PROJECT NO. 33490

RULEMAKING PROCEEDING TO ADDRESS PRICING SAFEGUARDS IN MARKETS OPERATED BY THE ELECTRIC RELIABILITY COUNCIL OF TEXAS	**§ § § § §**	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER ADOPTING AMENDMENT TO §25.505
AS APPROVED AT THE AUGUST 16, 2007, OPEN MEETING

The Public Utility Commission of Texas (commission) adopts an amendment to §25.505, relating to Resource Adequacy in the Electric Reliability Council of Texas Power Region. The amendment is adopted with changes to the proposed text as published in the March 9, 2007 issue of the *Texas Register* (32 TexReg 1176). The amendment revises certain disclosure requirements for entity-specific information received by the Electric Reliability Council of Texas (ERCOT) in its capacity as an independent organization, under Chapter 39 of the Public Utility Regulatory Act (PURA). The new amendment revises the disclosure requirements for some entity-specific information by delaying the disclosure date from 30 days to 60 days after the day for which the information was collected. The amendment also establishes an event trigger that requires more expedited disclosure of some information if the market clearing price for energy (MCPE) or the market clearing price for capacity (MCPC) exceed a certain level. Finally, the amendment establishes deadlines for the implementation of the new provisions. The amendment provides additional certainty to market participants who will know in advance the conditions under which their specific information will be disclosed. Furthermore, the commission anticipates that the resulting market transparency will enhance its ability to perform its market oversight duties and result in a more competitive environment within the ERCOT power region.

PURA Chapter 39, adopted in 1999, established the framework to implement a competitive electricity market in Texas. In adopting PURA Chapter 39, the Legislature announced the legislative policies and purposes that supported the implementation of customer choice. The Legislature specifically indicated, in PURA §39.001(a), that Chapter 39 was enacted "to protect the public interest during the transition to and in the establishment of a fully competitive electric power industry." Recognizing that the electricity market in ERCOT would not be fully competitive at the time the retail market opened in January 2002, the commission adopted certain provisions to help protect the public interest during the transition to competition. Subsequent to January 2002, the commission has reviewed its actions and has adopted various rules and approved various ERCOT Protocol revisions concerning the operation of the ERCOT markets.

Most recently, in Project No. 31972, *Rulemaking on Wholesale Electric Market Power and Resource Adequacy in the ERCOT Power Region,* the commission, among other issues, found that the establishment of a market transparency mechanism was necessary to enhance competitive electricity markets in ERCOT. In particular, the commission stated that:

> "To further the 'sunshine policy' that the commission announced in Docket No. 24770 related to hockey-stick bidding, the commission is requiring additional public disclosure of disaggregated pricing data by market participants. Greater transparency of pricing information should deter generation companies from offering unreasonably high prices and should permit broader scrutiny of questionable prices by other market participants and the general public. This broad scrutiny should help in the identification of prices that are the result of market manipulation or market power abuse. These two issues (the level of the

> price caps and the disclosure rules) are interrelated in their effect on the ERCOT market, and they are a part of a coherent approach to modifying the ERCOT market rules." (31 TexReg 7319).

As envisioned by the commission, this higher level of transparency was needed to balance policy decisions that also allowed the level of the offer cap to be raised gradually from the then-current level of $1,000 per mega-watt hour (MWh) for energy, or $1,000 per mega-watt (MW) for capacity, to an eventual level of $3,000 per MWh or per MW. In markets under the Federal Energy Regulatory Commission's (FERC's) jurisdiction, the highest offer cap remains $1,000 per MWH or MW. The increase in the offer cap in ERCOT was intended to provide an incentive for investment in additional generation capacity needed to meet the growing demand for electricity in the region. The expedited disclosure of pricing information was intended to prevent this greater pricing freedom from being used to engage in market manipulation or market power abuse and to provide assurance to consumers and market participants that the ERCOT market prices were the result of market conditions and not the abuse of market power.

Accordingly, the commission, in Project No. 31972, adopted rules that required ERCOT to disclose information as specified in §25.505. Section 25.505(f)(3) was challenged before the Third Court of Appeals in separate appeals of that rule by Constellation Energy Commodities Group, Inc. (Constellation) and by the City of Garland's public power utility. As a part of the appeals, the Austin Court of Appeals issued an order staying the implementation of the transparency provisions of §25.505(f)(3). (*See* Order (Sep. 29, 2006) (Stay Order), *Constellation Energy Commodities Group, Inc. v. Public Util. Comm'n*, No. 03-06-00552-CV (Tex. App. –

Austin) (pending) (*Constellation*). *See also* the similar Order (Sep. 29, 2006) *City of Garland v. Public Utility Comm'n*, No. 03-06-00571-CV (Tex. App. – Austin) (pending) (*Garland*). In a subsequent order on January 17, 2007, the Court, with the agreement of all parties, lifted the stay as it related to the 48-hour disclosure provision found in §25.505(f)(3), but continued the stay as applied to the other disclosure requirements of the section. The Court's order did not stay the effectiveness of other portions of the rule, including the provisions allowing the offer cap to be increased in March 2007. As a result, the ERCOT offer cap was raised to $1,500 per MWh or MW on March 1, 2007 and is scheduled to further increase to $2,250 per MWh or MW on March 1, 2008 and to $3,000 per MWh or MW two months after the full implementation of the Texas Nodal market design, currently scheduled for December 2008.

Rather than waiting for further consideration of this issue by the court, the commission decided that it should re-examine the previously-adopted disclosure requirements and initiated this rulemaking project for that purpose. The commission is pleased that the court has lifted the stay related to the 48 hour disclosure provisions. Because of the rapid availability of this information to the public, the commission finds that it can delay the disclosure of some entity-specific information. Accordingly, the commission decides to delay the disclosure provisions for entity-specific information from 30 days, as found in the current version of §25.505, to 60 days. In order to address unusual events when prices may spike to high levels, the adopted amendment includes an event trigger that requires the public release of entity-specific information within seven days after the day for which the information is submitted. The commission finds that the disclosure of this limited type of entity-specific information is sufficient to retain public confidence in the ERCOT markets.

As adopted, the amendment is necessary to meet the legislative goal of protecting the public interest during the transition to and in the establishment of a fully competitive electric power industry. The amendment also is necessary to protect customers from unfair, misleading or deceptive practices in the ERCOT market. The amendment is considered a competition rule and is subject to judicial review as specified in PURA §39.001(e). The amendment is adopted under Project No. 33490.

Comments on the published proposal were received from Constellation Energy Commodities Group, Inc. (Constellation); the Electric Reliability Council of Texas, Inc. (ERCOT); and the Office of Public Utility Counsel (OPC). Reply comments were received from Constellation, Reliant Energy Power Supply, LLC. (Reliant), and OPC. There was no public hearing on the requested amendment because no written request for such a hearing was filed with the commission by the deadline stated in the notice of proposed amendment.

Authority to adopt amendment

Constellation stated that it has consistently and emphatically advocated market transparency, but it raised a number of objections to the proposed amendment, including objections that the commission lacked the statutory authority to adopt the disclosure requirements contained in the proposed amendment. Constellation noted that FERC had recently rejected an attempt to require disclosure of disaggregated offer information in less than a six-month period in wholesale markets over which it has jurisdiction. Constellation also cited the provision currently contained in the ERCOT Protocols that protects certain entity-specific information for 180 days.

Constellation asserted that the commission lacks the statutory authority to evaluate confidentiality claims in a rulemaking and to require public disclosure of allegedly confidential information without following the requirements of the Public Information Act, (PIA), Texas Government Code §§552.001 – 552.353. To support its claims, Constellation cited language contained in *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d. 668, (Tex. 1976), cert. denied, 430 U.S. 931 (1977), and *Envoy Medical Systems LLC and Independent Review Incorporated v. State of Texas*, 108 S.W.3d 333 (Tex. App. – Austin 2003, no pet.). Constellation interpreted the PIA as generally allowing only the Attorney General or the courts to make a determination of whether information filed with an agency qualifies for one of the exceptions to public disclosure established by the PIA, citing *City of Garland v. Public Utility Commission*, 165 S.W.3d 814 (Tex. App. – Austin 2005, pet, denied). An exception to that procedure would allow the agency, in its adjudicative role in a contested case, to determine whether information filed under a protective order was in fact confidential or privileged or should be made public, subject to a party's opportunity to seek injunctive-type relief prior to disclosure. Constellation argued that a rule is not the appropriate procedure to address disclosure requirements because determinations of confidentiality are fact-specific and case-specific and should only be made in a contested case. In addition to the PIA, Constellation also cited the following legal provisions as requiring the commission to protect information that an entity claims is confidential:

1) Texas rules on privilege and protective orders, as recognized in §2001.083 and §2001.091 of the Administrative Procedure Act, Texas Government Code §§2001.001 – 2001.902 (APA), and incorporated by PURA §11.007(a);

2) various PURA provisions including PURA §§14.154, 17.051, 32.101, 39.001(b), 39.155(a), and 39.351; and

3) Constitutional protections against the taking of property.

In reply comments, OPC disagreed with Constellation's assessment of the statutory authority to adopt the proposed amendment. OPC stated that, although the FERC had rejected a proposal to require disclosure in less than 180 days, it did so because the applicant had failed to meet its burden of proof. The FERC Order noted that FERC did not necessarily oppose in principle a shortened lag time for the release of information including generator, load and financial bid and offer data. Additionally, the proposed disclosure requirement was dismissed "without prejudice." OPC also disputed that the PIA requires a contested case before the commission can change the disclosure requirements contained in the ERCOT Protocols. OPC pointed out that ERCOT did not conduct a contested case proceeding before it adopted the initial ERCOT Protocols or when it revised those requirements. OPC disputed the relevance of the *Industrial Foundation* and *Envoy Medical* case cited by Constellation because those cases concerned an attempt by an agency to expand the exceptions contained in the PIA, rather than a ruling by an agency that a PIA exception did not apply. Further, OPC argued that the offer information in question does not qualify as trade secrets under the PIA. It cited court decisions that trade secrets do not include information as to single or ephemeral events such as one day or day ahead offers into the ERCOT market. OPC responded to Constellation's implied argument that the ERCOT Protocols disclosure provision preempts the commission's authority by citing to PURA §39.151, which requires that the ERCOT Protocols be consistent with commission rules and to a court case affirming the commission's authority to require changes to the ERCOT Protocols.

OPC argued that the PURA references cited by Constellation were taken out of context and are clearly not applicable to the proposed amendment. Citing the commission's duty, under PURA §39.001, to protect the public interest during the transition to a competitive electric market, OPC asserted that the proposed disclosure of information is consistent with protecting the public from market manipulation and market power abuse.

Commission response

The commission disagrees with Constellation's arguments concerning the commission's authority to require disclosure of offer information. The commission notes that the confidentiality of information provided to ERCOT is currently addressed in Section 1.3 of the ERCOT Protocols. Pursuant to Protocol §1.3.1.1, much of the information addressed in the proposed rule is treated as confidential. However, Protocol §1.3.3 states that the protection that applies to the confidential information expires 180 days after the applicable operating day. The time limit on the protection provided by the Protocols indicates that such protection is not permanent. If the information was a trade secret *per se,* the disclosure of which would reveal business strategies or business formulas, it would presumably remain confidential indefinitely. Because the Protocols allow disclosure after 180 days, the information is currently available to competitors after that time. During the past five years, ERCOT has routinely released the information after 180 days. Potential competitors therefore already have access to this information, on a delayed basis, and can perform the assessment of their competitors' bidding strategy that Constellation says it fears. Therefore, any potential impact from the disclosure of the information has already occurred, and the rule does not create the threat alleged by Constellation.

The commission agrees with OPC that recent decisions by FERC on the issue of information disclosure do not prevent the commission from adopting different requirements for ERCOT. As discussed by OPC, the FERC decisions were based upon a failure to meet the applicable burden of proof and did not purport to foreclose additional consideration at a future time, as demonstrated by the notation that the order was issued "without prejudice" to further consideration. Additionally, FERC did not address disclosure standards in ERCOT or preempt other regulatory jurisdictions, like the commission, from adopting shorter time periods for information disclosure in markets under their jurisdiction. Finally, the ERCOT wholesale market is not subject to regulation by FERC, and its decisions would not be binding on the commission. To the extent that Constellation was using the FERC decision as a policy rationale for a longer period of confidentiality rather than as a basis for asserting the commission lacks statutory authority for the amendment, its position is discussed later in this preamble.

Contrary to the arguments from Constellation, the commission may make this decision in a rulemaking proceeding and need not conduct a contested case for such purpose. The APA §2001.003(6) defines a "rule" as "a state agency statement of general applicability that implements, interprets, or prescribes law or policy." The courts have recognized that, "unless mandated by statute, the choice to proceed by general rule or by ad hoc adjudication is one that lies primarily in the informed discretion of the agency." *State Board of Insurance v. Deffebach*, 631 S.W.2d 794, 799 (Tex. Civ. App. – Austin 1982, writ ref'd n.r.e.) There is no statutory provision directing the commission to use a contested

case proceeding in order to determine the confidentiality of the general classes of information addressed in the proposed amendment. Because the current disclosure requirements are addressed in the ERCOT Protocols, which are similar to rules, and because these disclosure requirements will affect all market participants in the same manner, the commission determines that it is particularly appropriate to use the rulemaking process to address the issue in this instance. Cases cited by Constellation for the proposition that an agency cannot *expand* the list of exemptions to public disclosure are not relevant to the question of whether an agency can establish a rule related to a schedule for the disclosure of information.

The commission disagrees with comments that the final Third Court decision in the *City of Garland* case prevents the commission from addressing disclosure standards for market participants or requires the commission to adopt a different standard for public power utilities. The opinion in *City of Garland* only addressed the cities' claims of confidentiality of certain contract information under §552.133 of the Texas Government Code. The Court, in a footnote, stated, "We express no opinion regarding the Commission's power to determine for itself other claims of confidentiality, including assertions based upon other TPIA exceptions." Therefore the decision does not preclude the commission from determining whether market information submitted to ERCOT should be disclosed to the public.

The commission agrees with OPC that Constellation's arguments misapply relevant provisions of PURA and other laws. The provisions of the APA cited by Constellation

concerning "the rules of privilege recognized by law" in APA §2001.083 only apply in a contested case. Similarly, the discovery provisions contained in APA §2001.091 apply in a contested case. The commission is adopting these disclosure provisions as a matter of the routine operation of the wholesale market, and provisions of law relating to the recognition of certain privileges in contested cases are simply not on point.

The PURA provisions cited by Constellation also are not applicable, as noted by OPC. PURA §14.154 concerns records obtained from affiliates of a public utility related to transactions with the public utility. Constellation is not a Texas public utility nor an affiliate of a Texas public utility and the information sought to be disclosed concerns offers to ERCOT rather than sales to a public utility. This proposed amendment does not address reporting requirements for qualifying facilities, exempt wholesale generators or power marketers, so PURA §17.051 is not applicable to this amendment. Similarly, the information addressed in the amendment is not information that is required to be filed with the commission pursuant to PURA §39.155 and §39.351, but is information submitted to ERCOT as part of an entity's voluntary participation in the ERCOT markets. PURA §32.101 concerns information held by an electric utility related to individual customers and their expected load and usage. Since Constellation is not an electric utility and the information does not concern individual customers, the provision does not apply to the information required to be disclosed by the amendment. Accordingly, none of these provisions are applicable to this amendment.

The commission also agrees with OPC that requiring disclosure of information does not conflict with the public policy expressed in PURA §39.001(b)(4), which provides that the commission should "ensure the confidentiality of competitively sensitive information." As noted by OPC, in applying this provision, the commission must also consider its duty under PURA §39.001(a) to "protect the public interest during the transition to and in the establishment of a fully competitive electric power industry." Additionally, the commission notes that PURA §39.101(a)(1) establishes that customers are entitled to "safe, reliable and reasonably priced electricity," and that PURA §39.101(b)(6) provides that customers are entitled "to be protected from unfair, misleading, or deceptive practices." Chapter 39 includes other provisions that give the commission significant oversight authority with respect to ERCOT and responsibilities for policing market power abuses in the wholesale market. The commission has previously held that these provisions allow the commission to take action to ensure safe, reliable and reasonably priced for customers and to protect customers from unfair, misleading and deceptive practices in the wholesale market, and the courts upheld that interpretation in *TXU Generation Co. L.P. v. Public Utility Commission of Texas*, 165 S.W.3d 821 (Tex. App. – Austin, 2005, pet. denied). In balancing these competing concerns, the commission finds that the amendment does ensure the confidentiality of sensitive information, but only for the period of time in which it is competitively sensitive, while also enabling the commission to protect both customers and the public interest.

The commission also disagrees with Constellation's constitutional claims. Constellation cites case law establishing the factors considered in determining whether an

unconstitutional taking of property has occurred. OPC has provided comments disputing that the information at issue is a trade secret due to its connection to an ephemeral event. However, even if the information is a trade secret, disclosure does not result in a taking because Constellation has not met the requirement to establish a "reasonable investment-backed expectation" in the non-disclosure of the information. Given that the ERCOT Protocols allow disclosure after 180 days, Constellation would not have a "reasonable investment-backed expectation" that the information would never be disclosed. Further, since the ERCOT Protocols can be amended by market participants or by the commission, Constellation has no "reasonable investment-backed expectation" that these disclosure times could not be changed. Instead, its "reasonable investment-backed expectation" should be based upon the form of disclosure required by the ERCOT Protocols or the commission's rules at the time the information is submitted. Since the commission is not attempting to implement this amendment on a retroactive basis, the adoption of the amendment does not interfere with Constellation's reasonable expectations and is, therefore, not a taking of any property interest. The commission rejects Constellations argument on constitutional grounds.

Sixty- day publication amendment

Constellation recommended that the commission not require disclosure of disaggregated information in fewer than 90 days. In support of its position, Constellation has referred to the general disclosure practice before FERC and stated that FERC has consistently required a minimum six-month delay before disclosing disaggregated offer information. Furthermore, Constellation referred to statements by the Department of Justice that the incremental benefit of

increased public dissemination of firm- and transaction-specific information may be small relative to the risks that the information could be used for coordination of bids among market participants.

Constellation also stated that the harm could be reduced by adopting the changes it previously proposed for the existing section, which included amending the section to require public disclosure of the data at issue in no fewer than 90 days, along with setting the event trigger level at the higher of 100 times the prevailing Houston Ship Channel (HSC) gas price or 70% of the current offer cap. Constellation opined that these changes, would reduce (though not eliminate) competitive harm to market participants compared to implementation of the amendment as published.

Constellation asserted that early disclosure would result in competitive harm. Constellation explained that early disclosure would result in highly public calls for action before the independent market monitor (IMM) and the commission had completed an investigation and that such action could jeopardize the investigation as well as tarnish the reputation of a market participant that acted properly. Constellation also stated that the amendment could lead to disclosure of information that the IMM would want kept confidential as part of an ongoing investigation. In support of its position, Constellation frequently referred to statements by commissioners and concluded that early disclosure may have negative impacts on the IMM's market monitoring responsibilities or the commission's enforcement activities. Constellation also questioned statements by other market participants concerning disclosure and noted an apparent inconsistency on this issue in statements by Reliant in a filing in Docket No. 29298,

Quarterly Wholesale Electricity Transaction Reports for 2003, compared to its statements in Project No. 31972.

Constellation stated that the decision in *City of Garland*, prevented the commission from requiring disclosure of information that a public power utility has determined is confidential. As a result, Constellation suggested that a public power utility could appeal the adoption of the amendment and prevent the disclosure of the public power utility's ERCOT information. Constellation was concerned about the discriminatory effect that could result from different disclosure requirements applying to privately-owned utilities and the public power utilities with which they compete. Constellation argued that the difference in treatment would harm competition, in conflict with PURA §39.001(b)(4), which requires the commission to "protect the competitive process in a manner that ensures the confidentiality of competitively sensitive information."

OPC disagreed with the proposal to increase the disclosure deadline from 30 days to 60 days. Instead, OPC urged that the deadlines for disclosure be shortened to 48 hours. This deadline would track the disclosure requirements in the Australian market upon which the ERCOT market is based.

In reply comments, OPC argued that the commission should not defer to the FERC's decision on disclosure in other electricity markets because of the unique features of the ERCOT market. Unlike the wholesale markets under FERC jurisdiction, which include capacity payments to

assure resource adequacy, the commission has adopted an energy-only market in ERCOT. The FERC decision does not address disclosure in an energy-only market.

OPC noted that the commission based the ERCOT market design on the Australian energy-only resource adequacy mechanism. OPC stated that the Australian market requires publication of disaggregated offer curves 24 hours after the market has closed. OPC observed that in the approximately six years of its operation, the Australian market has been successful, and has seen improved efficiency, improved reliability, and higher private investment. OPC also stated that in FERC proceedings, small generators had filed comments supporting more rapid disclosure of disaggregated information and cited economic game theory as supporting its claims that disclosure encourages active buyer participation as a means of preventing collusive behavior.

OPC also contended that more timely release of the data ("market or price transparency") encourages investment by providing load-serving entities (LSEs) with the knowledge that market clearing prices in an energy-only market are the product of supply and demand, not market power abuse. As a result, LSEs would feel comfortable entering into long-term commitments for new generation. OPC also averred that market transparency promotes market efficiency because the published information will hinder anti-competitive behavior.

In reply comments, Reliant stated that it stands by its comments in Project No. 31972 and asks the commission to incorporate them by reference. Reliant also requested that the commission reject the disclosure requirements Constellation suggested in its initial comments in this

proceeding for the same reason they were rejected in Project No. 31972. Reliant also asserted that Constellation was misguided in using Reliant's comments from Project No. 31972.

Reliant noted that Constellation's argument for using a 90-day disclosure requirement relied on a comparison with other markets. Reliant opined that these markets do not represent relevant comparisons to the ERCOT situation. Price volatility, disclosure, and pricing safeguards, Reliant continued, have been addressed differently in those markets for various reasons. Reliant noted that some of those markets include forward capacity markets in which prices are disclosed immediately following the forward auctions. Reliant also noted that none of the markets referenced by Constellation include the ERCOT approach to scarcity pricing in an energy-only market.

Reliant asserted that the commission's approach provides several benefits including the market's ability to self-police. Reliant stated that Constellation's proposal allows for delays before disclosure, which is contrary to the commission's "sunshine policy" and should be rejected.

Commission response

In this argument Constellation fails to acknowledge that the bidding information is already disclosed after six months by ERCOT protocol. Thus the information is not confidential per se. The question to be answered is of a generic nature – that is, at what time should the bidding data ERCOT receives in its public auctions be available to the public? As OPC mentioned previously in these comments, some market participants in Project No. 31972 advocated 48-hour and 30-day disclosure deadlines for the release of the ERCOT data.

Obviously these participants adjudged that the more timely release of data would not pose competitive harm to themselves; otherwise they would be urging steps against their self interests. It is unreasonable and contrary to basic economic theory that in a competitive market, participants will act against their self-interest.

The commission disagrees with Constellation's assertion that the release of confidential information, as proposed in the amendment, harms competition and that the proposed rule amendments would result in the publication of confidential information. On the contrary, the commission finds arguments by OPC and Reliant persuasive and convincing. The commission also relies on the experience in other markets, particularly the Australian market where such information is disclosed within 48 hours and, as explained by Peter Adams, a monitor of the Australian electricity market, such disclosure has not resulted in harm to the market as claimed by Constellation. In addition, the commission believes that the provision for a 60-day delay in disclosure in this amendment to §25.505 will ensure that there will be no harm to the market as a result of information disclosure. Furthermore, the commission finds that the benefit of disclosing information within the proposed timeline greatly outweighs any concerns about potential harm discussed by Constellation. As a result, the commission declines to amend the rule as Constellation has proposed.

As noted previously, since the start of retail open access, the commission has viewed the level of the offer cap and the appropriate amount of information disclosure to be interrelated. Because the commission has decided to increase the offer caps to encourage greater investments in generation and load resources in Texas, it believes that such

increases must be accompanied by increased disclosure of the information that affects the operation of the ERCOT market. The increased disclosure will help to ensure that price changes are the result of a properly functioning competitive market and not the result of market power abuse or other market manipulation. The commission agrees with comments suggesting that it should require a more rapid disclosure of certain market information.

By operating under the existing ERCOT Protocols, the market participants have implicitly agreed that their claims of confidentiality expire over time. The question faced by the commission in this project is whether 90 days, as proposed by Constellation, is an appropriate period of time, or whether the public interest is better served by mandating shorter disclosure timelines. As was the case in Project No. 31972, the commission received conflicting suggestions on this issue, ranging from disclosure after only 48 hours to disclosure pursuant to the current 180-day time period in the Protocols. Based upon those comments, the commission determined in that project that it was appropriate to limit the period of time during which some information is considered competitively sensitive. As a result, in Project No. 31972 the commission adopted a 30-day disclosure requirement for disaggregated information.

However, the commission is also sympathetic to the concerns expressed by Constellation that the time period before disclosure should be long enough to avoid encouraging collusion or other market manipulative activities. Except for intervals when an event trigger is reached, the commission agrees that, for most of the information subject to the rule,

disclosure after 30 days may not be necessary. Therefore, while the commission cannot agree with the 90-day delay as proposed by Constellation, the commission determines that the appropriate delay for disclosure of individual offer curves, except when the event trigger is implemented, should be 60 days. The commission finds that this delay in disclosure will not cause a loss of public confidence because much of the time prices in the ERCOT-administered markets are not subject to the type of price spikes that could create an impression of market power abuses or other market failures. In some cases, however, prices may spike to higher than usual levels and cause public concern and the need for more public information. To address such events, the proposed amendment includes an event trigger that would require the public release of entity-specific information on a much quicker timeframe. The proposed amendment requires that, when the trigger is exceeded, the portion of every market participant's offer curve that is equal to or exceeds the trigger level will be disclosed seven days after the day for which the information is submitted. The commission finds that the disclosure of this limited type of entity-specific information is sufficient to retain public confidence in the ERCOT markets while minimizing early disclosure of entity-specific information.

Constellation's concern about possible future actions of public power utilities, such as that of the City of Garland, is conjecture at this time. Neither Garland nor any other public power utility has filed comments in this proceeding objecting to the disclosure of information required by the amendment. In Project No. 31972, some public power utilities stated that disclosure after 60 days would not raise competitive concerns. In asserting any rights it may have under PIA §552.133, a public power utility would have to act in good

faith. The commission refuses to assume that public power utilities will object to the 60-day disclosure requirement when there is no indication to support that assumption. Accordingly, at this time, Constellation's concerns about possible harm to competition due to different treatment of public power utilities are simply conjecture.

In support of its claims, Constellation presented an affidavit from Leslie Dedrickson, one of its Vice Presidents. After first disclosing that Constellation no longer owns any generation assets in ERCOT, the affidavit complains about alleged competitive problems for generators caused by the amendment. In the affidavit, Constellation argued that less than a 90-day disclosure period is not necessary because the commission, the IMM, and ERCOT already have near-immediate access to the information, and the entity-specific information is available to the public at a later date. Constellation asserted that there is no benefit, but rather detriment, to release of entity-specific information under the short timeframes in the proposed amendment. Constellation further stated that buyers' and sellers' behaviors change when they obtain time-sensitive data that allows them to know the position of their potential counterparties. Constellation provided examples to make its points and concluded that in the presence of additional information, sellers likely will offer a higher price and buyers will also change their bid prices.

Commission response

While the commission agrees with Constellation that the commission, the IMM, and ERCOT have access to the disaggregated information, that should not be confused with market transparency, which is a core feature of any workably competitive market. Market transparency through a sunshine policy is an additional deterrent to market manipulation

and complements the work by the IMM, and the commission. Such a sunshine policy creates a level playing field for all market participants, assuring that all participants have access to the data. The market participants, who have a financial interest in the operation of markets, may even be able to identify potentially anticompetitive strategies that might not be apparent to the IMM or the commission. Market transparency thus assists the commission, the IMM and ERCOT in performing their duties. However, the commission agrees that information disclosure should be delayed long enough to minimize any harm that could be caused if disaggregated information is disclosed too early.

The commission believes that the amendment achieves a reasonable balance between the needs of market participants for timely release of information and the needs of suppliers to maintain confidentiality of disaggregated information long enough to avoid possible harm. Contrary to Constellation's comments, the fact that access to disaggregated information is provided to all buyers and sellers should facilitate more informed decision-making by all market participants and should result in more competition in the ERCOT electricity market. In particular, it should further encourage buyers to carefully assess the risks they are facing if they choose to rely on the ERCOT-administered energy market rather than exploring other options. Although disclosure may cause changes in buyers' and sellers' behaviors, there is no indication that such changes will necessarily result in higher prices. Indeed, increased competition and better decision-making by buyers should result in lower prices. The commission believes the disclosure of disaggregated information should be delayed long enough to avoid possible harms to the market or market participants. Therefore, the commission is amending the section to delay disclosure of disaggregated

information for 60 days, which is long enough to prevent any serious harm to those whose information is disclosed, while still providing the public interest benefits that are generated by market transparency.

In its affidavit, Constellation emphasized the importance of not disclosing any disaggregated information before a particular season is completed, asserting that market conditions are seasonal. It argued that conditions like operational problems, interruptions in supply, and effects of contract discontinuations or breaches could persist for longer than 60 days. Constellation also stated that disclosure in 90 days would cause similar types of harm, but such harm would occur less frequently, and to a lesser magnitude than if disclosure occurred in 60 days. A 90-day lag period comes closer to the end of a season, even in Texas, according to Constellation. A 90-day disclosure period would also come after or closer to, depending on the circumstance, the end of the other market conditions described by Constellation. To avoid competitive harm, however, Constellation asserted that a lag of at least 180 days is necessary.

Commission response

The commission does not agree that the alleged "seasonality of data" demonstrates that disclosure should be delayed to 90 or 180 days as advocated by Constellation. To the extent that there are significant seasonal fluctuations, market participants currently have access to over five years of information and can discern such differences by reviewing that data. There are several other reasons that concerns raised regarding seasonal impacts are not significant. First, there is no guarantee that contracts will be seasonal. In fact, there are many contracts that may not last beyond a single month. Second, market strategies need

not remain constant over such a long period as 90 days. Even assuming that there are identifiable 90-day seasons and bidding strategies, under a 60-day disclosure period, the season would be 2/3 completed before the first information was released. A competitor would have little time left within which to identify the bidding strategy and benefit from such information. Further, as noted previously, competitors could simply change their bidding strategies more frequently if they felt disadvantaged by the disclosure. Concerning the other conditions identified by Constellation, if those conditions persisted for as long as 60 days it is quite likely that they would be publicly reported or otherwise known even in the absence of the disclosure requirement. For example, plant operational problems and supply problems often become the subject of news reports and become widely known in much less than 60 days, particularly if they result in the closure of the plant or significant employee reductions. In short, Constellation has failed to demonstrate that the 60-day disclosure requirement would have the effect on competition that it claimed.

Constellation's affidavit provided several examples that it claimed demonstrate harm to the market from early disclosure of disaggregated information. It argued that disclosure sooner than 90 days would allow market participants to assess when they can offer higher prices to specific entities because of particular situations, such as a buyer being short on supply. It claimed that such action by market participants would harm Constellation and the market as a whole. Constellation asserted that public disclosure of information, such as balancing energy bid curves, could reveal information affecting bilateral markets and could reveal the effective heat rate of a unit. Constellation suggested that the ancillary service market would be affected because a sophisticated entity could use the information to determine that a bilateral contract for ancillary

services has terminated. Constellation also opined that the disclosure of information could also affect derivative products in the electric market associated with the underlying energy. According to Constellation, the amendment would create a high and costly risk with respect to generators' involvement in the coal, oil, and gas markets for obtaining fuel to produce the electricity they sell in ERCOT because the fuel suppliers could use the data to gain a clear understanding of the fuel needs and positions of a particular entity. The disclosure of suppliers' costs and positions provides leverage to those who sell products such as Renewable Energy Credits (RECs) to Constellation and could compromise Constellation's ability to hedge its costs.

Commission response

As in other parts of the affidavit, Constellation raises many concerns without providing any solid examples to substantiate its claims. Many of the harms that are alleged to result from early disclosure are, in reality, a result of any disclosure, regardless of the extent of the delay. That is, the alleged harms claimed by Constellation (*e.g.*, disclosure of information that could be used to calculate a unit's heat rate) could also occur under the current 180-day disclosure practiced in ERCOT. Other statements made by Constellation would be valid if the commission ordered disclosure of disaggregated information after forty-eight hours, as is the case in the Australian electricity market, but such statements are not applicable under the commission proposal for such disclosure to take place 60 days from the operating day, which is 30 times longer than what is practiced in the Australian electricity market. Therefore, the commission disagrees with Constellation. The commission also notes that Constellation's affidavit reveals that it no longer owns any generation assets in ERCOT. Constellation's claims regarding the potential impact of the

amendment on generators apparently are not supported by generators who are active in the ERCOT market since other generators have not filed similar comments on the proposed amendment to encourage the commission to further delay disclosure. In fact, entities such as Austin Energy and Texas Electric Cooperatives, Inc. (TEC), who have historically been very concerned about the confidentiality of their disaggregated information, agreed in comments in Project No. 31972 that a 30-day to 60-day disclosure would not raise competitive concerns. Furthermore, other entities such as Reliant or OPC have argued for even faster disclosure of disaggregated information to market participants to facilitate competition.

To show the effect of 60-day release of disaggregated information, Constellation proposed a hypothetical example involving a power generation company (PGC) able to transact business with only a few counterparties and that has one of its 500 MW peaking generators trip at the beginning of a week of record high temperatures during the summer months, as the result of a serious equipment malfunction that it estimates could take more than 60 days to repair. Based on this example, Constellation claimed that, by knowing the PGC's predicament, some sellers could change their negotiating strategy and insist on prices, terms, and conditions that are less favorable to the PGC than they would absent the accelerated dissemination of such information.

Commission response

The commission disagrees with this argument. Constellation's example is based upon an unsupported assumption that the only way in which the PGC's predicament would become known is through the disclosure required by the amendment. The commission does not

agree that this assumption is realistic. Further, sixty days should be long enough for the PGC in the above example to find various supply alternatives if fixing the equipment is not practical within 60 days. While a single supplier may not be able to replace the entire 500 MW of lost capacity, the PGC in question should be able to obtain blocks of purchased power from different sources to address its immediate need. The ERCOT electricity market is becoming more competitive over time, creating more alternatives to address any temporary and unexpected problems experienced by a PGC. Because no current generators in ERCOT provided comments or reply comments supporting Constellation's argument, the commission declines to change the amendment based upon Constellation's conjecture.

Constellation stated that the disclosure of disaggregated market data in only seven days pursuant to the event trigger needs to be an "extreme event" trigger. To support this statement, Constellation presented a calculation based upon certain assumptions to calculate the frequency with which the MCPE has hit 50 times the price of gas delivered at the Houston Ship Channel. Constellation concluded that between January 1, 2006, and March 12, 2007: (1) the MCPE in all zones hit the trigger 82 times; (2) the MCPE in at least one zone hit the trigger 124 times; and (3) the MCPE in any zone achieved the trigger during 69 out of 436 days. By way of comparison, ERCOT posted prices exceeding the $300 transparency cap 178 times between January 1, 2006 and September 30, 2006. These numbers show that bids would hit the proposal's trigger frequently, as was true of the transparency cap that the commission repealed. Constellation claimed that the event trigger will prevent a PGC from recovering all of its costs, particularly for

a peaking gas unit, including start up, fuel, and other costs. Furthermore, Constellation asserted that the trigger as currently formulated would act in a manner similar to the transparency cap.

In reply comments, Reliant noted that, based upon Constellation's figures, the implementation of the event trigger 82 times during the period January 1, 2006 through March 7, 2007 represented approximately 0.20% of the 41,856 intervals during that period. Similarly, if it was implemented 124 times, that would represent approximately 0.30% of the intervals. Reliant also calculated that, if Constellation's proposed event trigger was adopted, it would be implemented in only 0.03% and 0.05% of the intervals, respectively.

Commission response

The commission disagrees with Constellation that the event trigger is only intended to capture the most extreme events. Rather, the objective is to provide information to the public concerning whether the prices in the ERCOT market are reflecting competitive conditions or attempted market manipulation. In the absence of scarcity conditions, the MCPE generally should be at levels below the event trigger, as demonstrated by Constellation's own data. When gas prices are low but the MCPE exceeds the event trigger, the results generally will be due to scarcity or market manipulation. The event trigger provides information concerning the number of times the event trigger is exceeded and the number of offers that exceed that level. The event trigger thus provides important information to the public concerning the operation of the electricity market in ERCOT regardless of whether prices are due to extreme events. Finally, as Reliant's calculations demonstrate, the event trigger would be implemented in approximately 0.20% to 0.30% of

the intervals, if the past is indicative of the future. This is sufficiently infrequent to indicate that it would apply to unusual events without impacting the normal operation of the ERCOT market. There is no need to further limit disclosure in the manner caused by adoption of Constellation's proposed event trigger.

The commission also disagrees with Constellation's comments concerning the prior $300 threshold transparency cap. The transparency threshold is distinguishable because it resulted in next-day disclosure of the supplier's name and it had no relationship with actual production costs facing market participants. In contrast, the event trigger is set at a level which is fifty times the Houston Ship Channel natural gas price index. Because it is related to price of natural gas, which is the fuel used most of the time by the marginal unit that sets the MCPE in the ERCOT market, it accounts for changes in the cost of generation caused by fluctuations of the cost of fuel. Such a generous threshold is high enough to cover total variable and operating costs of any existing generating unit in ERCOT, including inefficient peakers. Furthermore, such an event trigger will result in disclosure after seven days, rather than 24 hours.

Constellation stated that the disclosure contemplated by the amendment would allow other market participants to ascertain the practices Constellation has developed and to "free ride" on Constellation's investment. In addition, Constellation claimed that analysis of the disclosed information would also allow competitors to analyze Constellation's bidding, scheduling, and business strategies.

Commission response

The commission disagrees with Constellation. As noted earlier, Constellation does not provide any solid examples to substantiate its claims, and it has failed to demonstrate how the amendment creates any alleged harm because there is already five years of information available for competitors to review to create the same analysis. Further, its claims are not supported by similar claims or calls for longer disclosure periods from other generators actually participating in the ERCOT market. As noted earlier, entities such as Austin Energy and TEC stated in comments in Project No. 31972 that a 30-day to 60-day disclosure would not raise competitive concerns. In addition, comments in this rulemaking process by Reliant and OPC rebut claims made by Constellation and encourage the commission to accelerate disclosure of disaggregated information to a shorter period than what was originally proposed by the commission.

The commission strongly disagrees with Constellation's assertions that the proposed disclosure would cause financial harm to Constellation, counterparties, and ultimately Texas consumers. In fact, the commission determines that the improved market transparency, which will result from the proposed information disclosure, will facilitate more efficient operation of the competitive electricity market in ERCOT. This will ultimately benefit both market participants and Texas customers.

Use of the phrase "offer curve" and June 1, 2007 implementation deadline

In its initial comments, ERCOT suggested that the commission replace the phrase "offer curve" with the phrase "price-quantity offer pair" in §25.505(f)(3)(A)(ii) and §25.505(f)(3)(B)(ii).

ERCOT stated that to meet the effective date of June 1, 2007 for the new disclosure described in this rule, ERCOT would need to implement a manual process to satisfy the disclosure requirement. ERCOT stated that it could accomplish this task, but would need a minor change in the draft language that would greatly reduce the work required while still achieving the commission's objective. Unless this change is made, ERCOT stated that it would be required to make software enhancements that would require four months to implement. Other options ERCOT proposed to simplify disclosure include posting only the QSE name and corresponding offer prices above the trigger (but not the quantity), or disclosing the full offer curves of the QSEs exceeding the trigger. ERCOT posited that these alternatives were not as good in meeting the intent of the commission. ERCOT stated it is also studying the impact the proposed rule language might have in the nodal environment and will keep the commission apprised of its findings.

Both OPC and Constellation did not oppose replacing the phrase "offer curve" with the phrase "price-quantity offer pair" in §25.505(f)(3)(A)(ii) and §25.505(f)(3)(B)(ii) as proposed by ERCOT.

Constellation also raised concerns regarding the proposed June 1, 2007, implementation date and concluded that full implementation by that date may not be easy to achieve.

Commission response

The commission agrees with the clarification suggested by ERCOT and is replacing the phrase "offer curve" with the phrase "price-quantity offer pair" in §25.505(f)(3)(A)(ii) and §25.505(f)(3)(B)(ii).

The commission agrees with Constellation that full implementation is not possible to achieve by June 1, 2007. The commission is also aware of ERCOT's workload and revises the implementation date of the disclosure provision. Therefore, the commission amends §25.505(f)(3)(A)(ii) to require ERCOT to implement the new disclosure provisions of the rule beginning with information submitted after September 1, 2007.

Event trigger

Constellation recommended that the definition of the event trigger be modified to reflect only an "extreme event" trigger of the greater of 100 times the price of gas as delivered to the HSC or 70% of the current offer cap. In support of its position, Constellation stated that the proposed event trigger is too low and would reveal the entire bid curve above the trigger level, resulting in too much information being disclosed too frequently. Constellation contended that, for the period between January 1, 2006 and March 12, 2007, the event trigger would have been engaged 69 to 124 times, if the trigger had been in place during this time.

Constellation argued that the trigger mechanism should only be activated by truly exceptional market events, such as extreme price spikes without obvious purpose. If the trigger is set too low, Constellation argued that it would operate as a "shame cap" and undermine the commission's energy-only approach to resource adequacy.

OPC noted that the language in the rule would not have revealed the bidding behavior of TXU during the summer of 2005, the time period where the IMM has determined that TXU was

engaging in anti-competitive bidding and increased costs to the market by approximately $70 million over a four-month period. OPC opined that a more realistic multiplier should be 35, which would establish an event trigger that would provide market transparency to questionable bids in the ERCOT market.

In its reply comments, OPC noted that Constellation argued that the commission's event trigger captures too many market events and is contrary to the commission decision in Project No. 31972 that a transparency cap was no longer needed. OPC asserted that this is not the case because the commission determined that the required greater market transparency would "deter generation companies from offering unreasonably high prices." Order, Project No. 31972, 31 TexReg 7319 (September 8, 2006).

In its reply comments, OPC noted that an event trigger should act as a "shame cap" to deter market manipulation. OPC argued that, in the past, a transparency cap has proven to be effective in deterring market manipulation. The event trigger is important to prevent inefficient markets which lead to excessive rates to consumers. OPC noted that any relief the load serving entities receive will be almost two years after the questionable events occurred because it is unlikely that an end to the harmful behavior will occur before an investigation is completed. Moreover, OPC opined that it is extremely unlikely that any refund the retail electric providers (REPs) or LSEs receive as a result of a finding of market manipulation will be returned to their customers who paid the higher rates. An event trigger that more effectively tracks questionable bids would promote the public interest in efficient markets. OPC contended that Constellation's proposal works contrary to that public interest and should not to be adopted by the commission.

Reliant, in its reply comments, questioned the reasonableness of the changes proposed by Constellation concerning the event trigger and recommended that the commission reject such proposed changes. Reliant referred the commission to a report presented by the ERCOT IMM at the March 7, 2007 commission Open Meeting when the IMM used a threshold of "20 times the natural gas price index" to evaluate the reasonableness of price spike intervals. Reliant, while not expressing any opinion about the reasonableness of the threshold used by the IMM, reminded the commission that the two thresholds recommended by the IMM and Constellation are "two apparent book-ends" to be considered by the commission.

In reply comments, Reliant noted that, as previously discussed, the commission's proposed event trigger would have been implemented in approximately 0.20% to 0.30% of the 41,856 intervals during the period from January 1, 2006 through March 7, 2007. Reliant stated that Constellation's proposed level for the event trigger would significantly reduce transparency in the ERCOT market relative to the proposed amendment. Reliant also concluded that Constellation's goal is to make the market less transparent. Therefore, Reliant encouraged the commission to opt for more market transparency and reject Constellation's proposal.

Commission response

Regarding event trigger calculation formula, the commission is neither convinced that it should raise the threshold value, as recommended by Constellation, nor is it convinced that it should lower it, as proposed by OPC. It has been the commission's intention to provide more market transparency consistent with its decision to allow for the offer cap level to

increase by 200% and reach $3,000 by early 2009. This greater latitude in price offers warrants much more transparency than before to retain public confidence in the ERCOT market. In addition, the commission believes that an event trigger set at a high level (50 times the price of natural gas) would ensure that the most expensive units within ERCOT will be economical to operate without resulting in disclosure of the names or offers of bidders. Furthermore, the commission notes that the event trigger and the information disclosed by its operation depends to a large degree on the decisions of market participants about their offer prices, a decision that they will make based on their business strategies and the recognition that there is a risk of a portion of their offer curves. Providing such disclosure, as indicated by Reliant, will allow market participants to make intelligent decisions regarding available prices. Therefore, the commission disagrees with both OPC and Constellation who recommended either lowering or increasing values for event trigger, respectively, and declines to change the language in the published amendment.

While OPC's comments regarding the event trigger are very helpful, the commission does not agree to reduce the event trigger to 35 times the HSC natural gas price index for each operating day. As was mentioned above, the commission believes that the event trigger should be set at a high level to cover the most expensive units in ERCOT; based on both the efficiency of generating plants in the markets and the need for them to recover start-up costs. The proposed event trigger based on 50 times the HSC natural gas price index for each operating day meets that objective. As a result, the commission declines to amend the rule as OPC has proposed.

Re-establishment of Regulatory Methods

OPC recommended that certain amendments be added to the rule to deter market manipulation because the market transparency proposed in the rule is an insufficient deterrent. OPC recommended that the commission reinstitute the $1,000/MWh or $1,000/MW offer cap that had been in effect prior to March 1, 2007 and reinstitute the modified competitive solution method (MCSM) previously used in ERCOT.

Constellation responded to OPC's arguments and noted that the recommendations to reinstitute MCSM and the $1,000 offer cap were beyond the scope of this proceeding because those subjects are addressed in §25.502, relating to *Pricing Safeguards in Markets Operated by the Electric Reliability Council of Texas*, and not in §25.505, which is the only section addressed in the notice for the amendment. Constellation also cited to the commission Order in Project No. 31972, in which the commission found that MCSM had served its purpose and could be repealed and stated that the increase in the offer cap was necessary to address resource adequacy in ERCOT.

Commission response

The commission disagrees with OPC's recommendations to re-establish certain regulatory methods that expired 90 days after the implementation and operation of §25.505(f). The commission concludes that the disclosures required by the proposed amendment are important measures that will improve the efficiency of the wholesale market, and that the higher offer caps are a key element of the scarcity pricing modifications that the commission recently adopted. With the strong growth in demand that has been

experienced in ERCOT, the commission concludes that it needs to leave the scarcity pricing mechanism in place, to permit better price signals for generation developers. The re-establishment of such regulatory methods is inconsistent with the operation of an energy-only mechanism approved earlier by the commission, provided appropriate levels of market transparency are required. If the proposed disclosure requirements are stayed or reversed as a consequence of judicial review, the commission reserves the right to revisit this determination. As a result, the commission declines to amend the rule as OPC has proposed.

Other proposed changes to the published amendment

Constellation recommends that the definition of "event trigger' be revised to state that it applies "for each interval." Constellation also suggests that the language in §25.505(f)(3)(A) and (B) be clarified by including language that the requirement to publish the offer curve applies "for balancing energy service and each ancillary service" and only "for that service and that interval."

Commission response

The commission agrees to clarify the definition of event trigger in §25.505(b) by including "for each interval" as requested by Constellation. The commission also agrees to clarify the language in §25.505(f)(3)(A) and (B) by including "for balancing energy service and each ancillary service" and "for that service and that interval" as proposed by Constellation.

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

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007) (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 §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 safe, reliable, and reasonably priced electricity and to protection from unfair, misleading, or deceptive practices, and gives the commission the authority to adopt and enforce rules to carry out these provisions; 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, 35.004, 39.001, 39.101, 39.151, and 39.157.

§25.505. Resource Adequacy in the Electric Reliability Council of Texas Power Region

(a) **General.** The purpose of this section is to prescribe mechanisms that the Electric Reliability Council of Texas (ERCOT) shall establish to provide for resource adequacy in the energy-only market design that applies to the ERCOT power region. The mechanisms are intended to encourage market participants to build and maintain a mix of resources that sustain adequate supply of electric service in the ERCOT power region, and to encourage market participants to take advantage of practices such as hedging, long-term contracting between market participants that supply power and market participants that serve load, and price responsiveness by end-use customers.

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

(1) **Generation entity** – an entity that owns or controls a generation resource.

(2) **Event trigger** -- a calculated value for each interval that is equal to 50 times the Houston Ship Channel natural gas price index for each operating day, expressed in dollars per megawatt-hour (MWh) or dollars per megawatt per hour (MW/h). The event trigger shall be applied solely for the purpose of establishing the timing of the publication of certain market data and shall not be construed to establish the legitimacy of any offer, whether such offer is less than, equal to, or higher than the event trigger.

(3) **Load entity** – an entity that owns or controls a load resource, including, but not limited to, a load acting as a resource (LaaR) or a balancing up load (BUL), as those terms are defined in the ERCOT Protocols.

(4) **Resource entity** – an entity that is a generation entity or a load entity.

(c) **Statement of opportunities (SOO).** ERCOT shall publish a SOO that provides market participants with a projection of the capability of existing and planned electric generation resources, load resources, and transmission facilities to reliably meet ERCOT's projected needs. A SOO published in even-numbered years shall use a ten-year study horizon and be published by December 31 of those years. A SOO published in odd-numbered years shall use a five-year study horizon and be published on or around October 1 of those years. ERCOT shall prescribe reporting requirements for generation entities and transmission service providers (TSPs) to report to ERCOT their plans for adding new facilities, upgrading existing facilities, and mothballing or retiring existing facilities. ERCOT also shall prescribe reporting requirements for load entities to report to ERCOT their plans for adding new load resources or retiring existing load resources.

(d) **Projected assessment of system adequacy (PASA).** Beginning no later than October 1, 2006, unless otherwise specified below, ERCOT shall provide market participants with information to assess the adequacy of resources and transmission facilities to meet projected demand in the following two reports:

(1) Each month, ERCOT shall publish a Medium-Term PASA for each week of the subsequent three years beginning with the week after the Medium-Term PASA is published. At a minimum, each Medium-Term PASA shall include the following information:

(A) Load forecast by ERCOT zone or area;

(B) Ancillary service requirements;

(C) Transmission constraints; and

(D) Aggregated information on the availability of resources, by ERCOT zone or area, including load resources.

(2) Each day, ERCOT shall publish a Short-Term PASA for each hour for the seven days beginning with the day the Short-Term PASA is published.

(A) At a minimum, each Short-Term PASA shall include the following information:

(i) Load forecast by ERCOT zone or area;

(ii) Ancillary service requirements;

(iii) Transmission constraints; and

(iv) Aggregated information on the availability of resources, by ERCOT zone or area, including load resources.

(B) By October 1, 2006, ERCOT shall file at the commission a plan to incorporate the impact of transmission constraints into its Short-Term PASA at a later date.

(e) **Filing of resource and transmission information with ERCOT.** ERCOT shall prescribe reporting requirements for resource entities and TSPs for the preparation of PASAs. At a minimum, the following information shall be reported to ERCOT:

(1) TSPs shall provide ERCOT with information on planned and existing transmission outages.

(2) Generation entities shall provide ERCOT with information on planned and existing generation outages.

(3) Load entities shall provide ERCOT with information on planned and existing availability of LaaRs, specified by type of ancillary service, and BULs.

(4) Generation entities shall provide ERCOT with a complete list of generation resource availability and performance capabilities, including, but not limited to:

(A) the net dependable capability of generation resources;

(B) projected output of non-dispatchable resources such as wind turbines, run-of-the-river hydro, and solar power; and

(C) output limitations on generation resources that result from fuel or environmental restrictions.

(5) Load serving entities (LSEs) shall provide ERCOT with complete information on load response capabilities that are self-arranged or pursuant to bilateral agreements between LSEs and their customers.

(f) **Publication of resource and load information in ERCOT markets.** To increase the transparency of the ERCOT-administered markets, ERCOT shall post at a publicly accessible location on its website, beginning no later than October 1, 2006, the information required pursuant to this subsection, unless a different date is specified by a paragraph of this subsection.

(1) The following information in aggregated form, for each settlement interval and for each area where available, shall be posted two calendar days after the day for which the information is accumulated.

(A) Quantities and prices of offers for energy and each type of ancillary capacity service, in the form of supply curves.

(B) Self-arranged energy and ancillary capacity services, for each type of service.

(C) Actual resource output.

(D) Load and resource output for all entities that dynamically schedule their resources.

(E) During the operation of the market under a zonal market design, scheduled load and actual load. During the operation of the market under a nodal market design, firm scheduled load, scheduled load with "up to" limits on congestion charges, and actual load.

(2) During the operation of the market under a nodal market design, the following day-ahead market information in aggregate form shall be posted two calendar days after the day for which the information is accumulated: load bids, including virtual loads, in the form of day-ahead bid curves, and cleared load.

(3) The following information in entity-specific form, for each settlement interval, shall be posted as specified below.

(A) During the operation of the market under a zonal market design:

(i) Portfolio offer curves for balancing energy and for each type of ancillary service, for each area where available, shall be posted 60 days after the day for which the information is accumulated beginning September 1, 2007, except that, for the highest-priced offer selected or dispatched by ERCOT for each interval after

January 12, 2007, ERCOT shall post the offer price and the name of the entity submitting the offer 48 hours after the day for which the information is accumulated. In the event of interzonal congestion, ERCOT shall post, separately for each zone, the offer price and the name of the entity submitting the highest-priced offer selected or dispatched.

(ii) If the market clearing price for energy (MCPE) or the market clearing price for capacity (MCPC) exceeds the event trigger during any interval, the portion of every market participant's price-quantity offer pair for balancing energy service and each other ancillary service that is at or above the event trigger for that service and that interval shall be posted seven (7) days after the day for which the offer is submitted. ERCOT shall implement the requirements of this clause by September 1, 2007.

(iii) Other offer-specific information for each type of service and for each area where available shall be posted 90 days after the day for which the information is accumulated beginning March 1, 2007. Effective March 1, 2008, this information shall be posted 60 days after the day the information was accumulated. The information subject to this disclosure requirement is as follows:

(I) final energy schedules for each QSE;

(II) final ancillary services schedules for each QSE;

(III) resource plans for each QSE representing a resource;

(IV) actual output from each resource; and

(V) all dispatch instructions from ERCOT for balancing energy and ancillary services.

(iv) The information posted shall include the names of the resources in the portfolio that were committed, the name of the entity submitting the information, the name of the entity controlling each resource in the portfolio.

(B) Two months after the start of operation of the market under a nodal market design:

(i) Offer curves (prices and quantities) for each type of ancillary service and for energy at each settlement point in the real time market, shall be posted 60 days after the day for which the information is accumulated except that, for the highest-priced offer selected or dispatched for each interval on an ERCOT-wide basis, ERCOT shall post the offer price and the name of the entity submitting the offer 48 hours after the day for which the information is accumulated.

(ii) If the MCPE or the MCPC exceeds the event trigger during any interval, the portion of every market participant's price-quantity offer pairs for balancing energy service and each other ancillary service that is at or above the event trigger for that service and that interval shall be posted seven (7) days after the day for which the offer is submitted.

(iii) Other resource-specific information, as well as self-arranged energy and ancillary capacity services, and actual resource output, for each type of service and for each resource at each settlement point shall be posted 60 days after the day for which the information is accumulated.

(iv) The posted information shall be linked to the name of the resource (or identified as a virtual offer), the name of the entity submitting the information, and the name of the entity controlling the resource. If there are multiple offers for the resource, ERCOT shall post the specified information for each offer for the resource, including the name of the entity submitting the offer and the name of the entity controlling the resource.

(C) The load and generation resource output for each zone, for each entity that dynamically schedules its resources, shall be posted 90 days after the day for which the information is accumulated beginning March 1, 2007. Effective March 1, 2008, the information required by this subparagraph shall be posted 60 days after the day for which the information is accumulated.

(D) ERCOT shall use §25.502(e) of this title (relating to Pricing Safeguards in Markets Operated by the Electric Reliability Council of Texas) as a basis for determining the control of a resource and shall include this information in its market operations data system.

(g) **Scarcity pricing mechanism (SPM).** ERCOT shall administer the SPM. The SPM shall take effect on January 1, 2007, unless the commission by order changes this date. The SPM shall operate as follows:

(1) The SPM shall operate on an annual resource adequacy cycle, starting on January 1 and ending on December 31 of each year.

(2) For each day of the annual resource adequacy cycle, the peaking operating cost (POC) shall be 10 times the daily Houston Ship Channel gas price index for the previous business day. The POC is calculated in dollars per megawatt-hour (MWh).

(3) For the purpose of this section, the real-time energy price (RTEP) shall be measured as the price at an ERCOT-calculated ERCOT-wide hub.

(4) In the annual resource adequacy cycle, the peaker net margin (PNM) shall be calculated as $\sum$((RTEP – POC) * (number of minutes in a settlement interval / 60 minutes per hour)) for each settlement interval when RTEP – POC >0.

(5) Each day ERCOT shall post at a publicly accessible location on its website the updated value of the PNM, in dollars per megawatt (MW).

(6) The system-wide offer caps shall be as follows:

(A) The low system offer cap (LCAP) shall be set on a daily basis at the higher of:

(i) $500 per MWh and $500 per MW per hour; or

(ii) 50 times the daily Houston Ship Channel gas price index of the previous business day, expressed in dollars per MWh and dollars per MW per hour.

(B) Beginning March 1, 2007, the high system-wide offer cap (HCAP) shall be $1,500 per MWh and $1,500 per MW per hour.

(C) Beginning March 1, 2008, the HCAP shall be $2,250 per MWh and $2,250 per MW per hour.

(D) Beginning two months after the opening of the nodal market, the HCAP shall be $3,000 per MWh and $3,000 per MW per hour.

(E) At the beginning of the annual resource adequacy cycle, the system-wide offer cap shall be set equal to the HCAP and, except for increases authorized in this section, maintained at this level as long as the PNM during an annual resource adequacy cycle is less than or equal to $175,000 per MW. During an annual resource adequacy cycle, the system-wide offer cap shall be increased in accordance with the schedule authorized in this section unless the PNM has been exceeded by that date. If the PNM exceeds $175,000 per MW during an annual resource adequacy schedule, the system-wide offer cap shall be reset at the LCAP for the remainder of that annual resource adequacy cycle.

(F) The Independent Market Monitor, as part of its responsibilities pursuant to Public Utility Regulatory Act §39.1515(h), may conduct an annual review of the effectiveness of the SPM.

(h) **Development and implementation.** ERCOT shall use a stakeholder process to develop protocols that comply with this section. Nothing in this section prevents the commission from taking actions necessary to protect the public interest, including actions that are otherwise inconsistent with the other provisions in this section.

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 §25.505, relating to Resource Adequacy in the Electric Reliability Council of Texas Power Region, is hereby adopted with changes to the text as proposed.

SIGNED AT AUSTIN, TEXAS the 16th day of August 2007.

PUBLIC UTILITY COMMISSION OF TEXAS

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PAUL HUDSON, CHAIRMAN

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JULIE PARSLEY, COMMISSIONER

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BARRY T. SMITHERMAN, COMMISSIONER

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