplement 2003) (PURA), which provide the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure; and specifically, PURA §39.151, which grants the commission authority to establish the terms and conditions for the exercise of ERCOT's authority.

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

§22.251. Review of Electric Reliability Council of Texas (ERCOT) Conduct.

(a) **Purpose.** This section prescribes the procedure by which an entity, including the commission staff and the Office of Public Utility Counsel, may appeal a decision made by ERCOT or any successor in interest to ERCOT.

(b) **Scope of complaints.** Any affected entity may complain to the commission in writing, setting forth any conduct that is in violation or claimed violation of any law that the commission has jurisdiction to administer, of any order or rule of the commission, or of any protocol or procedure adopted by ERCOT pursuant to any law that the commission has jurisdiction to administer. For the purpose of this section, the term "conduct" includes a decision or an act done or omitted to be done. The scope of permitted complaints includes ERCOT's performance as an independent organization under the PURA including, but not limited to, ERCOT's promulgation and enforcement of procedures relating to reliability, transmission access, customer registration, and accounting for the production and delivery of electricity among generators and other market participants.

(c) **Requirement of compliance with ERCOT Protocols.** An entity must use Section 20 of the ERCOT Protocols (Alternative Dispute Resolution Procedures, or ADR), or Section 21 of the Protocols (Process for Protocol Revision), or other Applicable ERCOT Procedures, before presenting a complaint to the commission. For the purpose of this section, the term "Applicable ERCOT Procedures" refers

to Sections 20 and 21 of the ERCOT Protocols and other applicable sections of the ERCOT protocols that are available to challenge or modify ERCOT conduct, including participation in the protocol revision process. If a complainant fails to use the Applicable ERCOT Procedures, the presiding official may dismiss the complaint or abate it to give the complainant an opportunity to use the Applicable ERCOT Procedures.

(1) A complainant may present a formal complaint to the commission, without first using the Applicable ERCOT Procedures, if:

(A) the complainant is the commission staff or the Office of Public Utility Counsel;

(B) the complainant is not required to comply with the Applicable ERCOT Procedures; or

(C) the complainant seeks emergency relief necessary to resolve health or safety issues or where compliance with the Applicable ERCOT Procedures would inhibit the ability of the affected entity to provide continuous and adequate service.

(2) For any complaint that is not addressed by paragraph (1) of this subsection, the complainant may submit to the commission a written request for waiver of the requirement for using the Applicable ERCOT Procedures. The complainant shall clearly state the reasons why the Applicable ERCOT Procedures are not appropriate. The commission may grant the request for good cause.

(3) For complaints for which ADR proceedings have not been conducted at ERCOT, the presiding officer may require informal dispute resolution.

(d) **Formal complaint.** A formal complaint shall be filed within 35 days of the ERCOT conduct complained of, except as otherwise provided in this subsection. When an ERCOT ADR procedure has been timely commenced, a complaint concerning the conduct or decision that is the subject of the ADR procedure shall be filed no later than 35 days after the completion of the ERCOT ADR procedure. The presiding officer may extend the deadline, upon a showing of good cause, including the parties' agreement to extend the deadline to accommodate ongoing efforts to resolve the matter informally, and the complainant's failure to timely discover through reasonable efforts the injury giving rise to the complaint.

(1) The complaint shall include the following information:

(A) a complete list of all complainants and the entities against whom the complainant seeks relief and the addresses, and facsimile transmission numbers and e-mail addresses, if available, of the parties' counsel or other representatives;

(B) a statement of the case that ordinarily should not exceed two pages and should not discuss the facts. The statement must contain the following:

(i) a concise description of any underlying proceeding or any prior or pending related proceedings;

(ii) the identity of all entities or classes of entities who would be directly affected by the commission's decision, to the extent such entities or classes of entities can reasonably be identified;

(iii) a concise description of the conduct from which the complainant seeks relief;

(iv) a statement of the ERCOT procedures, protocols, by-laws, articles of incorporation, or law applicable to resolution of the dispute and whether the complainant has used the Applicable ERCOT Procedures for challenging or modifying the complained of ERCOT conduct or decision (as described in subsection (c) of this section) and, if not, the provision of subsection (c) of this section upon which the complainant relies to excuse its failure to use the Applicable ERCOT Procedures;

(v) a statement of whether the complainant seeks a suspension of the conduct or implementation of the decision complained of; and

(vi) a statement without argument of the basis of the commission's jurisdiction.

(C) a detailed and specific statement of all issues or points presented for commission review;

(D) a concise statement without argument of the pertinent facts. Each fact shall be supported by references to the record, if any;

(E) a clear and concise argument for the contentions made, with appropriate citation to authorities and to the record, if any;

(F) a statement of all questions of fact, if any, that the complainant contends require an evidentiary hearing;

(G) a short conclusion that states the nature of the relief sought; and

(H) a record consisting of a certified or sworn copy of any document constituting or evidencing the matter complained of. The record may also contain any other item pertinent to the issues or points presented for review, including affidavits or other evidence on which the complainant relies.

(2) If the complainant seeks to suspend the conduct or the implementation of the decision complained of while the complaint is pending and all entities against whom the complainant seeks relief do not agree to the suspension, the complaint shall include a statement of the harm that is likely to result to the complainant if enforcement is not suspended. Harm may include deprivation of an entity's ability to obtain meaningful or timely relief if a suspension is not entered. A request for suspension of the conduct or enforcement of a decision shall be reviewed in accordance with subsection (i) of this section.

(3) All factual statements in the complaint shall be verified by affidavit made on personal knowledge by an affiant who is competent to testify to the matters stated.

(4) A complainant shall file the required number of copies of the formal complaint, pursuant to §22.71 of this title (relating to Filing of Pleadings, Documents, and Other Materials). A complainant shall serve copies of the complaint and other documents, in accordance with §22.74 of this title (relating to Service of Pleadings and Documents), and in particular shall serve a copy of the complaint on ERCOT's General Counsel, every other entity from whom relief is sought, the Office of Public Utility Counsel, and any other party.

(e) **Notice.** Within 14 days of receipt of the complaint, ERCOT shall provide notice of the complaint by email to all qualified scheduling entities and, at ERCOT's discretion, all relevant ERCOT committees and subcommittees. Notice shall consist of an attached electronic copy of the complaint, including the docket number, but may exclude the record required by subsection (d)(1)(H) of this section.

(f) **Response to complaint.** A response to a complaint shall be due within 28 days after receipt of the complaint and shall conform to the requirements for the complaint set forth in subsection (d) of this section except that:

(1) the list of parties and counsel is not required unless necessary to supplement or correct the list contained in the complaint;

(2) the response need not include a statement of the case, a statement of the issues or points presented for commission review, or a statement of the facts, unless the respondent contests that portion of the complaint;

(3) a statement of jurisdiction should be omitted unless the complaint fails to assert valid grounds for jurisdiction, in which case the reasons why the commission lacks jurisdiction shall be concisely stated;

(4) the argument shall be confined to the issues or points raised in the complaint;

(5) the record need not include any item already contained in a record filed by another party; and

(6) if the complainant seeks a suspension of the conduct or implementation of the decision complained of, the response shall state whether the respondent opposes the suspension and, if so, the basis for the opposition, specifically stating the harm likely to result if a suspension is ordered.

(g) **Comments by commission staff and motions to intervene.** Commission staff representing the public interest shall file comments within 45 days after the date on which the complaint was filed. In addition, any party desiring to intervene pursuant to §22.103 of this title (relating to Standing to Intervene) shall file a motion to intervene within 45 days after the date on which the complaint was filed. A motion to intervene shall be accompanied by a response to the complaint.

(h) **Reply.** The complainant may file a reply addressing any matter in a party's response or commission staff's comments. A reply, if any, must be filed within 55 days after the date on which the complaint was filed. However, the commission may consider and decide the matter before a reply is filed.

(i) **Suspension of enforcement.** The ERCOT conduct complained of shall remain in effect until and unless the presiding officer or the commission issues an order suspending the conduct or decision. If the complainant seeks to suspend the conduct or implementation of the decision complained of while the complaint is pending and all entities against whom the complainant seeks relief do not agree to the suspension, the complainant must demonstrate that there is good cause for suspension. The good cause determination required by this subsection shall be based on an assessment of the harm that is likely to result to the complainant if a suspension is not ordered, the harm that is likely to result to others if a suspension is ordered, the likelihood of the complainant's success on the merits of the complaint, and any other relevant factors as determined by the commission or the presiding officer.

(1) The presiding officer may issue an order, for good cause, on such terms as may be reasonable to preserve the rights and protect the interests of the parties during the processing of the complaint, including requiring the complainant to provide reasonable security, assurances, or to take certain actions, as a condition for granting the requested suspension.

(2) A party may appeal a decision of a presiding officer granting or denying a request for a suspension, pursuant to §22.123 of this title (relating to Appeal of an Interim Order and Motions for Reconsideration of Interim Orders Issued by the Commission).

(j) **Oral argument.** If the facts are such that the commission may decide the matter without an evidentiary hearing on the merits, a party desiring oral argument shall comply with the procedures set forth in §22.262(d) of this title (relating to Commission Action After a Proposal for Decision). In its discretion, the commission may decide a case without oral argument if the argument would not significantly aid the commission in determining the legal and factual issues presented in the complaint.

(k) **Extension or shortening of time limits.** The time limits established by this section are intended to facilitate the expeditious resolution of complaints brought pursuant to this section.

(1) The presiding officer may grant a request to extend or shorten the time periods established by this rule for good cause shown. Any request or motion to extend or shorten the schedule must be filed prior to the date on which any affected filing would otherwise be due. A request to modify the schedule shall include a representation of whether all other parties agree with the request, and a proposed schedule.

(2) For cases to be determined after the making of factual determinations or through commission ADR as provided for in subsection (n) of this section, the presiding officer shall issue a procedural schedule.

(l) **Standard for review.** If the factual determinations supporting the conduct complained of have not been made in a manner that meets the procedural standards specified in this subsection, or if factual determinations necessary to the resolution of the matter have not been made, the commission will resolve any factual issues on a *de novo* basis. If the factual determinations supporting the conduct complained have been made in a manner that meets the procedural standards specified in this subsection, the commission will reverse a factual finding only if it is not supported by substantial evidence or is arbitrary and capricious. The procedural standards in this subsection require that facts be determined:

(1) In a proceeding to which the parties have voluntarily agreed to participate; and

(2) By an impartial third party under circumstances that are consistent with the guarantees of due process inherent in the procedures described in the Texas Government Code Chapter 2001 (Administrative Procedure Act).

(m) **Referral to the State Office of Administrative Hearings.** If resolution of a complaint does not require determination of any factual issues, the commission may decide the issues raised by the complaint on the basis of the complaint and

the comments and responses. If factual determinations must be made to resolve a complaint brought under this section, and the parties do not agree to the making of all such determinations pursuant to a procedure described in subsection (n) of this section, the matter may be referred to the State Office of Administrative Hearings for the making of all necessary factual determinations and the preparation of a proposal for decision, including findings of fact and conclusions of law, unless the commission or a commissioner serves as the finder of facts.

(n) **Availability of alternative dispute resolution.** Pursuant to Texas Government Code Chapter 2009 (Governmental Dispute Resolution Act), the commission shall make available to the parties alternative dispute resolution procedures described by Civil Practices and Remedies Code Chapter 154, as well as combinations of those procedures. The use of these procedures before the commission for complaints brought under this section shall be by agreement of the parties only.

(o) **Granting of relief.** Where the commission finds merit in a complaint and that corrective action is required by ERCOT, the commission shall issue an order granting the relief the commission deems appropriate, including, but not limited to:

(1) Entering an order suspending the conduct or implementation of the decision complained of;

(2) Ordering that appropriate protocol revisions be developed;

(3) Providing guidance to ERCOT for further action, including guidance on the development and implementation of protocol revisions; and

(4) Ordering ERCOT to promptly develop protocols revisions for commission approval.

(p) **Notice of proceedings affecting ERCOT.** Within seven days of ERCOT receiving a pleading instituting a lawsuit against it concerning ERCOT's conduct as described in subsection (b) of this section, ERCOT shall notify the commission of the lawsuit by filing with the commission, in the commission project number designated by the commission for such filings, a copy of the pleading instituting the lawsuit. In addition, within seven days of receiving notice of a proceeding at the Federal Energy Regulatory Commission in which relief is sought against ERCOT, ERCOT shall notify the commission by filing with the commission, in the commission project number designated by the commission for such filings, a copy of the notice received by ERCOT.

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 §22.251, relating to Review of Electric Reliability Council of Texas (ERCOT) Conduct, is hereby adopted with changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE 5th DAY OF MARCH 2003.

PUBLIC UTILITY COMMISSION OF TEXAS

_____

Rebecca Klein, Chairman

_____

Brett A. Perlman, Commissioner

_____

Julie Caruthers Parsley, Commissioner