

PROJECT NO. 33864

RULEMAKING PROCEEDING TO	§	PUBLIC UTILITY COMMISSION
ADDRESS FAILURE TO ATTEND A	§	
HEARING AND DISPOSITION BY	§	OF TEXAS
DEFAULT	§	

**ORDER ADOPTING REPEAL OF §22.183 AND ADOPTING NEW §22.183
AS APPROVED AT THE JANUARY 25, 2008 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts the repeal of §22.183 and adopts new §22.183, relating to Failure to Attend Hearing and Disposition by Default with no changes to the proposed text as published in the November 16, 2007 issue of the *Texas Register* (32 TexReg 8241). The new rule will remove the restrictions on the types of proceedings that may proceed on a default basis and clarify the procedures that will be used to process proceedings if a party fails to appear for hearing, including more specific criteria for what types of notice must be provided to defaulting parties. Current §22.183, which is being repealed herein, allows disposition by default for proceedings initiated by the commission staff where allegations are made in a Notice of Violation, but the rule does not apply to the assessment of administrative penalties. Because the State Office of Administrative Hearings (SOAH) has adopted the commission's procedural rules, current §22.183 has had the effect of prohibiting the processing of Notices of Violation that seek administrative penalties when the party fails to appear for hearing, even though more severe actions such as license revocation are permitted. The new rule will remove the current restriction that prohibits default orders from assessing administrative penalties and would permit the assessment of penalties through a default order if a party fails to appear, consistent with the manner in which other regulatory agencies address such matters. The new rule is also intended to generally conform to the procedures used by the SOAH for other

state agencies, and provides clarity as to the forms of notice that must be given to an affected party prior to the issuance of a default order. The repeal of §22.183 and new §22.183 are adopted under Project Number 33864.

A public hearing was not requested and the commission received no comments on the proposed repeal of §22.183 and adoption of new §22.183.

This repeal and new section are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 2007 and Supp. 2007) (PURA), which provides the 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 PURA §15.024, which provides the commission with the authority to assess a penalty against a person who fails to timely respond to a written notice summarizing an alleged violation and a corresponding recommended penalty.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 14.052, and 15.024.

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

- (a) **Disposition by default.** If a party who does not have the burden of proof fails to appear for hearing, the presiding officer may proceed in that party's absence on a default basis. In the proposal for decision or final order, the factual allegations listed in the notice of hearing will be deemed admitted.
- (b) **Notice of default proceeding.** Any default proceeding under this section requires adequate proof of the following:
- (1) Proof that proper notice of hearing was provided to the defaulting party pursuant to Tex. Gov't Code, Chapter 2001. Such notice must have included a disclosure in at least twelve-point, bold-face type, that the factual allegations listed in the notice could be deemed admitted, and the relief sought in the notice of hearing might be granted by default if the defaulting party fails to appear at the hearing;
or
 - (2) If it is not possible to prove actual receipt of notice, a hearing may proceed on a default basis if there is credible evidence that:
 - (A) the notice of hearing was sent by certified mail, return receipt requested to the last known address in the commission's records, if the party has a license, certificate, or registration approved by the commission; and
 - (B) the notice of hearing was sent by certified mail, return receipt requested to the registered agent for process for the party on file with the Secretary of State, if the party is registered with the Secretary of State.

- (c) **Admission of evidence.** The party with the burden of proof shall submit evidence to the presiding officer in accordance with the requirements of this section.

- (d) **Motion to set aside a default.** Not later than 10 days after the hearing has concluded, if a dismissal, proposal for decision, or a proposed final order has not been issued, a party may file a motion to set aside a default and reopen the record. The presiding officer may grant the motion, set aside the default and reopen the record for good cause shown.

- (e) **Default proposal for decision or order.** Upon the failure of the defaulting party to appear at the hearing, the presiding officer may issue a default proposal for decision or final order, as applicable. Parties may file exceptions and replies to exceptions to a default proposal for decision pursuant to § 22.261 of this title (relating to Proposals for Decision) and may file a motion for rehearing to a default final order pursuant to § 22.264 of this title (relating to Rehearing).

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 repeal of §22.183 and new §22.183 relating to Failure to Attend Hearing and Disposition by Default is hereby adopted with no changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE _____ DAY OF _____ 2008.

PUBLIC UTILITY COMMISSION OF TEXAS

BARRY T. SMITHERMAN, CHAIRMAN

JULIE PARSLEY, COMMISSIONER

PAUL HUDSON, COMMISSIONER