

**PROJECT NO. 27736**

**RULEMAKING ON ALLOWABLE           §       PUBLIC UTILITY COMMISSION  
FEES AND RATES OF                   §  
INDEPENDENT ORGANIZATIONS       §                                   OF TEXAS  
   §**

**ORDER ADOPTING NEW §22.252  
AS APPROVED AT THE OCTOBER 9, 2003 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts new §22.252, relating to Procedures for Approval of ERCOT Fees and Rates, with changes to the proposed text as published in the August 8, 2003 edition of the *Texas Register* (28 TexReg 6171). The new section establishes the appropriate procedures parties shall follow in a proceeding related to the fees and rates charged by the Electric Reliability Council of Texas (ERCOT). Procedures for conducting a review of an ERCOT fee change have been developed by the commission on an *ad hoc* basis in prior cases. Based upon its experience in those cases, the commission decided to standardize the procedure it will use to review the reasonableness and sufficiency of ERCOT's fees. By standardizing the commission's procedures, the new rule will make commission oversight of ERCOT and the review of its fees more effective and efficient and facilitate participation by interested persons in reviewing ERCOT's fees. The commission finds that these rules support the public interest by providing greater regulatory certainty, increasing the efficiency of the commission's review process and helping to maintain reasonable fees for ERCOT's services. The new section is adopted under Project Number 27736.

In addition, the commission, under a separate order, also adopts the following substantive rules in Chapter 25 of this title (relating to Substantive Rules Applicable to Electric Service Providers): an amendment to substantive rule §25.362 of this title (relating to Electric Reliability Council of Texas (ERCOT) Governance) and new substantive rule §25.363 of this title (relating to ERCOT Fees and Other Rates) concerning the expense components included in ERCOT's fees and rates and ERCOT reporting requirements. The new substantive rule and amended substantive rule are being published separately but were adopted as part of Project Number 27736.

The commission staff conducted a public hearing on the proposed new section on September 10, 2003. Although public comment was invited, no person provided comments at the public hearing.

The commission received written comments on the proposed section on August 29, 2003 from Reliant Resources, Inc. (RRI) and ERCOT. Reply comments were submitted by ERCOT. All comments, including any not specifically referenced herein, have been fully considered by the commission. The commission has made other minor modifications for the purpose of clarifying its intent and for format and grammatical purposes.

***§22.252(b), Interim approval***

RRI commented that the general purpose of this subsection is to grant ERCOT the right to seek interim approval of a change to its rates or fees for good cause while an

application for a change in rates or fees is pending. RRI objected to the portion of the proposed rule that gives the commission the authority to determine whether or not to order a refund of an interim rate if the refund would harm ERCOT's ability to perform its functions. RRI stated that refunds for interim rates subsequently found unreasonable after full hearing should be the rule, not the exception. Therefore, RRI proposed that the following language should be deleted: *"unless a refund would harm ERCOT's ability to efficiently perform its required functions."* ERCOT urged the commission to reject RRI's comments. ERCOT noted that the commission has the discretion to determine whether or not refunds of interim rates will be required. ERCOT argued that it is a non-profit corporation that relies upon its fees as its only source of revenue. Requiring a refund could affect its ability to perform its required functions.

### ***Commission response***

In response to RRI's comments, the commission agrees that refunds for interim rates found unreasonable should be the rule, so that the ratepayers are not responsible for paying unreasonable costs incurred by ERCOT. However, the commission also recognizes that ERCOT is dependent upon its fee structure for the operating funds necessary to perform its required functions. The commission believes that the best way to balance these two competing considerations is to retain the discretion to determine whether or not refunds are appropriate in any particular circumstance. Accordingly, the commission declines to make the change suggested by RRI.

*Procedural timeline*

As discussed later, ERCOT objected to the entire procedural timeline related to its fee requests and instead proposed a more expedited procedure. As a part of that suggestion, ERCOT proposed eliminating the interim fee provisions contained in §22.252(b).

*Commission response*

The commission declines to adopt ERCOT's expedited schedule, for reasons discussed under §22.252(f). The commission believes that the ability to request interim rates is an important part of its procedure; therefore, it rejects ERCOT's suggestion and retains the interim rate provisions as originally proposed.

*§22.252(f), Schedule*

In comments directed to this subsection and subsection (g), ERCOT objected to the overall schedule for processing of its applications. It proposed that this subsection be amended to allow it to file an application within 60 days of the proposed effective date rather than 120 days as specified in the proposed rule. ERCOT argued that a shorter time period is needed in order to allow it to fund its operations in a planned and orderly manner. ERCOT asserted that forcing it to use "outdated" information could cause it to seek higher fees or more frequent fee changes. ERCOT also noted that it is a non-profit corporation and that any shortage in its revenue would require it to reduce spending or

borrow funds to meet its needs. Because of this, ERCOT argued that the commission "should err on the side of allowing ERCOT to implement fee change requests promptly rather than waiting for all issues to be decided." ERCOT stated that its fee requests are not "rocket science," that its internal fee budget process is open and subject to input from affected entities before it is adopted and that these factors support a shorter review period. Finally, ERCOT indicated that its proposed 60-day time period for review is consistent with its internal financial policy for its budget, consistent with the review time for independent system operator (ISO) fee requests at the Federal Energy Regulatory Commission (FERC), and longer than the 35-day review period for public utilities under PURA.

*Commission response*

Given the various interests of all the parties involved, the commission has crafted a rule that balances the concerns expressed by ERCOT with the need for an adequate and thorough review, in which interested parties have a reasonable opportunity to participate. The time periods in the proposed rule were intended to provide for a prompt, reasonable, and predictable review of any proposed changes in ERCOT's fees and rates. Under the rule as proposed, ERCOT has the option of requesting interim rates within 60 days if it files a request the same day it files its application for a change in fees. While the application is being further reviewed by the commission, modified rates can go into effect after 60 days if ERCOT receives interim approval. Thus, the commission finds

that ERCOT has the ability, under the rule, to obtain approval to implement its new rates within 60 days as it has requested, albeit on an interim basis.

The 120-day time frame for normal review gives interested persons an opportunity to review ERCOT's request and conduct discovery as needed to determine if the fee request is reasonable. The 120-day time limit is shorter than is usually applicable in major rate cases involving utilities, including some utilities that have revenues similar in magnitude to those of ERCOT. Moreover, as ERCOT admits, its revenues "continue to remain in a period of flux because of the continued expansion in scope of ERCOT's operations and because of ERCOT's increased understanding of what is required to implement its responsibilities." The continued flux in both ERCOT's operations and its budget have raised concerns about the level of fee being charged. In order to have sufficient time to review those concerns, the 60-day time period proposed by ERCOT is simply too short. The commission, therefore, finds that the 120-day time frame contained in the rule is appropriate.

The commission disagrees with ERCOT's assertion that it should "err on the side of allowing ERCOT to implement fee change requests promptly rather than waiting for all issues to be decided." ERCOT bears the burden of proving the reasonableness of its request. Unless that burden is met and the issues are decided, the fee, which is charged to market participants but ultimately borne by consumers, should not be finally approved by the commission. The commission believes that it should err on the side of assuring

reasonable and nondiscriminatory rates for all rather than merely acquiescing to one party's desire for expediency.

The commission disagrees with ERCOT's assertion that the proposed schedule will somehow cause it to use "outdated" information in its fee request. ERCOT seems to assert that information it uses for preparing a fee request with a 60-day effective date would be "fresh," while information presented for a 120-day effective date would be stale. This is a situation that is not uncommon in any rate change considered by the commission. The commission agrees that forecasts used to project the costs of ERCOT's functions that go into the rate calculation could change in a 60-day time period. If that occurs, ERCOT has the option of filing an amendment to its package to reflect such changes. The need for, and reasonableness of, those changes could then be reviewed by the commission. The possibility of changes occurring during the review period does not justify reducing the time period necessary for the commission review, particularly when ERCOT has the ability to obtain interim approval of its proposed rate changes.

The commission recognizes that ERCOT uses an open process in developing its budget and allows input from other parties. This open budget process will probably help to reduce the number of issues that are contested in any ERCOT fee application and the commission has considered that possibility in reducing the review time period to 120 days. However, the open budget process is not a substitute for the review that the commission conducts under PURA. The commission must make an independent

determination that the resulting fees and rates are reasonable and non-discriminatory. It cannot delegate that statutory authority to the ERCOT Board.

The commission also disagrees with ERCOT's characterization of the time frame applicable to utility rate changes. Although PURA allows for a 35-day effective date for utility rate changes, PURA §36.105 also *requires* a public hearing, and a correspondingly longer time period for approval, in every case in which the change constitutes a "major change." The changes proposed by ERCOT would, in probably all instances, constitute "major changes" and would not qualify for the shorter 35-day effective date contained in PURA §36.102. Further, PURA §36.108 authorizes the commission to suspend the rate change for 150 days after the proposed effective date or a date 185 days after the application was filed. Finally, the fact that the 120-day review period is longer than that used in ERCOT's Financial Policy and longer than the period used by the FERC in reviewing ISO charges does not bind the commission. The procedures and schedules adopted by those parties are designed to meet their requirements and do not establish the time frames needed by this commission to meet its statutory obligations. The commission believes the 120-day time period specified in the rule strikes a reasonable balance between ERCOT's desire for an expedited proceeding and the need for thorough review by interested persons and the commission.

The commission also notes that the 120-day time limit does not preclude the commission from approving a change in rates before 120 days has elapsed from the time of the filing. It merely requires ERCOT to file its request 120 days before the proposed effective date.

If the commission is satisfied that the application is sufficient and reasonable before 120 days has elapsed, it can approve the application at that time. Conversely, if more time is needed for review, the commission can extend the time period. The rule dictates that the normal time period for approval should be 120 days but also allows the commission to tailor the schedule as circumstances warrant. The commission believes that the rule as written provides a reasonable standard, while also allowing for early or late contingencies that may arise that could reduce or extend the time frame needed for review. Accordingly, the commission declines to shorten the time period for review as proposed by ERCOT.

***§22.252(g), Processing of the application***

***Paragraph (1)***

RRI commented that the commission has the authority to determine on its own whether to hear a case or refer it to the State Office of Administrative Hearings (SOAH), whether or not there is a request; therefore, the language indicating that the commission may resolve an issue based upon briefing, "*if requested*" should be deleted. ERCOT replied to RRI's comment indicating that the language was unclear. ERCOT read the rule as indicating that briefing would be allowed if requested by the commission, rather than only in response to a request from a party.

*Commission response*

The commission agrees that it has the authority to determine whether a matter should be resolved by briefing or through an evidentiary proceeding. The rule language was intended to indicate that briefing would only be allowed if requested by the commission. The language was not intended to limit the commission's ability to act to only those instances when a request was made by a party. In order to clarify the rule, the commission is revising the language as suggested by ERCOT, to indicate that briefing will be allowed "if briefing is requested by the commission."

*Paragraph (2)*

RRI recommended that subsection (g)(2) be clarified to reflect the language in PURA §14.053 which provides that SOAH *shall* conduct hearings in a contested case in the event one or more of the commissioners does not do so.

*Commission response*

The commission agrees and has made the change suggested by RRI.

*Paragraph (3)*

ERCOT expressed its appreciation of the commission's efforts to include constraints on the time to review a request for a fee change, but stated that the language should be modified to add language that requires the commission to determine whether a refund would harm ERCOT's ability to efficiently perform its required functions. In addition, ERCOT averred that it would be fair to require that the commission find good cause before allowing the 120-day deadline to be postponed.

*Commission response*

The commission declines both suggestions. Implicit in its analysis of any requested rate change is the fact that the commission will not approve any rate or fee that would harm ERCOT's ability to efficiently perform its required functions. Subsection (b) of the rule already indicates that any interim rate is subject to refund "unless a refund would harm ERCOT's ability to efficiently perform its required functions." There is no need to repeat the language of subsection (b) in subsection (g)(3). As noted previously, the commission believes that the best way to balance the competing interests of ERCOT and customers is to retain the discretion to determine whether or not refunds are appropriate in any particular circumstance. The commission also declines ERCOT's suggestions to make the 120 days a firm deadline or make an extension of the deadline subject to a good cause requirement. As noted previously, the rule provides a flexible schedule that allows the commission to respond to the circumstances presented. Adding the language proposed

by ERCOT significantly limits the commission's ability to extend the time frame if additional time is needed to adequately review ERCOT's fee request. The rule as adopted allows ERCOT to obtain interim rates before 120 days elapse, so ERCOT's ability to adequately perform its functions should not be affected by a commission schedule that extends beyond the 120th day.

***Emergency fee change***

ERCOT suggested a final portion be added to §22.252 that would create a procedure to allow for fees to be changed on an emergency basis. ERCOT opined that such a procedure would allow it to obtain timely relief in the unlikely event a significant revenue shortfall occurs that threatens its economic viability. ERCOT proposed that it be allowed to implement such emergency fee changes 30 days after the filing of an application and that it be limited to only one such request per year. The emergency fee would go into effect unless the commission determined that it was not necessary.

***Commission response***

The commission declines to add the provision sought by ERCOT. The proposed language seems to change the burden of proof applicable to fee change applications, requiring approval unless the commission acts to prohibit such change, rather than prohibiting a fee change unless the commission approves the fee change. The commission also notes that the rule as adopted allows interim rates to be effective 60

days after the filing of an application. ERCOT has not shown what emergencies it is attempting to address or demonstrated that it does not have other means of addressing such emergencies, such as through a short-term borrowing. In the absence of this information, the commission sees no need to create a special procedure that effectively prevents meaningful participation by other parties in reviewing ERCOT's application for a change. In short, ERCOT has failed to demonstrate the need for a provision allowing fee changes on an emergency basis.

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 §39.151 which grants the commission the authority to establish the reasonable and competitively neutral rates for an independent organization, like ERCOT.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 14.052, and 39.151.

**§22.252. Procedures for Approval of ERCOT Fees and Rates.**

- (a) **Procedures.** Except to the extent modified in this section, the commission's procedural rules concerning contested cases will govern the conduct of hearings, discovery, burden of proof, and resolution of disputes relating to Electric Reliability Council of Texas (ERCOT) fees and rates.
- (b) **Interim approval.** ERCOT may request interim approval of a fee or rate, or a change in a fee or rate, based on a showing of good cause. A request for interim relief shall be filed no later than 60 days before the interim relief is proposed to take effect. A fee or rate charged on an interim basis shall be subject to refund if it exceeds the final fee or rate set by the commission, unless a refund would harm ERCOT's ability to efficiently perform its required functions.
- (c) **Filing package.** The fee and rate application shall be in substantial compliance with a fee-filing package approved by the commission.
- (d) **ERCOT notice.** Once a docket number has been assigned to the fee and rate application, ERCOT shall provide notice of the application to all entities subject to the fees and rates (as identified through the current information available to ERCOT) and to all parties that intervened in its most recent fee and rate application docket. This notice may be made by electronic mail. ERCOT will also post the notice and a copy of its fee and rate application on its web site.

ERCOT shall file an affidavit to evidence that notice has been provided in accordance with this subsection. The notice shall contain the following information:

- (1) the docket number of the fee and rate application;
- (2) in dollars per megawatt hour, the amount of the current fee and rate, the amount of the proposed fee and rate increase or decrease, and the total fee and rate amount after the increase or decrease goes into effect;
- (3) the effect the proposed fee and rate is expected to have on ERCOT's revenues;
- (4) the effective date of the proposed fee and rate;
- (5) a description of the entities affected by the proposed fee and rate;
- (6) a brief explanation of the need for the proposed fee and rate;
- (7) the deadline for intervention in the proceeding; and
- (8) the following language: "Persons who wish to intervene in or comment in this proceeding should notify the Public Utility Commission of Texas within 30 days of the date of this notice. A request to intervene or for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326. A request to intervene shall include a statement of position containing a concise statement of the requestor's position on the application, a concise statement of each question of fact, law, or policy that the requestor considers at issue and a concise statement of the requestor's position on each issue identified."

- (e) **Commission notice.** The commission shall publish notice of the fee and rate application in the *Texas Register*. This notice shall contain the same information required in subsection (d) of this section.
- (f) **Schedule.** If ERCOT seeks to change its fees and rates, it shall file an application not less than 120 days before the new rate and fee is to become effective. The deadline for parties to intervene in a fee and rate application proceeding shall be 30 days after the date notice is issued by ERCOT pursuant to subsection (d) of this section.
- (g) **Processing of the application.** If no motion to intervene is filed by the intervention deadline, and no statement of position objecting to the fee and rate application is filed by the commission staff, the fee and rate application shall be presented to the commission for consideration of approval.
- (1) If a motion to intervene objecting to the fee and rate application is filed, the commission shall review the motion to determine whether it raises any disputed issues of fact, law or policy. If the motion does not raise factual issues, the commission may resolve any disputed issues of law or policy on the basis of briefing, if briefing is requested by the commission.
  - (2) If factual issues must be resolved, the matter shall be referred to the State Office of Administrative Hearings for the making of all necessary factual determinations and the preparation of a proposal for decision, including

findings of fact and conclusions of law, unless the commission or a commissioner serves as the finder of facts.

- (3) The commission shall render a final decision approving or denying a fee application under this section within 120 days of the date of filing of the application, unless the commission extends the time for a final decision. If the commission does not make a final determination concerning a fee and rate change before the proposed effective date, the commission will be considered to have approved the change on an interim basis as of the proposed effective date, subject to the authority of the commission thereafter to require a refund upon conclusion of the hearing.

- (h) **Review of fees based on a complaint.** On its own initiative, or upon complaint by an affected person, the commission may enter an order changing the fees and rates charged by ERCOT, after reasonable notice and hearing, if it finds that the existing fees and rates are unreasonable, are not competitively neutral, are insufficient to cover ERCOT's costs, or are in violation of law. The presiding officer shall establish the procedures for processing such complaints in accordance with the commission's procedural rules.

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 §22.252, relating to Procedures for Approval of ERCOT Fees and Rates, is hereby adopted with changes to the text as proposed.

**ISSUED IN AUSTIN, TEXAS ON THE 13th DAY OF OCTOBER 2003.**

**PUBLIC UTILITY COMMISSION OF TEXAS**

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**Rebecca Klein, Chairman**

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**Julie Parsley, Commissioner**

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**Paul Hudson, Commissioner**