

PROJECT NO. 55948

**REVIEW OF VOLUNTARY
MITIGATION PLAN
REQUIREMENTS**

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**PUBLIC UTILITY COMMISSION

OF TEXAS**

ORDER ADOPTING AMENDMENTS TO 16 TAC §25.504

The Public Utility Commission of Texas (commission) adopts amendments to 16 Texas Administrative Code (TAC) §25.504, relating to Wholesale Market Power in the Electric Reliability Council of Texas Power Region with changes to the proposed text as published in the February 2, 2024 issue of the *Texas Register* (49 TexReg 462). The rule is adopted under Project Number 55948. The amended rule will partially implement Public Utility Regulatory Act (PURA) §15.023 as revised by House Bill (HB) 1500 by the 88th Texas Legislature (R.S.). Specifically, the amended rule revises the standards, processes, and timelines under which voluntary mitigation plans are approved, reviewed, and terminated by the commission. The amended rule also clarifies that adherence to a commission-approved voluntary mitigation plan must be considered in a proceeding to determine whether a generation entity engaged in market power abuse and, if so, the appropriate administrative penalty to be assessed for the violation.

The commission received comments on the proposed rule from the Steering Committee of Cities served by Oncor and the Texas Coalition for Affordable Power (OCSC and TCAP); Texas Electric Cooperatives, Inc. (TEC); Texas Competitive Power Advocates (TCPA); and Texas Public Power Association

Definition of “wholesale market design change”

PURA §15.023(f) requires the commission to review each voluntary mitigation plan to ensure it remains in the public interest 90 days after the implementation of a wholesale market design change. The commission requested comment on whether the proposed rule should define “wholesale market design change” and if so, how the term should be defined.

All commenters recommended the commission define “wholesale market design change” in the adopted rule. OCSC and TCAP recommended the term “wholesale market design change” be defined to provide clarity to VMP applicants and market participants regarding when the commission will review a VMP and cited the 90-day commission review period required by HB 1500, §7. OCSC and TCAP further recommended a sufficiently broad definition be adopted that requires more frequent VMP review by the commission which would include “ancillary service procurement modifications, market product additions and modifications, and system-wide offer cap adjustments.”

TEC recommended the commission define “wholesale market design change” only for the limited purpose of §25.504 to avoid confusion with similar terms used by market participants in certain contracts such as operations and maintenance agreements. TEC also recommended that, per PURA §15.023(f), such a definition encompass “[a]ny market design change that could enable an entity to exercise market power abuse...and result in Commission review of VMPs pursuant to statute.” Specifically, TEC recommended that the definition of wholesale market design change “include any change that alters administrative pricing or that introduces new or substantially modified ancillary services.”

TPPA indicated that it reviewed recent and upcoming wholesale market design changes, including the 2022 market design blueprint, and recommended wholesale market design change be defined as the “addition of a new or material modification of an existing market product or process, a material increase in the amount of ancillary service capacity procured by ERCOT, a change in any system-wide offer cap, or a change in how price adders or ancillary service prices are calculated.”

TCPA recommended the commission define “wholesale market design change” and that such a change must be “something ‘material’ that has the substantial likelihood to modify wholesale market commercial operations in a substantial way” which could include the offering, award, or compensation of energy, ancillary, or reliability services. TCPA stated that otherwise any NPRR could be construed to be a “wholesale market design change” without further elaboration or context. TCPA also emphasized the importance of issuing a market notice as soon as possible, including ahead of the wholesale market design change. TCPA stated that this is necessary to clearly indicate the date by which the change is considered [to be] in effect and include the date by which the mitigation plans must be reviewed by the commission. TCPA provided draft language to amend proposed §25.504(f)(1) to incorporate a definition of “wholesale market design change consistent with its recommendation.

Commission Response

The commission declines to modify the proposed rule to include “wholesale market design change” as a defined term. Instead, the commission modifies the rule to clarify that in determining whether a change in a commission or ERCOT regulation constitutes a wholesale

market design change for purposes of this section, commission staff and the independent market monitor will consider whether the change could materially increase the ability of a generation entity with an existing voluntary mitigation plan to exercise market power. The commission also modifies the rule to clarify that the commission, on its own motion, may determine that a change in a commission or ERCOT regulation constitutes a wholesale market design change.

As noted by TCPA, any revision of ERCOT's protocols could be considered a wholesale market design change, and as noted by OCSC and TCAP, the term may appropriately apply to a broad range of policy changes, such as ancillary service procurement modifications, market product additions, and system-wide offer cap adjustments. This broad range of possible wholesale market design changes could lead to frequent reviews of voluntary mitigation plans, creating uncertainty for market participants and administrative burdens for the commission, commission staff, and the independent market monitor. The commission also agrees with TEC that the rule should focus on market changes that could enable a generation entity to exercise market power abuse, and that any construal of wholesale market design change should be limited in its application to this section.

The adopted rule addresses these stakeholder concerns by including a wide range of possible change types – any change in a commission or ERCOT regulation – but only requiring a VMP review when a change has the potential to materially increase market power abuse. The rule also, appropriately, entrusts the primary responsibility of determining when a change as the potential to materially increase market power abuse with commission staff and

the independent market monitor. Under PURA §39.1515(a), the independent market monitor is specifically charged with “detect[ing] and prevent[ing] market manipulation strategies...and provid[ing] independent analysis of any material changes proposed to the wholesale market.” Further, allowing commission staff to initiate VMP reviews without formal commission action is consistent with the limited 90-day statutory deadline for completing these reviews.

The commission declines to require the issuance of a market notice when it initiates a review of voluntary mitigation plans in response to a wholesale market design change, as requested by TCPA. Instead, the commission modifies the rule to require commission staff to provide notice to each generation entity with an existing plan when that entity’s plan is under review. This notice must be provided no later than the date commission staff files its recommendation on whether the voluntary mitigation plan remains in the public interest. In most cases, commission staff will be in contact with an affected generation entity sooner than this required date, but as noted by TCPA, a voluntary mitigation plan can be terminated by the commission or the generation entity with only a few days’ notice. Requiring a significant period of advanced notice for a mere review of a plan would be inconsistent with allowing these short-notice terminations.

However, the commission also modifies the rule to clarify that commission staff may, if it has already made its determination, indicate whether a proposed change in a commission or ERCOT regulation is a wholesale market design change for purposes of this section with its filings addressing that proposed change. For example, commission staff may signal an

upcoming wholesale market design change in its memo addressing a proposed revision to the ERCOT protocols or in its memo recommending approval of an adoption order in a commission rulemaking.

Proposed §25.504(c) – Exemption based on installed generation capacity

Under existing §25.504(c), a single generation entity that controls less than five percent of the installed generation capacity in ERCOT, is deemed not to have ERCOT-wide market power. This provision is commonly referred to as the “small fish exemption.”

OCSC and TCAP recommended the commission remove the small fish exemption under proposed §25.504(c) because the exemption is “obsolete and no longer necessary due to recent market mechanisms including the nodal market and Operating Reserve Demand Curve.” OCSC and TCAP remarked that the provision is based on the incorrect assumption that generators that control less than 5% of installed ERCOT generation capacity do not possess market power and therefore needlessly exposes consumers to abusive market behavior.

Commission Response

The commission declines to remove §25.504(c) from the rule, as recommended by OCSC and TCAP. Modifications to this provision were not noticed in the proposal for publication and are, therefore, beyond the scope of this rulemaking proceeding.

Proposed §25.504(e) – Voluntary mitigation plan

Proposed §25.504(e) provides that any generation entity may submit to the commission a mitigation plan relating to compliance with §25.503(g)(7), relating to Oversight of Wholesale Market Participants, or PURA §39.157. Proposed §25.504(e) also requires that a commission-approved voluntary mitigation plan be considered in a proceeding to determine whether the generation entity violated PURA 439.157 or §25.503(g)(7) and, if so, the amount of the administrative penalty to be assessed for the violation.

OCSC and TCAP agreed that a VMP, by itself, should not constitute an absolute defense against market abuse allegations. OSAC and TCAP supported the proposed rule providing the commission with discretion to assess VMP compliance and the associated administrative penalty from a variety of factors including the severity of the violation, history of previous violations, and any efforts to correct the violation.

Commission Response

The commission declines to modify the proposed rule in response to these comments, because no modifications were requested.

Proposed §25.504(e)(2) and (3) – Amendment or termination of voluntary mitigation plan

Proposed §25.504(e)(2) states that a generation entity or commission staff may apply to amend or terminate a voluntary mitigation plan that applies to the generation entity. Proposed §25.504(e)(3) limits the parties to a proceeding related to the approval or amendment of a voluntary mitigation

plan to the generation entity applying for the mitigation plan, commission staff, and the independent market monitor.

TCPA opposed the proposed requirement for a generation entity to “apply to amend or terminate” its VMP because it is inconsistent with historical practice and is not supported by statute. TCPA explained that if a generator is required to apply and wait for action by the commission to terminate its VMP, then such a plan is no longer “voluntary.” TCPA recommended that the rule be revised to ensure a generator may terminate such a plan upon notice to the Commission of its intent to terminate and the date on which the termination becomes effective” which is the same termination right the commission possesses under the proposed rule. TCPA also recommended that the requirement to provide notice of an intent to terminate should also include an administrative step ensuring public notice of the generator’s decision. TCPA provided draft language consistent with its recommendation.

Commission Response

The commission agrees with TCPA that a generation entity should be able to terminate its VMP unilaterally after providing notice of the termination to the commission and modifies the rule accordingly. Specifically, the commission modifies the rule to require the generation entity to provide notice to the executive director or executive director’s designee and file a notice of termination with the commission three working days prior to the effective termination date. This three-day notice period is in line with historical practice and consistent with the provisions of existing plans. Additionally, the commission further

modifies the rule to allow the generation entity or executive director to withdraw a notice of termination at any point before the effective date of the termination.

The amended rule is adopted under the following provisions of the Public Utility Regulatory Act (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 authorizes the commission to adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction. The amended rule is also adopted under §39.154 which, after the introduction of customer choice, prohibits a power generation company from owning or controlling more than 20 percent of the installed generation capacity located in, or is capable of delivering electricity to, a power region; and §39.157 which requires the commission to monitor market power associated with the generation, transmission, distribution, and sale of electricity in the State of Texas and authorizes the commission to require reasonable mitigation of the market power.

Cross reference to statutes: Public Utility Regulatory Act §§14.001, 14.002, 39.154, and 39.157

§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.
 - (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.

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 §25.504, relating to Wholesale Market Power in the Electric Reliability Council of Texas Power Region is hereby adopted with changes to the text as proposed.

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

PUBLIC UTILITY COMMISSION OF TEXAS

THOMAS GLEESON, CHAIRMAN

LORI COBOS, COMMISSIONER

JIMMY GLOTFELTY, COMMISSIONER

KATHLEEN JACKSON, COMMISSIONER