PROJECT NO. 26188

RULEMAKING CONCERNING DISCLOSURE OF INFORMATION RELATED TO ELECTRICITY TRANSACTIONS ORIGINATING OR TERMINATING IN TEXAS	**§ § § § §**	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER ADOPTING NEW §25.93
AS APPROVED AT THE JULY 25, 2003 OPEN MEETING

The Public Utility Commission of Texas (commission) adopts new §25.93, relating to Quarterly Wholesale Electricity Transaction Reports, with changes to the proposed text as published in the May 9, 2003 issue of the *Texas Register* (28 TexReg 3795). The rule provides a base of regularly gathered information that will enhance the commission's ability to monitor market power and investigate market power abuses with respect to the bilateral wholesale power market. The rule requires power generators, power marketers and others who sell power at wholesale in Texas to file quarterly reports on their wholesale power transactions in the state. This new section is adopted under Project Number 26188.

A public hearing on the proposed section was held at commission offices on June 16, 2003 at 9:30 a.m. Representatives from American Electric Power Service Corporation (AEP), Brazos Electric Power Cooperative (Brazos), Brownsville Public Utilities Board, Calpine Corporation (Calpine), CenterPoint Energy Inc. (CenterPoint), City of Austin d/b/a Austin Energy (Austin Energy), Exelon Generation Company LLC, Independent Market Participants (IMP), Lower Colorado River Authority (LCRA), the Office of Public Utility Counsel, TXU Energy (TXU), and the University of Houston Global Energy Markets Institute (GEMI) attended the hearing and

provided comments. To the extent that these comments differed from the submitted written comments, such comments are summarized herein.

The commission received written comments on the proposed new section from AEP, Austin Energy, Brazos, Xcel Energy Services (Xcel), Calpine, City Public Service Board of San Antonio (San Antonio), El Paso Electric Company (EPE), IMP, LCRA, Reliant Resources Inc. (Reliant), South Texas Electric Cooperative Inc. (STEC), Texas Industrial Energy Consumers (TIEC), TXU, and GEMI. Joint comments were filed by CenterPoint and Texas Genco LP (CenterPoint/Genco) and by Denton Municipal Electric and City of Garland (Denton/Garland).

In the proposal that was published in the *Texas Register*, the commission asked parties to respond to two specific questions: one dealing with whether a day-ahead market would alleviate the need for the proposed rule, and the other dealing with the usefulness of the proposed rule in developing wholesale power price indices. Commenters also addressed various issues pertaining to the types of information to be reported, as well as issues pertaining to confidentiality.

Question 1: Would the transparency provided by an ERCOT day-ahead market, once established, alleviate the need for this rule? Why or why not?

Brazos, Calpine, CenterPoint/Genco, STEC, TIEC, and TXU said a liquid day-ahead market would alleviate the need for the proposed rule by improving price transparency. According to Calpine, experience in other markets indicates that more short-term transactions will migrate

from a bilateral market to a newly established centrally administered spot market over time. This leads to improved price discovery capability and a more liquid market as an alternative for those entities that cannot find suitable pricing or terms in the bilateral market. Calpine concluded that natural protections in the long-term bilateral market — such as the fact that no party is restricted to negotiating with any party, but is free to transact with whomever it desires — mitigate the need to report those transactions. Brazos, CenterPoint/Genco, and STEC said that the commission should delay consideration of this rule until an Electric Reliability Council of Texas (ERCOT) day-ahead market design is more clearly formulated.

On the other hand, IMP cautioned that a day-ahead market would not reveal market power abuses that involved long-term contracts still in effect. The group said that although a financially binding day-ahead market could make market power abuses less likely, the commission would still need historical information tailored to the task of market monitoring. IMP stated that a day-ahead market would not alleviate the need for the commission to obtain information as provided in the rule.

Commission response

The commission agrees with IMP that a day-ahead market would not vitiate the need for this rule insofar as the commission's market monitoring responsibilities are concerned. The contention by Calpine and others that a day-ahead market would provide better price transparency than the proposed quarterly report is reasonable as a stand-alone proposition, but it has little bearing on

market monitoring. Calpine apparently would have the commission treat the bilateral contract market as a "black box" process within which all transactions are assumed to be fair and free of market power abuse. While it is reasonable to believe that a day-ahead market will make market power abuses less likely, such a result is by no means certain enough to warrant blind faith on the part of market monitors. Because of its statutory oversight responsibility, the commission finds it prudent to "trust but verify" and require quarterly reports on bilateral power transactions.

The commission sees no reason to delay implementing the quarterly reports until a day-ahead market is implemented. The benefits of price transparency that would result from a day-ahead market are distinct enough from the imperatives of market monitoring that this rule need not be bound to the evolution of a day-ahead market. Furthermore, at this point in time it is not certain what form an ERCOT day-ahead market might take, making it impossible to know the extent to which it would facilitate market monitoring. The more prudent course is to attend to the purposes of market monitoring in this rule so that market monitoring need not be a concern in Project Number 27678, *PUC Proceeding on Day-Ahead Markets, Power Exchanges, and Wholesale Price Transparency*.

Question 2: Should the rule be modified to require the disclosure of information to facilitate the development of a Texas price index? Would such an index be beneficial to the marketplace? What modifications would need to be made to the rule language to facilitate the development of a price index? What role would the commission and others play in the development of a price index?

At the public hearing and in subsequent written comments, GEMI proposed an energy price data hub that would require market participants to submit transaction information to a single clearinghouse as the transactions occur. The data hub would be operated by an independent non-profit entity whose board of directors had no other financial stake in the energy market. Data on all transactions would be collected and treated confidentially, then aggregated into price indices that could be easily audited. GEMI said that by authorizing a single independent non-profit entity to collect the data, the cost of providing reliable price indices could be reduced. To ensure the validity of the index and to prevent "free riders," the commission would require all market participants to report their wholesale transactions to the data hub.

GEMI said that its proposed data hub would be much less vulnerable to manipulation and fraud than energy indices currently available. GEMI said the hub would provide necessary price transparency on a level playing field, and would meet all the objectives relating to data reporting standards advanced by the Committee of Chief Risk Officers.

IMP noted that the daily data requirements, costs, and other impacts of the GEMI proposal were significantly different from what was contained in the proposed rule as published, and that the burden on affected persons was sufficiently great that the commission ought to republish the proposed rule if it were to proceed with the data hub concept. IMP drew a distinction between the commission's market monitoring function and the market's need for forward price indices, and pointed out that the proposed rule as published supports market monitoring. While most

commenters who addressed this question agreed that price indices would be a great benefit to market participants, IMP said that the commission's regulatory function should not be diluted in an effort to require reporting that serves two purposes, one of which is not tied to the commission's regulatory function under PURA.

TXU and IMP said that to be useful, a price index should cover a sufficient volume of homogeneous products provided at a specific location. TXU said the proposed rule as published would not gather the information required to construct such an index, while IMP added that an index would require a much narrower set of data than contemplated by the proposed rule. Calpine, CenterPoint/Genco, and TXU said that commingled long-term and short-term transactions would produce an erroneous index. IMP further said the Federal Energy Regulatory Commission (FERC) is currently considering GEMI's data hub proposal along with other options, but cautioned that Texas should not "get out in front of" FERC on this issue.

More generally, Calpine, CenterPoint/Genco, IMP, TIEC, and TXU all said it would be difficult to use data from the proposed quarterly report to construct a price index that was valid and useful to the market. Calpine said that an index that used the proposed rule as a base would not be accurate, timely or relevant. Data reported on a quarterly basis with a thirty-day lag would be historical and could therefore offer no insight for current spot market conditions, Calpine said, adding that comparing prices in Texas outside ERCOT to ERCOT could skew the index. Calpine said the requirement should be to report only short-term transactions, excluding cogenerators; TXU said a price index should be based on standard contracts.

CenterPoint/Genco and TXU said that if a price index were to be developed, it should be done by a third party and not by the commission. STEC also acknowledged the benefit of a price index, but said such a metric should come from a day-ahead market rather than the proposed rule. Austin Energy, on the other hand, said that to its knowledge wholesale market participants have not asked the commission to create a price index.

IMP said a price index derived from the quarterly report would be unworkable and unlikely to be beneficial to the marketplace. Reasons cited by IMP include the fact that the reported data would be historical, that the data would not be tied to a particular hub, and that a wide variety of disparate products would be included in the index. IMP also noted that the private sector is already responding to problems that have impaired the reliability of publicly reported forward pricing curves, and some market participants have even developed their own forward pricing curves.

Commission response

The commission agrees with the majority of commenters that the data contained in the quarterly reports could not yield a price index that would be useful to the market on a day-to-day basis. At best, the quarterly report could provide an *ex post* validation of other ERCOT price indices published by third parties closer to real-time. For example, the quarterly report database could be queried to extract a comprehensive set of the same kind of contracts sampled by *Megawatt*

Daily in its published price indices for ERCOT. That data could then be compared to the prices reported by *Megawatt Daily* for the same time period, enabling the commission to determine whether companies are attempting to manipulate the ERCOT bilateral power market by falsifying the data they provide for the index. As stated in its response to the first preamble question, however, the commission notes that the primary purpose of the proposed rule is market monitoring. Its shortcomings as an instrument for real-time price indices do not detract from its usefulness as a tool for the commission to examine market power issues.

With respect to the GEMI proposal, the commission agrees with IMP that the requirements of a data hub would go beyond the scope of the proposed rule as published. IMP also correctly notes that the need for a price index, although valid, is distinct from the commission's statutory responsibility to monitor the wholesale market for anticompetitive behavior. The commission finds that these two goals — market monitoring and price transparency — ought to be pursued separately, with this project focusing on the goal of market monitoring. The commission may consider a separate rulemaking, or may roll the issue of price indices into Project Number 27678, *PUC Proceeding on Day-Ahead Markets, Power Exchanges, and Wholesale Price Transparency*.

Additional issue: Required information

In their written comments and at the public hearing, AEP, Reliant, and TXU said the rule should permit reporting entities to exclude from the quarterly report contracts that continue to be in

effect after the reporting period, along with their associated transactions. Reliant said that while it agrees the commission has the authority to require reporting information on current contracts, it does not mean there is a sound policy reason for doing so. The company asserted that the commission's stated purpose of investigating alleged market power abuses could be served by examining data on completed transactions. Reliant explained that reporting ongoing contracts would communicate net long and short positions of buyers. Buyers would in effect, face a floor price set by sellers of power who know the retailers' supply position. Knowledge of the retailers' pricing structure will help the sellers to know what and when they need to bid in order to take advantage of the retailers' net market position. Austin Energy commented that if a buyer can determine the commencement and termination date of a bilateral contract or transaction and knows Austin Energy's selling price, the buyer will have an asymmetric insight into Austin Energy's costs and acceptable pricing. TXU said that release of information pertaining to ongoing contracts would violate Texas law that requires the commission to administer any reporting requirements in a manner that ensures the confidentiality of competitively sensitive information.

Brazos said that formal and informal proceedings to decide whether particular information should be protected will eventually result in the disclosure of sufficient price information to determine costs. Brazos said the risks are too great to fling highly confidential and relatively static cost information into the public record, with the hope that it will be somehow protected over an extended period of time. TXU expressed similar concerns, adding that revising the rule to eliminate the reporting of ongoing contracts will "remove the potential for inadvertent

disclosure by commission staff of extremely confidential, competitively sensitive information related to on-going transactions, and would remove the possibility that the commission might make an improper determination concerning the confidentiality of such information."

Reliant and TXU said they probably would not protest making data on completed transactions publicly available after an appropriate lag period. Reliant added that if the commission concludes that on-going contracts should be reported, the commission should deem such information highly sensitive and protect it from disclosure to third parties.

Subsection (d)(2), which describes the information that reporting entities would have to file, includes the phrase "and any other information the commission deems necessary." AEP, Brazos, and TXU commented that this language is improperly vague in the context of PURA §39.155(a), which says "[t]he commission shall by rule prescribe the nature and detail of the reporting requirements…." TXU also objected to the requirement in subsection (f) that a reporting entity provide the commission with any additional information not included in the quarterly report.

LCRA and TIEC supported the exclusion of available ERCOT data. Austin Energy requested clarification as to whether minor transactions could be aggregated. More generally, CenterPoint/Genco suggested allowing a reporting entity to aggregate voluminous, frequently changing transactions into a single, aggregated transaction for reporting purposes.

Commission response

The commission finds no sound reason to exclude current contracts from the quarterly reports. Doing so would leave the commission with an incomplete picture of the bilateral contract market, making the quarterly reports virtually useless as a tool for monitoring market power. Moreover, in many cases it would be a trivial matter to structure a business relationship so that new prices and other updated transaction terms would be governed by the same on-going contract. Despite its constant metamorphosis, the contract — along with its variegated transactions — would be concealed from market monitors as long as the parties could contrive to keep the same contract in force. In short, it would be unacceptably easy for a reporting party to evade the purposes of this rule by concealing from market monitors the majority of its transactions. The commission, therefore, rejects limiting the scope of the report to contracts that have terminated. Reporting entities must provide the commission with information on all transactions, regardless of whether the contracts are still in effect.

Disclosing contract information to the public is a separate issue from reporting it to the commission. The commission notes that Reliant and TXU might not oppose making data on expired contracts publicly available. The proposed rule, however, contemplates making such a decision (absent an open records request) in a contested docket and not this rulemaking. Similarly, the commission declines to deem current contract information as highly sensitive in this rulemaking, as requested by Reliant. That, too, is more appropriately determined in a contested docket, by the Texas Attorney General, or by the courts. Similarly, the commission

makes no finding with respect to TXU's suggestion that information concerning ongoing contracts is, *per se*, competitively sensitive. PURA does not define "competitively sensitive information" and the commission is unaware of any specific category of information that is, as a matter of law, competitively sensitive. The determination of whether information is competitively sensitive and whether it should be released to the public is therefore a fact-intensive question that the commission reserves for a more appropriate venue.

Comments by Brazos and TXU seem to suggest an assumption on their part that the commission will disclose any information for which a disclosure proceeding is conducted under subsection (g)(2). This assumption is incorrect, and the commission reiterates that only information that is determined not to be competitively sensitive will be released. The contested-case proceeding is necessary for the commission to establish a factual record to support one of two conclusions of law: that the information is competitively sensitive and must be protected; or that it is not competitively sensitive and may be released.

Concerns raised by Brazos and TXU about inadvertent disclosure by commission staff ignore the fact that the risk of inadvertent disclosure also exists with respect to TXU employees, consultants and counterparties' employees. TXU says that reducing the number of persons who get to see competitively sensitive information would reduce the probability of inadvertent disclosure, and while the commission agrees that unnecessary access to such information is certainly not warranted, the purpose for which access would be required by this rule — to enable the commission to monitor market power — is required by statute.

The commission acknowledges the point raised by AEP, Brazos, and TXU with respect to subsection (d)(2) and deletes the phrase "and any other information the commission deems necessary." On the other hand, subsection (f) pertains to requests for specific information in the context of a specific market power investigation. While PURA §39.155(a) speaks to what the commission may require in regular reports, §§14.001, 14.051 and 39.157(a) together confer upon the commission the broad authority to monitor market power and to compel the production of information necessary to exercise that duty when conducting an investigation. If the general information regularly contained in the quarterly reports raises further questions related to market power, and if answering such questions requires more detailed data from a specific entity, PURA authorizes the commission to require the entity to produce that data. The commission therefore declines to make any change to subsection (f).

The commission is mindful of the concern raised by Austin Energy, LCRA, and TIEC with regard to reporting sales to ERCOT, and by CenterPoint/Genco with regard to aggregating frequently changing transactions. The ERCOT market information system, to which the commission has full access, contains detailed volume and price information on transactions to which the independent system operator is a party. Nevertheless, the commission finds it useful to require reporting entities to include in their quarterly reports data on their transactions with ERCOT, but further finds that aggregating such information would be sufficient. The usefulness of this information is twofold: it will ensure that ERCOT transactions are accounted for in the commission's bilateral contract database, and it will provide a comparison to cross-check the

quality of data on ERCOT transactions. Both of these purposes may be sufficiently served by aggregating data on sales of electricity and capacity to ERCOT. The aggregated number should be in total MWh sold during the reporting period in each ERCOT-operated market (balancing energy, for example) and need not include price.

Additional issue: MOUs, co-ops, river authorities, and qualifying facilities

Austin Energy, San Antonio, and Denton/Garland said the reporting requirements of the proposed rule would impose a significant financial burden on municipally owned utilities (MOUs), especially if each transaction had to be reported separately. Austin Energy estimated that it would need to hire one additional FTE to prepare disclosure reports, and would have to devote additional upper-level staff time to reviewing the reports. Similarly, STEC and Brazos said the compliance burden on electric cooperatives would be excessive relative to their share of the wholesale market. San Antonio noted that market power concerns are not relevant to the native load of an MOU that is not participating in retail choice, and thus the commission's regulatory scope was limited. San Antonio said that if the commission desires information on aggregated annual retail load for a municipal utility, the rule should so specify. Denton/Garland said that under PURA §39.155(a) and §40.004(7) the commission may require them to report only annual or aggregated information and not specific contract and transaction information as would be required by the proposed rule.

STEC said small generators cannot exercise market power and therefore there was no need for their information. STEC recommended a reporting exemption for entities with 1,500 MW or less of generation capacity. Brazos said the proposed rule exceeded the limits on the commission's allowed authority to require reporting of electric co-operatives. Brazos said if co-ops were not exempt from filing, they should be required to report only those sales that are made on an arm's length, market-priced basis.

Brazos and LCRA said cost-based contracts should be treated differently from market-based contracts. LCRA said its long-term requirements contracts do not affect the market and are not the type of agreements in which a market monitor would normally be interested. LCRA said river authorities should be allowed to aggregate data on all of its requirement contracts in lieu of reporting information for individual contracts.

TIEC offered similar observations with respect to power sold by qualifying facilities (QFs) and other self-generators selling excess power to the wholesale market. TIEC said many transactions involving QFs involve the purchase of other products (steam and fuel, for example) in addition to the electricity. The nominal price for electricity therefore would not be representative of the actual market price for electricity. TIEC said QFs should not have to report information concerning ongoing contracts because disclosure of the price at which a manufacturer is selling excess generation, as well as disclosure of the total compensation under the contract, could allow competitors a decided advantage in pricing products in order to undercut the competition.

Commission response

The commission agrees that with respect to an MOU's native load and an electric cooperative's or river authority's cost-based contracts, aggregated data will serve the commission's purposes for monitoring market power. In addition, the commission notes TIEC's observation that the price at which a QF sells power to a wholesale customer may be bundled with other non-electricity commodities or services, and concludes that prices on such transactions would be of little use in the quarterly report.

Sales volumes, however, are important to the assessment of market power. Occasionally the commission may need to conduct a "mass balance" analysis of market power by looking at all generation and all load in the entire ERCOT market. A mass balance analysis is not possible without accounting for all parts of the market, including the volumes associated with MOU native load, co-op and river authority cost-based sales volumes, and total quantities sold into the system by QFs. Consequently, a public power authority's cost-based sales are necessary to assess market power in ERCOT even though that seller may not itself be the focus of the investigation.

The commission finds that the following aggregations are sufficient for the purposes of the quarterly report, and incorporates them into the rule.

(i) An MOU may aggregate data on the portion of its generation that it used to serve its native load. The aggregated number should be in total MWh for the reporting quarter, and need not include price.

(ii) A generation cooperative may aggregate data on cost-based sales to a distribution cooperative. The aggregated number should be in total MWh sold to each distribution co-op for the reporting quarter, and need not include price.

(iii) A river authority may aggregate data on cost-based sales to a wholesale customer. The aggregated number should be in total MWh sold to each wholesale customer for the reporting quarter, and need not include price.

(iv) A QF may aggregate data on sales of electricity to a wholesale customer. The aggregated number should be in total MWh sold to each wholesale customer for the reporting quarter, and need not include price.

The commission finds that these modifications to the proposed rule will significantly reduce the burden to MOUs, co-ops, and river authorities cited by public power authority commenters. An MOU whose generation is entirely devoted to serving its native load would only have to compute and report one number per quarter and, therefore, should not have to hire an additional FTE as suggested by Austin Energy. Outside of these special transactions, however, a public power entity is essentially the same as any other wholesale market participant. The burden

would increase according to the degree that the public power entity is acting as a private-sector power marketer, a burden that the commission finds appropriate and consistent with PURA. Therefore, all transactions not covered by the exceptions listed above must be reported as otherwise provided in the rule as adopted. The commission also reiterates that a co-op, MOU, river authority, or QF may still be required to produce disaggregated information in the context of a specific investigation outside the quarterly report.

With regard to its authority to require such information of co-ops, the commission disagrees with Brazos. PURA §41.004(5)(D) explicitly authorizes the commission to require reports of electric cooperatives to the extent necessary to enable the commission to determine information relating to market power. Implicit in the concept of "reports" is the need to ascertain in advance the type of information that is reasonably expected to be the most useful in assessing market power. At the same time, the commission has attempted to limit to a bare minimum the information that would be required of co-ops. The commission further notes that co-ops have a stake in the commission's efforts to prevent market power abuses by other wholesale market participants. The disruptive effects resulting from unmonitored and unchecked market power abuses could increase the price co-ops pay for power in the bilateral market, their costs for balancing energy and ancillary capacity services, and what they pay for transmission congestion. Co-ops are not isolated, self-contained islands in the ERCOT wholesale market; the commission's market monitoring activities are in their interest, too. It is, therefore, not inappropriate for co-ops to have a reasonable reporting obligation.

The commission also disagrees with Denton/Garland that the commission may require them to report only annual or aggregated information. Although PURA §39.155(a) does specifically require the reporting of annual power sales, it also provides that the commission may require the reporting of "*any other information* necessary for the Commission to assess market power…." (emphasis added). Therefore §39.155(a) is fully applicable and not limited in its scope, and is made fully binding on public power entities by §40.004(7)(B) and §41.004(5)(D).

Additional issue: Use of FERC reports

Xcel and IMP applauded the commission's efforts to match FERC's reporting requirements for its Electric Quarterly Report (EQR) and not make the proposed rule more burdensome than those required by FERC. IMP said tracking FERC requirements would facilitate regulatory comparisons of FERC data and Texas data, reduce errors, reduce compliance costs, enhance the commission's ability to analyze the data received, and provide Texas the benefits of FERC having worked through startup issues. IMP recommended that the commission conduct technical workshops to help familiarize entities with the reporting procedures, and also recommended that the first reporting period be treated as a pilot project so that technical problems could be identified and resolved prior to full implementation of the rule. Calpine said the commission's report should be consistent with the data elements and formats used by FERC for its EQR. EPE, AEP, and Xcel, said the commission should permit companies to satisfy the requirements of this rule by filing with the commission the same quarterly reports they file with FERC. Xcel said it would not have a problem with extracting Texas-specific data for the commission's reporting

purposes. EPE, however, argued that areas where customer choice has not yet been introduced should be exempted from the reporting requirement, and that EPE should be exempt from the requirement because of its exemption from PURA Chapter 39.

Commission response

It is the commission's intent to parallel existing FERC reporting requirements as much as would be practical and relevant to the ERCOT market. For a company's Texas transactions that are not within ERCOT, the commission finds that the information a company already reports to FERC would satisfy the purposes of this rule. Further, the commission finds that it is reasonable to allow companies extra time to extract Texas transactions from their FERC reports, and to submit the extracts rather than the entire FERC report. The commission revises the proposed language so that the reports are due 45 days after the reporting quarter. Under this timetable, the commission's quarterly reports will be due 15 days after the FERC reports are due.

The commission also agrees with IMP that technical workshops and a pilot project would be helpful to the commission as well as to reporting entities. The commission adds to the rule a subsection dealing with implementation procedures, including a pilot project for the fourth quarter of 2003.

However, the commission finds no statutory or policy justification for exempting EPE from the requirement to file reports. While PURA §39.102(c) exempts EPE from the requirements of

Chapter 39 until the end of the utility's rate freeze, §14.003(5)(B) explicitly authorizes the commission to require EPE to provide the quarterly report it submits to FERC. Moreover, PURA §14.001 and §14.003(2) empower the commission to specify the manner in which EPE's FERC quarterly report is to be filed with the commission.

With respect to transactions within ERCOT, the commission finds that the FERC reporting forms are a reasonable starting point for designing templates to meet the requirements of this rule. Some elements and values used by FERC may have to be modified, however, as some have little relevance within ERCOT. The details of the forms and templates need not be decided in this rule, as long as they do not depart from the parameters set forth in this order. The commission further recognizes that implementing an easy and useful reporting methodology may require more than one iteration. The commission will solicit stakeholder input to develop the reporting forms, and will review the process after the first round of reports to identify improvements.

Additional issue: Commission authority to determine confidentiality and to release public information

IMP, Denton/Garland, and Austin Energy disagreed with the commission's assertion that it is authorized to determine which information submitted pursuant to PURA §39.155 is competitively sensitive and whether other market-related information should be released to the public for the purpose of market power monitoring. In addition, LCRA and Denton/Garland

argued that Texas Public Information Act ("TPIA") §552.133, concerning public power utility competitive matters, protects their generation related information from public disclosure by the commission.

Commission response

In its adoption of P.U.C. Substantive Rule §25.362, 28 TexReg 2496, the commission explained its authority to decide whether information is competitively sensitive under PURA. This separate authority in PURA is in addition to authority given any governmental body to "voluntarily make part or all of its information available to the public, unless the disclosure is expressly prohibited by law or the information is confidential under law." Tex. Gov't Code Ann. §552.007(a). Under PURA, the commission's authority is necessarily implied by its express duty to "protect the competitive process" in a manner that "ensures the confidentiality of competitively sensitive information." PURA §39.001(b)(4). PURA §39.155 requires persons who own electric generation facilities in the state to report information concerning the capacity of such facilities and the volume of sales. This section also directs the commission to prescribe reporting requirements that ensure the confidentiality of competitively sensitive information. In order to ensure the confidentiality of protected information, the commission must be able to determine which information submitted is competitively sensitive. This statute provides the commission, rather than the Attorney General, that authority to determine whether information provided under §39.155 may be disclosed to the public. However, not all information submitted to the commission under PURA §39.155 is "competitively sensitive information." Indeed, the

commission believes that making certain market-related information available to the public in a timely manner is a necessary part of immunizing a well-tempered marketplace from the dangers of market power abuse. Transparency is essential to the market's ability to police itself; therefore judicious disclosure is consistent with the Legislature's desire that the commission use "competitive rather than regulatory methods to achieve the goals" of electric competition, goals that include vigilant market oversight. PURA §39.001(d). Moreover, FERC has concluded that disclosure of price information "will help the public detect and bring to the Commission's attention any instances of undue preferences, discrimination or market power abuses…." Revised Public Utility Filing Requirements, Order No. 2001, 99 FERC ¶ 61,107 (2002) at 41. Therefore, the commission must be able to identify which information is competitively sensitive if it is to ensure its rightful confidentiality.

The commission's authority to determine matters of confidentiality is not uncommon. The Attorney General has recognized a state agency's authority to determine whether information is confidential in the absence of a request for information. *See,* Attorney General Opinion No. H-836 (1976). Other agencies have also used their fact finding authority to assist the Attorney General in deciding confidentiality issues. *See* ORD-609 (1992).

The commission also disagrees with commenters who assert that the commission is prohibited from releasing any information deemed a "competitive matter" by public power utilities under TPIA §552.133. Their concerns are based on several misconceptions. First, commenters mistakenly believe that TPIA §552.133 makes confidential by law information deemed a

"competitive matter" by a public power utility. The TPIA does not, by itself, make "competitive matters" confidential by law. *See* ORD 522 (1989) at 4. Rather, information must already be confidential by law, either constitutional, statutory, or by judicial decision, before it can be excepted from disclosure under the TPIA. *See,* Tex. Gov't Code Ann. §552.101. Second, commenters fail to understand that absent a request for public information, the Attorney General's authority to issue a decision under the TPIA is not invoked (Tex. Gov't Code Ann. §552.301) and an agency's authority to release information is limited only by its organic statutes and laws limiting the disclosure of confidential information. Third, commenters misunderstand the commission's intention with respect to requests for information. The commission will request a decision from the Attorney General in the event it receives a request for information pursuant to PURA §39.155.

Additional issues: Requests by a legislator

Reliant and EPE note that subsection (g)(1) of the proposed rule permits the notification of the reporting entity of the request, the identity of the requesting member of the Texas Legislature, and the substance of the request only if "permitted by the requesting member…." EPE claims there is no legal basis or rationale for making notification dependent on the permission of the requesting member of the legislature and that the TPIA addresses the issue.

Commission response

Although TPIA §552.008 addresses the procedure to use when the commission receives a written request for public information from a member of the Texas Legislature, the notification called for in subsection (g)(1) does not conflict with this statute. This section of the TPIA does not require the commission to notify the owner of information that a request has been made by a legislator, but it does not prohibit notification either. Subsection (g)(1) is a courtesy to both the legislator and the owner of the information that is consistent with both commission precedent and the TPIA. This courtesy, however, does not alter the commission's fundamental obligation to provide the information to the legislator.

Additional issue: The proposed rule ignores the commission's own procedures for dealing with claims of confidentiality

Denton/Garland claimed that the proposed rule ignores the procedures already developed in P.U.C. Procedural Rule §22.71 for handling confidential submissions to the commission.

Commission response

The commission disagrees. Both rules work in tandem. Subsection (g) of the proposed rule requires that any report be "filed on compact disk and as hardcopy and shall follow the requirements of §22.71 of this title."

Additional issue: Subsection (g)(2) is unclear

CenterPoint/Genco submitted that the final sentence should be stricken from subsection (g)(2) of the proposed rule because it is contrary to both PURA and prior Attorney General opinions and decisions. CenterPoint/Genco said this provision would result in the release of any information that is the subject of a request for disclosure unless the parties are able to informally resolve a dispute. TXU noted that the statement in subsection (g)(2) that "the General Counsel's office will process the request…" lacks clarity and could suggest that the commission intends to depart from its historic practice of requesting an opinion from the Attorney General concerning public information requests. TXU specifically requests that the proposed rule be revised to state that requests for information designated as confidential by a reporting party will be referred to the Attorney General for a decision.

Commission response

The commission recognizes that the wording of subsection (g)(2) is ambiguous and does not clearly reflect the commission's intent that if an informal resolution cannot be reached the commission will request a decision from the Attorney General in accordance with the timeline set by the TPIA. Subsection (g)(2) is clarified accordingly.

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 its intent.

This section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2003) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §39.001 which requires competitive rather than regulatory methods for achieving the goals of Chapter 39, that electric services and their prices should be determined by customer choices and the normal forces of competition, and that the competitive process must be protected in a manner that ensures the confidentiality of competitively sensitive information; PURA §39.101, which establishes that customers are entitled to protection from unfair, misleading, or deceptive practices and directs the commission to adopt and enforce rules to carry out this provision and to ensure that retail customer protections are established that afford customers safe, reliable, and reasonably priced electricity; PURA §39.155 which grants the commission authority to require the reporting of certain information; PURA §39.157 which requires the commission to monitor market power; PURA §40.004, which authorizes the commission to require reports of municipally owned utility operations to the extent necessary to determine information relating to market power; and PURA §41.004, which authorizes the commission to require reports of electric cooperative operations to the extent necessary to determine information relating to market power.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 39.001, 39.101, 39.155, 39.157, 40.004, and 41.004.

§25.93. Quarterly Wholesale Electricity Transaction Reports.

(a) **Purpose**. The purposes of this section are to:

(1) Deter market power abuses and anticompetitive behavior by increasing wholesale market transparency with respect to bilateral contracts for delivery of electricity; and

(2) Improve the commission's ability to investigate allegations of market power abuse and anticompetitive behavior that may arise with respect to the wholesale electricity market.

(b) **Application.**

(1) This section applies to any person, municipally owned utility, electric cooperative and river authority that owns electric generation facilities and offers electricity for sale in this state. This section also applies to power marketers as defined in §25.5 of this title (relating to Definitions).

(2) This section applies to all wholesale transactions for the sale of electricity that begin or terminate in Texas, or occur entirely within Texas, including areas of the state not served by the Electric Reliability Council of Texas (ERCOT).

(c) **Definitions.** The following words and terms, when used in this section, shall have the following meanings, unless the context indicates otherwise:

(1) **Contract —** An agreement for the wholesale provision of energy or capacity under specified prices, terms, and conditions. A contract governs the financial aspects of an electricity transaction.

(2) **Protected information —** Information contained in a Quarterly Wholesale Electricity Transaction Report that comports with the requirements for exception from disclosure under the Texas Public Information Act (TPIA). Information ceases to be protected information upon a determination by the Legislature, a court, the attorney general, or the commission that the information is not subject to an exception under the TPIA.

(3) **Transaction —** The provision of a specific quantity of energy or the commitment of a specific amount of generating capacity for a specific period of time from a wholesale seller of electricity to a customer, whether pursuant to a contract, a market operated by an independent organization as defined in the Public Utility Regulatory Act §39.151(b), or any other provision of electricity or commitment of reserve capacity.

(4) **Wholesale seller of electricity —** Any power generation company, power marketer, municipally owned utility, electric cooperative, river authority, or other entity that sells power at wholesale.

(d) **Quarterly Wholesale Electricity Transaction Reports.**

(1) Wholesale sellers of electricity shall report to the commission information related to all wholesale electricity transactions with a point of delivery or point of receipt

in Texas, including intermediate transactions involving electricity generated in Texas or electricity ultimately delivered to customers in Texas. Reports shall be submitted quarterly and shall be due not later than 45 days after the last day of the quarter for which transactions are being reported.

(2) Reports shall provide contact information for the reporting entity, information on each wholesale electricity contract, and information on each transaction of electricity from the reporting entity to another party.

(A) Contact information shall include company name, address, telephone number, and facsimile machine number, if available; name, position, and telephone number of person attesting to the report; and the time period covered by the report.

(B) Each wholesale seller of electricity must file information on each contract for electricity that is in effect during the reporting period, including those that will continue to be in effect past the end of the reporting period. Information shall include the name of purchaser, contract execution and termination dates, time period over which the contract is in effect, product type, price, and applicable information about where the power was generated, delivered, and received.

(C) Each wholesale seller of electricity must file information on each transaction. Information shall include the time period over which the transaction was conducted; applicable information about where the power was generated, delivered, and received; product name; transaction

quantity; price; total transaction charges; and cross-reference to a contract reported under subparagraph (B) of this paragraph. If the period of a transaction extends over more than one reporting period, each report shall include only the portion of the transaction that occurred during the reporting period.

(D) Reporting parties may aggregate the following types of transactions:

(i) A municipally owned utility may aggregate data on the portion of its generation that it used to serve its native load. The aggregated number should be in total MWh for the reporting quarter, and need not include price.

(ii) A generation cooperative may aggregate data on cost-based sales to a distribution cooperative. The aggregated number should be in total MWh sold to each distribution cooperative for the reporting quarter, and need not include price.

(iii) A river authority may aggregate data on cost-based sales to a wholesale customer. The aggregated number should be in total MWh sold to each wholesale customer for the reporting quarter, and need not include price.

(iv) A qualifying facility may aggregate data on sales of electricity to a wholesale customer. The aggregated number should be in total MWh sold to each wholesale customer for the reporting quarter, and need not include price.

(v) Any reporting entity may aggregate data on sales of electricity or capacity to an independent system operator for balancing energy service, ancillary capacity services, or other services required by the independent system operator. This subparagraph includes sales by an entity that is qualified to sell the reporting entity's capacity and electricity to the independent system operator. The aggregated number should be in total MWh provided under each type of service for the reporting quarter, and need not include price.

(e) **Filing procedures.** Wholesale sellers of electricity shall file the Quarterly Wholesale Electricity Transaction Reports using forms, templates, and procedures approved by the commission. The commission may also approve the use of forms and templates issued by federal agencies for reporting information similar to that required under this section. Reports shall be filed according to §22.71 of this title (Relating to Filing of Pleadings, Documents and Other Materials) and §22.72 of this title (relating to Formal Requisites of Pleadings and Documents to be Filed with the Commission) except as specified in this subsection and subsection (g) of this section.

(1) The entirety of the report shall be submitted on standard-format compact disks (four copies) without a paper hard copy. The commission may also provide for reports to be submitted electronically.

(2) Pages containing the information required under subsection (d)(2)(A) of this section along with attestations and other necessary documents shall be filed in hard copy form.

(f) **Additional information.** If during an investigation of market power abuse the commission determines that it needs contract and transaction information not included in the quarterly report, it may require any person or entity subject to this section to provide such additional information.

(g) **Confidentiality**. If a wholesale seller of electricity asserts that any part of its Quarterly Wholesale Electricity Transaction Report is confidential, it must submit its entire report according to §22.71(d) of this title, and in addition must submit for public disclosure a copy that omits specific information for which the reporting entity asserts confidentiality. The full report, including material for which confidentiality is asserted, shall be submitted electronically and on compact disk as described in subsection (e)(1) of this section. The public report shall be filed on compact disk and as hard copy and shall follow the requirements of §22.71 of this title. Commission employees, consultants, agents, and attorneys who have access to reports shall not disclose protected information except as provided in this subsection and in accordance with the provisions of the Texas Public Information Act (TPIA).

(1) If the commission receives from a member of the Texas Legislature a request for protected information contained in a report, the commission shall provide the

information to the requestor pursuant to the provisions of Texas Government Code Annotated §552.008. If permitted by the requesting member of the Texas Legislature the commission shall notify the reporting entity of the request, the identity of the requestor, and the substance of the request.

(2) If the commission receives a written request for protected information, the commission, through its General Counsel's office, shall make a good faith effort to provide notice of the request to the affected reporting entity within three business days of receipt of the request. If the reporting entity objects to the release of the information, the General Counsel's office shall offer to facilitate an informal resolution between the requestor and the reporting entity in conformance with Texas Government Code §552.222. If informal resolution of an information request is not possible, the General Counsel's office will process the request in accordance with the TPIA.

(3) In the absence of a request for information, if the commission staff seeks to release protected information, the commission may determine the validity of the asserted claim of confidentiality through a contested-case proceeding. In a contested case proceeding conducted by the commission pursuant to this subsection, the staff and the entity that provided the information to the commission will have an opportunity to present information or comment to the commission on whether the information is subject to protection from disclosure under the TPIA.

(4) Any person who asserts a claim of confidentiality with respect to the information must, at a minimum, state in writing the specific reasons why the information is subject to protection from public disclosure and provide legal authority in support of such assertion.

(5) Except as otherwise provided in paragraph (1) of this subsection, if either the commission or the attorney general determines that the disclosure of protected information is permitted, the commission shall provide notice to the reporting entity at least three business days prior to the disclosure of the protected information or, in the case of a valid and enforceable order of a state or federal court of competent jurisdiction specifically requiring disclosure of protected information earlier than within three business days, prior to such disclosure.

(h) **Implementation**

(1) By February 14, 2004, reporting entities shall submit reports for the fourth quarter of 2003 using preliminary templates and procedures approved by the commission. After February 14, 2004, the commission will approve final reporting templates and procedures to be used for reports beginning with the first quarter of 2004.

(2) The commission shall establish a detailed implementation process that includes the following items:

(A) training sessions to educate parties required to file under this section about the data required and the form in which it should be submitted;

(B) technical workshops to permit the commission and filing parties to exchange technical systems information; and

(C) a pilot project to test systems and resolve operational problems with data submission.

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 §25.93, relating to Quarterly Wholesale Electricity Transaction Reports, is hereby adopted with changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE 15th DAY OF AUGUST 2003.

PUBLIC UTILITY COMMISSION OF TEXAS

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Rebecca Klein, Chairman

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Brett A. Perlman, Commissioner

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Julie Parsley, Commissioner