

PROJECT NO. 41659

RULEMAKING TO IMPLEMENT	§	PUBLIC UTILITY COMMISSION
CEASE AND DESIST AUTHORITY	§	
UNDER PURA CHAPTER 15 AS	§	OF TEXAS
REQUIRED BY HB 1600 (83RD	§	
REGULAR LEGISLATIVE SESSION)	§	

**ORDER ADOPTING NEW §25.54
AS APPROVED AT THE MARCH 27, 2014 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts new §25.54, relating to Cease and Desist Orders with changes to the proposed text as published in the October 18, 2013 issue of the *Texas Register* (38 TexReg 7228). The rule implements statutory provisions granting the commission the authority to issue cease and desist orders to electric market participants in certain circumstances. This new section is adopted under Project Number 41659.

No party requested that a public hearing be held.

The commission received comments on the proposed new section from CPS Energy, Luminant, NRG Energy, Inc. (NRG), the Retail Electric Provider Coalition (REP Coalition), Southwestern Public Service Company (SPS), and Texas Competitive Power Advocates (TCPA)

Responses to Questions Included in Proposal for Publication

(1) Should the commission further delineate the following terms in proposed §25.54(b)(1)-

(4)?

a. "A threat to continuous and adequate electric service,"

b. "Hazardous,"

c. "Immediate danger to the public safety," and

d. “An immediate injury to a customer of electric services” that is “incapable of being repaired or rectified by monetary compensation.”

For example, is a definition needed for the term “incapable of being repaired or rectified by monetary compensation” to clarify whether a Retail Electric Provider (REP) that is going out of business, commingling customer deposit funds, and depleting the remaining deposits would satisfy the conditions required to issue a cease and desist order? Alternatively, would the approaching expiration of a REP’s letter of credit meet any of the conditions?

In response to the hypothetical situations posed by the commission in the proposal for publication, NRG, Luminant, and the REP Coalition asserted that neither example posed by the commission would satisfy the requirements to issue a cease and desist order. NRG posited that neither hypothetical satisfies the statutory criteria in the proposed subsections because neither situation relates to customer safety or system reliability, and in both hypotheticals any injury would be capable of being rectified through monetary compensation. Similarly, Luminant argued that the hypothetical regarding a REP commingling funds would not satisfy the conditions required to issue a cease and desist order because the injury could be rectified by monetary compensation. Luminant did suggest that a REP incorrectly using a move-out protocol to disconnect a customer for non-payment during an extreme weather emergency would be more likely to satisfy the conditions required to issue a cease and desist.

The REP Coalition reasoned that in the first hypothetical a monetary remedy is available and in the second hypothetical there is no violation of PURA or commission substantive rules (a

condition precedent which was not required by the proposal but is recommended by the REP Coalition). Alternatively, the REP Coalition suggested two hypotheticals where they assert a REP may be subject to a cease and desist order. The REP Coalition suggested that a REP who attempts to circumvent the extreme weather disconnect rules, during an extreme weather event, by coding customers as “move outs” rather than disconnects for non-payment may be subject to a cease and desist order. The REP Coalition also suggested that a REP who is selling retail electric products to end-use customers without a REP certificate may be subject to a cease and desist order.

Luminant recommended including guidelines for the commission to follow when exercising its authority to issue a cease and desist order. NRG did not recommend that the terms listed in subsection (b)(1)-(4) be further defined because the terms closely mirror the language adopted by the Legislature in HB 1600 which granted the commission cease and desist authority and authorized this rulemaking. The REP Coalition advocated that the “threat to continuous and adequate electric service” condition should be clarified in the preamble.

Commission response

The commission agrees that the hypothetical situations in which a REP is commingling funds and going out of business or has an expiring letter of credit would not in isolation meet the requirements for the commission to issue a cease and desist order against the REP because the harm from the REP’s actions would be reparable with monetary compensation. The commission further agrees that the example situations described by the REP Coalition may be appropriate for issuance of a cease and desist order. The

commission declines to include guidelines, as recommended by Luminant, for the commission to follow when exercising its authority to issue a cease and desist order because the commission agrees with NRG that the terms closely mirror the language adopted by the Legislature in HB 1600. Additionally, the commission declines to give further clarification to the “threat to continuous and adequate electric service” condition because the term mirrors the statutory language, which provides market participants with reasonable expectation of when a cease and desist order might be issued.

(2) If the commission should further define the terms listed above, please provide suggestions.

Luminant’s recommended guidelines for issuance of a cease and desist order included requiring the commission to apply threshold standards used for issuance of temporary restraining orders, to find a facial violation of PURA or commission rules, and to determine whether an acute emergency situation presents the risk of imminent and irreparable actual harm to a particular person or property that is impossible to rectify with monetary compensation.

While NRG did not recommend that the terms listed in subsection (b)(1)-(4) be further defined, NRG instead requested that further guidance be provided in the preamble and recommended that basic qualifications should be added to subsection (b) in order to underline the severity and harm warranting the commission to issue a cease and desist notice. NRG recommended that any action meriting a cease and desist order must be a clear violation of PURA or the commission’s

substantive rules, continuing in nature, and irresolvable through the commission's current oversight authority.

The REP Coalition suggested that the "threat to continuous and adequate electric service" condition, which it argues is similar to NERC and ERCOT "adequacy standards," should apply to conduct that threatens electric reliability and would generally not apply to REP's conduct in relation to customers. The REP Coalition also asked the commission to provide guidance in the preamble as to whether there is a clear distinction between subsection (b)(2) and (3) or if there is no effective distinction and the terms are considered together in the manner in which they are used in §25.8(b)(3)(B). The REP Coalition advocated that these terms are more likely applicable to larger scale or systemic issues (*i.e.*, grid instability). The REP Coalition noted the similarity between the condition in subsection (b)(4) and the threshold standard applied by courts when determining whether a temporary injunction will prevent irreparable harm. The REP Coalition recommended that the commission apply the standard developed in temporary injunction cases, in which injuries are irreparable only when they "cannot be undone through monetary remedies." Finally, the REP Coalition argued that delineating the standard in the preamble for this condition will provide regulatory consistency for consumers and market participants.

Commission response

The commission declines to adopt Luminant's suggested guidelines for issuance of a cease and desist order. However, the commission agrees with NRG's recommendation to provide further guidance to the scope of the commission's cease and desist authority in the preamble while relying on the rule definitions which mirror the statutory language. The

commission finds that issuance of a cease and desist order is an extraordinary remedy and that all remedies, including assessment of administrative penalties and disgorgement of excess revenues, should be considered in the determination of whether issuing a cease and desist order is the most appropriate remedy. The commission also recommends that whether the conduct is continuing in nature, or is likely to recur, should be a factor for consideration when a cease and desist order is issued. However, the commission disagrees with NRG that any action meriting a cease and desist order should not be able to be rectified through an administrative penalty or disgorgement proceeding. PURA grants the commission authority to seek a variety of remedies to ensure compliance with PURA and commission rules, as well as to ensure that electric utility service is safe, adequate, and reliable. The remedies are not inherently mutually exclusive and the commission should retain the ability to select the best available remedy. Additionally, PURA §15.103 provides that the commission may issue a cease and desist order solely under Subchapter D or in conjunction with other applicable law.

The commission recognizes that there may be similarities between the “threat to continuous and adequate electric service” condition and the NERC and ERCOT “adequacy standards.” The commission agrees with the REP Coalition that there is no effective distinction between the terms “hazardous” conduct and that which “creates an immediate danger to the public safety,” and that the terms are to be considered in the manner in which they are used in §25.8(b)(3)(B). The commission also finds no effective distinction between the terms “incapable of being repaired or rectified by monetary compensation” and the standard suggested by the REP coalition, which inquires whether an injury

“cannot be undone through monetary remedies.” The terms in subsection (b)(4) mirror the statutory language and provide market participants with reasonable expectation of when a cease and desist order might be issued.

(3) If a cease and desist order is issued by the executive director, should the executive director be required to immediately notify each Commissioner of the order to provide them an opportunity to arrange to discuss the order as soon as possible, whether at a regularly scheduled open meeting or an emergency open meeting?

The REP Coalition argued that the rule should not universally delegate authority to the executive director to issue a cease and desist order. The REP Coalition asserted that a blanket delegation is unnecessary as an emergency meeting may be called in as little as two hours. Additionally, recent changes in open meetings statutes allow the commission to conduct an open meeting by teleconference, thus eliminating logistical problems with scheduling an emergency open meeting. If the commission wishes to delegate cease and desist authority, the REP Coalition argued the commission should limit the delegation to a specific type of harm or conduct. The REP Coalition suggested language that would allow the commission to delegate the authority to issue cease and desist orders to the executive director in relation to conduct specified by the commission and for a time period of no more than 180 days.

Furthermore, the REP Coalition argued that the authority to issue a cease and desist order should not be delegated to the executive director without the delegation publicly occurring within the context of an open meeting. The REP Coalition argued that transparency in delegation is critical

and that the Government Code requires that the commission can only take action at a properly noticed open meeting. Additionally, the REP Coalition asserted that PURA §15.104(b) indicates that a delegation of authority to issue a cease and desist order would publicly occur within the context of an open meeting. Thus, the REP Coalition recommended the commission amend the rule to reflect that a delegation of the authority to issue a cease and desist order would be decided at an open meeting. The REP Coalition argued that if the authority to issue a cease and desist order is delegated, the rule should require the executive director to immediately notify each Commissioner of the order and notice it for the next scheduled open meeting or, if the circumstances dictate, at an emergency open meeting. The REP Coalition argued that transparency in the exercise of the delegated authority by the executive director is equally as important as transparency in the agency's action to delegate the authority.

NRG commented that it is appropriate for the executive director to issue a cease and desist order on behalf of the commission. However, each Commissioner should be notified prior to such issuance, if possible. Luminant preferred that the commission retain the exclusive authority to issue cease and desist orders. If this authority is delegated to the executive director, Luminant suggested the executive director immediately call an emergency open meeting, at which the commission would review the order.

TCPA advocated that the executive director should be required to notify each Commissioner as soon as possible after issuing the cease and desist order to give Commissioners the opportunity to discuss the order, whether at a regularly scheduled open meeting or emergency open meeting. TCPA argued that notifying the Commissioners would provide a safeguard against issuing a

cease and desist order in error due to the haste in which it was issued, assist in swift clarification and consistent implementation of commission policies, and allow the commission to determine whether to convene an emergency open meeting to evaluate the order or conduct it proscribes and whether to adopt any other measures.

Commission response

The commission disagrees with Luminant that the Commissioners should retain the exclusive authority to issue a cease and desist order. The delegation of authority to the executive director allows the commission to act in an expedient manner if necessary to prevent the occurrence of hazardous or potentially hazardous conduct. The commission agrees with the REP Coalition that the option to delegate the authority to issue a cease and desist order to the executive director should be renewed on a periodic basis at a commission open meeting. However, the commission finds that a time period of up to two years is more practicable than the 180 day term suggested by the REP Coalition. The commission further agrees with the REP Coalition and NRG that when a cease and desist order is issued by the executive director, each Commissioner should be notified prior to the issuance when possible and, if not possible, immediately afterwards. While the commission agrees that an emergency open meeting may be needed after a cease and desist order is issued, the commission declines to require that the cease and desist order be noticed for an open meeting because public discussion of the order may not be necessary and because the procedures for placing an item on the open meeting agenda as an emergency item are thoroughly covered by the APA and the commission's procedural rules.

Section 25.54(b)

TCPA argued that “practicable” should be defined in order to give “greater precision” to the rule and that the definition of “practicable” should be defined in such a way to limit ex parte orders to only exigent circumstances. TCPA compares a cease and desist order to a temporary restraining order (TRO) in support of the argument that notice and opportunity for a hearing is “practicable” if there is no undue burden or unreasonable risk that illegal and harmful conduct will continue. CPS Energy suggested that the rule should provide further guidance on the meaning of “practicable” by defining the term or including examples of situations when notice and opportunity for a hearing are not practicable.

The REP Coalition requested that the commission modify the rule to require that a violation of PURA or commission substantive rule must occur for the commission to issue a cease and desist order. The REP Coalition pointed to the Sunset Advisory Commission’s citation of TDI as another agency that possessed cease and desist power to support their argument that Sunset intended the commission to reflect the requirement in TDI’s rule that a cease and desist order be issued only when there is a violation. The REP Coalition recommended adding this condition precedent to subsection (b). TCPA advocated adding a required finding of a violation of PURA or the commission’s substantive rules as a threshold criterion in subsection (b). TCPA argued that it is implied in the statute but expressly including the requirement in the rule would provide clarification.

Commission response

The commission finds that subsection (b) uses the term “practicable” in its plain meaning and including a dictionary definition of the term is unnecessary as statutory construction calls for terms to be defined in their plain meaning. While the TRO standard as suggested by TCPA may provide guidance to the commission in identifying extraordinary circumstances that warrant use of the cease and desist authority, the commission does not find it necessary to include specific guidelines in the rule.

The commission agrees that a cease and desist order must identify a violation of a statute or rule as reasonably believed by commission staff. The commission finds that the Legislature intended that the cease and desist authority be an extraordinary remedy. This authority should be exercised with great prudence. The commission believes that requiring an alleged violation to be identified in the cease and desist order honors the legislative intent of the statute and modifies the rule accordingly.

Section 25.54(c)

TCPA requested that the proposed order identify which law or rule the company is violating to afford the company full notice. TCPA suggested the rule language be modified to include this requirement. TCPA requested that the commission revise subsection (c) to more closely resemble the statute to clarify that “practicable” modifies both notice and hearing.

Commission response

The commission agrees with TCPA that the proposed order should identify the statute or rule that commission staff reasonably believes the market participant is violating. The commission finds that the rule adequately conveys that both notice and opportunity for a hearing must be provided if practicable and thus declines to modify the rule language.

Section 25.54(c)(1)

CPS Energy expressed concern about the notice procedures when notice and opportunity for a hearing is not practicable. CPS Energy suggested using the term “proposed cease and desist order” to clarify that a cease and desist order is not effective until after the market participant has received notice and an opportunity for a hearing. Luminant also recommended additional language to clarify the notice procedures when notice and opportunity for a hearing is not practicable. Similarly, NRG expressed concern that subsection (c)(1) could be read to require that a cease and desist order could be issued immediately, without allowing a market participant the opportunity to request a hearing. NRG recommended the subsection describing the content of the order be amended to clarify that the order is that which is issued after a hearing or in the instance that the market participant does not request a hearing.

TCPA commented that subsection (c)(1) fails to indicate how a market participant may exercise its opportunity for a hearing and confuses the sequence in which notice would relate to a request for hearing. TCPA advocated revising the subsection to make it consistent with statutory language.

Commission response

The commission clarifies that when notice and opportunity for hearing is practicable, notice of the cease and desist order must be provided according to contested case provisions in Chapter 2001, Texas Government Code, and the order will be issued after the requisite notice and opportunity for hearing have been provided. To further address the concerns of market participants regarding the issuance of a cease and desist order when notice and opportunity for hearing is practicable, the commission adopts a requirement that the notice shall include a description of the market participant's violations, as reasonably believed by commission staff, of PURA, commission rules. The notice shall also include a proposed order that contains a statement of the charges. The commission clarifies that a proposed order issued when notice and opportunity for a hearing is practicable does not require the market participant to immediately cease and desist the conduct at issue.

Section 25.54(c)(1)(b)

Luminant recommended that the rule clarify who within the commission has the authority to provide telephonic or other means of actual notice to the market participant subject to a cease and desist order. Luminant suggested the rule require notice to be communicated by the commission's executive director or oversight and enforcement director to the market participant's authorized representative, chief executive officer, chief financial officer, or general counsel. TCPA also recommended that the rule be revised to require "telephonic notice" to be in the form of a live conversation with an authorized representative of the market participant. Luminant further recommended that actual notice must include all of the information required to be in the proposed order and TCPA suggested that the rule be revised to require the entire body

of the mailed notice to be relayed in the conversation. NRG recommended that the option to serve the notice through telephonic means should be removed.

Commission response

The commission agrees with NRG's recommendation to remove the telephonic notice requirement. The commission acknowledges that telephonic notice may create questions of fact as to whether actual notice was received. If the commission only has the ability to contact the market participant by phone, then the commission can request that the market participant provide an address or fax number to provide written notice. In the case of a cease and desist order, the speed in which the order may be implemented will likely be important. Notice is sufficient when the market participant is directly and personally made aware of the existence of the particular fact in question. The commission's intent is to ensure that a cease and desist order will be effective as soon as the market participant receives a written order.

Section 25.54(c)(2)

NRG recommended, in the event notice and opportunity for a hearing is not practicable, the order contain a proposed hearing date that is within ten days of the date the market participant receives the order. Conversely, NRG recommended that if the date of a hearing is not stated in the order, and the market participant subject to the order requested a hearing within ten days, the cease and desist order should be set aside ten days after notice of the cease and desist order was received.

The REP Coalition argued that subsection (c)(2) fails to establish a timeline for the commission to issue a ruling on the hearing reviewing the ex parte cease and desist order. The REP Coalition contended that because a cease and desist order is not automatically stayed upon requesting a hearing, the cease and desist order could remain in effect for an indefinite and uncertain period of time. Thus, the REP Coalition recommended the commission revise subsection (c)(2) to require an order or proposal for decision be issued within seven days of the hearing.

Additionally, the REP Coalition recommended that a cease and desist order issued without notice and opportunity for a hearing include a statement describing why notice and opportunity for a hearing was not practicable.

Commission response

The commission disagrees that a cease and desist order issued without notice and opportunity for a hearing should include a proposed hearing date. PURA requires that a hearing reviewing a cease and desist order shall be governed by Chapter 2001, Texas Government Code, which includes procedures and deadlines for issuance of a proposal for decision. Furthermore, determining a hearing date before the order is issued may be procedurally impractical because the commission is likely to refer a contested case hearing to the State Office of Administrative Hearings (SOAH). In this instance a hearing date may not be set at SOAH without the proceeding first being referred to and accepted by SOAH. The commission also disagrees that the cease and desist order should be automatically set aside if a hearing cannot be scheduled within ten days. The deadline places an arbitrary expiration on the order that may hinder the commission's ability to

prevent a market participant from engaging in hazardous conduct. The commission agrees with the REP Coalition that a cease and desist order issued without notice and opportunity for a hearing should state the specific reasons why notice and an opportunity for a hearing was not practicable.

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

This new section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (West 2007 and Supp. 2013) (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 §15.102, which requires the commission to adopt rules to implement the commission's cease and desist authority.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 14.052, and 15.101-107.

§25.54. Cease And Desist Orders.

- (a) **Application.** This section is applicable to electric utilities, transmission and distribution utilities, power generation companies, retail electric providers, municipally owned utilities, electric cooperatives, the independent system operator, and any other person regulated under the Public Utility Regulatory Act (PURA) Subtitle B, collectively referred to as “market participants,” and shall refer to the definitions provided in PURA §11.003 and §31.002.
- (b) **Authority to issue order.** The commission or the executive director, who has been authorized pursuant to subsection (c) of this section, may issue a cease and desist order if the commission or executive director determines that the alleged conduct of a market participant meets one or more of the following conditions:
- (1) The conduct poses a threat to continuous and adequate electric service;
 - (2) The conduct is hazardous;
 - (3) The conduct creates an immediate danger to the public safety; or
 - (4) The conduct is causing or can be reasonably expected to cause an immediate injury to a customer of electric services and that the injury is incapable of being repaired or rectified by monetary compensation.
- (c) **Delegation of authority.** The commission may delegate the authority to issue a cease and desist order to the executive director. The authority to issue a cease and desist order shall be delegated at an open meeting and may remain in effect for up to two years.

(d) **Procedure.** The commission must provide notice and opportunity for a hearing before issuing a cease and desist order if such notice is practicable. If such notice is not practicable, the commission may issue a cease and desist order without providing notice and opportunity for a hearing.

(1) **If notice and opportunity for a hearing is practicable.** If notice and opportunity for a hearing is practicable, the commission shall follow these procedures:

(A) **Notice and Opportunity for Hearing.** The commission shall provide notice and opportunity for hearing pursuant to Chapter 2001, Texas Government Code. The notice shall include a description of the violation(s) of PURA or this chapter that the market participant's conduct is alleged to violate and specific facts that support each allegation as reasonably believed by commission staff and a proposed order that contains a statement of the charges. Notice of a proposed order shall be given not later than the 10th day before the date set for a hearing.

(B) **Hearing.** A hearing on a cease and desist order is a contested case under Chapter 2001, Texas Government Code. The commission may hold a hearing on a cease and desist order or may refer the case to be heard by the State Office of Administrative Hearings.

(C) **Service of Cease and Desist Order.** If, after notice and opportunity for a hearing, the commission issues a cease and desist order, then the commission shall serve the cease and desist order by registered or certified

mail, return receipt requested, to the market participant's last known address. A cease and desist order is effective upon the earlier of receipt of actual notice or three days after the order is mailed.

(D) **Content of Cease and Desist Order.** A cease and desist order shall be served upon the market participant affected by that order and shall:

(i) Contain a statement of the charges and a description of the alleged violation(s) of PURA or this chapter that the market participant's conduct has been found to have violated and specific facts that support each violation; and

(ii) Require the market participant immediately to cease and desist from the acts, methods, or practices stated in the order.

(2) **Notice and opportunity for a hearing not practicable.** If notice and opportunity for a hearing is not practicable, the commission shall follow these procedures:

(A) **Contents of order.** A cease and desist order shall be served upon the market participant affected by that order and shall:

(i) Contain a statement of the charges and a description of the alleged violation(s) of PURA or this chapter that the market participant's conduct has been found to have violated and specific facts that support each violation as reasonably believed by commission staff;

(ii) Require the market participant immediately to cease and desist from the acts, methods, or practices stated in the order;

- (iii) Notify the market participant that a request for a hearing to affirm, modify, or set aside the order must be submitted not later than the 30th day after the date the market participant receives the order; and
 - (iv) Contain a statement indicating that notice and an opportunity for a hearing was not practicable and state the specific reasons why notice and an opportunity for a hearing was not practicable.
- (B) **Service.** Chapter 2001, Texas Government Code, does not apply to the issuance of a cease and desist order issued by the commission when notice and an opportunity for a hearing is not practicable.
 - (i) The commission shall serve the cease and desist order by registered or certified mail, return receipt requested, to the market participant's last known address.
 - (ii) A cease and desist order is effective upon the earlier of receipt of actual notice or three days after the order is mailed.
- (C) **Hearing Requested.** The market participant affected by the cease and desist order may request a hearing to affirm, modify, or set aside the order. A request must be submitted not later than the 30th day after the date the market participant receives the order.
 - (i) If the market participant affected by a cease and desist order requests a hearing, the commission shall set the hearing date not later than the 10th day after the date the commission receives a

request for a hearing or agreed to by the market participant and the commission.

- (I) A hearing conducted after the issuance of a cease and desist order is a contested case under Chapter 2001, Texas Government Code. The commission may hold a hearing on a cease and desist order or may refer the case to be heard by the State Office of Administrative Hearings.
 - (II) Pending a hearing on a cease and desist order, the cease and desist order continues in effect unless stayed by the commission.
 - (III) At or following the hearing, the commission shall wholly or partly affirm, modify, or set aside the cease and desist order.
- (ii) If the market participant affected by a cease and desist order does not request a hearing and the commission does not hold a hearing on the order, the order is affirmed without further action by the commission.

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 §25.54 relating to Cease and Desist Orders is hereby adopted with changes to the text as proposed.

SIGNED AT AUSTIN, TEXAS the 28th day of MARCH 2014.

PUBLIC UTILITY COMMISSION OF TEXAS

DONNA L. NELSON, CHAIRMAN

KENNETH W. ANDERSON, JR., COMMISSIONER

BRANDY D. MARTY, COMMISSIONER