

PROJECT NO. 39191

EMERGENCY RULEMAKING TO	§	PUBLIC UTILITY COMMISSION
REMOVE NINETY (90) DAY NOTICE	§	
REQUIREMENT AND MODIFY EILS	§	
CONTRACT PERIODS UNDER P.U.C.	§	OF TEXAS
SUBST. R. 25.507	§	

**ORDER ADOPTING AMENDMENTS TO §25.507 ON AN EMERGENCY BASIS
AS APPROVED AT THE MARCH 24, 2011 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts amendments to §25.507, relating to Electric Reliability Council of Texas (ERCOT) Emergency Interruptible Load Service (EILS), on an emergency basis. The amendments allow ERCOT to establish an additional EILS contract period for the time period of April 1 to May 31, 2011 and give less than the 90 days' notice for this contract period only. These amendments constitute a competition rule subject to judicial review as specified in Public Utility Regulatory Act (PURA) §39.001(e).

On February 25, 2011, ERCOT filed its petition for emergency rulemaking to amend §25.507 (the rule). The commission published notice of the petition in the March 11, 2011 issue of the *Texas Register* (36 TexReg 1728), and received comments on the petition from Texas Competitive Power Advocates (TCPA), consisting of Calpine Energy Services, LP, Constellation Energy Commodities Group, Exelon Generation (Power Team), GDF-SUEZ Energy Marketing NA, Inc., Gregory Power Partners, LP, Macquarie Energy, LLC, NextEra Energy Resources, NRG Texas LLC, PSEG TX, LP, Shell Energy North America (US), and Topaz Power Group; Texas Industrial Energy Consumers (TIEC); EnerNOC; and ERCOT.

Petition and Comment Overview

In its petition, ERCOT stated that EILS is an emergency demand response program that can be deployed in system emergencies. In emergency situations, ERCOT has the discretion through this program to instruct utilities to interrupt firm service to a limited number of customers who have offered to be interrupted for a price, in order to prevent a broader service interruption to firm load customers. EILS resources are deployed by ERCOT in an emergency event prior to or in conjunction with ERCOT instructing utilities to interrupt firm load. Based on subsection (a)(1) of the rule, ERCOT procures EILS during the course of the year for three contract periods: (1) February through May; (2) June through September; and (3) October through January. Under subsection (a)(2), ERCOT may restructure the contract periods to facilitate additional load participation in EILS, but ERCOT must publicly announce any changes to the contract period schedule at least 90 days prior to the next contract period start date. EILS resources are subject to a maximum of two deployments per EILS contract period, lasting no more than a total of eight hours per contract period, unless an EILS deployment is still in effect when the eighth hour lapses, in which case EILS deployment shall continue until ERCOT releases the EILS resource.

ERCOT stated in its petition that, on February 1, 2011, it began a new contract period covering February 1 – May 31, 2011. On February 2, 2011, in response to cold temperatures and a temporary decrease in available energy supply, ERCOT deployed a total of 467.7 megawatts (MW) of EILS resources. ERCOT did not release the EILS resources until 10:01 a.m. on February 3, 2011, for a total response time for some resources of approximately 28 hours. Because of the deployment restrictions in the rule, beginning the third day of the contract period, ERCOT was no longer permitted to deploy EILS resources for the remaining portion of the

contract period. ERCOT stated that it has continuing operational concerns for the remainder of the contract period, and desires to acquire a new supply of EILS capacity as soon as possible. ERCOT requested that the rule be modified on an emergency basis to remove the 90-day notice requirement before changing the contract periods so that ERCOT may create a new contract period for April 1 through May 31, 2011. ERCOT requested a commission decision on its petition no later than the commission's March 24, 2011 Open Meeting in order to allow ERCOT to move forward with procurement of EILS capacity by April 1, 2011.

TCPA understood and supported ERCOT's goal of having tools to maintain grid stability during emergency events, but opposed the complete elimination of the 90-day notice period and requested additional changes to the rule. EnerNOC supported the goal of the petition, but requested a change to the proposed language amending the rule. TIEC opposed the petition, and stated that the performance of EILS resources when deployed on February 2, 2011 should be evaluated before procuring additional resources, that ERCOT's petition does not meet the standard for an emergency rule, and that the proposed rule changes are too broad. ERCOT responded that it seeks only a temporary change to the rule to be effective only for the April to May contract period, that any other proposed changes to the rule should be evaluated through the normal rulemaking process, that it will evaluate the performance of EILS loads when procuring resources for the new contract period, and that the situation does meet the "imminent peril" standard for emergency rulemakings.

Procurement and Utilization of Ancillary Services

TCPA stated that a focus by ERCOT on increasing competitive procurement of operating reserves at times when a severe weather event is anticipated would not distort market prices. TCPA stated that both EILS deployment and procurement of capacity through the Reliability Unit Commitment process are operator-control mechanisms that drive down market prices when they should reflect scarcity situations, and they should never be considered prior to enhancing market-driven mechanisms.

Commission Response

The Commission agrees that competitive market mechanisms should be utilized when possible. However, EILS, as described in the rule, is a “special emergency service” and is utilized by ERCOT only in extreme situations to prevent or mitigate the effects of shedding firm load. The procurement and utilization of EILS vis-à-vis the procurement and utilization of other ancillary services is beyond the scope of the rule and this emergency rulemaking proceeding.

EILS Performance

TCPA stated that EILS performance is not yet available for analysis of this product's contribution to the February event, including whether previously-contracted EILS providers will be eligible to contract for the new April through May period. TIEC stated that additional EILS should not be procured until performance from the February 2nd event has been evaluated. TIEC stated that granting the petition could allow ERCOT to procure additional EILS from entities that did not perform and the entities, under subsection (e) of the rule, should be barred from EILS

participation for six months. TIEC also stated that entities that failed to perform during the February 2nd event have not reached their deployment limits and should still be subject to a call for interruption without ERCOT having to pay them for additional service. EnerNOC responded to TIEC's statement that "EILS has never been tested" until the February 2, 2011 event by stating that EILS loads have been frequently tested during the four years of the EILS program's existence, and ERCOT evaluates the performance of the EILS loads after each test. EnerNOC stated that the rule does allow for a six-month suspension for loads that fail to perform, but the rule does not specify when the six-month period begins, and it is unrealistic to halt all procurement after each deployment until performance has been evaluated. EnerNOC also expressed confusion at how TIEC reached the conclusion that if a deployed EILS load failed its performance requirements that it has not reached its deployment limit. Finally, EnerNOC stated that the evaluation of the performance of the EILS loads must take into account the extraordinary event that occurred and the exceptionally long period that EILS resources were deployed.

ERCOT responded to comments regarding the evaluation of the February 2 event by stating that it is reviewing the performance of EILS loads and will be in a position to discuss the performance by the March 24, 2011 open meeting. ERCOT stated that EILS loads that failed their availability requirement for the October 2010 through January 2011 and February through May 2011 contract periods, including the February 2-3, 2011 event, as well as EILS loads that experienced dual test failures in the October 2010 through January 2011 contract period will be ineligible for procurement for the requested April 1 through May 31, 2011 contract period. ERCOT will procure EILS capacity from EILS loads that it can "conclusively determine" met

their EILS event performance obligations on February 2-3, 2011 in accordance with the rule and ERCOT protocol requirements.

Commission Response

Subsection (e) of the rule addresses suspension of EILS resources from participation in EILS procurement, and ERCOT's procurement for the emergency April through May 2011 contract period will be subject to that subsection. In addition, ERCOT has addressed TIEC's concern about EILS resource performance during the February 2-3, 2011 event by stating that it will be able to consider that performance in determining which EILS resources will be eligible for procurement for the April through May 2011 contract period. There is insufficient time in this emergency rulemaking to evaluate and resolve other comments about the particular performance of EILS resources and their availability for deployment for the remainder of the February through May 2011 contract period and their eligibility for procurement for the emergency contract period. Furthermore, these comments concern implementation issues that can be resolved outside of this proceeding.

Standard for Emergency Rule

ERCOT stated in its petition that EILS is designed to reduce the need for ERCOT to instruct utilities to shed firm load, or to reduce the amount of firm load that is required to be shed during an emergency event. EILS is procured for all hours and could be needed at any time. ERCOT believed that the deployment of EILS during the February 2, 2011 event most likely mitigated the need to direct utilities to shed additional firm load. Anytime firm load shedding is implemented to maintain the reliability of the ERCOT system, the public health, safety, and

welfare of the ERCOT region community is at stake. ERCOT desires to have all operational tools available before reaching that final step. ERCOT also stated that the “shoulder months” of April and May can pose a unique set of operational challenges if extreme weather occurs due to the sizable amount of generation that is historically off-line during these months for planned outages. ERCOT stated that the potential for extreme weather exists in the spring, and ERCOT must be prepared to respond to any extreme weather situation. ERCOT views EILS as a valuable operational tool and ERCOT must have all operational tools readily available for deployment.

TIEC stated that the petition does not meet the standard for an emergency rule. TIEC stated that ERCOT can rely on other operational tools, such as procuring additional ancillary services, to meet any potential threats to grid reliability. Operating temporarily without EILS does not rise to the level of “immediate peril.” TIEC stated that ERCOT’s claim of “immediate peril” is contradicted by the statement that ERCOT may not procure EILS if the MW offered are not priced reasonably. TIEC also stated that ERCOT seems to be requesting a permanent amendment to the rule, while under the Administrative Procedure Act (APA), an emergency rule is only effective for a limited time – up to 120 days with an extension for no more than 60 days. Finally, TIEC stated that it also does not appear that the Commission can modify an existing rule on a temporary basis.

ERCOT responded that it disagrees that the petition does not meet the “imminent peril” standard. EILS is described in the rule as a “special emergency service” and having EILS available during an emergency event supports the notion that it is intended to prevent or minimize the “imminent

peril” to public health, safety, and welfare of the ERCOT region community that could result from load shedding events. ERCOT also responded that it is not requesting that the emergency rule be in effect beyond the period to procure EILS capacity for April and May 2011.

Commission Response

The Commission agrees with ERCOT that an “imminent peril to the public health, safety, or welfare” requires adoption at this time of emergency amendments to the rule. As indicated in subsection (a) of the rule, EILS is a special emergency service that is used by ERCOT in an emergency to prevent or reduce involuntary blackouts of electric customers. An involuntary blackout of electric customers is a peril to the public health, safety, and welfare. A blackout is a public health peril because the unavailability of electricity can be life threatening to vulnerable populations. A blackout is a public safety peril because the unavailability of electricity to such things as traffic lights can cause accidents. Finally, a blackout is a public welfare peril because the unavailability of electricity can severely disrupt basic, everyday activities of a modern society.

The February 2-3, 2011 event was extreme, and involved extremely cold temperatures and a very large amount of resource outages. As a result, ERCOT unexpectedly exhausted its ability to deploy EILS resources near the beginning of the February through May 2011 contract period. In addition, the “shoulder months” of April and May, for which ERCOT seeks an emergency EILS contract period, can pose a unique set of operational challenges for ERCOT if extreme weather occurs. Historically, a sizable amount of generation capacity is unavailable during April and May for planned outages, between the high-load

winter period and the high-load summer period. However, unseasonably hot weather can occur during April and May, which will greatly increase the demand for electricity. In April 2006, the ERCOT region experienced 100-plus degree temperatures. Because of the large amount of generation capacity that was unavailable, ERCOT had to direct utilities to shed 1,000 MW of firm load. In fact, the April 2006 event was the impetus for the commission's original adoption of the EILS rule.

An imminent peril to the public health, safety, and welfare exists because ERCOT does not currently have the ability to deploy EILS service during April through May 2011. ERCOT indicated in its petition that it believed that the commission would need to grant its petition no later than the commission's March 24, 2011 open meeting in order to allow ERCOT sufficient time to procure EILS service for the emergency April through May 2011 contract period. ERCOT will need to enter into contracts for that service before April 1, 2011. Therefore, the commission concludes that the emergency rule amendments should take effect as soon as possible, which under APA §2001.036(a)(2) is immediately upon filing of the rule amendments with the secretary of state. APA §2001.036(b) requires that an agency take appropriate measures to make emergency rules known to persons who may be affected by them. To meet this requirement, the commission hereby orders ERCOT to promptly provide notice of the emergency rule amendments adopted herein in the same manner that it provided notice of its petition, which is described in ERCOT's proof of notice filed on February 28, 2011.

APA §2001.003(6)(B) defines “rule” to include the amendment of a prior rule. Thus, APA §2001.034’s authorization to adopt an “emergency rule” includes an emergency amendment of a rule. APA §2001.034(c) limits the time period during which an emergency rule can remain in effect. The time period for the emergency amendments to the EILS rule that the commission is adopting is addressed below, in the ERCOT’s Proposed Rule Amendments section of this order.

ERCOT’s Proposed Rule Amendments

TCPA stated that the elimination of the 90-day notice requirement is neither a reasonable nor measured response to ERCOT’s short-term need. TCPA stated that the 90-day notice requirement was adopted to give ERCOT the flexibility to modify contract periods in the rule while giving potential EILS loads adequate notice to evaluate and prepare for different contract periods. TCPA stated that the trade-off of interests has not disappeared and the notice period continues to serve the purpose for which it was intended, and requested that ERCOT be granted a one-time, “good-cause” exception to the rule rather than eliminating the notice requirement. EnerNOC agreed that the language in the rule is to protect EILS providers from last-minute contract-period changes, which make it difficult for EILS providers to contract with EILS loads. EnerNOC requested that instead of completely removing the 90-day notice requirement, ERCOT make all reasonable efforts to provide 90 days’ notice, unless circumstances make it impractical. This would provide some assurance to EILS providers while the current circumstance would make this notice impractical. EnerNOC responded to TCPA’s comments by stating that it is not opposed to granting a good-cause waiver to the rule for ERCOT.

TIEC stated that the proposed amendment is too broad, in that it would allow ERCOT to unilaterally procure additional EILS for any period, rather than be limited to the period covering April 1 to May 31, 2011. TIEC requested rule language that would explicitly establish the new contract period of April 1 to May 31, 2011 and exempt this period only from the 90-day notice requirement. TIEC also requested that the Commission grant a good cause waiver to the existing rule, rather than making overly broad changes to the rule. EnerNOC stated that TIEC's proposed language was acceptable.

ERCOT responded to suggestions that it request a good-cause exception by stating that it believed that an emergency rulemaking would provide a much more transparent way to make the case to the market of the need for additional EILS capacity. ERCOT responded to EnerNOC's initial comments by stating that the emergency rule will not be effective any longer than the limited time period to procure capacity for April 1 through May 31, 2011, and that EnerNOC's recommended rule change would be appropriate for consideration during a normal rulemaking. Finally, ERCOT responded to TIEC's requested rule language by stating that the language will accomplish the same end result as sought by ERCOT, and that if the Commission prefers TIEC's language, ERCOT believes it will result in the same outcome.

Commission Response

As discussed above in the Standard for Emergency Rule section of this order, ERCOT's proposed amendments to the rule meet the requirements of the APA for an emergency rule. Therefore, the emergency rule amendments that the commission adopts in this order

are an appropriate means of authorizing ERCOT to pursue and possibly implement a special April through May 2011 contract period.

The Commission agrees that the language proposed by TIEC more clearly achieves the result intended by ERCOT, by specifically setting out the special contract period and removing the 90-day notice requirement only for that time period. Therefore, the Commission concludes that the language proposed by TIEC, with slight modification, should be used to amend the rule on an emergency basis.

Additional Rule Amendments

TCPA stated that, based on examination of empirical data, there may be additional changes to the rule and the EILS product that would also give ERCOT more flexibility and make the product more useful for system operations. TCPA stated that the Wholesale Market Subcommittee at ERCOT is considering a change to EILS that would allow ERCOT to deploy this tool earlier in an Energy Emergency Alert event. TCPA also stated that a change to subsection (c)(4)(C) to provide for an increase in both the number of permitted deployments in a contract period and the amount of time each deployment may be in effect, may also merit consideration. TCPA stated that these changes would give ERCOT greater flexibility to address unusual circumstances rather than simply eliminating the 90-day notice requirement in order to acquire additional EILS. ERCOT stated that TCPA's suggested changes to the rule are better suited as part of an overall assessment of the EILS deployment on February 2-3, 2011 and any changes that would more effectively utilize EILS in the future.

Commission Response

There is insufficient time in this emergency rulemaking proceeding to consider the changes to EILS discussed by TCPA. In addition, the changes are not necessary to address the emergency concerning EILS that ERCOT identified in its petition. Furthermore, making substantial changes to the structure of EILS in an expedited time frame may reduce EILS resource participation in the emergency contract period, which would undermine this order's objective to allow ERCOT to obtain EILS resources for the emergency contract period.

All comments, including any not specifically referred to herein, were fully considered by the commission.

These emergency amendments are adopted under the Public Utility Regulatory Act (PURA), Texas Utilities Code Annotated §14.002, 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(e), which requires the commission to 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, discriminatory, predatory, or anticompetitive; PURA §39.151, which grants the commission the authority to adopt and enforce rules relating to the reliability of the regional electric network and accounting for the production and delivery of electricity among market participants; provides that an independent organization is directly responsible and accountable to the commission; provides that the commission has complete authority to oversee and investigate the organization's

finances, budget, and operations as necessary to ensure the organization's accountability and to ensure that it adequately performs its functions and duties; requires an independent organization to provide reports and information relating to the independent organization's performance of its functions and relating to the organization's revenues, expenses, and other financial matters; and provides that the commission may establish the terms and conditions for the ERCOT independent system operator's authority to oversee utility dispatch functions after the introduction of customer choice; and the Administrative Procedure Act (APA), Texas Government Code §2001.034, which provides for the adoption of an emergency rule.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 35.004(e), and 39.151; and APA §2001.034.

§25.507. Electric Reliability Council of Texas (ERCOT) Emergency Interruptible Load Service (EILS).

- (a) **EILS procurement.** ERCOT shall procure EILS, a special emergency service that is intended to be deployed by ERCOT in an Emergency Electric Curtailment Plan (EECP) event prior to or in conjunction with ERCOT instructing transmission and distribution service providers to interrupt firm load.
- (1) EILS may be procured for one or more of three contract periods:
 - (A) February through May;
 - (B) June through September; and
 - (C) October through January.
 - (2) Notwithstanding the foregoing, ERCOT may restructure the contract periods to facilitate additional load participation in EILS. ERCOT must publicly announce any changes to the contract period schedule described above at least 90 days prior to the next contract period start date.
 - (3) ERCOT may determine cost limits for each EILS contract period in order to ensure that the EILS cost cap is not exceeded. To minimize the cost of EILS, ERCOT may reject any bid that ERCOT determines to be unreasonable or outside of the parameters of an acceptable bid.
 - (4) ERCOT may contract for any number of MW in an EILS contract period not to exceed 1,000 MW.

(5) ERCOT may establish an additional EILS contract period for the time period of April 1 to May 31, 2011. ERCOT may give less than the 90 days' prior notice required in subsection (a)(2) of this section for this contract period only. This paragraph expires on June 1, 2011.

(b) – (h) (no change).

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 amendments to §25.507, relating to Electric Reliability Council of Texas (ERCOT) Emergency Interruptible Load Service (EILS), are hereby adopted on an emergency basis, effective immediately on filing with the Secretary of State.

ISSUED IN AUSTIN, TEXAS ON THE _____ DAY OF _____ 2011.

PUBLIC UTILITY COMMISSION OF TEXAS

BARRY T. SMITHERMAN, CHAIRMAN

DONNA L. NELSON, COMMISSIONER

KENNETH W. ANDERSON, JR., COMMISSIONER