

**PROJECT NO. 55948**

<b>REVIEW OF VOLUNTARY</b>	<b>§</b>	<b>PUBLIC UTILITY COMMISSION</b>
<b>MITIGATION PLAN</b>	<b>§</b>	
<b>REQUIREMENTS</b>	<b>§</b>	<b>OF TEXAS</b>

**PROPOSAL FOR PUBLICATION OF AMENDMENTS TO 16 TAC §25.504**

The Public Utility Commission of Texas (commission) proposes amendments to 16 Texas Administrative Code (TAC) §25.504, relating to Wholesale Market Power in the Electric Reliability Council of Texas Power Region.

This proposed rule will implement Public Utility Regulatory Act (PURA) §15.023 as revised by House Bill 1500 during the Texas 88th Regular Legislative Session. The proposed rule provides that adhering to a voluntary mitigation plan is one factor that must be considered by the commission to determine whether a generation entity abused market power, rather than constituting an absolute defense against an allegation of market power abuse. In addition, the proposed rule amends the standards, process, and timelines under which voluntary mitigation plans are reviewed and approved or denied by the commission.

***Growth Impact Statement***

The agency provides the following governmental growth impact statement for the proposed rule, as required by Texas Government Code §2001.0221. The agency has determined that for each year of the first five years that the proposed rule is in effect, the following statements will apply:

(1) the proposed rule will not create a government program and will not eliminate a government program;

- (2) implementation of the proposed rule will not require the creation of new employee positions and will not require the elimination of existing employee positions;
- (3) implementation of the proposed rule will not require an increase and will not require a decrease in future legislative appropriations to the agency;
- (4) the proposed rule will not require an increase and will not require a decrease in fees paid to the agency;
- (5) the proposed rule will not create a new regulation;
- (6) the proposed rule will expand an existing regulation;
- (7) the proposed rule will not change the number of individuals subject to the rule's applicability; and
- (8) the proposed rule will not affect this state's economy.

***Fiscal Impact on Small and Micro-Businesses and Rural Communities***

There is no adverse economic effect anticipated for small businesses, micro-businesses, or rural communities as a result of implementing the proposed rule. Accordingly, no economic impact statement or regulatory flexibility analysis is required under Texas Government Code §2006.002(c).

***Takings Impact Analysis***

The commission has determined that the proposed rule will not be a taking of private property as defined in chapter 2007 of the Texas Government Code.

***Fiscal Impact on State and Local Government***

Barksdale English, Director, Division of Compliance and Enforcement, has determined that for the first five-year period the proposed rule is in effect, there will be no fiscal implications for the state or for units of local government under Texas Government Code §2001.024(a)(4) as a result of enforcing or administering the section.

***Public Benefits***

Mr. English has determined that for each year of the first five years the proposed section is in effect, the public benefit anticipated as a result of enforcing the section will be that only voluntary mitigation plans that are in the public interest are approved, and that voluntary mitigation plans are kept up to date through a regular review process. There will be no economic cost to persons required to comply with the rule under Texas Government Code §2001.024(a)(5).

***Local Employment Impact Statement***

For each year of the first five years the proposed section is in effect, there should be no effect on a local economy; therefore, no local employment impact statement is required under Texas Government Code §2001.022.

***Costs to Regulated Persons***

Texas Government Code §2001.0045(b) does not apply to this rulemaking because the commission is expressly excluded under subsection §2001.0045(c)(7).

*Public Hearing*

The commission staff will conduct a public hearing on this rulemaking if requested in accordance with Texas Government Code §2001.029. The request for a public hearing must be received by February 22, 2024. If a request for public hearing is received, commission staff will file in this project a notice of hearing.

*Public Comments*

Interested persons may file comments electronically through the interchange on the commission's website. **Comments must be filed by February 22, 2024.** Comments should be organized in a manner consistent with the organization of the proposed rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed rule. The commission will consider the costs and benefits in deciding whether to modify the proposed rule on adoption. All comments should refer to Project Number 55948.

The commission also invites comments specifically on the following question:

Should the rule define "wholesale market design change," and if so, how should it be defined?

**Each set of comments should include a standalone executive summary as the last page of the filing. This executive summary must be clearly labeled with the submitting entity's name and should include a bulleted list covering each substantive recommendation made in the comments.**

*Statutory Authority*

The amendment is proposed under Public Utility Regulatory Act (PURA) §14.001, which grants 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 this title 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; and §15.023, which authorizes the commission and a person to enter into a voluntary mitigation plan relating to a violation of PURA §39.157.

Cross Reference to Statute: Public Utility Regulatory Act §§14.001; 14.002; and 15.023.

**§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 mitigation plan ~~relating to~~for ensuring compliance with §25.503(g)(7) of this title or with the Public Utility Regulatory Act §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.~~Any plan that is submitted may be revised, with the agreement of the market participant, and approved or rejected by the commission. Adherence to a plan approved by the commission constitutes an absolute defense against an allegation of market power abuse with respect to behaviors addressed by the plan. Failure to adhere to a plan approved by the commission does not, of itself constitute a violation of §25.503(g)(7) of this title, but may be treated in the same manner as any other violation of a commission order.~~

- (1) The commission will approve the 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 or terminate 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) 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:

(A) The executive director or the executive director's designee must determine that continuation of the plan is no longer in the public interest.

(B) The executive director or the executive director's designee must provide notice of the termination to the generation entity with an approved voluntary mitigation plan at least three working days prior to the effective date of the termination.

(C) 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.

(f) **Review of voluntary mitigation plans.**

(1) The commission will review each 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 review under this paragraph has occurred.

- (2) At least 30 days prior to a deadline established by paragraph (1) of this subsection, commission staff must provide a recommendation on whether each voluntary mitigation plan remains in the public interest. As part of its recommendation, for each voluntary mitigation plan adopted prior to September 1, 2023, commission staff must 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 hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

**ISSUED IN AUSTIN, TEXAS ON THE 18TH DAY OF JANUARY 2024 BY THE  
PUBLIC UTILITY COMMISSION OF TEXAS  
ADRIANA GONZALES**