



*Commission response*

**The commission agrees with some of Luminant's non-substantive recommendations and its recommendation regarding §22.181(e). The commission adds cross-references to §22.181(d) as suggested by Luminant and adds language to §22.181(e) to clarify that parties other than the applicant have an opportunity to respond to motions to dismiss.**

*Section 22.181(f)*

Luminant argued that subsection §22.181(f)(4) could be misinterpreted to apply to all presiding officer actions under §22.181(f)(2). Luminant suggested that the commission clarify subsection (f)(4) to state that an order issued under paragraph (2) is final only if the order addresses withdrawal under subsection (g)(1) or (2).

*Commission response*

**The commission renumbers subsections (f)(3) and (4) as (f)(4) and (6) respectively. The commission understands Luminant's concern and adds Luminant's suggested revision to subsection (f)(6) to clarify that an order of an administrative law judge is final if the dismissal is based solely upon withdrawal of an application under subsections (g)(1) or (2). The commission also adds new (f)(3) and (5) and revises (f)(2), (4), and (6) to clarify whether it is the commission or an administrative law judge acting under the paragraph. These modifications are intended to clarify the scope of the commission's delegation of authority.**

AT&T proposed deleting the language in §22.181(f)(3) giving the presiding officer discretion to issue either an interim order or proposal for decision in cases of partial dismissal. AT&T argued that the proposed language could lead to confusion on the part of the commission and parties since a proposal for decision suggests that a final order may be adopted by the commission. AT&T therefore proposed that this paragraph only allow for issuance of an interim order. AT&T also proposed technical edits to this subsection in accordance with its recommendations.

*Commission response*

**The commission makes changes to this paragraph to reduce the risk of confusion but disagrees with AT&T that this paragraph should only allow for issuance of an interim order. The commission renumbers §22.181(f)(3) as (f)(4) and adds language to clarify that in the case of partial dismissal the presiding officer may either issue an interim order or proposal for *interim* decision. Such interim orders and proposals for interim decision will produce interim orders of the commission subject to motions for reconsideration. The commission's addition of clarifying language resolves AT&T's concern that the issuance of a proposal for decision for a partial dismissal could cause confusion.**

*Section 22.181(g)*

AT&T proposed that §22.181(g)(1) be revised to allow a party to withdraw its application with prejudice. AT&T also recommended that this subsection be revised to change the timeframe in which a party can withdraw its application without prejudice. AT&T proposed changing the proposed language that allows a party to withdraw its application without prejudice before it *has*

*presented its direct case* to language that allows a party to withdraw its application without prejudice only before it has begun the presentation of its direct case. AT&T argued that there could be disputes as to when a party has presented its direct case and that its proposed language avoids such potential disputes.

*Commission response*

**The commission agrees with AT&T's recommendation to add language that allows a party to agree to withdraw its application with prejudice. However, the commission finds AT&T's recommendation regarding when a party can withdraw its application without prejudice to be outside the scope of this rulemaking. AT&T's proposed revision would substantively change the rule rather than clarify current procedure, and the commission therefore declines to adopt this revision.**

AT&T recommended deleting the phrase *after the matter has otherwise been set on the open meeting agenda* from §22.181(g)(2) and (3). AT&T argued that the proposed language creates conflicting timetables that would lead to confusion. Luminant suggested that language be added to clarify that §22.181(g)(2) and (3) would apply only after a matter has been set on the open meeting agenda for final disposition.

*Commission response*

**The commission strikes the phrase *after the matter has otherwise been set on an open meeting agenda* from §22.181(g)(2) and (3), rejects Luminant's recommended language,**

**and adds new (g)(4) to clarify its intended meaning. The new (g)(4) specifies the standard that will apply to evaluation of a request to withdraw an application after the matter has been set on an open meeting agenda for consideration of an appeal of an interim order, a request for certified issues, or a preliminary order with threshold legal or policy issues.**

Luminant argued the amendments to §22.181(g)(4) would permit the presiding officer to condition withdrawal at any time after the presentation of the applicant's direct case upon a finding that withdrawal is with prejudice. Luminant stated that it was unclear what justification exists for ordering a dismissal with prejudice over the objection of the applicant. Therefore, Luminant suggested the addition of language specifying that withdrawal with prejudice can only be granted under this paragraph when the applicant has requested that result.

*Commission response*

**The commission rennumbers §22.181(g)(4) as (g)(5) and adds language to subsection (g)(5) to specify that if the presiding officer finds good cause for withdrawal, an order of dismissal under (g)(5) shall not be with prejudice unless requested by the applicant.**

*Section 22.182(f)*

Luminant proposed the addition of language to §22.182(f) to clarify that a partial summary decision will result in either an interim order or interim proposal for decision that is subject to motions for reconsideration.

*Commission response*

**The commission adds language to §22.182(f) in accordance with Luminant's suggestion to ensure the commission's intent is clear. Similar to the revisions in §22.181, the commission revises its language in §22.182(f) and adds subsection (g) to clarify the procedure for when the commission is acting as opposed to an administrative law judge.**

In accordance with its recommendation regarding §22.181(f)(3), AT&T proposed deleting language in §22.182(f) giving the presiding officer discretion to issue either an interim order or proposal for decision in cases of partial summary decision. Again, AT&T argued that this subsection should only provide for the issuance of an interim order and that the proposed language could lead to confusion.

*Commission response*

**The commission makes changes to this subsection to reduce the risk of confusion but disagrees with AT&T that this subsection should only allow for issuance of an interim order. The commission adds language to §22.182(f) to clarify that in the case of partial summary decision the presiding officer may either issue an interim order or proposal for *interim* decision. Such interim orders and proposals for interim decision will produce interim orders of the commission subject to motions for reconsideration. The commission's addition of clarifying language resolves AT&T's concern that the issuance of a proposal for decision for a partial summary decision could cause confusion.**

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting these sections, the commission makes other minor modifications for the purpose of clarifying its intent.

The repeal, new, and amended sections are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (West 2016) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure.

Cross Reference to Statutes: PURA §14.002 and §14.052.

**§22.181. Dismissal of a Proceeding. (REPEALED)****§22.181. Dismissal of a Proceeding.**

- (a) **Dismissal of a proceeding.** Upon the motion of the presiding officer or the motion of any party, the presiding officer may recommend that the commission dismiss, with or without prejudice, any proceeding for any reason specified in this section.
- (b) **Dismissal of issues within a proceeding.** Upon the motion of the presiding officer or the motion of any party, the presiding officer may dismiss or may recommend that the commission dismiss, with or without prejudice, one or more issues within a proceeding for any reason specified in this section.
- (c) **Dismissal without hearing.** A dismissal under this section requires a hearing unless the facts necessary to support the dismissal are uncontested or are established as a matter of law.
- (d) **Reasons for dismissal.** Dismissal of a proceeding or one or more issues within a proceeding may be based on one or more of the following reasons:
- (1) lack of jurisdiction;
  - (2) moot questions or obsolete petitions;
  - (3) res judicata;
  - (4) collateral estoppel;
  - (5) unnecessary duplication of proceedings;

- (6) failure to prosecute;
  - (7) failure to amend an application such that it is sufficient after repeated determinations that the application is insufficient;
  - (8) failure to state a claim for which relief can be granted;
  - (9) gross abuse of discovery consistent with §22.161(b)(2) of this title (relating to Sanctions);
  - (10) withdrawal of an application consistent with subsection (g) of this section; or
  - (11) other good cause shown.
- (e) **Motion for dismissal, responses, and replies.** Dismissal of a proceeding or one or more issues within a proceeding may be made upon the motion of the presiding officer or the motion of any party.
- (1) A party's motion for dismissal must specify at least one of the grounds for dismissal identified in subsection (d) of this section. The motion must include a statement that explains the basis for the dismissal and if necessary
    - (A) A statement that sets forth the material facts that support the motion; and
    - (B) An affidavit that supports the motion and that includes evidence that is not found in the then-existing record.
  - (2) A presiding officer's motion shall be provided by written order or stated in the record and must specify one or more grounds for dismissal identified in subsection (d) of this section and a clear and concise statement of the material facts supporting the dismissal.

- (3) The party that initiated the proceeding or any other affected party shall have 20 days from the date of receipt to respond to a motion to dismiss. The response must contain a statement of reasons the party contends the motion to dismiss should not be granted, and if necessary
    - (A) A statement that refers to each material fact identified in the motion to dismiss as uncontested that the responding party contends is contested; and
    - (B) An affidavit that supports the response to the motion to dismiss and that includes evidence the party relies upon to establish contested issues of fact. The affidavit may include evidence that is not found in the then-existing record.
  - (4) Replies to a response to a motion to dismiss may be made only by leave of and as directed by the presiding officer.
- (f) **Action on a motion to dismiss.** Action on a motion to dismiss shall conform to this subsection.
- (1) If a hearing on the motion to dismiss is held, that hearing shall be confined to the issues raised by the motion to dismiss.
  - (2) If the administrative law judge determines that all issues within a proceeding should be dismissed, the administrative law judge must prepare a proposal for decision in accordance with §22.261 of this title (relating to Proposals for Decision) to that effect, unless the reason for dismissal is solely the withdrawal of an application under subsection (g)(1) or (2) of this section, in which case the administrative law judge may issue an order dismissing the proceeding. The

commission shall consider the proposal for decision or motion for rehearing on an order of dismissal as soon as is practicable.

- (3) If the commission determines that all issues within a proceeding should be dismissed, the commission will issue an order subject to motions for rehearing under §22.264 of this title (relating to Rehearing).
  - (4) If the administrative law judge determines that one or more, but not all, issues within a proceeding should be dismissed, the administrative law judge may issue a proposal for interim decision or an interim order dismissing such issues. An interim order issued by the administrative law judge resulting in partial dismissal is subject to appeal or reconsideration under §22.123 of this title (relating to Appeal of an Interim Order and Motions for Reconsideration of Interim Order Issued by the Commission).
  - (5) If the commission determines that one or more, but not all, issues within a proceeding should be dismissed, the commission may issue an interim order dismissing such issues. An interim order issued by the commission resulting in partial dismissal is subject to appeal or reconsideration under §22.123 of this title.
  - (6) An order of the administrative law judge dismissing a proceeding under paragraph (2) of this subsection based solely upon the withdrawal of an application under subsection (g)(1) or (2) of this section is the final order of the commission and is subject to motions for rehearing under §22.264 of this title.
- (g) **Withdrawal of application.** An application may be withdrawn only in accordance with this subsection.

- (1) A party that initiated a proceeding may withdraw its application without prejudice to refiling of same, at any time before that party has presented its direct case. A party may agree to withdraw its application with prejudice.
- (2) After the presentation of its direct case, but prior to the issuance of a proposed order or proposal for decision, a party may request to withdraw its application with or without prejudice, and withdrawal may be granted only upon a finding of good cause by the presiding officer.
- (3) A request to withdraw an application with or without prejudice after a proposed order or proposal for decision has been issued, may be granted only upon a finding of good cause by the commission. In ruling on the request, the commission will weigh the importance of the matter being addressed to the jurisprudence of the commission and the public interest.
- (4) A request to withdraw an application with or without prejudice after the application has been placed on an open meeting agenda for consideration of an appeal of an interim order, a request for certified issues, or a preliminary order with threshold legal or policy issues may be granted only upon a finding of good cause by the commission. In ruling on the request, the commission will weigh the importance of the matter being addressed to the jurisprudence of the commission and the public interest.
- (5) If a request to withdraw an application is granted, the presiding officer shall issue an order of dismissal stating whether the dismissal is with or without prejudice. If the presiding officer finds good cause, the order of dismissal under this paragraph shall not be with prejudice, unless the applicant requests dismissal with prejudice.

Such order must, if applicable, specify the facts on which good cause is based and the basis of the dismissal and is the final order of the commission subject to motions for rehearing under §22.264 of this title.

**§22.182. Summary Decision.**

- (a) **Motion for summary decision.** The presiding officer, on motion by any party, may grant a motion for summary decision on any or all issues to the extent that the pleadings, affidavits, materials obtained by discovery or otherwise, admissions, matters officially noticed in accordance with §22.222 of this title (relating to Official Notice), or evidence of record show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision in its favor, as a matter of law, on the issues expressly set forth in the motion.
- (b) **Filing and contents of motion.** Any party to a proceeding may move for summary decision on any or all of the issues. The motion must be filed before the close of the hearing on the merits or before the issuance of a proposal for decision or proposed order if no hearing is held, unless the time to file is extended by order of the presiding officer. The party filing the motion shall demonstrate that the issue or issues may be resolved by summary decision in accordance with the standard set forth in subsection (a) of this section. Affidavits in support of the motion shall be based on personal knowledge and shall set forth such facts as would be admissible in evidence. A motion for summary decision shall specifically describe the facts upon which the request for summary decision is based, the information and materials which demonstrate those facts, and the laws or legal theories that entitle the movant to summary decision.

- (c) **Response to motion.** Any response to a motion for summary decision shall be filed within the time set by the presiding officer. A party opposing the motion shall show, by affidavits, materials obtained by discovery or otherwise, admissions, matters officially noticed, or evidence of record, that there is a genuine issue of material fact for determination at the hearing, or that summary decision is inappropriate as a matter of law.
- (d) **Hearing on the motion.** If appropriate, the presiding office shall set the motion for hearing.
- (e) **No further hearing.** No further evidentiary hearing shall be held on issues for which summary decision has been granted.
- (f) **Action on the motion by administrative law judge.** The administrative law judge must issue a proposal for decision if all issues will be resolved by summary decision. The administrative law judge may issue an interim order or a proposal for interim decision if some, but not all, issues will be resolved by summary decision. Such a partial summary decision may result if the motion for summary decision does not include all issues or, if the motion does include all issues, the administrative law judge grants summary decision on some issues and denies summary decision on other issues. Parties may file exceptions and replies to exceptions to a proposal for interim decision recommending resolution of issues by summary decision. An interim order issued by the administrative law judge granting partial summary decision is subject to appeal or reconsideration under §22.123

of this title (relating to Appeal of an Interim Order and Motions for Reconsideration of Interim Order Issued by the Commission).

- (g) Action on the motion by the commission. If all issues will be resolved by summary decision, the commission will issue an order that is subject to motions for rehearing under §22.264 of this title (relating to Motions for Rehearing). An interim order issued by the commission granting partial summary decision is subject to reconsideration under §22.123 of this title.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority. It is therefore ordered by the Public Utility Commission of Texas that the repeal of 22.181, relating to dismissal of a proceeding, is hereby adopted without changes to the text as proposed. Section 22.181, relating to dismissal of a proceeding and §22.182, relating to summary decision are hereby adopted with changes to the text as proposed.

**Signed at Austin, Texas the \_\_\_\_\_ day of December 2016.**

**PUBLIC UTILITY COMMISSION OF TEXAS**

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**DONNA L. NELSON, CHAIRMAN**

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**KENNETH W. ANDERSON, JR., COMMISSIONER**

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**BRANDY MARTY MARQUEZ, COMMISSIONER**