

PROJECT NO. 40862

RULEMAKING PROCEEDING TO	§	PUBLIC UTILITY COMMISSION
AMEND PUC SUBST. R. 25.362,	§	
RELATING TO ELECTRIC	§	OF TEXAS
RELIABILITY COUNCIL OF TEXAS	§	
(ERCOT) GOVERNANCE	§	

**ORDER ADOPTING AMENDMENTS TO §25.362
AS APPROVED AT THE FEBRUARY 14, 2013 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts amendments to §25.362, relating to Electric Reliability Council of Texas (ERCOT) Governance, with no changes, as published in the December 7, 2012 issue of the *Texas Register* (37 TexReg 9564). The purpose of these amendments is to establish that the commission may remove an unaffiliated member of the ERCOT governing board only for “cause”. The amendments constitute a competition rule subject to judicial review as specified in PURA §39.001(e). Project Number 40862 is assigned to this proceeding.

The commission received comments on the proposed amendments from the Steering Committee of Cities Served by Oncor (Cities).

Proposed subsection (g)

Cities supported the proposed rule’s general approach for removal of an unaffiliated member of the ERCOT governing board for cause, but expressed concerns with the grounds for removal outlined in subsection (g)(5)(D). Cities stated that the proposed language was not consistent with the independence required of unaffiliated directors and therefore, should not be adopted in this proceeding. PURA §39.151(g)(7) requires the ERCOT board to include five directors,

selected by ERCOT's membership, that are unaffiliated with any market segment. Cities stated that it is unclear why unaffiliated directors elected to provide expertise outside the electric industry would be subject to removal for positions that they may take in disagreement with the commission. Cities commented that adopting the provision would inject uncertainty into the transparency of the ERCOT process and lead outside observers to question whether the independent directors would be expressing independent judgment or following the commission's policy positions. Cities requested that the commission decline to adopt proposed subsection (g)(5)(D).

Commission Response

The commission disagrees with Cities that proposed subsection (g)(5)(D) places an undue burden on the independence required of the unaffiliated ERCOT directors. PURA §39.151(d) provides that: an independent organization certified by the commission is directly responsible and accountable to the commission; the commission has complete authority to oversee and investigate the organization's finances, budget, and operations as necessary to ensure the organization's accountability and to ensure that the organization adequately performs the organization's functions and duties; the organization shall fully cooperate with the commission in the commission's oversight and investigatory functions; the commission has complete authority to ensure that the organization adequately performs its functions and duties; and the commission may take appropriate action against an independent organization that does not adequately perform the organization's functions or duties or does not comply with PURA §39.151.

PURA §39.151(g)(7) requires that the board members at issue be unaffiliated with any market segment and selected by the other members of the governing body. PURA in no way requires that these board members be independent of the commission. Although PURA provides that an independent organization such as ERCOT be independent of any particular market segment, PURA expressly provides that the organization is directly responsible and accountable to the commission. Market participants influence the selection of these board members because the other voting board members represent various segments of market participants (other than the independent organization's chief executive officer). However, the independent organization and its board are ultimately directly responsible and accountable to the commission. A board member that is unaffiliated with any market segment cannot fulfill the role contemplated by PURA if that board member has a fundamental disagreement with the commission as to the policies or procedures that ERCOT shall adopt. Under the existing rule, an unaffiliated board member must be approved by the commission before that person can serve on the board. Subsection (g)(5)(D) as proposed is consistent with that provision in that it provides for the commission's removal of an unaffiliated board member if that person cannot fulfill the role contemplated by PURA. The commission therefore adopts the amendments to the rule as proposed.

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

The amendments are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (West 2007 and Supp. 2012) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. In addition, PURA §39.151 provides that: an independent organization certified by the commission is directly responsible and accountable to the commission; the commission has complete authority to oversee and investigate the organization's finances, budget, and operations as necessary to ensure the organization's accountability and to ensure that the organization adequately performs the organization's functions and duties; the organization shall fully cooperate with the commission in the commission's oversight and investigatory functions; the commission has complete authority to ensure that the organization adequately performs its functions and duties; and the commission may take appropriate action against an independent organization that does not adequately perform the organization's functions or duties or does not comply with PURA §39.151.

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

§25.362. Electric Reliability Council of Texas (ERCOT) Governance.

- (a) **Purpose.** This section provides standards for the governance of an independent organization within the ERCOT region.
- (b) **Application.** This section applies to ERCOT or any other organization within the ERCOT region that qualifies as an independent organization under PURA §39.151.
- (c) **Adoption of rules by ERCOT and commission review.** ERCOT shall adopt and comply with procedures concerning the adoption and revision of ERCOT rules.
 - (1) The procedures shall provide for advance notice to interested persons, an opportunity to file written comments or participate in public discussions, and, in the case of market protocols, operating guides, planning guides, and market guides, an evaluation by ERCOT of the costs and benefits to the organization and the operation of electricity markets.
 - (2) ERCOT staff, the independent market monitor, and the commission's reliability monitor may comment on any proposed change in ERCOT rules that affects the operation and competitiveness of markets operated by ERCOT or reliability of the electric network in ERCOT.
 - (3) If the findings of a commission-mandated audit of ERCOT operations or governance indicate the need for a change in operating practices or procedures or governance rules, ERCOT shall develop and submit to the commission a plan for implementing the changes. ERCOT shall implement the plan, as approved by the commission. Commission-mandated audits, as contemplated in PURA

§39.151(d) and (d-1), shall be funded by ERCOT and do not require approval by the governing board of ERCOT.

- (4) The commission may review a provision of ERCOT's articles of incorporation or by-laws, or a new or amended ERCOT rule on the application of an interested person, including commission staff and the Office of Public Utility Counsel.
 - (5) The commission shall process requests for review of a provision of ERCOT's articles of incorporation or by-laws, a new or amended ERCOT rule, or ERCOT decision in accordance with §22.251 of this title (relating to Review of Electric Reliability Council of Texas (ERCOT) Conduct). A request for review under this subsection initiated by the commission, commission staff, or the Office of Public Utility Counsel is not subject to the alternative dispute resolution requirements in §22.251(c) of this title, (which requires the use of Section 20 of the ERCOT Protocols (Alternative Dispute Resolution Procedures), Section 21 of the Protocols (Process for Protocol Revision), or other applicable ERCOT procedures. In addition, the commission may, for good cause, waive the requirement that a complaint be filed within the time prescribed in §22.251(d) of this title.
- (d) **Access to meetings.** ERCOT shall adopt and comply with procedures for providing access to its meetings to market participants and the general public. These procedures shall include provisions on advance notice of the time, place, and topics to be discussed during open and closed portions of the meetings, and making and retaining a record of the meetings. Records of meetings of the governing board shall be retained permanently, and

ERCOT shall establish reasonable retention periods, but not less than five years, for records of other meetings.

- (e) **Access to information.** This subsection governs access to information held by ERCOT.
- (1) ERCOT shall adopt and comply with procedures that allow persons to request and obtain access to records that ERCOT has or has access to relating to the governance and budget of the organization, market operations, reliability, settlement, customer registration, and access to the transmission system. ERCOT shall make these procedures publicly available. Information that is available for public disclosure pursuant to ERCOT procedures shall normally be provided within ten business days of the receipt of a request for the information. If a response requires more than ten business days, ERCOT shall notify the requester of the expected delay and the anticipated date that the information may be available. ERCOT's procedures regarding access to records shall be consistent with this chapter and commission orders.
- (A) Information submitted to or collected by ERCOT pursuant to requirements of ERCOT rules shall be protected from public disclosure only if it is designated as Protected Information pursuant to ERCOT rules, except as otherwise provided in this subsection.
- (B) ERCOT shall promptly respond to a request from the commission, a commissioner, a commissioner's designee, the commission executive director, or the executive director's designee for information that ERCOT collects, creates or maintains, in order to provide the commission access to information that the commission, a commissioner, a commissioner's

designee, the executive director, or the executive director's designee determines is necessary to carry out the commission's responsibilities for oversight of ERCOT and the wholesale and retail markets.

- (C) In the absence of a request for information under the Texas Public Information Act, Texas Government Code Annotated, the commission staff may seek to release information that the commission has in its possession or has access to that has been designated as Protected Information under ERCOT rules, and the commission may determine the validity of the asserted claim of confidentiality through a contested-case proceeding. In a contested-case proceeding conducted by the commission pursuant to this subsection, the staff, the entity that provided the information to the commission, and ERCOT will have an opportunity to present information or comment to the commission on whether the information is subject to protection from disclosure under law.
 - (D) In connection with any challenge to the confidentiality of information under subparagraph (C) of this paragraph, any person who asserts a claim of confidentiality with respect to the information must, at a minimum, state in writing the specific reasons why the information is subject to protection from public disclosure and provide legal authority in support of the assertion.
- (2) Commission employees, consultants, agents, and attorneys who have access to Protected Information pursuant to this section shall not disclose such information except as provided in the Texas Public Information Act.

- (f) **Conflicts of interest.** ERCOT shall adopt policies to ensure that its operations are not affected by conflicts of interests relating to its employees' outside employment and financial interests and its contractors' relationships with other businesses. These policies shall include an obligation to protect confidential information obtained by virtue of employment or a business relationship with ERCOT.
- (g) **Qualifications, selection, and removal of members of the governing board.** ERCOT shall establish and implement criteria for an individual to serve as a member of its governing board, procedures to determine whether an individual meets these criteria, and procedures for removal of an individual from service if the individual ceases to meet the criteria.
- (1) The qualification criteria shall include:
- (A) Definitions of the market sectors;
 - (B) Levels of activity in the electricity business in the ERCOT region that an organization in a market sector must meet, in order for a representative of the organization to serve as a member of the governing board;
 - (C) Standards of good standing that an organization must meet, in order for a representative of the organization to serve as a member of the governing board; and
 - (D) Standards of good standing that an individual must meet, in order for the individual to serve as a member of the governing board.
- (2) The procedures for removal of a member from service on the governing board shall include:

- (A) Procedures for determining whether an organization or individual meets the criteria adopted under paragraph (1) of this subsection; and
 - (B) Procedures for the removal of an individual from the governing board if the individual or the organization that the individual represents no longer meets the criteria adopted under paragraph (1) of this subsection or violates an ERCOT rule, including a written ERCOT policy adopted under this section, or commission rule, or applicable statute.
- (3) The procedures adopted under paragraph (2) of this subsection shall:
- (A) Permit any interested party to present information that relates to whether an individual or organization meets the criteria specified in paragraph (1) of this subsection or has violated an ERCOT rule, including a written ERCOT policy adopted under this section, or commission rule, or applicable statute; and
 - (B) Specify how decisions concerning the qualification of an individual or whether an individual has violated an ERCOT rule or written ERCOT policy or procedure adopted under this section, or commission rule, or applicable statute will be made.
- (4) A decision concerning an individual or organization's qualification or an individual's removal from the governing board is subject to review by the commission.
- (5) ERCOT shall notify the commissioners when a vacancy occurs for an unaffiliated member of the governing board. ERCOT shall provide information to the commissioners concerning the process for selecting a new member, the candidates

who have been identified and their qualifications, any recommendation that will be made to the governing board, and any other information requested by a commissioner. The selection of an unaffiliated member of the governing board is subject to approval by the commission. A person who is selected may not serve as a member of the governing board until the commission approves the selection. An unaffiliated board member whose three-year term has expired shall, if reappointed by the ERCOT governing board, cease serving as a member of the governing board until the reappointment is approved by the commission. The commission may remove an unaffiliated member of the governing board for cause. Compensation, per diem and travel reimbursements to be paid to unaffiliated members of the governing board shall be subject to commission review and approval. As used in this paragraph, “cause” shall mean:

- (A) a violation of a commission rule or applicable statute, an ERCOT rule, or written ERCOT policy or procedure adopted under this section;
 - (B) a director is indicted or charged with a felony or is convicted of a misdemeanor involving moral turpitude;
 - (C) conduct inconsistent with a director’s fiduciary duty to ERCOT or that may reflect poorly upon the board or ERCOT; or
 - (D) a fundamental disagreement with the commission as to the policies or procedures that ERCOT shall adopt, in each case as determined by the commission at its sole discretion.
- (6) A member of the governing board of ERCOT appointed after the effective date of this paragraph who serves as an unaffiliated member may not represent a market

participant before the governing board of ERCOT, the ERCOT technical advisory committee, or any of its subcommittees or working groups, for a period of one year after the person ceases to serve as a member of the governing board.

- (h) **Chief executive officer.** The appointment of the chief executive officer of ERCOT is subject to commission approval. ERCOT shall notify the commissioners when a vacancy occurs for the chief executive officer. ERCOT shall provide information to the commissioners concerning the process for selecting a new chief executive officer, the candidates who have been identified and their qualifications, any recommendation that will be made to the governing board, and any other information requested by a commissioner. A person may not seek the position of the ERCOT chief executive officer while serving as a commissioner. Compensation to be paid to the ERCOT chief executive officer shall be subject to commission review and approval.
- (i) **Required reports and other information.** ERCOT shall file with the commission the reports and provide the information required by this subsection.
- (1) **Annual report.** ERCOT shall file an annual report with the commission, not later than 120 days after the end of the year. The annual report shall include:
- (A) A strategic plan, including a statement of the mission and vision of the organization, a summary of the industry environment in which it operates, a description of the major challenges it faces, and key strategies it intends to employ to perform its functions and meet its challenges.
- (B) A long-term organizational plan including:
- (i) An overview of the major systems, including both hardware and software, operated by ERCOT, including descriptions of the

- functionality provided, estimates of remaining useful life, estimates of ongoing maintenance and upgrade costs, and evaluations of the performance of each system;
- (ii) A description of major capital projects completed in the prior budget year and those expected to be completed in the following budget year, including an explanation of why each project is needed to assist ERCOT in meeting its responsibilities or the benefits it would provide to market participants or consumers;
 - (iii) A schedule summarizing ERCOT's sources and uses of funds for a six-year period beginning with the last historic calendar year and projections for the next five calendar years;
 - (iv) Long-term goals for all ERCOT activities;
 - (v) An evaluation of ERCOT's performance in meeting its responsibilities and system expectations during the current budget year; and
 - (vi) Any other information requested by the commission.
- (C) Financial information including:
- (i) A copy of an independent audit of ERCOT's financial statements for the report year;
 - (ii) A schedule comparing actual revenues and costs to budgeted revenues and costs for the report year, a schedule showing the variance between actual and budgeted revenues and costs, and a

schedule showing the assets and liabilities (including level and types of debt);

- (iii) The annual board-approved budget;
- (iv) A description of any derivative transactions entered into by ERCOT; and
- (v) Any other financial information requested by the commission.

(2) **Operations report and plan.** No later than January 15 of each year, ERCOT shall file an operations report and plan. The commission may initiate a review of the plan, at its discretion. The report and plan shall contain the following information:

- (A) A copy of an independent audit of ERCOT's market operation for the report year;
- (B) A summary of key market operations statistics, including prices and quantities of energy and capacity purchased in the markets operated by ERCOT;
- (C) A summary of key reliability statistics;
- (D) A summary of transmission planning and generation interconnection activities and the most recent report on capacity, demand and reserves;
- (E) A description of ERCOT's roles and responsibilities within the electric market in Texas, including system reliability, operation of energy and capacity markets, managing transmission congestion, transmission planning and interconnection of new generating plants, and a description of how ERCOT's roles and responsibilities relate to the roles and

responsibilities of the transmission and distribution utilities and retail electric providers and to the North American Electric Reliability Corporation and Texas Reliability Entity;

- (F) A risk management plan that identifies any significant risks to system reliability, the operation of ERCOT's energy and capacity markets, its management of transmission congestion, and any other risks that would significantly disrupt the sale and delivery of electricity within the ERCOT region, and the measures that might be taken to mitigate such risks;
- (G) An emergency communications plan that describes how ERCOT will communicate to market participants, government officials, and the public information concerning actual or likely disruptions of electric service that would affect a significant number of customers;
- (H) An assessment of the reliability and adequacy of the ERCOT system during extremely cold or extremely hot weather conditions, including information regarding steps to be taken by power generation companies and utilities to prepare their assets for extreme weather events; and
- (I) Identification of existing and potential transmission constraints, and the need for additional transmission, generation or demand response resources within the ERCOT region. The report shall include projections of changes in demand, the capability of generation, energy storage, and demand response resources, projected reserve margins, alternatives for meeting system needs, and recommendations for meeting system needs.

- (3) **Quarterly reports.** ERCOT shall file quarterly reports no later than 45 days after the end of each quarter, which shall include:
- (A) Any internal audit reports that were produced during the reporting quarter;
 - (B) A report on performance measures, as prescribed by the commission;
 - (C) By account item as established in the fee-filing package prescribed by the commission under §22.252 of this title (relating to Procedures for Approval of ERCOT Fees and Rates) a report of:
 - (i) ERCOT fees and other rates, funds allocated, funds encumbered, and funds expended;
 - (ii) An explanation for expenditures deviating from the original funding allocation for the particular account item;
 - (iii) For the report covering the fourth quarter of ERCOT's fiscal year, a detailed explanation of how unexpended funds will be expended in the subsequent year; and
 - (D) Any other information the commission may deem necessary.
- (4) **Emergency reports.** If ERCOT management becomes aware of any event or situation that could reasonably be anticipated to adversely affect the reliability of the regional electric network; the operation or competitiveness of the ERCOT market; ERCOT's performance of activities related to the customer registration function; or the public's confidence in the ERCOT market or in ERCOT's performance of its duties, ERCOT management shall immediately notify the chairman of the commission, or the chairman's designee, and the executive director of the commission, or the executive director's designee, by telephone.

Additionally, ERCOT shall file a written report of the facts involved by the end of the following business day after becoming aware of such event or situation, unless the executive director specifies, in writing, that the report may be delayed. The executive director may not authorize a delay of more than 30 days for filing the required written report. For good cause, the commission may grant further delays in filing the required report. If it determines that additional reports are necessary, the commission may establish a schedule for the filing of additional reports after the initial written report by ERCOT. As a part of any additional written report, ERCOT may be required to fully explain the facts and to disclose any actions it has taken, or will take, in order to prevent a recurrence of the events that led to the need for filing an emergency report.

- (5) **Meeting Periodicity Report.** Beginning with the effective date of this section, ERCOT shall recommend annually to the commission the periodicity of governing board meetings. ERCOT's recommendation shall be based on an examination of the frequency of meetings conducted by similar organizations and shall include an estimate of the costs associated with meeting more frequently than once per quarter.
- (j) **Compliance with rules or orders.** ERCOT shall inform the commission with as much advance notice as is practical if ERCOT realizes that it will not be able to comply with PURA, any provision of this chapter, or a commission order. If ERCOT fails to comply with PURA, any provision of this chapter, or a commission order, the commission may, after notice and opportunity for hearing, adopt the measures specified in this subsection or such other measures as it determines are appropriate.

- (1) The commission may require ERCOT to submit, for commission approval, a proposal that details the actions ERCOT will undertake to remedy the non-compliance.
 - (2) The commission may require ERCOT to begin submitting reports, in a form and at a frequency determined by the commission, that demonstrate ERCOT's current performance in the areas of non-compliance.
 - (3) The commission may require ERCOT to undergo an audit performed by an appropriate independent third party.
 - (4) The commission may assess administrative penalties under PURA Chapter 15, Subchapter B.
 - (5) The commission may suspend or revoke ERCOT's certification under PURA §39.151(c) or deny a request for change in the terms associated with such certification.
 - (6) Nothing in this section shall preclude any form of civil relief that may be available under federal or state law.
- (k) **Priority of commission rules.** This section supersedes any protocols or procedures adopted by ERCOT that conflict with the provisions of this section. The adoption of this section does not affect the validity of any rule or procedure adopted or any action taken by ERCOT prior to the adoption of this section.

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 §25.362, relating to Electric Reliability Council of Texas (ERCOT) Governance is hereby adopted with no changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE _____ DAY OF _____ 2013.

PUBLIC UTILITY COMMISSION OF TEXAS

DONNA L. NELSON, CHAIRMAN

KENNETH W. ANDERSON, JR., COMMISSIONER

ROLANDO PABLOS, COMMISSIONER