

PUC PROJECT NO. 52312

**REVIEW OF ADMINISTRATIVE
PENALTY AUTHORITY**

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**PUBLIC UTILITY COMMISSION
OF TEXAS**

**EXECUTIVE SUMMARY OF TCPA COMMENTS ON ADMINISTRATIVE
PENALTIES PROPOSAL FOR PUBLICATION APPROVED ON AUGUST 19, 2021**

- 16 TAC § 22.246(b)(5): amend with new subpart (i) to clarify, consistent with the statute, that a violation of PURA § 35.0021(c) does not occur, and a generation asset is therefore not subject to an administrative penalty, until after ERCOT has conducted an inspection, found a potential violation, and provided a generation asset owner with the opportunity and reasonable time to remedy the potential violation. Additionally, the rule should recognize the right of the asset owner to appeal ERCOT's determination, and should not apply penalties if the resource has sought to mothball or retire the resource. In the alternative, modify subsection (g) by adding subpart (g)(1)(B)(i) to incorporate these recommendations.
- 16 TAC § 22.246(c)(1)-(2): revise to reiterate the need for reasonable remediation implementation timelines and clarify that a "separate" violation means a violation resulting from a company's distinct action or inaction and is not calculated on a "per unit" basis unless a distinct action or inaction contributed uniquely to that unit being in violation of PURA § 35.0021 or a related Commission rule or order.
- 16 TAC § 22.246(c)(3): revise to require considerations in the amount of penalty to include: whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided; and whether the asset owner demonstrated good faith, including preventive or corrective actions.
- 16 TAC § 22.246(f)(2): revise to provide email notice of a report.

- 16 TAC § 25.8(b)(3)(A): revise to reflect the above recommendations regarding opportunity to cure in the definition of Class A violations related to PURA § 35.0021.

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**PUBLIC UTILITY COMMISSION

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**TCPA COMMENTS ON THE PROPOSED AMENDMENTS TO 16 TAC §§ 22.246 AND
25.8**

Texas Competitive Power Advocates (“TCPA”) is a trade association representing power generation companies and wholesale power marketers with investments in Texas and the Electric Reliability Council of Texas (“ERCOT”) wholesale electricity market. TCPA members¹ and their affiliates provide a wide range of important market functions and services in ERCOT, including development, operation, and management of power generation assets, power scheduling and marketing, energy management services, and sales of competitive electricity service to consumers. TCPA members participating in this filing provide nearly ninety percent (90%) of the non-wind electric generating capacity in ERCOT, representing billions of dollars of investment in the state, and employing thousands of Texans.

TCPA appreciates the opportunity to provide comments on the proposed amendments filed on August 19, 2021 in Project No. 52312, *Review of Administrative Penalty Authority* amending 16 Texas Administrative Code ("TAC") §§ 22.246 and 25.8 to implement additional administrative penalty authority as required by Senate Bill 3, 87th Legislative Session (Regular Session) ("SB 3"). As these comments are filed on or before September 16, 2021, they are timely submitted.

¹ TCPA member companies participating in these comments include: Calpine, Cogentrix, EDF Trading North America, Exelon, Luminant, NRG, Shell Energy North America, Talen Energy, Tenaska, TexGen Power, and WattBridge.

GENERAL COMMENTS

Weather preparedness is essential for generation assets to perform effectively year-round. TCPA members' experience is that generation asset owners are sufficiently motivated to invest in resource weatherization by two powerful forces: (1) a commitment to serving end-use customers; and (2) competitive market realities, which reward availability and discourage unavailability. While imposition of up to an \$1,000,000 administrative penalty might add some additional motivation to abide by the Commission's reliability standards, over-imposition of such penalties could result in a hemorrhaging of financial resources that could otherwise be used to re-invest in reliability-related plant maintenance and preparedness. TCPA offers these comments to facilitate Commission Staff's efforts to implement important legislation that will ensure generation asset owners abide by the Commission's reliability preparedness rules in a reasonable and equitable manner.

TCPA also requests that the Commission track the requirements of SB 3 and, as described by Commission Staff's proposed draft of weatherization standards,² ensure these rules enforce a reliability *preparedness* standard rather than a reliability *performance* standard. By recognizing the standard is for reliability preparedness, the Commission should consider, as much as possible, a generation asset owner's individual actions or inactions in determining the number of violations of the standard rather than using an arbitrary metric such as a "per resource" accounting that could result in over penalizing a generation asset owner. This will provide the Commission an opportunity to manage the higher maximum penalty authority provided by SB 3, encouraging a

² *Rulemaking to Establish Electric Weatherization Standards*, Project No. 51840, Proposal for Publication for New 16 TAC § 25.55 as Approved at the August 26, 2021 Work Session at 1 (Aug. 26, 2021) ("It is the intent of the commission that the primary objective of implementing phase one weather emergency *preparedness* reliability standards is to ensure that the electric industry is prepared to provide continuous reliable electric service throughout this upcoming winter season and to comply with the statutory deadline for the adoption of weather emergency *preparedness* reliability standards set forth in SB 3." (emphasis added)).

culture of compliance while avoiding unintended consequences or incentives to maximize penalty amounts.

**COMMENTS ON PROPOSED
AMENDMENTS TO 16 TAC §§ 22.246 AND 25.8**

A. 16 TAC § 22.246(b)(5)

PURA § 35.0021(c) requires: (1) the independent organization certified under § 39.151 for the ERCOT power region to inspect generation assets in the power region for compliance with the Commission's reliability standards, (2) for such independent organization to provide the owner of a generation asset with a reasonable period of time in which to remedy any violation the independent organization discovers in an inspection; and (3) for the independent organization to then report to the Commission any violation. A "violation" that is subject to penalties under subsection (c)(2) should not be considered to occur until a generation asset owner has an opportunity and reasonable time to remedy a potential violation and fails to do so. TCPA believes that the appropriate placement for this is in the definition of the violation to make it clear that this opportunity precedes other steps within the rule.

It is imperative that any deadline for an opportunity for remedy be a "reasonable time period" as required by the statute. To be a reasonable time period, circumstances must be taken into consideration including but not limited to the time required for the work to be completed, the time it takes for any parts to be acquired, the appropriate timing for any unit to be taken offline, the availability of necessary skilled labor, or other supply chain issues. For example, if a violation occurs, but ERCOT does not believe the unit can be taken offline for the requisite time period without affecting reliability until a certain date, or there are no available workers or contractors with the skills to reliably perform the work until a certain date, the deadline should be set considering those delays combined with the time required to complete the work. Similarly, if the

required remedy renders a resource uneconomic and it elects to suspend operations through either mothballing or retirement, then there is no value to be gained by applying an administrative penalty to the resource, since any question of its go-forward compliance is rendered moot.

For these reasons, the following amendment to the draft language is recommended:

(b) **Definitions.** The following words and terms, when used in this section, have the following meanings unless the context indicates otherwise:

(5) **Violation** – Any activity or conduct prohibited by the Public Utility Regulatory Act (PURA), the Texas Water Code (TWC), commission rule, or commission order.

(i) For prohibited conduct related to PURA §§ 35.0021 or 38.075, a violation does not occur until the independent organization certified under § 39.151 for the power region conducts an inspection of a generation resource and provides an opportunity and reasonable time for the asset owner to appeal the determination or implement a remedy. Any deadline for the opportunity to remedy a potential violation under PURA §§ 35.0021 or 38.075 or rules adopted under those provisions must allow for reasonable period of time for the remedy to be completed in light of the circumstances, including but not limited to the time required for the work to be completed, the time it takes for any parts to be acquired, the appropriate timing for any unit to be taken offline, existing supply chain issues, or the availability of skilled workers. The deadline may be subject to extension upon a showing of need for the extension. An appeal of

the independent organization's determination or an application filed under Section 25.502(e) to mothball or retire the resource will automatically toll the deadline.

In the alternative, if the Commission disagrees that the above language should be included in the definition of violation, language concerning the opportunity to remedy should be incorporated into subsection (g)(1)(B) as follows:

(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.

(i) For prohibited conduct related to PURA §§ 35.0021 or 38.075, an opportunity and reasonable time to appeal the determination and implement a remedy must be given by the independent organization certified under § 39.151 for the power region. The opportunity to appeal and remedy a potential violation under PURA §§ 35.0021 or

38.075 and this section must be provided prior to the steps listed in subsections (e) and (f)(2) and will negate those steps if the potential violation is remedied. Any deadline for the opportunity to remedy under PURA §§ 35.0021 or 38.075 and this subsection must allow for reasonable period of time for the remedy to be completed in light of the circumstances, including but not limited to the time required for the work to be completed, the appropriate timing for any unit to be taken offline, the time it takes for any parts to be acquired, existing supply chain issues, or the availability of skilled workers. The deadline may be subject to extension upon a showing of need for the extension. An appeal of the independent organization's determination or an application filed under Section 25.502(e) to mothball or retire the resource will automatically toll the deadline.

B. 16 TAC § 22.246(c)(1)-(2)

As drafted, the rule is ambiguous with respect the nature of each “separate violation.” PURA § 15.023(b-1) was implemented as part of a suite of new measures intended to prepare for, prevent, and respond to weather emergencies and power outages. By increasing the maximum potential administrative penalty for violations of weather preparedness standards, the Legislature included a “stick” rather than “carrot” approach to ensuring generation asset owners within ERCOT would take appropriate measures to harden their facilities against future severe weather events like Winter Storm Uri. This deterrent is more than adequate to ensure that generation asset owners weatherize every resource where each “separate violation” means each “distinct failure” to abide by the standards.

Consider, for example, “Generation Company A,” that owns multiple generation resources within ERCOT. Presume Generation Company A purchases cold weather instrumentation protection devices for all of its generators, after diligent research and with a good-faith belief in the efficacy of the device; however, upon ERCOT inspection, the device is deemed insufficient per the weatherization standards. Because Generation Company A could be deemed in violation of the weatherization rules through no intentional malfeasance, the “separate violation” should be the fleet-wide application of the device – not the individual “failure” on a resource-by-resource basis. Generation Company A should also have an opportunity to appeal the violation deemed by ERCOT.

Imposing a possible \$1,000,000 per resource, per day violation would not do anything to deter weatherization failures that are beyond a generation asset owner’s control and would be overly punitive. It would also not deter the specific action that resulted in the failure and would only serve to require the generation asset owner to pay large administrative penalties instead of spending that money on additional resource weatherization measures. For these reasons, the following amendment to the draft language is recommended:

- (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. An administrative penalty for violation of PURA §35.0021 or PURA §38.075, or a commission rule or commission order adopted to implement PURA §35.0021 or PURA §38.075 will not be assessed until after the entity has been provided a reasonable period of time

in which to remedy any potential violation discovered in an inspection or to appeal the inspector's determination that a violation has occurred, or if the generation resource is following the process described in Section 25.502(e) to mothball or retire the resource.

- (2) The administrative penalty for each separate violation of PURA § 35.0021, or PURA § 38.075, or a commission rule or commission order adopted under to implement PURA § 35.0021 or PURA § 38.075 will be in an amount not to exceed \$1,000,000 per violation per day. For all other violations, the administrative penalty for each separate violation will be in an amount not to exceed \$25,000 per violation per day. A "separate violation" means a company's distinct action or inaction that directly results in a violation of the commission rule or commission order. A "separate violation" does not mean a resource-by-resource, unit by unit, or other duplicative violation that results in the stacking of penalties where a single action or inaction results in multiple units or resources failing to abide by the commission rule or commission order. 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.

C. 16 TAC § 22.246 (c)(3)

TCPA recommends additions to the list of considerations for the amount of the administrative penalty, similar to some of those included in subsection (d). TCPA believes these additions are appropriate for other potential violations, but especially potential violations related to weather emergency preparedness. The standards for weather emergency preparedness are still being developed and the extent to which existing generators must modify facilities of varying ages

in still unknown. While such considerations could arguably be considered within subsection (A), additional clarity would be beneficial to help ensure full consideration of the circumstances. Thus, TCPA recommends revising paragraph (E) and adding paragraph (F):

- (E) demonstrated good faith, including efforts to prevent or correct the violation; ~~and~~
- (F) whether the violation was attributable to mechanical or electrical failures and
whether the violation could have been reasonably anticipated and avoided; and
- (G) ~~(F)~~ (existing language).

D. 16 TAC § 22.246 (f)(2)

In light of the current situation with the pandemic and the increased periods in which personnel may be working from alternate locations, and the necessity for prompt attention to any potential violation, TCPA recommends that subsection 16 TAC § 22.246 (f)(2)(B) include a requirement that notice also be provided by email to the contact(s) on file with the Commission.

- (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 email and regular or certified mail.

E. 16 TAC § 25.8(b)(3)(A)

Consistent with the above recommendations for 16 TAC § 22.246, further clarifying the meaning of “separate” and “violation” as relates to penalties applicable for violations under PURA § 35.0021 is proposed. For these reasons, the following amendment to the draft language is recommended:

- (b) **Classification system.**

(3) **Class A violations.**

- (A) Each separate violation of PURA § 35.0021, PURA § 38.075, or a commission rule or commission order adopted under PURA § 35.0021 or PURA § 38.075 is a Class A violation and the administrative penalty will not exceed \$1,000,000 per violation per day. The meaning of “separate” and “violation” for Class A violations of PURA § 35.0021 is described in 16 TAC § 22.246. Penalties for all other Class A violations will not exceed \$25,000 per violation per day.


CONCLUSION

TCPA appreciates the opportunity to comment on the proposed amendments. We look forward to working with the Commission, Commission Staff, and other stakeholders on this matter.

Dated: September 16, 2021

Respectfully submitted,

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