

PROJECT NO. 31937

RULEMAKING TO ESTABLISH A	§	PUBLIC UTILITY COMMISSION
CLASSIFICATION SYSTEM FOR	§	
THE ASSESSMENT OF	§	OF TEXAS
ADMINISTRATIVE PENALTIES	§	

**ORDER ADOPTING AMENDMENT TO §22.246
AS APPROVED AT THE SEPTEMBER 21, 2006 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts an amendment to §22.246, relating to Administrative Penalties with no changes to the proposed text as published in the April 28, 2006 issue of the *Texas Register* (31 TexReg 3462). The amendment implements Public Utility Regulatory Act (PURA) §15.023. The amendment will increase the maximum penalty per violation from \$5,000.00 to \$25,000.00 and limit penalties in excess of \$5,000.00 per violation to only those violations included in the highest class of violations. This amendment is adopted under Project Number 31937.

The commission received comments on the proposed amendment from AT&T Texas (AT&T), El Paso Electric Company (EPE), Retail Electric Provider Coalition (REPC), Entergy Gulf States, Inc. (EGSI), Joint TDUs, Econnergy Energy Company, Inc. (Econnergy), Joint Commenters, TXU Wholesale Company (TXU Wholesale), and Joint Retail Electric Providers (Joint REPs).

Subsection (c)(2)

REPC, AT&T and Joint TDUs in their reply comments, stated that the commission should amend the definition of “violation” in paragraph (b)(3) because the logic in the definition is circular. The commenters would add the following sentence to the existing definition: “The

violation is the act or failure to act that is inconsistent with PURA, Commission rule, or Commission order, not the manner in which that act or failure to act has been conveyed or applied or failed to be conveyed or applied.” Commenters cited assessing a penalty for each day a report is not filed on time as a clear example of a “separate” violation. According to these commenters, other situations are not so clear. For example, does sending out 50 postcards that violate the customer protection rules constitute fifty separate violations or one violation? These commenters argue that PURA says that each day that a violation continues is a violation so a violation is an event that occurs daily and not on a per customer basis. Additionally, Joint TDUs stated that if a rule sets a compliance period as yearly, then another “separate violation” could only occur on the day that is the end of the next compliance period.

Commission response

Section 22.246(b)(3), which contains the definition of “violation,” is not one of the provisions proposed for amendment in this project. Adopting such a definition would alter the issues raised in the proposed amendment and may not give interested persons adequate opportunity to comment on the amendment. For this reason, the commission declines to consider amending the rule as proposed by commenters.

REPC, Joint TDUs and Joint Commenters suggested that the commission should expressly incorporate mitigating factors in §22.246(c)(3), such as the respondents' efforts to self-police, self-reporting, efforts to cooperate with the commission, the impact of the penalty on the respondent's financial viability, whether the respondent received an economic benefit, and

others. All of the factors are listed in the Reply Comments of Joint Commenters in the Consensus Redline (Joint TDUs, Joint REPs, and Joint Commenters).

Commission response

Section 22.246(c)(3) is not one of the provisions proposed for amendment in this project. Therefore, for the reasons stated above with respect to §22.246(b)(3), the commission declines to consider amending the rule as proposed by commenters.

REPC, AT&T, Joint TDUs, and EPE in their reply comments, suggested that the commission should amend subsections (e) and (f). Commenters' proposed amendments would require commission staff to submit an investigation report to an entity before issuing a notice of violation to avoid unwarranted harm to an entity's reputation.

Commission response

Sections 22.246(e) and (f) are not provisions proposed for amendment in this project. Therefore, for the reason stated above, with respect to §22.246(b)(3), the commission declines to consider amending the rule as proposed by commenters.

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

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 1998 & Supplement 2005) (PURA), which provide 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 specifically, PURA §15.023, which grants the commission authority to assess an administrative penalty in an amount not to exceed \$25,000.00 per violation, provided that a penalty in an amount that exceeds \$5,000.00 may be assessed only if the violation is included in the highest class of violations in the classification system.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002, §14.052, and §15.023.

§22.246. Administrative Penalties.

- (a) **Scope.** This section is intended to address enforcement actions related to administrative penalties only and does not apply to any other enforcement actions that may be undertaken by the commission or the commission staff.
- (b) **Definitions.** The following words and terms, when used in this section, shall have the following meanings unless the context clearly indicates otherwise:
- (1) **Executive director** — The executive director of the commission or the executive director's designee.
 - (2) **Person** — Includes a natural person, partnership of two or more persons having a joint or common interest, mutual or cooperative association, and corporation.
 - (3) **Violation** — Any activity or conduct prohibited by the Public Utility Regulatory Act (PURA), commission rule or commission order.
 - (4) **Continuing violation** — Except for a violation of PURA Chapter 17, 55, or 64, and commission rules or commission orders pursuant to those chapters, any instance in which the person alleged to have committed a violation attests that a violation has been remedied and was accidental or inadvertent and subsequent investigation reveals that the violation has not been remedied or was not accidental or inadvertent.
- (c) **Amount of penalty.**
- (1) Each day a violation continues or occurs is a separate violation for which a penalty can be levied, regardless of the status of any administrative procedures that are initiated under this subsection.

- (2) The penalty for each separate violation may be in an amount not to exceed \$25,000 per day, provided that a penalty in an amount that exceeds \$5,000 may be assessed only if the violation is included in the highest class of violations in the classification system.
- (3) The amount of the penalty shall be based on:
- (A) the seriousness of the violation, including the nature, circumstances, extent, and gravity of any prohibited acts, and the hazard or potential hazard created to the health, safety, or economic welfare of the public;
 - (B) the economic harm to property or the environment caused by the violation;
 - (C) the history of previous violations;
 - (D) the amount necessary to deter future violations;
 - (E) efforts to correct the violation; and
 - (F) any other matter that justice may require, including, but not limited to, the respondent's timely compliance with requests for information, completeness of responses, and the manner in which the respondent has cooperated with the commission during the investigation of the alleged violation.
- (d) **Initiation of investigation.** Upon receiving an allegation of a violation or of a continuing violation, the executive director shall determine whether an investigation should be initiated.
- (e) **Report of violation or continuing violation.** If, based on the investigation undertaken pursuant to subsection (d) of this section, the executive director determines that a

violation or a continuing violation has occurred, the executive director may issue a report to the commission.

- (1) **Contents of the report.** The report shall state the facts on which the determination is based and a recommendation on the imposition of a penalty, including a recommendation on the amount of the penalty.
 - (2) **Notice of report.** Within 14 days after the report is issued, the executive director shall, by certified mail, return receipt requested, give written notice of the report to the person who is alleged to have committed the violation or continuing violation which is the subject of the report. The notice must include:
 - (A) a brief summary of the alleged violation or continuing violation;
 - (B) a statement of the amount of the recommended penalty;
 - (C) a statement that the person who is alleged to have committed the violation or continuing violation has a right to a hearing on the occurrence of the violation or continuing violation, the amount of the penalty, or both the occurrence of the violation or continuing violation and the amount of the penalty;
 - (D) a copy of the report issued to the commission pursuant to this subsection; and
 - (E) a copy of this section, §22.246 of this title (relating to Administrative Penalties).
- (f) **Options for response to notice of violation or continuing violation.**
- (1) **Opportunity to remedy.**

- (A) This paragraph does not apply to a violation of PURA Chapters 17, 55, or 64, or of a commission rule or commission order pursuant to those chapters.
- (B) Within 40 days of the date of receipt of a notice of violation set out in subsection (e)(2) of this section, the person against whom the penalty may be assessed may file with the commission proof that the alleged violation has been remedied and that the alleged violation was accidental or inadvertent. A person who claims to have remedied an alleged violation has the burden of proving to the commission both that an alleged violation was remedied before the 31st day after the date the person received the report of violation and that the alleged violation was accidental or inadvertent. Proof that an alleged violation has been remedied and that the alleged violation was accidental or inadvertent shall be evidenced in writing, under oath, and supported by necessary documentation.
- (C) If the executive director determines that the alleged violation has been remedied, was remedied within 30 days, and that the alleged violation was accidental or inadvertent, no penalty will be assessed against the person who is alleged to have committed the violation.
- (D) If the executive director determines that the alleged violation was not remedied or was not accidental or inadvertent, the executive director shall make a determination as to what further proceedings are necessary.
- (E) If the executive director determines that the alleged violation is a continuing violation, the executive director shall institute further

proceedings, including referral of the matter for hearing pursuant to subsection (h) of this section.

- (2) **Payment of penalty.** Within 30 days after the date the person receives the notice set out in subsection (e)(2) of this section, the person may accept the determination and recommended penalty through a written statement sent to the executive director. If this option is selected, the person shall take all corrective action required by the commission. The commission by written order shall approve the determination and impose the recommended penalty.
 - (3) **Request for hearing.** Not later than the 20th day after the date the person receives the notice set out in subsection (e)(2) of this section, the person may submit to the executive director a written request for a hearing on the occurrence of the violation or continuing violation, the amount of the penalty, or both the occurrence of the violation or continuing violation and the amount of the penalty.
- (g) **Settlement conference.** A settlement conference may be requested by any party to discuss the occurrence of the violation or continuing violation, the amount of the penalty, and the possibility of reaching a settlement prior to hearing. A settlement conference is not subject to the Texas Rules of Evidence or the Texas Rules of Civil Procedure; however, the discussions are subject to Texas Rules of Civil Evidence 408, concerning compromise and offers to compromise.
- (1) If a settlement is reached:
 - (A) the parties shall file a report with the executive director setting forth the factual basis for the settlement;

- (B) the executive director shall issue the report of settlement to the commission; and
 - (C) the commission by written order will approve the settlement.
- (2) If a settlement is reached after the matter has been referred to SOAH, the matter shall be returned to the commission. If the settlement is approved, the commission shall issue an order memorializing commission approval and setting forth commission orders associated with the settlement agreement.
- (h) **Hearing.** If a person requests a hearing under subsection (f)(3) of this section, or fails to respond timely to the notice of the report of violation or continuing violation provided pursuant to subsection (e)(2) of this section, or if the executive director determines that further proceedings are necessary, the executive director shall set a hearing, provide notice of the hearing to the person, and refer the case to SOAH pursuant to §22.207 of this title (relating to Referral to State Office of Administrative Hearings). The case shall then proceed as set forth in paragraphs (1)-(5) of this subsection.
- (1) The commission shall provide the SOAH administrative law judge a list of issues or areas that must be addressed.
 - (2) The hearing shall be conducted in accordance with the provisions of this chapter.
 - (3) The SOAH administrative law judge shall promptly issue to the commission a proposal for decision, including findings of fact and conclusions of law, about:
 - (A) the occurrence of the alleged violation or continuing violation;

- (B) whether the alleged violation was cured and was accidental or inadvertent for a violation of any chapter other than PURA Chapters 17, 55, or 64, or of a commission rule or commission order pursuant to those chapters; and
 - (C) the amount of the proposed penalty.
- (4) Based on the SOAH administrative law judge's proposal for decision, the commission may:
 - (A) determine that a violation or continuing violation has occurred and impose a penalty;
 - (B) determine that a violation occurred but that, pursuant to subsection (f)(1) of this section, the person remedied the violation within 30 days and proved that the violation was accidental or inadvertent, and that no penalty will be imposed; or
 - (C) determine that no violation or continuing violation has occurred.
- (5) Notice of the commission's order issued pursuant to paragraph (4) of this subsection shall be provided under the Government Code, Chapter 2001 and §22.263 of this title (relating to Final Orders) and shall include a statement that the person has a right to judicial review of the order.

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 §22.246 relating to Administrative Penalties is hereby adopted with no changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE _____ DAY OF SEPTEMBER 2006.

PUBLIC UTILITY COMMISSION OF TEXAS

PAUL HUDSON, CHAIRMAN

JULIE PARSLEY, COMMISSIONER

BARRY T. SMITHERMAN, COMMISSIONER