

PROJECT NO. 33812

RULEMAKING TO IMPLEMENT	§	PUBLIC UTILITY COMMISSION
REQUIREMENT OF PURA §39.151(d)	§	
CONCERNING DECERTIFICATION OF	§	OF TEXAS
AN INDEPENDENT ORGANIZATION	§	

**ORDER ADOPTING AMENDMENT TO §25.361 AND NEW §25.364
AS APPROVED AT THE SEPTEMBER 24, 2009 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts an amendment to §25.361, relating to the Electric Reliability Council of Texas (ERCOT), and adopts new §25.364, relating to Decertification of an Independent Organization, with no changes to the proposed text as published in the July 17, 2009 issue of the *Texas Register* (34 TexReg 4715). The new rule establishes the process the commission will use to decertify an independent organization, select a successor organization, provide for the transfer of assets, and facilitate the transition to the successor. The amendment specifies that the Electric Reliability Council of Texas (ERCOT), which is certified as an independent organization, is subject to the decertification provisions adopted in new §25.364. This new rule and amendment are competition rules subject to judicial review as specified in Public Utility Regulatory Act (PURA) §39.001(e). The amendment of §25.361 and new §25.364 are adopted under Project Number 33812.

A public hearing was not requested and the commission received comments from only one party, Texas Industrial Energy Consumers (TIEC), on the proposed new §25.364. No party filed comments on the proposed amendment to §25.361.

§25.364(d)

TIEC recognized the significance of the commission acting to decertify an independent organization. To reflect the gravity of such a task, TIEC suggested the commission modify the rule to require progressive actions, such as administrative penalties or other enforcement measures, before undertaking decertification.

Commission Response

The commission agrees that the decertification of an independent organization would constitute a serious and significant action. While the commission recognizes the potential value in a progressive approach to achieve corrective action, the rule, as proposed, does not foreclose such an approach. In fact, the proposed rule allows the commission the flexibility to take less onerous actions, if warranted, but retains flexibility for the commission to undertake decertification directly if the actions of an independent organization are so egregious that the commission does not envision lesser remedies achieving sufficient results. PURA §39.151(d) permits the commission the flexibility to take appropriate action against an independent organization that fails to adequately perform its required functions and the rule should reflect the commission's flexibility to choose the appropriate action, including decertification. Therefore, the commission declines to accept TIEC's proposed modification to subsection (d).

§25.364(f)

TIEC suggested modifications to §25.364(f) that would define the requirements for a successor independent organization and proposed that certification of the successor would be required

before an order decertifying the existing independent organization could be issued. The requirements proposed by TIEC consist of the statutory requirements for an independent organization contained in PURA §39.151(a), the requirements imposed on ERCOT, set forth in §25.361 in its role as an independent organization, and a requirement that the commission approve the successor organization's governing body, bylaws, and protocols as part of the certification proceeding.

Commission Response

The commission agrees that consideration of the statutory requirements itemized by TIEC is essential when the commission designates a successor organization. At the time the commission decides to undertake the certification of a successor independent organization, the commission can establish the standards for approval of the successor. The commission can, of course, rely on the required functions described in §25.361 as a starting point, but it may wish to modify or augment those requirements in light of the decertification proceeding it has undertaken.

TIEC's proposal that the certification of a successor organization be completed before the existing organization is decertified may have merit, but it limits the commission's flexibility when handling such a significant and extraordinary case. The decertification of an independent organization and the certification of a successor organization should be rare events. The commission should not at this time decide how best to handle the processing of those cases, but instead should retain its options to achieve the best transition from one

organization to another. Accordingly, the commission declines to modify §25.364(f) as suggested by TIEC.

This amendment and new rule are adopted under PURA, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2008), 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 §39.151, which requires the commission to adopt a rule to address decertifying an independent organization and selecting and certifying a successor organization.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002 and 39.151.

§25.361. Electric Reliability Council of Texas (ERCOT).

(a) - (k) (No change.)

- (l) **Decertification.** ERCOT shall be subject to decertification as an independent organization in accordance with §25.364 of this title (relating to Decertification of an Independent Organization).

§25.364. Decertification of an Independent Organization.

- (a) **Purpose.** This section establishes the procedures for the decertification of an independent organization and the transfer of assets to a successor organization pursuant to Public Utility Regulatory Act (PURA) §39.151(d).
- (b) **Applicability.** This section applies to any organization that the commission has certified as an independent organization pursuant to PURA §39.151.
- (c) **Initiation of proceeding to decertify.** The commission may initiate a proceeding to revoke an independent organization's certification. Prior to initiating a proceeding to revoke a certification, the commission may conduct an audit or study of the performance of an independent organization with respect to its efficiency and effectiveness in carrying out the duties of an independent organization under PURA and this title. Any such audit or study may be conducted or supervised by the commission and shall be funded by the independent organization.
- (d) **Standard for decertification.** The commission may issue an order decertifying an independent organization if it finds that the organization has committed significant violations of PURA or commission rules or failed to efficiently and effectively carry out the duties of an independent organization.
- (e) **Order revoking certification.** The commission's order revoking certification shall ensure continuity of operations of the independent organization and shall designate the successor organization that will assume the functions of the independent organization. The commission order revoking certification will provide for the independent

organization to transfer its assets and liabilities to the successor independent organization designated by the commission.

- (f) **Selection of successor organization.** Prior to the decertification of an independent organization, the commission shall designate, and certify pursuant to PURA §39.151(c), a successor independent organization from among persons that have submitted proposals in response to the commission's request. To the extent that there are duties performed by the current independent organization that are not required by statute, organizations other than a successor independent organization may be designated to assume those functions.
- (g) **Transfer of assets.** The transfer of assets and liabilities from a decertified independent organization to its successor organization shall be made in a way that ensures that the functions of the independent organization continue to be provided reliably and without interruption. The commission may impose specific conditions or requirements upon the transfer of assets and liabilities.
- (h) **Continuity of operations.** To ensure that all of the required functions of the independent organization continue to be carried out during the decertification and transfer process, the commission, upon its own initiative, may order the independent organization or its successor organization, or both, to perform or continue certain acts related to the organization's operation. These include, but are not limited to, capital investment projects, financing, meeting or renegotiating contractual obligations, and employment of essential personnel.

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 an amendment to §25.361 and new §25.364 relating to Decertification of an Independent Organization is hereby adopted with no changes to the text as proposed.

SIGNED AT AUSTIN, TEXAS the _____ day of September 2009.

PUBLIC UTILITY COMMISSION OF TEXAS

BARRY T. SMITHERMAN, CHAIRMAN

DONNA L. NELSON, COMMISSIONER

KENNETH W. ANDERSON, JR., COMMISSIONER