

PROJECT NO. 52312

**REVIEW OF ADMINISTRATIVE
PENALTY AUTHORITY**

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**PUBLIC UTILITY COMMISSION
OF TEXAS**

**PROPOSAL FOR PUBLICATION OF AMENDMENTS TO 16 TAC §22.246 and §25.8
AS APPROVED AT THE AUGUST 19, 2021 OPEN MEETING**

The Public Utility Commission of Texas (commission) proposes amendments to existing 16 Texas Administrative Code (TAC) §22.246, relating to Administrative Penalties, and §25.8, relating to a Classification System for Violations of Statutes, Rules, and Orders Applicable to Electric Service Providers. These proposed rules will implement an amendment to the Public Utility Regulatory Act (PURA) §15.023(b-1) enacted by the 87th Texas Legislature that establishes an administrative penalty not to exceed \$1,000,000 for violations of PURA §35.0021 or §38.075, each relating to Weather Emergency Preparedness.

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 not expand, limit, or repeal 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

David Smeltzer, Director of Rules and Projects, 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 sections.

Public Benefits

Mr. Smeltzer has also determined that, for each year of the first five years the proposed rules and amendments are in effect, the anticipated public benefits expected as a result of the adoption of the proposed amendments will be alignment of commission rules with the requirements of PURA §35.0021 and §38.075. Mr. Smeltzer does not believe there will be any major economic costs 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 on September 22, 2021, at 9:30 A.M. in the Commissioners' Hearing Room, 7th floor, William B. Travis Building if requested in accordance with Texas Government Code §2001.029. The request for a public hearing must be received by September 16, 2021. If no request for public hearing is received and the commission staff cancels the hearing, it will file in this project a notification of the cancellation of the hearing prior to the scheduled date for the hearing.

Public Comments

Interested persons may file comments electronically through the interchange on the commission's website. Comments must be filed by **September 16, 2021**. Comments should be organized in a manner consistent with the organization of the proposed rules. 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 rules on adoption. **Commission staff strongly encourages commenters to include a bulleted executive summary to assist Commission Staff in reviewing the filed comments in a timely fashion.** All comments should refer to Project Number 52312.

Statutory Authority

These new rules are proposed under the following provision of 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 provides

the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; §15.023, which establishes that the penalty for a violation of a provision of PURA §35.0021 or PURA §38.075 may be in an amount not to exceed \$1,000,000 for a violation and that each day a violation continues is a separate violation for purposes of imposing a penalty.

Cross reference to statutes: PURA §§14.001, 14.002, and 15.023, 35.0021, and 38.075.

§22.246. Administrative Penalties.

- (a) **Scope.** This section addresses enforcement actions related to administrative penalties or disgorgement of excess revenues 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, have the following meanings unless the context indicates otherwise:
- (1) **Affected Wholesale Electric Market Participant** -- An entity, including a retail electric provider (REP), municipally owned utility (MOU), or electric cooperative, that sells energy to retail customers and served load during the period of the violation.
 - (2) **Excess Revenue** -- As defined in §25.503 of this title (relating to Oversight of Wholesale Market Participants).
 - (3) **Executive director** -- The executive director of the commission or the executive director's designee.
 - (4) **Person** -- Includes a natural person, partnership of two or more persons having a joint or common interest, mutual or cooperative association, and corporation.
 - (5) **Violation** -- Any activity or conduct prohibited by [the Public Utility Regulatory Act \(PURA\)](#), the [Texas Water Code \(TWC\)](#), commission rule, or commission order.
 - (6) **Continuing violation** -- Except for a violation of PURA chapter 17, 55, or 64, and commission rules or commission orders adopted or issued under 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 administrative penalty for violations of PURA or a rule or order adopted under PURA.

(1) Each day a violation continues or occurs is a separate violation for which an administrative penalty can be levied, regardless of the status of any administrative procedures that are initiated under this subsection.

(2) The administrative penalty for each separate violation ~~may be in an amount not to exceed \$25,000 per day, except for violations of PURA §35.0021, or PURA §38.075, or a commission rule or commission order adopted under PURA §35.002 or PURA §38.0075 which will be in an amount not to exceed \$1,000,000 per violation per day.~~ For all other violations, the administrative penalty for each separate violation will be in an amount not to exceed \$25,000 per violation per day. ~~An~~ provided that an administrative penalty in an amount that exceeds \$5,000 may be assessed only if the violation is included in the highest class of violations in the classification system.

(3) The amount of the administrative penalty must 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) Amount of administrative penalty for violations of the TWC or a rule or order adopted under chapter 13 of the TWC.

- (1) Each day a violation continues may be considered a separate violation for which an administrative penalty can be levied, regardless of the status of any administrative procedures that are initiated under this subsection.
- (2) The administrative penalty for each separate violation may be in an amount not to exceed \$5,000 per day.
- (3) The amount of the penalty must be based on:
 - (A) the nature, circumstances, extent, duration, and gravity of the prohibited acts or omissions;
 - (B) the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;

- (C) the demonstrated good faith, including actions taken by the person, affiliated interest, or entity to correct the cause of the violation;
- (D) any economic benefit gained through the violations;
- (E) the amount necessary to deter future violations; and
- (F) any other matters that justice requires.

(e) **Initiation of investigation.** Upon receiving an allegation of a violation or of a continuing violation, the executive director will determine whether an investigation should be initiated.

(f) **Report of violation or continuing violation.** If, based on the investigation undertaken in accordance with subsection (e) 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 must state the facts on which the determination is based and a recommendation on the imposition of an administrative penalty, including a recommendation on the amount of the administrative penalty and, if applicable under §25.503 of this title, a recommendation that excess revenue be disgorged.

(2) **Notice of report.**

(A) Within 14 days after the report is issued, the executive director will 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 may be given by regular or certified mail.

(B) For violations of the TWC or a rule or order adopted under chapter 13 of the TWC, within ten days after the report is issued, the executive director will, 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.

(C) The notice must include:

- (i) a brief summary of the alleged violation or continuing violation;
- (ii) a statement of the amount of the recommended administrative penalty;
- (iii) a statement recommending disgorgement of excess revenue, if applicable, under §25.503 of this title;
- (iv) 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 administrative penalty, or both the occurrence of the violation or continuing violation and the amount of the administrative penalty;
- (v) a copy of the report issued to the commission under this subsection;
and
- (vi) a copy of this section, §22.246 of this title (relating to Administrative Penalties).

- (D) If the commission sends written notice to a person by mail addressed to the person's mailing address as maintained in the commission's records, the person is deemed to have received notice:
- (i) on the fifth day after the date that the commission sent the written notice, for notice sent by regular mail; or
 - (ii) on the date the written notice is received or delivery is refused, for notice sent by certified mail.

(g) 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 chapter 13 of the TWC, or of a commission rule or commission order adopted or issued under those chapters.
- (B) Within 40 days of the date of receipt of a notice of violation set out in subsection (f)(2) of this section, the person against whom the administrative penalty or disgorgement 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 must

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 administrative 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 will 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 will institute further proceedings, including referral of the matter for hearing under subsection (i) of this section.

(2) **Payment of administrative penalty, disgorged excess revenue, or both.** Within 20 days after the date the person receives the notice set out in subsection (f)(2) of this section, the person may accept the determination and recommended administrative penalty and, if applicable, the recommended excess revenue to be disgorged through a written statement sent to the executive director. If this option is selected, the person must take all corrective action required by the commission. The commission by written order will approve the determination and impose the recommended administrative penalty and, if applicable, recommended disgorged excess revenue or order a hearing on the determination and 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 (f)(2) of this section, the person may submit to the executive director a written request for a hearing on any or all of the following:
- (A) the occurrence of the violation or continuing violation;
 - (B) the amount of the administrative penalty; and
 - (C) the amount of disgorged excess revenue, if applicable.
- (4) **Failure to respond.** If the person fails to timely respond to the notice set out in subsection (f)(2) of this section, the commission by order will approve the determination and impose the recommended penalty or order a hearing on the determination and the recommended penalty.
- (h) **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 administrative penalty, disgorged excess revenue if applicable, 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 must file a report with the executive director setting forth the factual basis for the settlement;
 - (B) the executive director will 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 the State Office of Administrative Hearings, the matter will be returned to the commission. If the settlement is approved, the commission will issue an order memorializing commission approval and setting forth commission orders associated with the settlement agreement.
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- (i) **Hearing.** If a person requests a hearing under subsection (g)(3) of this section, or the commission orders a hearing under subsection (g)(4) of this section, the commission will refer the case to SOAH under §22.207 of this title (relating to Referral to State Office of Administrative Hearings) and give notice of the referral to the person. For violations of the TWC or a rule or order adopted under chapter 13 of the TWC, if the person charged with the violation fails to timely respond to the notice, the commission by order will assess the recommended penalty or order a hearing to be held on the findings and recommendations in the report. If the commission orders a hearing, the case will then proceed as set forth in paragraphs (1)-(5) of this subsection.
 - (1) The commission will provide the SOAH administrative law judge a list of issues or areas that must be addressed.
 - (2) The hearing must be conducted in accordance with the provisions of this chapter and notice of the hearing must be provided in accordance with the Administrative Procedure Act.
 - (3) The SOAH administrative law judge will 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; of a commission rule or commission order adopted or issued under those chapters; or of chapter 13 of the TWC; and
 - (C) the amount of the proposed administrative penalty and, if applicable, disgorged excess revenue.
 - (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 an administrative penalty and, if applicable, disgorged excess revenue;
 - (B) if applicable, determine that a violation occurred but that, as permitted by subsection (g)(1) of this section, the person remedied the violation within 30 days and proved that the violation was accidental or inadvertent, and that no administrative penalty will be imposed; or
 - (C) determine that no violation or continuing violation has occurred.
 - (5) Notice of the commission's order issued under paragraph (4) of this subsection must be provided under the Government Code, chapter 2001 and §22.263 of this title (relating to Final Orders) and must include a statement that the person has a right to judicial review of the order.
- (j) **Parties to a proceeding.** The parties to a proceeding under chapter 15 of PURA relating to administrative penalties or disgorgement of excess revenue will be limited to the person who is alleged to have committed the violation or continuing violation and the commission,

including the independent market monitor. This does not apply to a subsequent proceeding under subsection (k) of this section.

- (k) **Distribution of Disgorged Excess Revenues.** Disgorged excess revenues must be remitted to an independent organization, as defined in PURA §39.151. The independent organization must distribute the excess revenue to affected wholesale electric market participants in proportion to their load during the intervals when the violation occurred to be used to reduce costs or fees incurred by retail electric customers. The load of any market participants that are no longer active at the time of the distribution will be removed prior to calculating the load proportions of the affected wholesale electric market participants that are still active. However, if the commission determines other wholesale electric market participants are affected or a different distribution method is appropriate, the commission may direct commission staff to open a subsequent proceeding to address those issues.
- (1) No later than 90 days after the disgorged excess revenues are remitted to the independent organization, the monies must be distributed to affected wholesale electric market participants active at the time of distribution, or the independent organization must, by that date, notify the commission of the date by which the funds will be distributed. The independent organization must include with the distributed monies a communication that explains the docket number in which the commission ordered the disgorged excess revenues, an instruction that the monies must be used to reduce costs or fees incurred by retail electric customers, and any other information the commission orders.

- (2) The commission may require any affected wholesale electric market participants receiving disgorged funds to demonstrate how the funds were used to reduce the costs or fees incurred by retail electric customers.
- (3) Any affected wholesale electric market participant receiving disgorged funds that is affiliated with the person from whom the excess revenue is disgorged must distribute all of the disgorged excess revenues directly to its retail customers and must provide certification under oath to the commission that the entirety of the revenues was distributed to its retail electric customers.

§25.8. Classification System for Violations of Statutes, Rules, and Orders Applicable to Electric Service Providers.

(a) **Purpose.** The purpose of this rule is to establish a classification system for violations of the Public Utility Regulatory Act (PURA) and related commission rules and orders, and to establish a range of penalties that may be assessed for each class of violations.

(b) **Classification system.**

(1) **Class C violations.**

(A) Penalties for Class C violations may not exceed \$1,000 per violation per day.

(B) The following violations are Class C violations:

(i) failure to file a report or provide information required to be submitted to the commission under this chapter within the timeline required;

(ii) failure by an electric utility, retail electric provider, or aggregator to investigate a customer complaint and appropriately report the results within the timeline required;

(iii) failure to update information relating to a registration or certificate by the commission within the timeline required; and

(iv) a violation of the Electric no-call list.

(2) **Class B violations.**

- (A) Penalties for Class B violations may not exceed \$5,000 per violation per day.
- (B) All violations not specifically enumerated as a Class C or Class A violation ~~are~~ shall be considered Class B violations.
- (3) **Class A violations.**
- (A) Each separate violation of PURA §35.0021, PURA §38.075, or a commission rule or commission order adopted under PURA §35.0021 or PURA §38.075 is a Class A violation and the administrative penalty will not exceed \$1,000,000 per violation per day. Penalties for all other Class A violations ~~will~~ may not exceed \$25,000 per violation per day; ~~except for violations of PURA §§ 35.0021 or §38.075, or a commission rule or commission order adopted under PURA §35.0021 or §38.075, which not exceed \$1,000,000 per violation per day.~~
- (B) The following types of violations are Class A violations if they create economic harm in excess of \$5,000 to a person or persons, property, or the environment, or create an economic benefit to the violator in excess of \$5,000; create a hazard or potential hazard to the health or safety of the public; or cause a risk to the reliability of a transmission or distribution system or a portion thereof.
- (i) A violation related to the wholesale electric market, including protocols and other requirements established by an independent organization;

- (ii) A violation related to electric service quality standards or reliability standards established by the commission or an independent organization;
- (iii) A violation related to the code of conduct between electric utilities and their competitive affiliates;
- (iv) A violation related to prohibited discrimination in the provision of electric service;
- (v) A violation related to improper disconnection of electric service;
- (vi) A violation related to fraudulent, unfair, misleading, deceptive, or anticompetitive business practices;
- (vii) Conducting business subject to the jurisdiction of the commission without proper commission authorization, registration, licensing, or certification;
- (viii) A violation committed by ERCOT;
- (ix) A violation not otherwise enumerated in this paragraph (3)(B) of this subsection that creates a hazard or potential hazard to the health or safety of the public;
- (x) A violation not otherwise enumerated in this paragraph (3)(B) of this subsection that creates economic harm to a person or persons, property, or the environment in excess of \$5,000, or creates an economic benefit to the violator in excess of \$5,000; and

- (xi) A violation not otherwise enumerated in this paragraph (3)(B) of this subsection that causes a risk to the reliability of a transmission or distribution system or a portion thereof.
- (c) **Application of enforcement provisions of other rules.** To the extent that PURA or other rules in this chapter establish a range of administrative penalties that are inconsistent with the penalty ranges provided for in subsection (b) of this section, the other provisions control with respect to violations of those rules.
- (d) **Assessment of administrative penalties.** In addition to the requirements of §22.246 of this title (relating to Administrative Penalties), a notice of violation recommending administrative penalties ~~will~~shall indicate the class of violation.

This agency 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 19th DAY OF AUGUST 2021 BY THE
PUBLIC UTILITY COMMISSION OF TEXAS
ANDREA GONZALEZ**