

PROJECT NO. 33495

RULEMAKING PROJECT TO AMEND	§	PUBLIC UTILITY COMMISSION
RULE RELATING TO THE	§	
INDEPENDENT MARKET MONITOR	§	OF TEXAS
FOR ERCOT	§	

**ORDER ADOPTING AMENDMENT TO §25.365
AS APPROVED AT THE MARCH 29, 2007 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts an amendment to §25.365, relating to the Independent Market Monitor (IMM). The amendment limits the liability of the IMM in the performance of its duties in monitoring the Wholesale Electricity Market in the Electric Reliability Council of Texas (ERCOT). The amendment is adopted with changes to the proposed text as published in the December 15, 2006 issue of the *Texas Register* (31 TexReg 9925).

The commission initially adopted §25.365 to prescribe the terms of the IMM's service, and this amendment addresses the degree to which the IMM would be subject to a lawsuit in connection with its performance of its duties. The amendment provides a public benefit, as it protects the IMM from possible intimidation by parties that are subject to an IMM investigation.

The amendment is necessary to maintain the independence and integrity of the IMM, to ensure that it carries out its market monitoring duties without undue influence from the market participants, and to limit the costs that are incurred in providing market monitoring services.

This amendment is adopted under Project Number 33495.

The commission invited public comments on the proposed amendment, and in particular, on the following question:

Is it more appropriate to implement the proposed limitation of liability provisions through a contract provision added to ERCOT's standard form agreements, or through changes to ERCOT's Protocols?

The commission received comments on the proposed amendment from TXU and ERCOT.

Summary of Comments

TXU supported implementing a limitation of liability provision through a change to ERCOT Protocols, and did not think it necessary to include it in the ERCOT standard form agreements because these agreements state that participants shall comply with, and be bound by, all ERCOT Protocols. In addition, TXU expressed the view that a statement in the ERCOT Protocols would appropriately address the IMM's liability concern and should be used in lieu of a rule change.

ERCOT believed that neither revising the standard form agreements nor changing the Protocols was necessary. ERCOT noted that the contract executed by the IMM provides that the PUCT staff would initiate a rulemaking to address the IMM's limitation of liability to third parties. Subsection (n) of the proposed rule stating the limitation of liability of the IMM satisfies the contract language and subsection (o) requiring a modification of the ERCOT agreements is not necessary and could not add to the effectiveness of the rule. If, however, the commission wants a limitation of liability provision outside the PUC rule, then ERCOT recommended placing it in the Protocols and not in the form agreements. Making a change to the Protocols would cause

negligible ERCOT administrative impact, whereas re-execution of every agreement to comply with subsection (o) would be administratively daunting and of limited usefulness. ERCOT added that April 1 would be an overly ambitious deadline for effecting changes to the Protocols, and would be even less attainable for modifying the agreements.

The commission's view is that the inclusion of a limitation of liability provision in the contracts between ERCOT and companies that operate in the ERCOT market provides the strongest protection from liability for the IMM and the best notice to companies that operate in the market. The commission recognizes, however, that amending existing contracts requires a significant amount of time and effort on ERCOT's part. Accordingly, the rule will direct ERCOT to include a limitation of liability provision relating to the IMM in all new contracts and all existing contracts being renegotiated, as of July 1, 2007. The rule will further direct ERCOT to amend all other existing contracts within a period of 15 months from the adoption date of the rule as amended. Until the contracts can be amended, the inclusion of the limitation of liability in the commission rule will provide protection to the IMM and notice to market participants.

TXU suggested a language change in the proposed rule. In the proposed rule, the IMM's release of reliability is limited to "acts or omissions that arise from or are related to matters within the scope of the IMM's authority." TXU stated that this language is too broad and proposed to limit it to "acts or omissions consistent with the IMM's performance of its duties as defined by PURA §39.1515 and PUC Substantive Rule §25.365, relating to the IMM."

The commission concludes that the proposed amendment to the phrasing that TXU suggested in its comment is not appropriate. The purpose of the limitation of liability provision is to prevent the market monitor from being intimidated in its review of market events by the threat or reality of a lawsuit from a company that operates in the market. For this reason, a limitation of liability that is as broad in scope as the market monitor's responsibilities is important. The IMM's responsibilities are defined, in part, by the statute and rule that TXU refers to, but its responsibilities are also defined by contractual documents and communications from the commission concerning matters to be investigated. These additional documents may authorize and direct the IMM to evaluate and report on market events. Accordingly, the commission concludes that the scope of the limitation of liability set out in the proposed rule is appropriate, and it declines to make the change suggested by TXU.

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 2006) (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 §39.1515, which requires that the commission select an entity to act as the commission's wholesale electric market monitor to detect and prevent market manipulation strategies and recommend measures to enhance the

efficiency of the wholesale market; PURA §35.004, which requires that the commission ensure that ancillary services necessary to facilitate the transmission of electric energy are available at reasonable prices with terms and conditions that are not unreasonably preferential, prejudicial, predatory, or anticompetitive; PURA §39.001, which establishes the Legislative policy to protect the public interest during the transition to and in the establishment of a fully competitive electric power industry; 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 §39.151, which requires the commission to oversee and review the procedures established by an independent organization, directs market participants to comply with such procedures, and authorizes the commission to enforce such procedures; and PURA §39.157, which directs the commission to monitor market power associated with the generation, transmission, distribution, and sale of electricity and provides enforcement power to the commission to address any market power abuses.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 39.1515, 35.004, 39.001, 39.101, 39.151, and 39.157.

§25.365. Independent Market Monitor.

(a) – (m) (No change.)

(n) **Liability of the IMM.** The IMM, and its directors, officers, employees and agents, shall not be liable to any person or entity for any act or omission, other than an act or omission constituting gross negligence or intentional misconduct, arising under or relating to this section, including but not limited to liability for any financial loss, loss of economic advantage, opportunity cost, or actual, direct, indirect or consequential damages of any kind resulting from or attributable to any such act or omission of the IMM as long as such act or omission arose from or related to matters within the scope of the IMM's authority.

(o) **Contractual Provisions.**

(1) Effective July 1, 2007, ERCOT shall include the following provision in any new or re-negotiated agreement it has with an entity that engages in any activity that is in whole or in part the subject of the ERCOT Protocols:

The IMM, and its directors, officers, employees, and agents, shall not be liable to any person or entity for any act or omission, other than an act or omission constituting gross negligence or intentional misconduct, including but not limited to liability for any financial loss, loss of economic advantage, opportunity cost, or actual, direct, indirect, or consequential damages of any kind resulting from or attributable to any such act or omission of the IMM, as long as such act or omission arose from or is related to matters within the scope of the IMM's authority

arising under or relating to PURA §39.1515 and Public Utility Commission Substantive Rule §25.365, relating to Independent Market Monitor.

- (2) Not later than 15 months after this subsection takes effect, ERCOT shall include the provision set out in paragraph (1) of this subsection in every agreement it has with an entity that engages in any activity that is in whole or in part the subject of the ERCOT Protocols.

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 §25.365, relating to the Independent Market Monitor, is hereby adopted with changes to the text as proposed.

SIGNED AT AUSTIN, TEXAS the _____ day of April 2007.

PUBLIC UTILITY COMMISSION OF TEXAS

PAUL HUDSON, CHAIRMAN

JULIE PARSLEY, COMMISSIONER

BARRY T. SMITHERMAN, COMMISSIONER