



Filing Receipt

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DOCKET NO. 52924

NOTICE OF VIOLATION BY BT	§	PUBLIC UTILITY COMMISSION
COOKE SOLAR LLC FOR	§	
VIOLATIONS OF 16 TAC § 25.55,	§	OF TEXAS
CONCERNING FAILURE TO COMPLY	§	
WITH WINTER WEATHER	§	
EMERGENCY PREPAREDNESS	§	
REPORTING REQUIREMENTS	§	

**PETITION TO DETERMINE VIOLATION AND IMPOSE
AN ADMINISTRATIVE PENALTY**

On December 8, 2021, the Executive Director of the Public Utility Commission of Texas (Commission) filed a formal Notice of Violation (NOV) against BT Cooke Solar LLC (BT Cooke) for violations of 16 Texas Administrative Code (TAC) § 25.55(c)(2), concerning BT Cooke's failure to comply with winter weather emergency preparedness reporting requirements. The Executive Director, at the recommendation of Commission Staff, recommended an initial administrative penalty be assessed against BT Cooke in the amount of \$550,000 for the violations. Due to the continuing nature of violations discussed in the NOV, the Executive Director recommended the total amount of administrative penalties assessed against BT Cooke in this proceeding continue to increase each day that the violations continue after the date the NOV was filed.

Commission Staff now files this pleading to request action on the NOV filed on December 8, 2021 if BT Cooke fails to request a hearing within the 20-day window established under 16 TAC § 22.246(g)(3).

I. APPLICABLE LAW

Under PURA¹ § 35.0021(b), the Commission must establish rules requiring each provider of electric generation service in the ERCOT power region to implement measures to prepare its generation assets to provide adequate electric generation service during a weather emergency. In accordance with PURA § 35.0021(b), the Commission adopted substantive rule 16 TAC § 25.55(c) to detail the winter weather emergency preparedness requirements applicable to ERCOT-registered generation entities. Under 16 TAC § 25.55(c)(2), each generation entity in the ERCOT

¹ Public Utility Regulatory Act, Tex. Util. Code Ann. §§ 11.001-58.303 (PURA).

power region was required to submit to ERCOT a winter weather readiness report no later than December 1, 2021.

As stated under PURA § 35.0021(g), the Commission must impose an administrative penalty on any entity that violates a rule adopted under PURA § 35.0021 and does not remedy that violation within a reasonable period of time. Additionally, PURA § 15.023(a) authorizes the Commission to impose an administrative penalty for any violation of PURA or any rule adopted thereunder, regardless of whether there has been a reasonable time period for remedy.

Under PURA § 15.023(b-1), the Commission is authorized to impose administrative penalties of up to \$1,000,000 per violation per day for violations of PURA § 35.0021. As detailed under PURA § 15.023(c), the amount of administrative penalty to be assessed for a violation shall be determined based on an analysis of the seriousness of the violation, the economic harm caused by the violation, the history of previous violations, the amount necessary to deter future violations, efforts to correct the violation, and any other matter that justice may require.

II. ALLEGED VIOLATIONS

BT Cooke is registered with the Commission as a power generation company (PGC) in the ERCOT power region under PGC registration number 20590. Within the ERCOT power region, BT Cooke operates as the resource entity for at least one generation resource. As detailed in the NOV filed on December 8, 2021,² BT Cooke is a generation entity in the ERCOT power region subject to the winter weather preparation requirements established by the Commission under 16 TAC § 25.55(c).

Under 16 TAC § 25.55(c)(2), BT Cooke was required to submit to ERCOT a winter weather readiness report for its generation resource no later than December 1, 2021. BT Cooke did not submit the required winter weather readiness report for its generation resource by the December 1, 2021 deadline and, as of December 8, 2021, the report remains outstanding.

Commission Staff asserts that violations of the provision at issue in this proceeding has two components: an initial violation triggered by the failure to submit the required information on the specified due date, and a continuing violation for the ongoing failure to have the required information on file with the appropriate agency. Accordingly, Commission Staff asserts that BT Cooke has violated 16 TAC § 25.55(c)(2) by failing to timely submit the required winter weather

² Attachment 1.

readiness report. Additionally, Commission Staff asserts that BT Cooke continues to violate 16 TAC § 25.55(c)(2) each day until the required information is properly submitted. Commission Staff notes that while the continuing violation may eventually be remedied once BT Cooke submits the required information, the initial failure to meet the December 1, 2021 deadline is not remediable.

III. ADMINISTRATIVE PENALTIES

Under PURA §§ 15.023(b-1), the Commission is authorized to assess an administrative penalty of up to \$1,000,000 per violation per day against any entity that violates a rule adopted under PURA § 35.0021.

The Executive Director, at the recommendation of Commission Staff, recommended an initial administrative penalty of \$550,000. The initial administrative penalty is comprised of the following components:

- \$250,000 for failure to submit a winter weather readiness report by December 1, 2021, as required under 16 TAC § 25.55(c)(2); and
- \$50,000 for each day that a violation of 16 TAC § 25.55(c)(2) has persisted for the generation resource since December 1, 2021.

Accordingly, as of December 8, 2021, the Executive Director recommended an administrative penalty of \$550,000 for BT Cooke's failure to submit the requisite winter weather readiness information. Additionally, due to the continuing nature of the violations, the Executive Director recommended that the administrative penalty be increased by \$50,000 per day for each day the violation of 16 TAC § 25.55(c)(2) continues after the date of the NOV. Commission Staff respectfully requests that the Executive Director's recommended administrative penalty be imposed for the reasons discussed in the report attached to the NOV filed on December 8, 2021.³

³ *Notice of Violation by BT Cooke Solar LLC for violations of 16 TAC § 25.55, Concerning Failure to Comply with Winter Weather Emergency Preparedness Reporting Requirements*, Docket No. 52924, Notice of Violation at Attachment A, pages 3-4 (Dec. 8, 2021).

IV. NOTICE

Notice in this proceeding is governed by 16 TAC § 22.246(f)(2). Under 16 TAC § 22.246(f)(2)(A), within 14 days of the date the NOV is issued, the Executive Director must provide written notice of the NOV, either by regular or certified mail, to the person who is alleged to have committed the violation that is the subject of the NOV. Under 16 TAC § 22.246(f)(2)(C), the notice provided by the Executive Director must include the following information: a brief summary of the alleged violation; a statement of the amount of recommended penalty; a statement that the person who is alleged to have committed the violation has a right to a hearing on the occurrence of the violation, the amount of the administrative penalty, or both the occurrence of the violation and the amount of administrative penalty; a copy of the NOV issued; and a copy of 16 TAC § 22.246.

At the direction of the Executive Director and in compliance with 16 TAC § 22.246(f)(2), Commission Staff provided written notice of the NOV by certified mail, return receipt requested, to the authorized representative associated with BT Cooke's PGC registration in the Commission's records:

BT Cooke Solar LLC
Shane Kim
President
300 Spectrum Center Drive
Irvine, CA 92618

A copy of the notice provided, which satisfies all requirements under 16 TAC § 22.246(f)(2), is attached to this pleading.⁴ Commission Staff also provided an electronic copy of the NOV to Mr. Kim by e-mail at Rippeyproiect@us.q-cells.com and to coniglioproject@us.q-cells.com, the email associated with Mr. Kim in ERCOT's records.

V. REQUESTED RELIEF

Under 16 TAC § 22.246(g)(3), a person who receives notice of a NOV under 16 TAC § 22.246(f)(2) may submit to the Executive Director a written request for hearing no later than the

⁴ Attachment 1.

20th day after the date the person received such notice.⁵ As provided under 16 TAC § 22.246(f)(2)(D)(ii), notice sent by certified mail is deemed to be received on the date written notice is received. If a person fails to timely respond to the notice of a NOV provided under 16 TAC § 22.246(f)(2), 16 TAC § 22.246(g)(4) states that the Commission, by order, will approve the determination and impose the recommended penalty or order a hearing on the determination and the recommended penalty.

Due to the continuing nature and gravity of the violations at issue in this proceeding, in the event that BT Cooke does not request a hearing within 20 days after receiving the notice sent at the direction of the Executive Director on December 8, 2021, Commission Staff respectfully requests that the Commission issue an order consistent with the violations and administrative penalty detailed in the December 8, 2021 NOV.

Dated: December 8, 2021

Respectfully Submitted,

PUBLIC UTILITY COMMISSION OF TEXAS

**DIVISION OF COMPLIANCE AND
ENFORCEMENT**

Barksdale English
Division Director

/s/Courtney Dean
Courtney N. Dean
State Bar No. 24116269
1701 N. Congress Avenue
P.O. Box 13326
Austin, Texas 78711-3326
(512) 936-7235
(512) 936-7268 (facsimile)
courtney.dean@puc.texas.gov

⁵ Under 16 Tex. Admin. Code (TAC) § 22.246(f)(2)(D)(ii), notice sent by certified mail is deemed to be received on the date written notice is received.

DOCKET NO. 52924

CERTIFICATE OF SERVICE

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on December 8, 2021, in accordance with the Order Suspending Rules, issued in Project No. 50664.

/s/Courtney Dean
Courtney N. Dean

ATTACHMENT 1

NOTICE OF VIOLATION

Peter M. Lake
Chairman

Will McAdams
Commissioner

Lori Cobos
Commissioner

Jimmy Glotfelty
Commissioner

Thomas Gleeson
Executive Director



Greg Abbott
Governor

Public Utility Commission of Texas

TO: Chairman Peter M. Lake
Commissioner Will McAdams
Commissioner Lori Cobos
Commissioner Jimmy Glotfelty

All Parties of Record

FROM: Thomas Gleeson, Executive Director

RE: **PUC Docket No. 52924** – Notice of Violation by BT Cooke Solar LLC for violations of 16 TAC § 25.55, Concerning Failure to Comply with Winter Weather Emergency Preparedness Reporting Requirements

DATE: December 8, 2021

The Division of Compliance and Enforcement (DICE) of the Public Utility Commission of Texas (Commission) has recommended the assessment of an administrative penalty against BT Cooke Solar LLC (BT Cooke) for violations of 16 Texas Administrative Code (TAC) § 25.55, concerning winter weather emergency preparedness reporting requirements. This letter serves as a formal Notice of a Report of Violation (NOV) under 16 TAC § 22.246(f).

I. Introduction

Under PURA¹ § 35.0021(b), the Commission must, by rule, require each provider of electric generation service in the ERCOT power region to implement measures to prepare its generation assets to provide adequate electric generation service during a weather emergency. In accordance with PURA § 35.0021(b), the Commission adopted substantive rule 16 TAC § 25.55(c) to detail the winter weather emergency preparedness requirements applicable to ERCOT-registered generation entities. Pursuant to 16 TAC § 25.55(c)(2), each generation entity in the ERCOT power region was required to submit to ERCOT a winter weather readiness compliance report no later than December 1, 2021.

PURA § 35.0021(g) provides that the Commission must impose an administrative penalty on any entity that violates a rule adopted under PURA § 35.0021 and does not remedy that

¹ Public Utility Regulatory Act, Tex. Util. Code Ann. §§ 11.001-58.303 (PURA).



violation within a reasonable period of time. Additionally, PURA § 15.023(a) authorizes the Commission to impose an administrative penalty for any violation of PURA or any rule adopted thereunder, regardless of whether or not there has been a reasonable time period for remedy.

II. Summary of Alleged and Continuing Violations

As discussed in the attached Report on Violations,² BT Cooke has violated 16 TAC § 25.55(c)(2) by failing to submit to ERCOT required winter weather emergency preparedness information for a generation resource. Further, BT Cooke continues to violate 16 TAC § 25.55(c)(2) each day until the required information has been submitted to ERCOT.

III. Statement of the Amount of Recommended Penalty

Based on the attached Report on Violations, DICE recommends assessing an administrative penalty against BT Cooke in the amount of \$550,000. Due to the continuing nature of the violations, DICE recommends that the administrative penalty be increased by \$50,000 per day for each day the violation of 16 TAC § 25.55(c)(2) continues after the date of this NOV. This recommendation is based on consideration of the penalty factors set forth in PURA § 15.023(c) and 16 TAC § 22.246. A copy of 16 TAC § 22.246 has been attached to this letter,³ as required under 16 TAC § 22.246(f)(2)(C)(vi).

III. Statement Relating to BT Cooke's Rights

Persons alleged to have committed a violation or continuing violation have a right to a hearing on the occurrence of the violation or continuing violation, the amount of the penalty, or both. Options available under Commission rules to resolve this matter include paying the penalty, requesting a settlement conference, or requesting a contested case hearing on the occurrence of the violation or continuing violation, the amount of the penalty, or both the occurrence of the violation and the amount of the penalty.⁴

Written acceptance of the determination of violation and recommended penalty or a written request for a hearing must be received no later than 20 days after service of notice of the report on violations.⁵ Failure to timely respond to the notice will result in the commission approving by order the determination of violation and recommended penalty.⁶

² Attachment A.

³ Attachment B.

⁴ 16 Tex. Admin. Code (TAC) § 22.246(f)(2)(C)(iv).


⁵ PURA § 15.024(d).

⁶ PURA § 15.204(e).

The factual allegations listed in this Notice of Violation could be deemed admitted and the relief sought herein could be granted by default if you fail to timely request a hearing.

If you have any questions about the issues raised in this NOV, please do not hesitate to contact Courtney Dean, Attorney, Division of Compliance and Enforcement, 1701 N. Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. Ms. Dean can also be reached at courtney.dean@puc.texas.gov or at (512) 936-7235.

Sincerely,

A handwritten signature in black ink, appearing to read 'Thomas Gleeson', written over a horizontal line.

Thomas Gleeson
Executive Director
Public Utility Commission of Texas

ATTACHMENT A
REPORT ON VIOLATIONS

MEMORANDUM

TO: Thomas Gleeson, Executive Director

FROM: Courtney Dean, Attorney
Division of Compliance and Enforcement

RE: **Report on Violations** by BT Cooke Solar LLC for violations of 16 TAC § 25.55, Concerning Failure to Comply with Winter Weather Emergency Preparedness Reporting Requirements

DATE: December 8, 2021

The Division of Compliance and Enforcement (DICE) of the Public Utility Commission of Texas (Commission) recommends the assessment of an administrative penalty against BT Cooke Solar LLC in the amount of \$550,000 for violations of 16 Texas Administrative Code (TAC) § 25.55, concerning winter weather emergency preparedness reporting requirements. Due to the continuing nature of the violations discussed herein, DICE recommends the total amount of administrative penalties assessed continue to increase for each day the violations persist after the date of this memorandum.

I. APPLICABLE LAW

PURA¹ § 35.0021(b) directs the Commission to establish rules requiring each provider of electric generation service in the ERCOT power region to implement measures to prepare its generation assets to provide adequate electric generation service during a weather emergency. In accordance with PURA § 35.0021(b), the Commission adopted substantive rule 16 TAC § 25.55(c) to detail the winter weather emergency preparedness requirements applicable to ERCOT-registered generation entities. Under 16 TAC § 25.55(c)(2), each generation entity in the ERCOT power region was required to submit to ERCOT a winter weather readiness compliance report no later than December 1, 2021.

PURA § 35.0021(g) provides that the Commission must impose an administrative penalty on any entity that violates a rule adopted under PURA § 35.0021 and does not remedy that violation within a reasonable period of time. Additionally, PURA § 15.023(a) authorizes the Commission to impose an administrative penalty for any violation of PURA or any rule adopted thereunder, regardless of whether or not there has been a reasonable time period for remedy. Under PURA § 15.023(b-1), the Commission is authorized to impose administrative penalties of up to \$1,000,000 per violation per day for violations of PURA § 35.0021.

Under PURA § 15.023(c), the amount of administrative penalty to be assessed for a violation must be determined based on an analysis of the seriousness of the violation, the economic harm

¹ Public Utility Regulatory Act, Tex. Util. Code Ann. §§ 11.001-58.303 (PURA).

caused by the violation, the history of previous violations, the amount necessary to deter future violations, efforts to correct the violation, and any other matter that justice may require.

II. STATEMENT OF FACTS

BT Cooke is a generation entity in the ERCOT power region as defined under 16 TAC § 25.55(b)(3). As a generation entity in the ERCOT power region, BT Cooke was required to submit to ERCOT a winter weather readiness report detailing its compliance with the Commission's weatherization requirements no later than December 1, 2021. As detailed in the attached affidavit of Dwayne W. Rickerson, Vice President of Grid Planning & Operations at ERCOT, BT Cooke failed to timely submit the required winter weather readiness report for a generation resource with a capacity of 59.8 megawatts (MW). ERCOT's records indicate that, as of December 8, 2021, BT Cooke's winter weather readiness report remains outstanding.

DICE asserts that violations of the provision at issue in this proceeding have two components: an initial violation triggered by the failure to submit the required information on the specified due date, and a continuing violation for the continuing failure to have the required information on file with the appropriate agency. Accordingly, DICE has determined that BT Cooke violated 16 TAC § 25.55(c)(2) by failing to timely submit its winter weather readiness report on December 1, 2021 and that BT Cooke continues to violate 16 TAC § 25.55(c)(2) each day until the required report is submitted. DICE notes that while the continuing violation may eventually be remedied once BT Cooke submits the required information, the initial failure to meet the December 1, 2021 deadlines is not remediable.

III. ADMINISTRATIVE PENALTY

Under PURA §§ 15.023(b-1), the Commission is authorized to assess an administrative penalty of up to \$1,000,000 per violation per day against any entity that violates a rule adopted under PURA § 35.0021. DICE has considered the above-detailed violations and recommends a total administrative penalty of \$550,000. The total administrative penalty is comprised of the following components:

- \$250,000 for failure to submit a winter weather readiness report by December 1, 2021, as required under 16 TAC § 25.55(c)(2); and
- \$50,000 for each day that a violation of 16 TAC § 25.55(c)(2) has persisted for the generation resource since December 1, 2021.

Accordingly, as of the date of this memorandum, DICE recommends an administrative penalty of \$550,000 for BT Cooke's failure to submit the requisite winter weather readiness information. Additionally, due to the continuing nature of the violations, DICE recommends that the administrative penalty be increased by \$50,000 per day for each day the violation of 16 TAC § 25.55(c)(2) continues after the date of this memorandum.

DICE bases its recommendation on consideration of the following factors, as required under PURA § 15.023(c):

1. The seriousness of the violation, including the nature, circumstances, extent, and gravity of a prohibited act and the hazard or potential hazard created to the health, safety, or economic welfare of the public

BT Cooke's failure to submit its winter weather readiness report as required under 16 TAC § 25.55(c)(2) is a serious violation of the highest degree.

During the week of February 14, 2021, extreme winter weather swept through the state, causing an unprecedented electric generation shortage within the ERCOT power region as generation facilities froze over, leaving millions of Texans without power for days at a time. The widespread and long-lasting power outages in sub-freezing temperatures caused human suffering and pervasive property damage for Texans across the ERCOT region.

In the aftermath of the winter storm, the Texas Legislature passed Senate Bill (SB) 3, amending PURA to require the Commission to develop weather emergency preparation rules to ensure that generation facilities in the state are properly equipped to handle future winter weather events. Under the authority of PURA § 35.0021(b), the Commission adopted these rules under 16 TAC § 25.55, including 16 TAC § 25.55(c)(2), in order to protect the health, safety, and economic welfare of the public and intended to prevent the recurrence of a winter weather public emergency.

The nature, circumstances, and gravity of BT Cooke's failure to submit a winter weather readiness report warrant enhanced penalties. The Commission's implementation of weather emergency preparation requirements was heavily publicized and adopted subsequent to a rulemaking process that incorporated input from public comments made by a number of stakeholders. Additionally, as a market participant in the ERCOT power region, BT Cooke has a duty to remain aware of and comply with applicable Commission rules and requirements. Accordingly, the nature and circumstances surrounding the violations indicate that BT Cooke should have been aware of the requirements to submit the information required under 16 TAC § 25.55(c)(2).

Further, BT Cooke's failure to file the required information has created a potential hazard to the health, safety, and welfare of the public. Without a winter weather readiness report, ERCOT and the Commission are unable to know whether BT Cooke has properly weatherized its generation unit to operate in the course of a future winter weather event. This lack of information endangers public health and safety by posing a reliability risk during the winter months. Additionally, this lack of information endangers the economic welfare of the public with respect to both personal damages and costs potentially pushed on to customers in the event of another winter generation shortage.

BT Cooke's failure to comply with the requirements is particularly serious in light of the Commission and ERCOT's enhanced regulatory focus on ensuring resource reliability. Accordingly, DICE recommends that the violations described in this memorandum justify enhanced penalties in an amount sufficient to reflect the severity of their nature.

2. Economic harm to property or the environment caused by the violation

While BT Cooke's failure to submit its winter weather readiness report has not caused any immediate economic harm to property or the environment, as detailed above, the violation has the potential to cause financial harm to the economic welfare of the public in the event of another winter generation shortage.

3. History of previous violations

Commission records do not indicate the BT Cooke has a prior history of other violations of PURA or Commission rules.

4. The amount necessary to deter future violations

Because 16 TAC § 25.55(c)(2) contains a one-time reporting requirement, this criterion is not directly applicable. However, given the gravity of violations that impact grid reliability in general, DICE believes this factor justifies an enhanced penalty to deter future violations of other reliability-focused requirements.

5. Efforts to correct the violation

BT Cooke failed to timely submit its winter weather readiness report by December 1, 2021. DICE is unaware of any effort by BT Cooke to submit the required information since the December 1, 2021 deadline.

6. Any other matter justice may require

BT Cooke's failure to submit its winter weather readiness report as required under 16 TAC § 25.55(c)(2) impacted one generation asset with a capacity of 59.8 MW—enough to power an estimated 11,960 homes during periods of peak demand. Accordingly, the potential impact of a weather-related failure at the generation resource is significant and merits the assessment of enhanced administrative penalties.

Further, DICE recommends that the administrative penalties assessed to BT Cooke for its violations of 16 TAC § 25.55(c)(2) be increased by \$50,000 day that the violations continue after the date of this memorandum. DICE believes the continued accumulation of penalties is necessary to ensure that the winter weather readiness report is ultimately filed.

Therefore, DICE recommends that an administrative penalty of \$550,000 for BT Cooke's violation of 16 TAC § 25.55(c)(2) is reasonable and appropriate when considered in light of the factors listed under PURA § 15.023(c). Additionally, DICE recommends that the penalty be increased by \$50,000 for each day that violations under 16 TAC § 25.55(c)(2) continue after the date of this memorandum.

IV. RELIEF SOUGHT

DICE recommends that the Commission issue an order with the following provisions:

- 1) BT Cooke violated 16 TAC § 25.55(c)(2) by failing to submit its winter weather readiness report by December 1, 2021, and the violation continues each day until BT Cooke submits its completed winter weather readiness report to ERCOT.
- 2) BT Cooke must pay an administrative penalty of \$550,000 for its violations, with the amount to be increased by \$50,000 for each day that violations of 16 TAC § 25.55(c)(2) continue after the date of this memorandum.
- 3) BT Cooke must submit to ERCOT its required winter weather readiness report within three days of the date of a final order.

V. CONCLUSION

DICE has determined that BT Cooke violated 16 TAC § 25.55(c)(2) by failing to timely submit required information to ERCOT and continues to violate 16 TAC § 25.55(c)(2) each day until the required information is submitted. DICE recommends an administrative penalty be assessed against BT Cooke in the amount of \$550,000, as increased by \$50,000 each day that violations of 16 TAC § 25.55(c)(2) continue after the date of this memorandum.

AFFIDAVIT OF DWAYNE W. RICKERSON

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, on this day personally appeared Dwayne W. Rickerson, who, being first duly sworn, did state as follows:

“My name is Dwayne W. Rickerson. I am employed as Vice President of Grid Planning & Operations with Electric Reliability Council of Texas, Inc. (ERCOT), having its principal place of business at 7620 Metro Center Drive, Austin, Texas. I am over the age of eighteen and am fully competent to make this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

ERCOT did not receive from BT Cooke Solar, LLC by December 1, 2021 the winter weather readiness report required by Public Utility Commission Rule 25.55(c)(2) for the following Generation Resource:

RIPPEY – UNIT1

ERCOT records indicate that this Resource has a capacity of approximately 59.8 MW.


Additionally, at the time this affidavit was executed on December 8, 2021, ERCOT has not received a winter weather readiness report for the above-identified Generation Resource.”

Further affiant sayeth not.

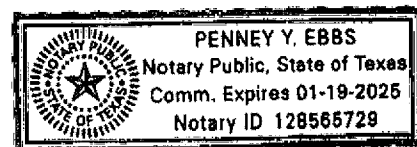


Signature of Affiant

SUBSCRIBED AND SWORN TO BEFORE ME this 8th day of December 2021.



Notary Public, State of Texas



ATTACHMENT B
COPY OF 16 TAC § 22.246

**Subchapter M. PROCEDURES AND FILING REQUIREMENTS IN PARTICULAR
COMMISSION PROCEEDINGS.**

§22.246. Administrative Penalties.

- (a) **Scope.** This section addresses enforcement actions related to administrative penalties or disgorgement of excess revenues 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, have the following meanings unless the context indicates otherwise:
- (1) **Affected Wholesale Electric Market Participant** -- An entity, including a retail electric provider (REP), municipally owned utility (MOU), or electric cooperative, that sells energy to retail customers and served load during the period of the violation.
 - (2) **Excess Revenue** -- As defined in §25.503 of this title (relating to Oversight of Wholesale Market Participants).
 - (3) **Executive director** -- The executive director of the commission or the executive director's designee.
 - (4) **Person** -- Includes a natural person, partnership of two or more persons having a joint or common interest, mutual or cooperative association, and corporation.
 - (5) **Violation** -- Any activity or conduct prohibited by PURA, the TWC, commission rule, or commission order.
 - (6) **Continuing violation** -- Except for a violation of PURA chapter 17, 55, or 64, and commission rules or commission orders adopted or issued under 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 administrative penalty for violations of PURA or a rule or order adopted under PURA.**
- (1) Each day a violation continues or occurs is a separate violation for which an administrative penalty can be levied, regardless of the status of any administrative procedures that are initiated under this subsection.
 - (2) The administrative penalty for each separate violation may be in an amount not to exceed \$25,000 per day, provided that an administrative 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 administrative penalty must 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) **Amount of administrative penalty for violations of the TWC or a rule or order adopted under chapter 13 of the TWC.**
- (1) Each day a violation continues may be considered a separate violation for which an administrative penalty can be levied, regardless of the status of any administrative procedures that are initiated under this subsection.
 - (2) The administrative penalty for each separate violation may be in an amount not to exceed \$5,000 per day.
 - (3) The amount of the penalty must be based on:
 - (A) the nature, circumstances, extent, duration, and gravity of the prohibited acts or omissions;

- (B) the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;
 - (C) the demonstrated good faith, including actions taken by the person, affiliated interest, or entity to correct the cause of the violation;
 - (D) any economic benefit gained through the violations;
 - (E) the amount necessary to deter future violations; and
 - (F) any other matters that justice requires.
- (e) **Initiation of investigation.** Upon receiving an allegation of a violation or of a continuing violation, the executive director will determine whether an investigation should be initiated.
- (f) **Report of violation or continuing violation.** If, based on the investigation undertaken in accordance with subsection (e) 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 must state the facts on which the determination is based and a recommendation on the imposition of an administrative penalty, including a recommendation on the amount of the administrative penalty and, if applicable under §25.503 of this title, a recommendation that excess revenue be disgorged.
 - (2) **Notice of report.**
 - (A) Within 14 days after the report is issued, the executive director will 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 may be given by regular or certified mail.
 - (B) For violations of the TWC or a rule or order adopted under chapter 13 of the TWC, within ten days after the report is issued, the executive director will, 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.
 - (C) The notice must include:
 - (i) a brief summary of the alleged violation or continuing violation;
 - (ii) a statement of the amount of the recommended administrative penalty;
 - (iii) a statement recommending disgorgement of excess revenue, if applicable, under §25.503 of this title;
 - (iv) 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 administrative penalty, or both the occurrence of the violation or continuing violation and the amount of the administrative penalty;
 - (v) a copy of the report issued to the commission under this subsection; and
 - (vi) a copy of this section, §22.246 of this title (relating to Administrative Penalties).
 - (D) If the commission sends written notice to a person by mail addressed to the person's mailing address as maintained in the commission's records, the person is deemed to have received notice:
 - (i) on the fifth day after the date that the commission sent the written notice, for notice sent by regular mail; or
 - (ii) on the date the written notice is received or delivery is refused, for notice sent by certified mail.
- (g) **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 chapter 13 of the TWC, or of a commission rule or commission order adopted or issued under those chapters.

- (B) Within 40 days of the date of receipt of a notice of violation set out in subsection (f)(2) of this section, the person against whom the administrative penalty or disgorgement 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 must 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 administrative 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 will 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 will institute further proceedings, including referral of the matter for hearing under subsection (i) of this section.
- (2) **Payment of administrative penalty, disgorged excess revenue, or both.** Within 20 days after the date the person receives the notice set out in subsection (f)(2) of this section, the person may accept the determination and recommended administrative penalty and, if applicable, the recommended excess revenue to be disgorged through a written statement sent to the executive director. If this option is selected, the person must take all corrective action required by the commission. The commission by written order will approve the determination and impose the recommended administrative penalty and, if applicable, recommended disgorged excess revenue or order a hearing on the determination and 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 (f)(2) of this section, the person may submit to the executive director a written request for a hearing on any or all of the following:
 - (A) the occurrence of the violation or continuing violation;
 - (B) the amount of the administrative penalty; and
 - (C) the amount of disgorged excess revenue, if applicable.
- (4) **Failure to respond.** If the person fails to timely respond to the notice set out in subsection (f)(2) of this section, the commission by order will approve the determination and impose the recommended penalty or order a hearing on the determination and the recommended penalty.
- (h) **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 administrative penalty, disgorged excess revenue if applicable, 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 must file a report with the executive director setting forth the factual basis for the settlement;
 - (B) the executive director will 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 the State Office of Administrative Hearings, the matter will be returned to the commission. If the settlement is approved, the commission will issue an order memorializing commission approval and setting forth commission orders associated with the settlement agreement.

- (i) **Hearing.** If a person requests a hearing under subsection (g)(3) of this section, or the commission orders a hearing under subsection (g)(4) of this section, the commission will refer the case to SOAH under §22.207 of this title (relating to Referral to State Office of Administrative Hearings) and give notice of the referral to the person. For violations of the TWC or a rule or order adopted under chapter 13 of the TWC, if the person charged with the violation fails to timely respond to the notice, the commission by order will assess the recommended penalty or order a hearing to be held on the findings and recommendations in the report. If the commission orders a hearing, the case will then proceed as set forth in paragraphs (1)-(5) of this subsection.
- (1) The commission will provide the SOAH administrative law judge a list of issues or areas that must be addressed.
 - (2) The hearing must be conducted in accordance with the provisions of this chapter and notice of the hearing must be provided in accordance with the Administrative Procedure Act.
 - (3) The SOAH administrative law judge will 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; of a commission rule or commission order adopted or issued under those chapters; or of chapter 13 of the TWC; and
 - (C) the amount of the proposed administrative penalty and, if applicable, disgorged excess revenue.
 - (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 an administrative penalty and, if applicable, disgorged excess revenue;
 - (B) if applicable, determine that a violation occurred but that, as permitted by subsection (g)(1) of this section, the person remedied the violation within 30 days and proved that the violation was accidental or inadvertent, and that no administrative penalty will be imposed; or
 - (C) determine that no violation or continuing violation has occurred.
 - (5) Notice of the commission's order issued under paragraph (4) of this subsection must be provided under the Government Code, chapter 2001 and §22.263 of this title (relating to Final Orders) and must include a statement that the person has a right to judicial review of the order.
- (j) **Parties to a proceeding.** The parties to a proceeding under chapter 15 of PURA relating to administrative penalties or disgorgement of excess revenue will be limited to the person who is alleged to have committed the violation or continuing violation and the commission, including the independent market monitor. This does not apply to a subsequent proceeding under subsection (k) of this section.
- (k) **Distribution of Disgorged Excess Revenues.** Disgorged excess revenues must be remitted to an independent organization, as defined in PURA §39.151. The independent organization must distribute the excess revenue to affected wholesale electric market participants in proportion to their load during the intervals when the violation occurred to be used to reduce costs or fees incurred by retail electric customers. The load of any market participants that are no longer active at the time of the distribution will be removed prior to calculating the load proportions of the affected wholesale electric market participants that are still active. However, if the commission determines other wholesale electric market participants are affected or a different distribution method is appropriate, the commission may direct commission staff to open a subsequent proceeding to address those issues.
- (1) No later than 90 days after the disgorged excess revenues are remitted to the independent organization, the monies must be distributed to affected wholesale electric market participants active at the time of distribution, or the independent organization must, by that date, notify the commission of the date by which the funds will be distributed. The independent organization must include with the distributed monies a communication that explains the docket number in which the commission ordered the disgorged excess revenues, an instruction that the monies must be used to

reduce costs or fees incurred by retail electric customers, and any other information the commission orders.

- (2) The commission may require any affected wholesale electric market participants receiving disgorged funds to demonstrate how the funds were used to reduce the costs or fees incurred by retail electric customers.
- (3) Any affected wholesale electric market participant receiving disgorged funds that is affiliated with the person from whom the excess revenue is disgorged must distribute all of the disgorged excess revenues directly to its retail customers and must provide certification under oath to the commission that the entirety of the revenues was distributed to its retail electric customers.