

PROJECT NO. 33864

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

**PROPOSAL FOR PUBLICATION OF REPEAL OF §22.183 AND NEW §22.183
AS APPROVED AT THE NOVEMBER 1, 2007 OPEN MEETING**

The Public Utility Commission of Texas (commission) proposes the repeal of §22.183 and new §22.183, relating to Failure to Attend Hearing and Disposition by Default. The proposed 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 contested proceedings if a party fails to appear for hearing, including more specific criteria for what types of notice must be provided to defaulting parties. The current §22.183 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 proposed new rule would 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 proposed new rule is also intended to generally conform the rule 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. Project Number 33864 is assigned to this proceeding.

Nathan Barrow, Attorney, Legal Division, has determined that for each year of the first five-year period the proposed section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Barrow has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be more efficient processing of contested proceedings where a party fails to appear for hearing, while preserving a party's right to notice of hearing and an opportunity to contest allegations.

There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Mr. Barrow has also determined that for each year of the first five years the proposed section is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rulemaking, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas

78701 on Thursday, December 20, 2007 at 10:00 a.m. The request for a public hearing must be received within 30 days after publication.

Comments on the proposed repeal of the current §22.183 and the proposed new §22.183 may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Sixteen copies of comments to the proposed repeal of the current §22.183 and the proposed new §22.183 are required to be filed pursuant to §22.71(c) of this title. Comments should be organized in a manner consistent with the organization of the proposed rules. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 33864.

The repeal of the current §22.183 and the addition of the new §22.183 is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §§14.002 and 14.052 (Vernon 2007) (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 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. REPEAL**§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 proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

**ISSUED IN AUSTIN, TEXAS ON THE 2nd DAY OF NOVEMBER 2007 BY THE
PUBLIC UTILITY COMMISSION OF TEXAS
ADRIANA A. GONZALES**