

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS.

Subchapter S. WHOLESALE MARKETS.

§25.504. Wholesale Market Power in the Electric Reliability Council of Texas Power Region.

- (a) **Application.** This section applies to all generation entities in the Electric Reliability Council of Texas (ERCOT). This section defines the term “market power,” as that term is used in §25.503 of this title (relating to Oversight of Wholesale Market Participants).
- (b) **Definitions.** The following terms, when used in this section, shall have the following meanings, unless the context or specific language of a section indicates otherwise:
- (1) **Generation entity** -- An entity that controls a generation resource. An entity affiliated with a generation entity shall be considered part of that generation entity.
 - (2) **Market power** -- The ability to control prices or exclude competition in a relevant market.
 - (3) **Market power abuse** -- Practices by persons possessing market power that are unreasonably discriminatory or tend to unreasonably restrict, impair, or reduce the level of competition, including practices that tie unregulated products or services to regulated products or services or unreasonably discriminate in the provision of regulated services. Market power abuses include predatory pricing, withholding of production, precluding entry, and collusion.
- (c) **Exemption based on installed generation capacity.** A single generation entity that controls less than 5% of the installed generation capacity in ERCOT, as the term “installed generation capacity” is defined in §25.5 of this title (relating to Definitions), excluding uncontrollable renewable resources, is deemed not to have ERCOT-wide market power. Controlling 5% or more of the installed generation capacity in ERCOT does not, of itself, mean that a generating entity has market power.
- (d) **Withholding of production.** Prices offered by a generation entity with market power may be a factor in determining whether the entity has withheld production. A generation entity with market power that prices its services substantially above its marginal cost may be found to be withholding production; offering prices that are not substantially above marginal cost does not constitute withholding of production.
- (e) **Voluntary mitigation plan.** Any generation entity may submit to the commission a voluntary mitigation plan relating to compliance with §25.503(g)(7) of this title or with the Public Utility Regulatory Act (PURA) §39.157(a). Adherence to a commission-approved voluntary mitigation plan must be considered in a proceeding to determine whether the generation entity violated PURA §39.157 or §25.503(g)(7) of this title and, if so, the amount of the administrative penalty to be assessed for the violation.
- (1) The commission will approve the voluntary mitigation plan only if it finds that the plan is in the public interest.
 - (2) A generation entity or commission staff may apply to amend a voluntary mitigation plan that applies to the generation entity.
 - (3) The parties to a proceeding related to the approval or amendment of a voluntary mitigation plan are limited to the generation entity applying for the mitigation plan, commission staff, and the independent market monitor.
 - (4) **Termination of voluntary mitigation plan.**
 - (A) The commission, on its own motion, may terminate, in whole or in part, a voluntary mitigation plan approved under this subsection. The executive director or the executive director’s designee may also terminate a voluntary mitigation plan, in whole or in part, under the following conditions:
 - (i) The executive director or the executive director’s designee must determine that continuation of the plan is no longer in the public interest.
 - (ii) The executive director or the executive director’s designee must provide notice of the termination to the applicable generation entity and file a notice of termination in the same control number in which the plan was approved at least three working days prior to the effective date of the termination. The executive director or the executive director’s designee may withdraw the notice of termination at any point prior to the effective date of the termination.

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- (iii) The commission must affirm or set aside the executive director or the executive director's designee's termination of a voluntary mitigation plan as soon as practicable after the effective date of the termination.
 - (B) A generation entity with a commission-approved voluntary mitigation plan may terminate the plan. The generation entity must provide the executive director or executive director's designee notice of the termination and file a notice of termination in the same control number in which the plan was approved at least three working days prior to the effective date of the termination. The generation entity may withdraw its notice of termination at any point prior to the effective date of the termination.
- (f) **Review of voluntary mitigation plans.**
 - (1) The commission will review each effective voluntary mitigation plan adopted under subsection (e) of this section to determine whether the plan remains in the public interest at least once every two years and not later than 90 days after the implementation date of a wholesale market design change. Commission staff, in consultation with the independent market monitor, will determine when a wholesale market design change requiring the review of voluntary mitigation plans has occurred.
 - (A) In determining whether a change in a commission or ERCOT regulation constitutes a wholesale market design change for purposes of this subsection, commission staff and the independent market monitor must consider whether the change could materially increase the ability of a generation entity with an existing voluntary mitigation plan to exercise market power.
 - (B) If, at the time a proposed change in a commission or ERCOT regulation is being considered for approval by the commission, commission staff has determined that the proposed change would, if implemented, constitute a wholesale market design change, commission staff may include its determination in a filing addressing the proposed change (e.g., as part of a staff memo recommending commission approval of a change in the ERCOT protocols).
 - (C) Commission staff must provide notice, using a reasonable method of notice, to a generation entity with an existing voluntary mitigation plan when its voluntary mitigation plan is under review. This notice must be provided no later than the date commission staff files its recommendation under paragraph (2) of this subsection.
 - (D) Nothing in this paragraph prevents the commission, on its own motion, from determining that a change in a commission or ERCOT regulation constitutes a wholesale market design change for purposes of this subsection and directing commission staff, in consultation with the independent market monitor, to provide a recommendation on whether each existing voluntary mitigation plan remains in the public interest.
 - (2) At least 40 days prior to a deadline established by paragraph (1) of this subsection, commission staff must file a recommendation and draft order addressing whether each voluntary mitigation plan remains in the public interest. Commission staff's recommendation must include the date of the deadline established by paragraph (1) of this subsection and, if applicable, the details and implementation date of the applicable wholesale market design change. As part of its recommendation, for each voluntary mitigation plan adopted prior to September 1, 2023, commission staff must also address whether the plan complies with PURA §15.023(f) and this section.
 - (3) If the commission determines that all or a part of the plan is no longer in the public interest, the commission will terminate any part of the plan that it determines is no longer in the public interest. The generation entity may propose an amended plan for the commission's consideration.