

**PROJECT NO. 27624**

<b>RULEMAKING REGARDING</b>	<b>§</b>	<b>PUBLIC UTILITY COMMISSION</b>
<b>FAILURE TO ATTEND A HEARING</b>	<b>§</b>	
<b>AND DEFAULT SUMMARY</b>	<b>§</b>	<b>OF TEXAS</b>
<b>PROCEEDING</b>	<b>§</b>	

**ORDER ADOPTING NEW §22.183 AS APPROVED AT THE  
SEPTEMBER 18, 2003 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts new §22.183, relating to Failure to Attend Hearing and Disposition by Default, with changes to the proposed text as published in the June 27, 2003 issue of the *Texas Register* (28 TexReg 4807). The proposed new section is necessary to address issues that arise when a party without the burden of proof fails to appear for a properly noticed hearing in a proceeding initiated by the commission's Legal and Enforcement Division and subsequent disposition of the case on a default basis. The proposed rule is modeled after 1 TAC §155.55, which is the default judgment rule for the State Office of Administrative Hearings (SOAH). The primary purpose of the rule is to provide a procedure for the revocation of certificates issued to entities who failed to commence or have ceased doing business in Texas. A streamlined default procedure rule will conserve agency resources by eliminating the need for staff to continue enforcement actions against such entities. This new section is adopted under Project Number 27624.

New language has been added to new §22.183(a) to more closely track 1 TAC §155.55 and to clarify that the factual allegations against the party without the burden of proof contained in the notice of violation will be deemed admitted. New §22.183(a) now provides that allegations against the party without the burden of proof contained in the notice of hearing

will be deemed admitted as true, upon an offer of proof that proper notice was provided to the defaulting party. This language is almost identical to the language used by SOAH in 1 TAC §155.55(a), which provides that "If a party who does not have the burden of proof fails to appear on the day and time set for hearing, the judge may proceed in that party's absence on a default basis and issue a proposal for decision or order, where provided by law, against the defaulting party. In the proposal for decision or order, the factual allegations against that party in the notice of hearing will be deemed admitted." Similar to the SOAH default rule, new §22.183(b) provides that if a party without the burden of proof fails to appear at the hearing, the commission can grant a default order or a continuance. New §22.183(b) further provides that if a party without the burden of proof appears at the hearing, the commission may refer the matter to SOAH for an evidentiary hearing. New §22.183(c)(1) provides that the commission must provide 30 days notice of the prehearing conference and hearing on the merits to the respondent by certified mail, return receipt requested. New §22.183(c)(3) provides that the notice must clearly state that if the respondent fails to appear at the hearing, a default final order may be issued without further notice. The language contained in new §22.183(d)(1) has been modified by changing the "and" before oral testimony to "or" to clarify that oral testimony is one of the types of evidence which may be used to support the default order and to demonstrate that the respondent received proper notice but that it is not required for all default orders. New §22.183(d)(1) now provides that the Legal and Enforcement Division will provide evidence at the hearing before the commission, including, but not limited to, affidavits, exhibits, pleadings, or oral testimony, to support the issuance of the default final order and to demonstrate that the respondent received proper notice under subsection (c)(1) of the

proposed rule and §22.54 of this title. New language has been added to new §22.183(f) to clarify that any party to a proceeding under this section, including a party against whom a default order is rendered, may file a motion for rehearing. New §22.183(f) now provides that "Any party to a proceeding under this section, including a party against whom a default order is rendered, may file a motion for rehearing pursuant to §22.264 of this title (relating to Rehearing)." The disposition by default may include suspension or revocation of any certificates, licenses, or registrations the defaulting party has with the commission, but may not include administrative penalties.

The commission received comments on the proposed new section from the Office of Public Utility Counsel (OPC), MCImetro Access Transmission Services, LLC (MCI), and Oncor Electric Delivery Company and TXU Energy Companies (Oncor and TXU).

*Subsection (a), Disposition by default*

Oncor and TXU expressed concerns about the language in new §22.183(a) which provides that the default order, "may include the suspension or revocation of *any* certificates, licenses, or registrations the defaulting party has with the commission" (emphasis added). Specifically, Oncor and TXU stated that this language could be interpreted to allow the commission to revoke or suspend certificates of convenience and necessity (CCN) and retail electric provider (REP) certificates for failure to appear at a properly noticed hearing. Commenters referred to the Public Utility Regulatory Act (PURA) §§17.052, 37.059, and 39.356 which limit the commission's authority to revoke CCN and REP certificates.

*Commission response*

The commission agrees that these sections of PURA place limitations on the commission's authority to revoke CCNs and REP certificates. New §22.183 is not inconsistent with these statutory limitations and does not provide the commission with any additional authority to revoke CCNs and REP certificates which exceeds the statutory authority of the commission. The proposed rule merely creates a clearly defined process for obtaining a default order. In order to revoke a CCN or REP certificate, the commission must still meet the statutory requirements for revocation under PURA. Therefore, no language changes are necessary to address these concerns.

*Subsection (b), Failure to appear*

MCI expressed concerns that new §22.183(b) "lacked sufficient specificity regarding to whom notice will be made." They requested that language be added to this subsection to require the commission to "address the notice to the respondent's authorized representative contact."

*Commission response*

The commission does not agree that this additional language is necessary. New §22.183(b)(4) provides for notice "in accordance with §22.54 of this title (relating to Notice

to Be Provided by the Commission), and Texas Government Code Annotated §2001.054 (Vernon 2000, Supplement 2003) (APA)." The notice required under this section of the proposed rule is the same notice that is provided by the commission in other non-rulemaking proceedings before the commission, including enforcement cases and revocation proceedings. The notice required is also the same notice provided in license revocation proceedings before the State Office of Administrative Hearings. The commission finds that this notice is sufficient for default order proceedings. Moreover, the Legal and Enforcement Division is required to make an offer of proof that the defaulting party received proper notice before a disposition by default can be made.

*Subsection (d), Admission of evidence*

MCI expressed concerns that affidavits "of persons who are not parties to the default order proceeding, i.e., consumers" submitted by the commission to support the issuance of the default order under new §22.183(d)(1) might be considered to be hearsay and therefore not be admissible evidence under the Texas Rules of Evidence. MCI suggested language that would require evidence submitted by the Legal and Enforcement Division to be "consistent with the Texas Rules of Evidence."

*Commission response*

The commission recognizes MCI's concerns. However, the default procedures provided for by this rule are not intended for use in proceedings involving consumer complaints. As

previously stated, the primary purpose of the rule is to provide a procedure for the revocation of certificates issued to entities who failed to commence or have ceased doing business in Texas.

As adopted, new §22.183(d)(1) provides commission staff with flexibility, on a case by case basis, regarding the type of evidence that it deems appropriate to support a default order. The evidence supporting the default order could be attached to the pleading initiating the case. As such, pursuant to new §22.183(d)(1), when a party fails to appear at a properly notice hearing, the allegations and supporting documents are deemed "true." Therefore, there is no additional need for an independent basis supporting the admissibility of the documents attached to the pleading, since they are deemed true and admitted without objection. In order to clarify this issue the rule has been amended to state that all documents attached to the Notice of Violation are deemed true and are admissible. The admissibility of the allegations and the attachments is based on the doctrine of waiver.

Since the allegations and attachments are admissible based on the waiver doctrine, the commission staff would file an affidavit for the limited purpose of demonstrating that the respondent received proper notice under subsection (c)(1) of the proposed rule and §22.54 of this title. More specifically, the proposed rule only requires the commission staff to provide evidence at the hearing before the commission to demonstrate that the respondent received proper notice under subsection (c)(1) of the proposed rule and §22.54 of this title. MCI did not express any concerns about the limited use of this type of evidence. No language changes are necessary to address this concern.

*Additional comments*

OPC recommended that language be added to new §22.183 to "allow the party when the default judgment is rendered a chance to set aside the default order." OPC recommended that language be added which was "similar to that used in a Procedural Rule by the Texas Department of Insurance involving default judgments." MCI and Oncor and TXU filed comments which supported the addition of this type of language to new §22.183. MCI included recommended language in its comments.

*Commission response*

The commission notes that a respondent can seek review of a default judgment by filing a motion for rehearing under Procedural Rule §22.264 of this title (relating to Rehearing), as provided in new §22.183(f). Moreover, the commission is required to notify all parties of the commission's final order under Texas Government Code Annotated §2001.142 (Vernon 2000, Supplement 2003) (APA) as well as commission procedural rule §22.263 of this title (relating to Final Orders). The party against whom the default order is rendered may file a motion for rehearing, which provides them with the opportunity to set aside the default order. The commission finds that this is a sufficient remedy and that it is not necessary to provide an additional process to set aside default orders. New language has been added to the proposed rule to clarify that a party may file a motion for rehearing.

This new section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998, Supplement 2003) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure; and specifically, PURA §17.052, that grants the commission the authority to adopt and enforce rules to suspend or revoke certificates or registrations for repeated violations of Chapter 17, Customer Protection, or commission rules; §17.102, that grants the commission authority to adopt and enforce rules that provide for penalties for violations of §17.102, including revocation of certificates or registrations; §17.156, that grants the commission authority to revoke the registration or certificate of telecommunications service providers, retail electric providers, or electric utilities for repeated violations of Chapter 17, subchapter D, Protection Against Unauthorized Charges; §37.059, which grants the commission authority to revoke or amend a certificate of convenience and necessity after notice and hearing if the commission finds that the certificate holder has never provided or is no longer providing service in all or any part of the certificated area; §39.356, which grants the commission authority to: 1) suspend, revoke, or amend a retail electric provider's certificate for significant violations of Title II of PURA, rules adopted under Title II, or of any reliability standard adopted by an independent organization certified by the commission to ensure reliability of a power region's electrical network, 2) suspend or revoke a power generation company's registration for significant violations of Title II of PURA, rules adopted under Title II, or of any reliability standard adopted by an independent organization certified by the commission to ensure reliability of a power region's electrical network, or 3) suspend or revoke an aggregator's registration for significant violations of Title II of PURA,



or rules adopted under Title II; §54.008, which grants the commission authority to revoke or amend certificates of convenience and necessity, certificates of operating authority, or service provider certificates of operating authority after notice and hearing if the commission finds that the certificate holder has never provided or is no longer providing service in all or any part of a certificated area; §54.105, which grants the commission authority to revoke a holder's certificate for failure to comply with PURA, Title II; §55.135, which grants the commission authority to revoke a permit for failure to comply with Chapter 55, subchapter F, Automatic Dial Announcing Devices; §55.306, which grants the commission authority to suspend, restrict, deny or revoke the registration or certificate of a telecommunications utility for repeated and reckless violations of the commission's telecommunications utility selection rules; §64.052, which grants the commission authority to suspend or revoke certificates or registrations for repeated violations of Chapter 64 or commission rules; §64.102, which grants the commission authority to revoke certificates or registrations for violations of commission rules adopted under §64.102; §64.156, which grants the commission authority to suspend, restrict or revoke the registration or certificate of a telecommunications provider who repeatedly violates Chapter 64, subchapter D, Protection Against Unauthorized Charges; and Local Government Code §283.058, which grant(s) the commission the authority to revoke or amend certificates.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 14.052, 17.052, 17.102, 17.156, 37.059, 39.356, 54.008, 54.105, 55.135, 55.306, 64.052, 64.102, 64.156; and Local Government Code §283.058

**§22.183. Failure to Attend Hearing and Disposition by Default.**

- (a) **Disposition by default.** Disposition by default shall mean the issuance of an order against a party who does not have the burden of proof, in a proceeding initiated by the Legal and Enforcement Division of the commission, in which the allegations and all documents attached to the Notice of Violation against that party contained in the notice of hearing are deemed admitted as true, upon the offer of proof that proper notice was provided to the defaulting party. The order may include the suspension or revocation of any certificates, licenses, or registrations the defaulting party has with the commission. The order shall not include the assessment of penalties.
- (b) **Failure to appear.**
- (1) The commission may proceed in a party's absence with a disposition by default, without further notice, if a party who does not have the burden of proof fails to appear in person or through a duly authorized representative, on the day and time set for hearing.
  - (2) Failure of a party who does not have the burden of proof to appear at the hearing entitles the commission staff to:
    - (A) a continuance at the time of the contested case hearing for a reasonable period to be determined by the commission; or
    - (B) request issuance of a default order by the commission.

- (3) If a party who does not have the burden of proof appears at the hearing, the commission may refer the matter to the State Office of Administrative Hearings for an evidentiary hearing.
- (4) The commission may fully consider and dispose of the pending matter if notice has been provided in accordance with §22.54 of this title (relating to Notice to Be Provided by the Commission), and Texas Government Code Annotated §2001.054 (Vernon 2000, Supplement 2003) (APA).

(c) **Prerequisites for default proceeding.**

- (1) The commission gives 30 days notice of the prehearing conference and the hearing on the merits by certified mail, return receipt requested, to the respondent.
- (2) At least 30 days has passed since the notice of the prehearing conference and the hearing on the merits was issued under paragraph (1) of this subsection.
- (3) The notice of hearing must clearly state that if the respondent fails to appear at the hearing, a default final order may be issued without further notice.

(d) **Admission of evidence.**

- (1) The Legal and Enforcement Division shall provide evidence, including, but not limited to, affidavits, exhibits, pleadings, or oral testimony, to support the issuance of the default final order and to demonstrate that the respondent received proper notice under subsection (c)(1) of this section and §22.54 of this title.

- (2) If the respondent fails to appear at the hearing, the factual evidence presented under paragraph (1) of this subsection may be admitted.
- (e) **Default order.** Default final orders shall contain findings of fact and conclusions of law sufficient to support the relief ordered.
- (f) **Motions for rehearing.** Any party to a proceeding under this section, including a party against whom a default order is rendered, may file a motion for rehearing pursuant to §22.264 of this title (relating to Rehearing).

This agency hereby certifies that the rule, as adopted, 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 §22.183, relating to Failure to Attend Hearing and Disposition by Default, is adopted with changes to the text as proposed.

**ISSUED IN AUSTIN, TEXAS ON THE 29th DAY OF SEPTEMBER 2003.**

**PUBLIC UTILITY COMMISSION OF TEXAS**

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**Rebecca Klein, Chairman**

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**Paul Hudson, Commissioner**

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**Julie Parsley, Commissioner**