

**PROJECT NO. 27464**

<b>RULEMAKING PROCEEDING</b>	<b>§</b>	
<b>CONCERNING QUANTIFICATION OF</b>	<b>§</b>	<b>PUBLIC UTILITY COMMISSION</b>
<b>STRANDED COSTS OF NUCLEAR</b>	<b>§</b>	
<b>GENERATION ASSETS, SUBSTANTIVE</b>	<b>§</b>	<b>OF TEXAS</b>
<b>RULE §25.264</b>	<b>§</b>	

**ORDER ADOPTING NEW §25.264,  
QUANTIFICATION OF STRANDED COSTS OF NUCLEAR GENERATION ASSETS,  
AS APPROVED AT THE MAY 9, 2003 OPEN MEETING.**

The Public Utility Commission of Texas (commission) adopts new §25.264, relating to Quantification of Stranded Costs of Nuclear Generation Assets, with changes to the proposed text as published in the April 4, 2003 issue of the *Texas Register* (28 TexReg 2849). The new rule clarifies the methods that are available to an electric utility and its affiliated power generation company to quantify the market value of its nuclear generation assets for the purpose of determining its stranded costs under the Public Utility Regulatory Act, Texas Utilities Code Annotated, Chapter 39 (Vernon 1998, Supplement 2003) (PURA). This rule is adopted under Project Number 27464.

In Docket Number 27120, *Petition of Central Power and Light Company for Declaratory Order and Plan of Divestiture*, the commission considered a request by AEP Texas Central Company (AEP) (previously known as Central Power and Light Company) for a declaratory order interpreting the provisions of PURA Chapter 39 related to the stranded cost calculation for nuclear assets. AEP indicated that it intended to sell all of its generating assets, including its nuclear assets, because it felt that a sale would produce the highest value for its assets, relative to the other market-based methods of determining value, and thus, would result in the lowest amount of stranded costs that would have to be recovered from ratepayers. However, AEP was

concerned that PURA could be interpreted to prohibit the sale of nuclear assets, and AEP would be required to establish the value of those assets using an administrative method (the commission's "excess costs over market" or ECOM method). The sale is not likely to recover the full value of the nuclear generation assets, so AEP would need to recover the remaining amount of its investment, or stranded costs, from ratepayers. However, if the commission requires the use of the ECOM method, it is likely that it would produce a result indicating that AEP had minimal, if any, stranded costs. Thus, if AEP sold its nuclear assets but the commission interpreted PURA as requiring the use of the ECOM method, AEP would be placed in a position where it would be unable to recoup the full value of its investment in its nuclear generation assets. AEP requested a declaratory order from the commission concerning the proper interpretation of PURA so that it could determine whether to sell its nuclear generation assets. In the absence of an interpretation, AEP indicated that it would use a different method of establishing the value of its nuclear assets. This would avoid the possible application of the ECOM method, but it would also likely generate a lower value for the nuclear assets and increase the amount of stranded costs to be collected from ratepayers. After briefing by the parties, the commission determined that it was more appropriate to address the issue in a rulemaking proceeding and established this project to interpret the applicable provisions of PURA and eliminate the uncertainty concerning whether the sale of assets method can be used to determine the market value, and thus the amount of resulting stranded costs, of nuclear generation assets.

This rule is necessary to firmly establish the methods that may be employed to determine the stranded cost of nuclear power generation assets. In addition, the rule is needed to serve the public interest and legislative policy stating that utilities with uneconomic generation-related assets should be allowed to recover the reasonable excess costs over market value of those assets. In order to assure that the market value of nuclear generation assets is properly quantified in a manner that reduces, to the extent possible, the amount of excess costs over market value for those assets, the rule clarifies that a public utility and its affiliated companies may use any of the valuation methods specified in PURA §39.262(h) and (i) to quantify the market value of nuclear generation assets.

Although this rulemaking project was initiated in response to an issue raised by AEP concerning its individual stranded costs, the commission determines that the public interest is best served by the adoption of a rule of general applicability to address the proper interpretation of PURA. In enacting Chapter 39 of PURA, the Legislature stated, in PURA §39.001(a), that it is the public policy "to protect the public interest during the transition to and in the establishment of a fully competitive electric power industry." The Legislature also found that it is in the public interest to allow public utilities to collect their stranded costs. Chapter 39 contains provisions directing the commission to determine the utilities' initial amounts of stranded costs and to establish a competition transition charge to enable the utilities to recover stranded costs through rates charged to ratepayers. After competition has been established for two years, the commission is to conduct a true-up proceeding to determine the utilities' final amounts of stranded costs and to increase, decrease, or eliminate the competition transition charge to reflect those final amounts.

Under this legislative process, the determination of stranded costs is a matter that affects both the utilities and their ratepayers. This rule, establishing the methods for quantification of stranded costs of nuclear generating assets, will also affect both the utilities and their ratepayers. While the number of utilities with nuclear generating assets may be limited, they have numerous customers in many different customer classes that will be affected by the commission's decision in this project. The commission finds that it is appropriate to adopt the rule in order to properly interpret potentially ambiguous provisions of PURA and to implement the legislative policies concerning the recovery of stranded costs. Because of the impact of the rule on the interests of the public at large as well as the impact on utilities, the commission concludes that this rule is a statement of general applicability that implements and interprets law and policy.

The rule is proposed as part of the commission's efforts to adopt competition rules to protect the public interest during the transition to and in the establishment of a fully competitive electric power industry under PURA Chapter 39. As noted previously, Chapter 39 of PURA delegated many important functions to the commission in order to "protect the public interest during the transition to and in the establishment of a fully competitive electric power industry." Among those functions was the determination of a utility's stranded costs in a manner that allows the utilities to collect those costs while also protecting ratepayers from excessive and unreasonable charges. Simultaneously, the commission must implement the legislative directive to "encourage full and fair competition among all providers of electricity." The commission finds that balancing these concerns related to the development of a competitive market requires that the commission adopt a rule interpreting the methods by which a utility may quantify the stranded

costs of its nuclear generation assets. Accordingly, the commission concludes that this rule is a competition rule under PURA Chapter 39.

A public hearing on the proposed section was held at commission offices on Tuesday, April 29, 2003, at 9:00 a.m. Representatives from American Electric Power Companies (AEP), Centerpoint Energy (Centerpoint), City Public Service of San Antonio (San Antonio), Texas Industrial Energy Consumers (TIEC), the State of Texas, by and through the Office of the Attorney General, Customer Protection Division, Public Agency Representation Section (State) and Vinson & Elkins attended the hearing. Although public comment was invited, no person provided comments at the public hearing.

*Comments on proposed §25.264*

The commission received written comments on the proposed new section only from AEP. AEP generally supported the rule and agreed that it correctly interprets and prescribes the PURA provisions concerning the quantification of stranded costs of nuclear generation assets. AEP also made recommendations for certain revisions to the rule and for clarifications of the applicability and justification for the rule.

AEP agreed that the proposed rule is a rule of "general applicability" but requested that the commission explain in more detail why this is a rule of general applicability. AEP noted that the Administrative Procedure Act defines a "rule" as "a state agency statement of general

applicability that implements, interprets, or prescribes law or policy." AEP cited to various court cases for the propositions that a rule can be of general applicability even if it applies to only a limited group and that rules, like legislation are written to apply to the community at large, even though they concern only a small number of companies. Based upon this precedent, AEP asserted that the proposed rule is a rule of general applicability.

The commission agrees with AEP and has added language to previous portions of the preamble explaining that the rule is a statement of general applicability that implements, interprets, and prescribes the law as established by PURA and supports the public policies established by the Legislature when it adopted PURA Chapter 39.

AEP noted that, in the preamble to the proposed rule, the commission had indicated that the proposed rule was a competition rule, adopted pursuant to the commission's efforts to protect the public interest during the transition to and in the establishment of a fully competitive electric power industry under Chapter 39 of PURA. AEP agreed with the commission's declarations in the proposed rule preamble, but requested that the commission re-affirm this declaration in the preamble of the order adopting the rule.

The commission agrees with AEP's request and has included language in other portions of the preamble to re-affirm that this rule is being adopted pursuant to the commission's efforts to implement competition under PURA Chapter 39.

AEP commented that the proposed rule is a correct interpretation of the statutory language as well as the legislative intent underlying PURA §39.262, as it applies to the valuation of stranded costs of nuclear generation assets. AEP argued that, in accordance with applicable standards of statutory construction, the commission must determine and implement the intent of the Legislature and that the best indication of legislative intent is the language of the statute. AEP cited the language of §39.262(h)(1) as allowing the power generation company (PGC) to sell "some or all" of the generation assets of the company, without making any exception or exclusion for nuclear assets in that section. The language of §39.262(i) requiring the PGC to place its "remaining" assets in transferee corporations or value the nuclear assets using the ECOM method, should be read as referring to the assets "that have been left behind after the company has exercised its right to sell some of them." AEP also noted that the definition of "market value" contained in §39.251(4) contemplates that at least "certain nuclear assets" can have a market value that is determined by being "sold in a bona fide third-party transaction", *i.e.*, a sale of assets.

In its comments, AEP also argued that interpretation of PURA contained in the proposed rule was consistent with Legislative policy. AEP asserted that the Legislature expressed a clear preference for market valuations of potentially stranded costs. Allowing the utility to use any of the proposed market valuation methods, including the sale of assets, was more consistent with this policy. AEP indicated that the commission should favor an interpretation that favors making all of the market valuation methods available so that each utility could make the choice of the best market valuation method to address its individual circumstances.

AEP contended that a review of the legislative history related to Chapter 39, which was added to PURA by Senate Bill 7 (Act of May 21, 1999, 76th Leg., R.S., ch. 405, 1999 Tex. Gen. Laws 2543) (SB 7), also supported allowing the utility to use any of the market valuation methods for nuclear assets. AEP noted that the Legislature supported the general concept of a market methodology as the best way to determine stranded costs. The Legislature was aware of concerns that a forced sale of the nuclear assets could lead to a "fire sale" due to the reduced demand for such assets at the time the legislation was pending. During various drafts and revisions, the Legislature generally increased the reasonable options available to the utilities. AEP reasoned that, if there had been a legislative intent to prohibit the sale of nuclear assets, that intent should have been expressed during the committee process but AEP did not find such expressions. AEP noted that the word "remaining" was added to §39.262(i) by the House State Affairs Committee when it adopted a Committee Substitute for Senate Bill 7 (CSSB 7), which changed various provisions of SB 7. AEP did not identify any legislative discussion indicating the reason for the addition of the word "remaining" to the language contained in the Senate version of SB 7.

The commission agrees with AEP's analysis of the meaning and intent of the PURA provisions concerning the determination of stranded costs of nuclear generation assets. An interpretation of PURA Chapter 39 as allowing quantification of the stranded costs of nuclear generation assets through a sale or exchange of assets, in addition to a full or partial stock evaluation, is more consistent with the express language of the statute. An interpretation that nuclear assets could

not be valued though a sale would require that the commission ignore: (1) specific statutory language allowing the sale of "some or all" assets; (2) language allowing the market value of some nuclear assets to be determined through a "bona fide third-party transaction"; and (3) language limiting the application of the alternative provisions of §39.262(i) to only the "remaining" assets. In interpreting PURA, the commission must give meaning to all of the words of the statute. Based upon a consideration of PURA as a whole, the commission finds that PURA Chapter 39 should be interpreted in a manner that allows the market value of nuclear generation assets to be established using any of the four methods of quantification specified in PURA §39.262(h).

The commission also agrees with AEP that this interpretation is consistent with the policy underlying PURA Chapter 39. At the time it enacted SB 7 the Legislature started a multi-year process to create a competitive electric power market in Texas. No doubt the Legislature was aware that market conditions existing in 1999 could undergo significant changes before all steps of market creation were completed. For this reason, the Legislature gave considerable discretion to the commission and to the utilities concerning how the various parts of electric restructuring would be accomplished. Allowing a utility the flexibility to use any of the four market valuation methods will enable it to adapt to any changes in the market that have occurred since the enactment of SB 7 and thereby obtain a result that provides the highest value for its nuclear assets while also reducing the potential stranded cost burden on its ratepayers. This result is consistent with the legislative policy calling for the protection of "the public interest during the transition to and the establishment of a fully competitive electric power market."

The commission also agrees with AEP that the interpretation of PURA contained in the rule is not contradicted by the legislative history of SB 7. Although the Legislature may have been concerned about the possibility of a "fire sale" of nuclear assets, based upon market conditions existing at that time, it did not include specific language prohibiting a sale of nuclear assets. The commission notes that during the 76th Legislature, a bill addressing electric restructuring was also introduced in the House. House Bill 349 (HB 349) was introduced by Representative Steve Wolens, Chairman of the House State Affairs Committee. While HB 349 addressed similar subjects as SB 7, it was not a companion bill and, in many places, treated subjects in a different manner than in SB 7. On the subject of stranded cost, HB 349 gave the utility the option of deciding whether to use a market valuation method or an administrative method. There was no language that separately addressed the valuation of nuclear assets, so either option was available to the utility under HB 349. This language was consistent with Representative Wolen's stated preferences (cited in AEP's comments) favoring a market value approach.

After SB 7 was passed by the Senate on March 17, 1999, it was referred to the House State Affairs Committee for consideration. On April 12, 1999, the House State Affairs Committee considered both SB 7 and HB 349. Subsequent to that hearing, on May 5, 1999, the House State Affairs Committee reported a Committee Substitute (CSSB 7), which added the word "remaining" to what became §39.262(i). This addition was consistent with Chairman Wolen's stated preference for a market value approach and was consistent with the language contained in HB 349. Without the inclusion of the word "remaining," the language of §39.262(i) could be

interpreted to require the use of ECOM to quantify the stranded costs of nuclear generating assets. The commission finds that this amendment to §39.262(i) was intended to provide greater flexibility to utilities and to clarify that a utility could use a sale of assets to value its nuclear assets. The language that was used in CSSB 7 was contained in the final version of the statute and is now found in §39.262(i). Based upon a consideration of the legislative history of SB 7, CSSB 7, and HB 349, the commission concludes that the interpretation of PURA contained in the new rule is consistent with the intent of the Legislature, as well as being supported by the express language of the statute and the policy reasons underlying SB 7.

AEP stated that the rule as proposed does not precisely reflect the intent of the statutory language. AEP requested that the first sentence of the rule be revised to use the word "may" rather than the word "shall" in specifying the options available for quantifying the market value of nuclear generation assets. AEP also argued that the second sentence of the rule did not precisely reflect the statute and requested that the second sentence of the rule be replaced by language that copies the actual language of the statute.

The commission agrees with AEP's comments concerning the use of the word "may" instead of "shall" and amends the rule accordingly. However, the commission disagrees, in part, with AEP's comments concerning the second sentence of the proposed rule. The commission finds that merely repeating the same language as used in the statute fails to provide the necessary interpretation of law and policy that this rule was intended to provide. Accordingly, the commission will not revise the second sentence in the manner requested by AEP. AEP's

comments raise concerns that the language used in the proposed rule does not precisely reflect the statutory intent and language. In response to AEP's comments, the commission agrees that there may be some uncertainty in the language used in the proposed rule and amends the language of the second sentence to more clearly reflect the statutory intent. These changes adequately address the comments of AEP concerning the specific language used in the rule.

All comments, including any not specifically referenced 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 Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2003) (PURA), which provides the Public Utility 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 establishes the public policy to protect the public interest during the transition to and in the establishment of a fully competitive electric power industry; PURA §39.252, which allows an electric utility to recover all of its net, verifiable, nonmitigable stranded costs in purchasing power and providing electric generation service; PURA §39.262(a), which provides that an electric utility and its affiliates may not be permitted to overrecover its stranded costs; PURA §39.262(c), which directs each transmission and distribution utility, its affiliated retail electric provider, and its affiliated power generation company to jointly file an application to finalize its stranded costs under procedures

to be determined by the commission; and PURA §39.262(h) and (i), which establish the methods by which the final stranded costs shall be calculated.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 39.001, 39.252, and 39.262.

**§25.264. Quantification of Stranded Costs of Nuclear Generation Assets.**

The market value of an affiliated power generation company's nuclear assets may be established by compliance with any of the four methods of quantification specified in Public Utility Regulatory Act (PURA) §39.262(h) and related requirements specified in §25.263 of this title (relating to True-up Proceeding). If the electric utility or its affiliated power generation company values some of its assets using the sale of assets or an exchange of assets, any remaining assets shall be combined in one or more transferee corporations as described in PURA §39.262(h)(2) and (3) for purposes of determining their market value, or the electric utility or its affiliated power generation company shall quantify its stranded costs for remaining nuclear assets using the "excess costs over market" or ECOM method.

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 §25.264, relating to Quantification of Stranded Costs of Nuclear Generation Assets, is hereby adopted with changes to the text as proposed.

**ISSUED IN AUSTIN, TEXAS ON THE 22nd DAY OF MAY 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**