Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the Texas Register does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

Title 1. Administration

Part 3. Office of the Attorney General

Chapter 55. Child Support Enforcement

Subchapter F. Collections and Distributions

1 TAC §55.143

The Office of the Attorney General (OAG) adopts a new rule at 1 Texas Administrative Code (TAC), Part 3, Chapter 55, Subchapter F, §55.143. The rule addresses an incentive program for paying child support arrears and is adopted with minor non-substantive edits to the text as published in the November 5, 2021, issue of the Texas Register (46 TexReg 7479). The rule will be republished.

Explanations of and Justification for the Rules

The rule prescribes how the OAG, a Title IV-D agency (Texas Family Code §231.001) will administer a payment incentive program to promote payment by obligors who are delinquent in satisfying child support arrears assigned to the Title IV-D agency. The adopted new §55.143 identifies the program requirements. The current program, however, is not changing with §55.143’s implementation.

Section Summary

Section 55.143 identifies criteria, conditions, procedures, and financial incentives for the program. The OAG will make the application form available on its website (Texas Attorney General, Child Support Division’s Arrears Payment Incentive Program Application (Form 1575)).

Fiscal Impact on State and Local Government

Ruth Anne Thornton, Director of Child Support, has determined that for the first five-year period the adopted rule is in effect there are no foreseeable additional costs to state or local government as a result of enforcing or administering the adopted rule. In addition, enforcing or administering the rule does not have foreseeable implications relating to revenues of state or local governments.

There are, however, foreseeable reductions in costs to state or local government as a result of enforcing or administering the adopted rules. The program will likely reduce costs to the OAG and allow for reallocation of resources by increasing case closures. This is because the state’s cost to maintain indefinitely non-paying cases solely for the purpose of attempting to collect state-owned arrearage balances likely exceeds the funds that might eventually be collected and retained by the state through various collection remedies.

By creating an incentive for obligors to make increased payments to satisfy their arrearage balances more quickly, this program will result in increased case closures and reduced state costs.

Public Benefits

Ms. Thornton has also determined that for each year of the first five years the adopted rule is in effect the public will benefit from increased payments by obligors who are delinquent in satisfying child support arrears assigned to the OAG.

Because state-owned arrears are often the last portion of a child support obligation collected, the program has demonstrated to be a proven incentive for obligors to send in more payments in higher amounts and in an expedited manner. As a result, families’ collections have increased. In cases with only state-owned arrearages remaining, the program has proven to be an incentive for many noncompliant obligors to start making voluntary payments to satisfy their remaining obligations.

Probable Economic Costs

Ms. Thornton has determined that for each year of the first five-year period the adopted rules are in effect, there are no anticipated economic costs to persons who are required to comply with the adopted rules. The adopted new §55.143 identifies the program requirements, but the current program is not changing with §55.143’s implementation.

Fiscal Impact on Small Businesses, Micro-Businesses, and Rural Communities

Ms. Thornton has determined that for each of the first five-year period the adopted rule is in effect, there will be no foreseeable adverse fiscal impact on small business, micro-businesses, or rural communities. As stated, the adopted new §55.143 identifies the program requirements, but the current program is not changing with §55.143’s implementation.

Since the adopted rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, is not required.

Local Employment or Economy Impact

Ms. Thornton has determined that the adopted rule does not have an impact on local employment or economies. Therefore, no local employment or economy impact statement is required under Texas Government Code §2001.022.

Government Growth Impact Statement
In compliance with Texas Government Code §2001.0221, the OAG has prepared the following government growth impact statement. During the first five years the adopted rule would be in effect, the adopted rule:

- will not create or eliminate a government program (the program was first authorized by the Texas legislature in 2011, and the OAG has successfully operated the program since 2012, first as a limited pilot program, and then as a statewide program beginning in 2018);
- will not require the creation of new employee positions or the elimination of existing employee positions;
- will not require an increase or decrease in future legislative appropriations to the agency;
- will not require an increase or decrease in fees paid to the agency;
- will create a new regulation;
- will not expand, limit, or repeal an existing regulation;
- will not increase or decrease the number of individuals subject to the rule’s applicability; and
- will not positively or adversely affect this state’s economy.

TAKINGS IMPACT ASSESSMENT

Ms. Thornton has determined that no private real property interests are affected by the adopted rules and the adopted rules do not restrict, limit, or impose a burden on an owner’s rights to his or her private real property that would otherwise exist in the absence of government action. As a result, the adopted rules do not constitute a taking or require a takings impact assessment under Texas Government Code §2007.043.

SUMMARY OF PUBLIC COMMENTS

The adopted rule was published in the November 5, 2021 issue of the Texas Register (46 TexReg 7479). The deadline for public comment was December 6, 2021. The OAG did not receive any comments from interested parties on the rule, as proposed, during the 30-day public comment period.

STATUTORY AUTHORITY. OAG adopts new 1 TAC §55.143 pursuant to Texas Family Code §§231.003 and 231.124. Texas Family Code §231.001 designates OAG as Texas’s Title IV-D agency. Section 231.003 authorizes the Title IV-D agency to by rule promulgate procedures for the implementation of Chapter 231. Section 231.124 provides that the OAG may establish and administer a payment incentive program to promote payment by obligors who are delinquent in satisfying child support arrearages.

Cross-reference to Statute. New §55.143 implements an incentive program to promote payment of child support arrearages as permitted by Texas Family Code §231.124.

§55.143. Arrears Payment Incentive Program.

(a) The Arrears Payment Incentive Program is a voluntary program administered by the Office of the Attorney General (OAG), a Title IV-D agency, to promote payment by obligors who are delinquent in satisfying child support arrearages assigned to the Title IV-D agency under Texas Family Code §231.104(a). The program is established pursuant to Texas Family Code §231.124. The program provides a credit for every dollar amount paid by the obligor on interest and arrearage balances during each month of the obligor’s voluntary enrollment in the program. Participation by an obligor in the program does not prohibit the OAG from pursuing any other collection method authorized by law.

(b) The following criteria must be met for an obligor to be eligible to participate in the program:

1. There must be a final Texas child support order in the obligor’s case;
2. The obligor must have and maintain a current address on record with the OAG;
3. There must be at least $500 in both state-owned arrears (the child support obligation assigned to the state under Texas Family Code §231.104(a) that accrued during any month the obligee received TANF/AFDC public assistance benefits), and unrecovered assistance (the amount of money paid in the form of public assistance under the Title IV-A program that has not yet been recovered from collections applied to state-owned arrears for the case);
4. The child support obligation must not be payable to the Department of Family and Protective Services;
5. The obligor must not have a pending bankruptcy case;
6. The obligor’s case must not be one in which the OAG is providing intergovernmental services under Texas Family Code Chapter 159; and
7. The obligor must not be currently incarcerated.

(c) The following conditions apply to an obligor’s continued participation in the program:

1. To receive program matching payment credits reducing state-owned arrears, an obligor must pay the current support obligations for the month in full, including medical and dental support, if any, plus make a payment toward the child support arrears balance;
2. An obligor must make at least one qualifying arrearage payment within any 180-day period for continued participation in the program. Failure by an obligor to make at least one qualifying arrearage payment within any 180-day period may result in the OAG removing the obligor from the program;
3. Payments must be voluntarily paid by the obligor or by the obligor’s employer through income withholding; and
4. If an obligor enrolled in the program seeks federal bankruptcy protection, the obligor will no longer be eligible to receive program matching payment credits and will be removed from the program while the bankruptcy proceeding is pending.

(d) The following procedures apply to enrollment in the program:

1. The OAG will make the Texas Attorney General, Child Support Division’s Arrears Payment Incentive Program Application (Form 1575) available on its website;
2. If an obligor has multiple cases and wants each case enrolled in the program, the obligor will need to apply to the program for each case;
3. The obligor may apply for initial enrollment in the program, regardless of whether the obligor is currently making payments on the case;
4. If the obligor is removed from the program, there will be a six-month waiting period to be eligible to re-apply; and
5. An obligor may be immediately eligible for re-enrollment if a lump sum payment equaling at least three full months of support obligations, including any periodic court-ordered arrears payments, is paid through the Texas Child Support State Disbursement Unit.
The following terms apply to the financial incentives to be offered under the program:

1. If the obligor pays all current support obligations for the month, any additional amounts paid towards the child support arrears will be matched with a dollar-for-dollar credit that will be applied to reduce state-owned child support arrears. Program matching payment credits will not be applied to reduce medical support or dental support arrears. Program matching payment credits will not reduce any family-owned arrears;

2. An obligor is eligible to earn program matching payment credits from the date of acceptance into the program;

3. Program matching payment credits automatically stop once unrecovered assistance is paid in full or state-owned child support arrears are paid in full, whichever occurs first; and

4. Payments received on other cases involving the obligee may impact the portion of arrears on the obligor’s case that are eligible for program matching payment credits.

(f) The following payments are not eligible for program matching payment credits:

1. Federal offsets;
2. State debt setoffs;
3. Lottery intercepts;
4. Bond forfeitures;
5. Monies received as the result of child support liens or levies; or
6. Payments made directly to the obligee and not through the Texas Child Support State Disbursement Unit.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency’s legal authority.

The Texas Health and Human Services Commission (HHSC) adopts new §351.843, concerning the Early Childhood Intervention Advisory Committee, in Texas Administrative Code (TAC), Part 15, Chapter 351, Subchapter B, Division 1.

Section 351.843 is adopted without changes to the proposed text as published in the December 3, 2021, issue of the Texas Register (46 TexReg 8159). This rule will not be republished.

BACKGROUND AND JUSTIFICATION

The purpose of the adoption of new §351.843 is to move the ECI advisory committee requirements from 40 TAC Chapter 101, Subchapter C, Division 3 to 1 TAC Chapter 351 and format the advisory committee rule so it aligns with other HHSC advisory committee rules.

The proposed repeal of 40 TAC Chapter 101, Subchapter C, Division 3, will remove rules related to ECI from the chapter related to the Department of Assistive and Rehabilitative Services, which was abolished September 1, 2018, and relocate them to 1 TAC Chapter 351, where other HHSC advisory committee rules are located. The repeal was published elsewhere in this same issue of the Texas Register.

COMMENTS

The 31-day comment period ended January 3, 2022.

During this period, HHSC received a comment regarding the proposed rule from one commenter, a parent. A summary of comments relating to §351.843 and HHSC’s response follows.

Comment: The commenter suggested new §351.843 not be added if moving the rule negatively impacts the visibility of the committee, makes referrals to ECI more difficult, or gives child-care providers more latitude in determining if children should be referred.

Response: HHSC declines to revise the rule in response to this comment. The new rule does not change any impacts or requirements.

STATUTORY AUTHORITY

New §351.843 is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency’s legal authority.

Filed with the Office of the Secretary of State on February 24, 2022.

TRD-202200670
Austin Kinghorn
General Counsel
Office of the Attorney General
Effective date: March 16, 2022
Proposal publication date: November 5, 2021
For further information, please call: (512) 460-6673

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 351. COORDINATED PLANNING AND DELIVERY OF HEALTH AND HUMAN SERVICES

SUBCHAPTER B. ADVISORY COMMITTEES

DIVISION 1. COMMITTEES

1 TAC §351.843
The Public Utility Commission of Texas (commission) adopts amendments to existing 16 Texas Administrative Code (TAC) §22.246, relating to Administrative Penalties. The commission adopts this rule with changes to the proposed rule as published in the September 3, 2021, issue of the Texas Register (46 TexReg 5517). The rule will be republished. This rule will implement an amendment to the Public Utility Regulatory Act (PURA) §15.023(b-1) enacted by the 87th Texas Legislature that establishes an administrative penalty not to exceed $1,000,000 for violations of PURA §35.0021 or §38.075, each relating to Weather Emergency Preparedness. In response to filed comments, these rules will also clarify the application of certain statutory provisions relating to the commission's penalty authority and applicable remedy periods.

The commission received comments on the proposed rule from AEP Texas Inc., CenterPoint Energy Houston Electric, LLC, Oncor Electric Delivery Company LLC, and Texas-New Mexico Power Company (collectively, the Joint ERCOT TDUs); Texas Electric Cooperatives, Inc. (TEC); Texas Competitive Power Advocates (TCPA); Texas Public Power Association (TPPA); and Lower Colorado River Authority and Lower Colorado River Authority Transmission Services Corporation (collectively, LCRA).

General Comments
Statutory Interpretation of PURA §15.023(a), §15.024(c), §35.0021(g), and §38.075(d)

PURA §15.023(a) and §15.024(c) were in effect prior to the 87th session of the Texas Legislature and will be referred to as preexisting law. PURA §35.0021 and §38.075 were both enacted by the 87th Texas Legislature and will be referred to as the weather preparedness statutes. Rules adopted and orders issued under these statutes will be referred to as weather preparedness rules and weather preparedness orders respectively.

Commission Comment

Commenters have noted, either explicitly or by implication, several conflicts between the weather preparedness statutes and preexisting law. The commission addresses the specifics of these comments throughout this order where relevant. The statutory underpinnings for the resolution of these conflicts are discussed under this General Comments heading. The weather preparedness statutes were enacted after the preexisting statutes and are more specific in their application. Accordingly, under the Code Construction Act §311.025-31.026, the weather preparedness statutes prevail in any conflicts.

The first issue involving the interaction of preexisting law and the weather preparedness statutes relates to circumstances in which the commission has authority to issue an administrative penalty for a violation of a weather preparedness statute, rule, or order.

Under PURA §15.023(a), "[t]he commission may impose an administrative penalty against a person regulated under [PURA, Title II] who violates [PURA, Title II] or a rule or order adopted under [PURA, Title II]." Notably, the weather preparedness statutes are located in PURA, Title II. Under the Code Construction Act §311.016, "may" creates discretionary authority. Therefore, under preexisting law, the commission has general discretion to impose administrative penalties for violation of a weather preparedness statute, rule, or order.

Each of the weather preparedness statutes contains an identical provision that reads "[t]he commission shall impose an administrative penalty on an entity, including a municipally owned utility or an electric cooperative, that violates a [weather preparedness rule] and does not remedy that violation within a reasonable period of time." Under the Code Construction Act, "shall" imposes a duty. Accordingly, if an entity violates a weather preparedness rule, the commission is required to impose an administrative penalty.

In comments submitted on various provisions throughout the two proposed rules, TCPA, TEC, Joint ERCOT TDUs, and LCRA each interpret the language of the weather preparedness statutes to mean that the commission cannot impose an administrative penalty against an entity that violates a weather preparedness statute, rule, or order unless the entity fails to remedy the violation within a reasonable period of time.

Commission Response

The commission disagrees that it cannot impose an administrative penalty against an entity that violates a weather preparedness requirement unless the entity fails to remedy the violation within a reasonable period of time. As the commenters point out, each of the weather preparedness statutes indicate the commission shall impose a penalty if a violation is not remedied in a reasonable period of time. However, neither of the weather preparedness statutes impose or suggest any limitation on PURA §15.023(a), which provides the commission with discretionary authority to issue a penalty for a violation of PURA, Title II or a rule or order adopted under Title II.

The interpretation that the commission is prevented from issuing an administrative penalty without first giving an entity an opportunity to remedy the violation fails on a policy level as well, as such a limitation would create a significant compliance loophole. Under such an interpretation, an entity would be incentivized to delay implementing any costly weather preparedness measure until after it was identified by the Electric Reliability Council of Texas (ERCOT) or the commission, because the regulatory risk of noncompliance would be eliminated. If the violation is discovered, the entity would be assured a reasonable period of time to remedy the violation, regardless of the circumstances surrounding the violation. If it is not discovered, potentially costly upgrades could be avoided completely. Moreover, an entity could even fail to meet the same requirement multiple times, each time relying upon a built-in cure period to address any compliance issues.

The commission adopts amended §22.246(g)(5)(C) to clarify the commission's discretionary penalty authority under preexisting law.

The next interaction of potentially conflicting statutes involves potential exceptions to the commission's discretionary penalty authority.
authority under §15.023(a). The first exception originates from the aforementioned provision of the weather preparation statutes that requires the commission to impose a penalty if a weather preparation rule is violated and not remedied in a reasonable period of time. The second comes from PURA §15.024(c), which states that "a penalty may not be assessed under this section if the person against whom the penalty may be assessed remedied the violation before the 31st day after the date the person receives [a formal notice of violation]." A person who claims to have remedied an alleged violation has the burden of proving to the commission that the alleged violation was remedied and was accidental or inadvertent." Under the Code Construction Act §311.016, "may not" imposes a prohibition. Therefore, the commission is prohibited from imposing a penalty for a violation of Title II or a rule or order adopted under Title II if the entity can demonstrate that the violation was accidental or inadvertent and was remedied before the 31st day after receiving notice under Subsection (b).

Commission Response

The commission modifies §22.246 to reflect two exceptions to the commission's discretionary penalty authority. First, consistent with the weather preparedness statutes, under adopted §22.246(g)(5)(C)(ii), the commission is required to issue an administrative penalty for a violation of a weather preparedness rule that was not remedied within a specified timeframe. Second, consistent with PURA §15.024(c), under adopted §22.246(g)(5)(C)(ii), the commission is prohibited from issuing an administrative penalty for a violation of a weather preparedness statute, rule, or order if the violation is remedied within a specified timeframe, and was accidental or inadvertent. In this instance, the alleged violator has the burden of proving that each of these conditions was met. Each of these exceptions to the commission's general discretionary authority is justified because under the Code Construction Act, the more specific provisions of PURA §15.024(c) and the weather preparedness statutes control over PURA §15.023(a). The commission addresses the specified timeframes below. The commission also modifies the rule to clarify that neither of the above exceptions apply to a violation that is not remediable.

The third potential conflict of laws relates to the appropriate remedy period for purposes of the exceptions to the commission's discretionary administrative authority. Under preexisting law, the general remedy period for any violation is 30 days after the receipt of a formal notice of violation. Under the weather preparedness statutes, the remedy period is a reasonable period of time. TPPA contends that these are two distinct remedy periods and argued that the commission should clarify that the two periods are different. Conversely, Joint ERCOT TDUs argue that the reasonable remedy period takes precedence over the generic 30-day remedy period, because the reasonable remedy period is specific to weather preparedness violations. Joint ERCOT TDUs further argue that a reasonable remedy period is "a fact question, dependent on the particular facts and circumstances attendant to the situation. A reasonable period of time for remedying a violation of a rule established pursuant to the Weatherization Statutes may not, therefore, be established by rule, or without any consideration of the particular facts and circumstances giving rise to a violation."

Commission Response

The commission agrees with Joint ERCOT TDUs - while acknowledging that Joint ERCOT TDUs were making this argument in support of a different ultimate position - that there is only a single, reasonability-based remedy period for violations of weather preparation requirements. Weather preparedness violations pose a serious risk to reliability of the bulk electric system, and an entity that violates these rules must remedy those violations as expeditiously as reasonably possible. Applying a generic remedy period, as provided by preexisting law, or two separate remedy periods, as recommended by TPPA, would lead to contradictory results and would undermine the effectiveness of the commission's statutorily mandated regulatory objectives. If, for example, the reasonable remedy period for a violation is 20 days, if an entity fails to remedy that violation within 20 days, the commission is required by the weather preparedness statutes to impose an administrative penalty. Affording that entity a second remedy period after it has received a formal notice of violation from the executive director clearly conflicts with the plain language of the weather preparedness statutes.

Under the adopted §22.246(g)(5)(C), the remedy period for both exceptions to the commission's discretionary penalty authority is a "reasonable" period of time. The commission agrees with Joint ERCOT TDUs that the weather preparedness statutes establish a remedy period that is dependent upon the particulars of the violation and, potentially, the circumstances surrounding the violation.

The final potential conflict between preexisting law and the weather preparedness statutes is the process and timing surrounding the remedy periods. Under preexisting law, the remedy period begins after the entity has received a formal notice of violation from the executive director. Under the weather preparedness statutes, the remedy period, in many cases, will begin when ERCOT provides the entity with the results of a weather preparedness inspection. This is a significant distinction, because §22.246 provides specific notice and process requirements that are not applicable to a remedy period that takes place prior to the issuance of a formal notice of violation.

Commission Response

The process surrounding the application of the period for remedying violations is determined by the applicable substantive weather preparedness rules. However, because the commission has not yet adopted its final Phase II weather preparedness rules, adopted §22.246(g)(5)(D) establishes default procedural rules surrounding remedying weather preparedness violations that supplement the other notice of violation provisions of that section. These procedural provisions mirror the preexisting process for the generic penalty period under §22.246(g)(1).

Specifically, under adopted §22.246(g)(5)(D) an entity that remedies a violation discovered during an ERCOT inspection by the deadline provided by ERCOT is deemed to have remedied that violation in a reasonable period of time. If ERCOT has not provided a deadline, the executive director will provide the entity with a written notice describing the violation and a deadline for remediying the violation. Finally, if the commission disagrees that the deadline provided by ERCOT or the executive director is reasonable, the commission will determine what the deadline should have been. The commission will use this updated deadline to determine the applicability of the exceptions to the commission's discretionary penalty authority and, if appropriate, as a factor in determining the magnitude of the administrative penalty assessed against the entity for the violation. This updated deadline does not, however, guarantee that the entity will be provided additional time to remedy the violation in the future. Accordingly, an entity should continue its remedial efforts even after it misses the deadline provided by ERCOT or the executive director.
§22.246(b)(5), Definition of violation

§22.246(b)(5) defines the term "Violation" as "[a]ny activity or conduct prohibited by PURA...commission rule, or commission order."

TCPA recommended adding a subparagraph to §22.246(b)(5) that would clarify that with regard to weather preparedness standards, a violation does not occur until after ERCOT has conducted an inspection, found a potential violation, and provided the entity with a reasonable opportunity to cure the potential violation. TCPA argued this is required by PURA §35.0021(c).

Commission Response

The commission declines to modify the definition of violation as requested by TCPA. A violation occurs when an entity fails to comply with PURA, a commission rule, or a commission order. Whether ERCOT identifies this violation in one of its inspections or the entity eventually remedies the violation has no bearing on whether a violation occurred.

The plain language of PURA §35.0021 requires ERCOT to provide an entity with a reasonable period of time to "remedy any violation" and "report to the commission any violation" related to weather emergency preparedness. (Emphasis added). At no point does it refer to "potential violations" as suggested by TCPA. Moreover, acknowledging and documenting each failure to comply as a violation is important for establishing whether an entity has a history of violations, an important consideration in determining appropriate penalty amounts in any future enforcement proceedings related to that issue under §25.246(c)(3)(C).

§22.246(c), Penalty amounts

Existing §22.246(c) outlines the maximum penalty amounts that can be assessed for violations of PURA or a rule or order adopted under PURA and provides a list of penalty factors that the commission must consider when determining what level of penalty to impose for a particular violation. Proposed §22.246(c) clarifies that for violations of PURA §35.0021 and §38.075, or a rule or order adopted under those provisions, the commission may impose a penalty of up to $1,000,000 per violation per day.

LCRA recommended the addition of a new paragraph in §22.246(c) clarifying that the commission would not assess an administrative penalty for an entity's first violation of a weather preparedness requirement if the risk posed by the violation is low or if the entity cures the violation in a reasonable period of time.

Commission Response

The commission declines to limit its ability to assess an administrative penalty for an entity's first violation of a weather preparedness rule or statute. Neither PURA §35.002 or §38.075 include any penalty exemptions for first time offenders. The commission will consider the facts and circumstances surrounding each violation in determining whether to assess an administrative penalty, including the history of previous violations and efforts made to correct the violation, as required by this subsection.

§22.246(c)(1), Separate violations

Under paragraph §22.246(c)(1), each day a violation continues is a separate violation for which an administrative penalty can be assessed.

TCPA requested that the commission insert language clarifying that an administrative penalty will not be assessed until after the entity has been provided a reasonable period of time to remedy a violation discovered in an inspection or to appeal the inspector's determination that a violation has occurred. TCPA also requested language that a violation would not be assessed if a generation resource is following the process to mothball or retire a resource.

Commission Response

The commission declines to add language to §22.246(c)(1) that a penalty will not be assessed until after the entity has provided a reasonable amount of time to remedy any potential violation discovered in an inspection or to appeal the inspection. Remedy periods are discussed in the commission's response to general comments above. With regard to the ability of an entity to appeal the results of an ERCOT inspection before a penalty is issued, the commission, not ERCOT, retains authority to determine whether a violation has occurred, whether the violation was remedied in a reasonable amount of time, and whether the assessment of an administrative penalty is appropriate. The commission will not assess any administrative penalties without providing the entity an opportunity to request a hearing on any contested issues.

The commission also declines to specify that a violation will not be assessed if a generation resource is following the process to mothball or retire a resource as requested by TCPA. Whether a particular fact pattern constitutes a violation of the commission's weather preparedness rules or which scenarios might excuse such a violation is beyond the scope of this rulemaking.

§22.246(c)(2), Maximum penalties

Proposed paragraph §22.246(c)(2) identifies the maximum administrative penalty of $1,000,000 for violations of PURA §35.002 and §38.075 and maximum administrative penalty of $25,000 for all other violations of PURA and commission rules.

TPPA pointed out typographical errors in citations of PURA §35.002 and §38.075 in §22.246(c)(2).

Commission Response

The commission makes the recommended changes.

TEC and LCRA each recommended modifying §22.246(c)(2) to limit the imposition of penalties to "continuing violations." TEC's suggested language appears to only permit penalties for continuing violations, and the LCRA's proposed language only allows for a penalty of over $5,000 for a violation "that is a continuing violation that was not accidental or inadvertent and was not remedied within a reasonable period of time."

TCPA made general comments regarding §22.246(c)(2) requesting that the commission clarify what constitutes a "separate violation" and proper metrics for consideration of a violation of the weatherization rule to mitigate the risk of loss by a respondent facing a prospective violation.

Commission Response

TEC and LCRA misconstrue the meaning of the defined term "continuing violation." A continuing violation is not, as these parties suggest, merely an ongoing violation after parties have had an opportunity to remedy. A continuing violation is "any instance in which the person alleged to have committed a violation attests that the 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." In other words, if an entity attempts to avail itself of the provisions under §22.246(g)(1)(B) by attesting that a viola-
tion has been remedied and was accidental, but that attestation was invalid, that violation becomes a continuing violation. Under §22.246(g)(1)(E), the executive director will institute further proceedings against the entity, rather than permit the entity an opportunity to remedy the violation.

The commission adds adopted §22.246(g)(2)(D)(vii), which requires the executive director to institute further proceedings if the executive director determines a violation is a continuing violation.

§22.246(c)(3), Penalty factors

§22.246(c)(3) identifies aggravating and mitigating factors that the commission must consider when assessing a penalty for an administrative violation.

TCPA and LCRA recommended additional mitigating and aggravating factors be added to §22.246(c)(3) to inform the commission's assessment of an administrative penalty. TCPA specifically recommended the addition of whether the violation was attributable to mechanical or electrical failures, whether the violation could have been reasonably anticipated and avoided, and whether the asset owner demonstrated good faith, including preventive or corrective actions.

LCRA recommended new penalty factors that account for "risk, severity, and repeat offenses" when assessing penalties for weatherization.

Commission Response

The commission declines to implement the specific recommendations of TCPA and general recommendations of LCRA regarding the addition of new penalty factors to §22.246(c)(3). Paragraph §22.246(c)(3) is intended to mirror penalty factors the commission is required to consider when establishing its penalty classification system under PURA §15.023(c). Further, the additional factors proposed by commenters are already encompassed by §22.246(c)(3)(A), (C), (E) and (F), which specify that the amount of an administrative penalty must be based on the seriousness of the violation, history of previous violations, efforts to correct the violation, and any other matter that justice may require.

§22.246(f)(2), Notice of report

Existing §22.246(f) allows the executive director to initiate an enforcement proceeding by providing the commission a report alleging a violation by a specific entity. Subparagraph §22.246(f)(2)(A) requires the executive director to provide notice of this report to the entity alleged to have committed the violation by regular or certified mail.

TCPA, citing concerns related to increased remote work due to the pandemic, recommended that §22.246(f)(2)(A) require e-mail notice of the report from the executive director regarding the violation in addition to regular or certified mail.

Commission Response

PURA §15.024(b) requires that this notice be given by regular or certified mail and (b-1) specifies that notice is deemed to have been received on the fifth day after the commission sends written notice by mail addressed to the person's mailing address as maintained in commission records or, if sent by certified mail, on the date the written notice is received, or delivery is refused. Therefore, the commission cannot, by rule, materially alter the conditions upon which notice is deemed to have been received by imposing additional e-mail requirements. The executive di-

rector is not, however, prohibited from sending email notice in addition to notice by mail.

§22.246(g), Options for response

Subsection §22.246(g) provides a list of options for a respondent who has been issued a notice of violation or notice of continuing violation. The options consist of an opportunity to remedy the violation, pay the administrative penalty or disgorge excess revenue, or both, or request a hearing. The rule also identifies the consequences for failure to respond to a notice of violation or notice of continuing violation.

LCRA recommended the addition of a new paragraph under this subsection that would prohibit the commission from issuing an administrative penalty for violations of weather preparedness standards if a person self-reports the violation and certifies that the violation has been remedied. LCRA's proposed new paragraph would also require the self-report to be submitted in writing, under oath, supported by necessary documentation, and delivered to the executive director by certified mail.

Commission Response

The commission declines to restrict its penalty authority in circumstances where an entity self-reports and corrects a violation as requested by LCRA. Such a restriction on the commission's penalty authority would create a compliance loophole that would allow an entity to strategically delay compliance without consequence. Under §22.246(f)(3), when establishing the appropriateness and magnitude of an administrative penalty, the commission will consider efforts to correct the violation and any other matter that justice may require, including the manner in which the respondent has cooperated with the commission during an investigation of the alleged violation.

TCPA and Joint ERCOT TDUs each commented that §22.246(g)(1) did not properly apply to weather preparedness violations. TCPA recommended that the commission clarify that the 31-day cure period provided by §22.246(g) was not the same as the reasonable period of time that an entity has to remedy a weather preparedness violation under the weather preparedness statutes. TCPA argued that if ERCOT did not give entities a 31-day period following an inspection, it could conflict with this procedural rule.

Joint ERCOT TDUs, on the other hand, argued that all of §22.246(g) should not apply to weather preparedness violations and instead proposed an entirely new section applicable to such violations. Joint ERCOT TDUs proposal mirrors §22.246(g) and imposes an extremely detailed regulatory structure for the commission's processing of weather preparedness violations, including timelines and specific standards for responses and mitigation plans. Joint TDUs' full proposal will not be fully detailed in this preamble.

Commission Response

The commission agrees with TPPA and Joint ERCOT TDUs that §22.246(g) does not fully align with the weather preparedness statutes with regards to the applicable remedy period. As discussed in the commission's response to General Comments above, this is primarily due to a conflict of laws between the weather preparedness statutes and preexisting law. As detailed above, the commission modifies §22.246(g)(1) to clarify that it does not apply to weather preparedness violations and adopts new §22.246(g)(5). This new paragraph clarifies the commission's penalty authority and adapts the procedural requirements of §22.246(g) to the requirements of the weather
preparedness statutes. The commission declines to adopt TPPA's recommended approach for reasons discussed under General Comments. The commission declines to adopt Joint ERCOT TDU's approach, because it is unnecessarily detailed. The commission will further address the process surrounding weather preparedness violations in its Phase II weather preparedness rulemaking.

§22.246(g)(1)(C), Grace period

Under §22.246(g)(1)(C), if the executive director determines that an alleged violation was remedied within 30 days and the violation was accidental or inadvertent, no administrative penalty will be assessed.

LCRA recommended that §22.246(g)(1)(C) be amended to specify that no administrative penalty will be assessed for weather preparedness violations if the executive director determines that the violation was remedied within a reasonable period of time.

Commission Response

The commission declines to amend subparagraph §22.246(g)(1)(C) to specify that no administrative penalty will be assessed for weather preparedness violations if the executive director determines that the violation was remedied within a reasonable period of time. The commission addressed this issue of remediation in its response to general comments above.

§25.8, Classification system for violations of statutes, rules, and orders applicable to electric service providers.

§25.8(b), Classification system

Subsection 25.8(b) classifies violations of PURA and commission rules into C, B, and A class violations, in increasing order of severity and maximum allowable administrative penalties. The proposed rule added language to §25.8(b)(3)(A), which addresses class A violations, that a 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 proposed rule further clarifies that other class A violations retain the prior maximum assignable penalty amount of $25,000 per violation per day.

TPPA, TEC, and LCRA each criticized the proposed rule's grouping of all weather preparedness violations as class A violations with a million-dollar penalty ceiling. TPPA argued that two tiers of class A violations is confusing and that establishing separate tiers for weather preparedness violations would set expectations and "provide valuable instruction to the market before any violations occur."

Each of these commenters argued that non-material violations, such as failure to file a report, should not result in million-dollar penalties. TEC and LCRA suggested that paperwork violations should be classified as class C violations, and LCRA further specified that a weather-preparedness violation should only be a class C violation if it "creates economic harm in excess of $5,000 to a person or persons, property, or the environment, or creates an economic benefit to the violator in excess of $5,000; creates a hazard or potential hazard to the health or safety of the public; or causes a risk to the reliability of a transmission or distribution system or a portion thereof."

Commission Response

The commission declines to classify "paperwork violations" as class C violations or otherwise adopt any language that would limit the commission's ability to assign significant administrative penalties for any violation of its weather preparedness rules or orders. As has been repeatedly pointed out by commenters, the weather preparedness statutes create a preparation standard, not a performance standard, and couple this standard with a million-dollar penalty ceiling. Therefore, it is clear that the commission is to utilize the increased penalty authority prior to the occurrence of any actual weather-related performance failures - not after it is too late to prevent any human suffering, loss of life, or property damage caused by those failures. Furthermore, even violations such as "paperwork violations," could materially interfere with the commission's and ERCOT's compliance regimen, which may require the inspection of hundreds of facilities and the review and evaluation of remediation plans for any instances of noncompliance identified during these inspections. Seemingly minor violations, such as missing submission deadlines or errors in those submissions, could impede the timely completion and review of inspections or otherwise interfere with the commission's and ERCOT's ability to evaluate and ensure the weather-readiness of the grid.

The commission disagrees with TPPA that having two tiers of class A violations is confusing. The language of the rule articulates with precision, the maximum penalty associated with each type of violation.

The commission also disagrees with TPPA's argument that more nuanced penalty classifications of weather-preparedness violations would provide meaningful guidance to market participants. Establishing penalty categories for certain types of violations only provides meaningful guidance to an entity that is evaluating whether to comply with a particular rule based on the severity of the penalty for each class of infraction. The commission expects all entities to fully comply with all applicable weather-preparedness rules to ensure the reliability of the grid. The specter of significant administrative penalties is specifically meant to deter any economic calculation that might distract an entity from directing its full efforts to achieving compliance with these standards.

TPPA argued that the commission should create a separate tiering system for weatherization-related violations. TPPA noted that the "chief author" of SB 3, Senator Charles Schwertner, produced an explanatory document that clarified that it was his intent that the commission create a penalty matrix, "to ensure that the $1 million penalty cap is focus on extreme violations and not simple violations like paperwork errors."

Commission Response

The commission also declines to create a separate penalty classification system for weather-preparedness violations as requested by TPPA. The commission is not persuaded by TPPA's argument that a summary document distributed by one of the bill's authors prior to a committee hearing on the bill constitutes definitive legislative intent for how the statute should be interpreted. Moreover, the Legislature explicitly required creation of penalty classification systems in sections 6, 20, and 31 of SB 3, each addressing other issues. Had the Legislature intended the creation of a penalty classification system for electric weather-preparedness violations, it would have included a similar requirement. Finally, under PURA §15.023(d), a classification system established under PURA §15.023(c) "shall provide that a penalty in an amount that exceeds $5,000 may be assessed only if the violation is included in the highest class of violations in the classification system." Categorically limiting any
type of weather-preparedness violation to $5,000 per violation per day is inappropriate, given the extremely high priority that both the commission and the Legislature places on compliance in this area.

TEC argued that a violation should only be a class A violation if it was a "continuing violation" and there had been "notice and a reasonable opportunity to cure the violation." TCPA argued that §25.8(b)(3)(A) should incorporate text reflecting that separate violations mean a company's distinct action or inaction that directly results in a violation, rather than 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."

Commission Response

The commission disagrees with TEC for the reasons discussed in its response to §22.246(c)(2), and TCPA for the reasons discussed in its response to §22.246(c)(1).

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this rule, the commission makes other minor modifications for the purpose of clarifying its intent.

These rule amendments are adopted under the following proviso of PURA: §14.001, which provides the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by PURA that is necessary and convenient to the exercise of that power and jurisdiction; §14.002, which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; §15.023, which establishes that the penalty for a violation of a provision of PURA §35.0021 or PURA §38.075 may be in an amount not to exceed $1,000,000 for a violation and that each day a violation continues is a separate violation for purposes of imposing a penalty.

Cross reference to statutes: PURA §§14.001, 14.002, and 15.023, 35.0021, and 38.075.

§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 the Public Utility Regulatory Act (PURA), the Texas Water Code (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 of PURA §35.0021, PURA §38.075, or a commission rule or commission order adopted under 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. 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; PURA §35.0021 or §38.075; or chapter 13 of the TWC; or of a commission rule or commission order adopted or issued under those chapters or sections.

(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.

(5) Opportunity to remedy a weather preparedness violation.

(A) This paragraph applies to a violation of PURA §35.0021, §38.075, or a commission rule or order adopted or issued under those sections.

(B) PURA §15.024(c), as written, does not apply to a violation of PURA §35.0021, §38.075, or a commission rule or order adopted or issued under those sections. This paragraph implements PURA §15.024(c), as modified by PURA §15.023(a), §35.0021(g), and §38.075(d), for violations of PURA §35.0021, §38.075, or a commission rule or order adopted or issued under those sections.

(C) The commission may impose an administrative penalty against an entity regulated under PURA §35.0021 or §38.075 that violates those sections, or a commission rule or order adopted under those sections, except:

(i) the commission will assess a penalty for a violation of PURA §35.0021, §38.075, or a commission rule adopted under those sections if the entity against which the penalty may be assessed does not remedy the violation within a reasonable amount of time; and

(ii) the commission will not assess a penalty for a violation of PURA §35.0021, §38.075, or a commission rule or order adopted or issued under those sections if the violation was accidental or inadvertent, and the entity against which the penalty may be assessed remedies the violation within a reasonable period of time.

(D) For purposes of this paragraph, the following provisions apply unless a provision conflicts with a commission rule or order adopted under PURA §35.0021 or §38.075, in which case, the commission rule or order applies.

(i) Not all violations to which this paragraph applies can be remedied. Clauses (C)(i) and (C)(ii) of this paragraph do not apply to a violation that cannot be remedied.

(ii) For purposes of clauses (C)(i) and (C)(ii) of this paragraph, an entity that claims to have remedied an alleged violation and, if applicable, that the alleged violation was accidental or inadvertent has the burden of proving its claim to the commission. Proof that an alleged violation has been remedied and, if applicable, that the alleged violation was accidental or inadvertent must be evidenced in writing, under oath, and supported by necessary documentation.

(iii) An entity that remedies a violation that is discovered during an inspection by the independent organization certified under PURA §39.151 for the ERCOT power region prior to the deadline provided to that entity by the independent organization in accordance with PURA §35.0021 or §38.075 is deemed to have remedied that violation in a reasonable period of time.

(iv) If the independent organization certified under PURA §39.151 has not provided an entity with a deadline, the executive director will determine whether the deadline can be remedied and, if so, the deadline for remedying a violation within a reasonable period of time. The executive director will provide the entity with written notice of the violation and the deadline for remedying the violation within a reasonable period of time. This notice does not constitute notice under paragraph (f)(2) of this section unless it fulfills the other requirements of that subsection. However, the provisions of subparagraph (f)(2)(D) of this section apply to notice under this clause.

(v) The executive director will determine if and when a report should be issued to the commission under subsection (f) of this section and will make a determination as to what further proceedings are necessary.

(vi) If the executive director determines that the alleged violation was not remedied within a reasonable period of time or is a continuing violation, the executive director will issue a report to the commission under subsection (f) of this section and will institute further proceedings, including referral of the matter for hearing under subsection (i) of this section.

(vii) If the commission determines that the deadline for remedying a violation provided by the independent organization certified under PURA §39.151 or determined by the executive director is unreasonable, the commission will determine what the deadline should have been. The commission will use this updated deadline to determine the applicability of subclauses (C)(i) and (C)(ii) of this paragraph and, if appropriate, as a factor in determining the magnitude of administrative penalty to impose against the entity for the violation.

(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 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.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Andrea Gonzalez
Rules Coordinator
Public Utility Commission of Texas
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CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS
SUBCHAPTER A. GENERAL PROVISIONS
16 TAC §25.8

The Public Utility Commission of Texas (commission) adopts amendments to existing 16 Texas Administrative Code (TAC) §25.8, relating to a Classification System for Violations of Statutes, Rules, and Orders Applicable to Electric Service Providers. The commission adopts this rule with changes to the proposed rule as published in the September 3, 2021, issue of the Texas Register (46 TexReg 5518). The rule will be republished. This rule will implement an amendment to the Public Utility Regulatory Act (PURA) §15.023(b-1) enacted by the 87th Texas Legislature that establishes an administrative penalty not to exceed $1,000,000 for violations of PURA §35.0021 or §38.075, each relating to Weather Emergency Preparedness. In response to filed comments, these rules will also clarify the application of certain statutory provisions relating to the commission's penalty authority and applicable remedy periods. The commission received comments on the proposed rule from AEP Texas Inc., CenterPoint Energy Houston Electric, LLC, Oncor Electric Delivery Company LLC, and Texas-New Mexico Power Company (collectively, the Joint ERCOT TDUs); Texas Electric Cooperatives, Inc. (TEC); Texas Competitve Power Advocates (TCPA); Texas Public Power Association (TPPA); and Lower Colorado River Authority and Lower Colorado River Authority Transmission Services Corporation (collectively, LCRA).

General Comments
Statutory Interpretation of PURA §15.023(a), §15.024(c), §35.0021(g), and §38.075(d)
PURA §15.023(a) and §15.024(c) were in effect prior to the 87th session of the Texas Legislature and will be referred to as preexisting law. PURA §35.0021 and §38.075 were both enacted by the 87th Texas Legislature and will be referred to as the weather
preparedness statutes. Rules adopted and orders issued under these statutes will be referred to as weather preparedness rules and weather preparedness orders respectively.

Commission Comment

Commenters have noted, either explicitly or by implication, several conflicts between the weather preparedness statutes and preexisting law. The commission addresses the specifics of these comments throughout this order where relevant. The statutory underpinnings for the resolution of these conflicts are discussed under this General Comments heading. The weather preparedness statutes were enacted after the preexisting statutes and are more specific in their application. Accordingly, under the Code Construction Act §311.025-31.026, the weather preparedness statutes prevail in any conflicts.

The first issue involving the interaction of preexisting law and the weather preparedness statutes relates to circumstances in which the commission has authority to issue an administrative penalty for a violation of a weather preparedness statute, rule, or order.

Under PURA §15.023(a), "(t)he commission may impose an administrative penalty against a person regulated under (PURA, Title II) who violates (PURA, Title II) or a rule or order adopted under (PURA, Title II)." Notably, the weather preparedness statutes are located in PURA, Title II. Under the Code Construction Act §311.016, "may" creates discretionary authority. Therefore, under preexisting law, the commission has general discretion to impose administrative penalties for violation of a weather preparedness statute, rule, or order.

Each of the weather preparedness statutes contains an identical provision that reads "(t)he commission shall impose an administrative penalty on an entity, including a municipally owned utility or an electric cooperative, that violates a (weather preparedness rule) and does not remedy that violation within a reasonable period of time." Under the Code Construction Act, "shall" imposes a duty. Accordingly, if an entity violates a weather preparedness rule, the commission is required to impose an administrative penalty.

In comments submitted on various provisions throughout the two proposed rules, TCPA, TEC, Joint ERCOT TDUs, and LCRA each interpret the language of the weather preparedness statutes to mean that the commission cannot impose an administrative penalty against an entity that violates a weather preparedness statute, rule, or order unless the entity fails to remedy the violation within a reasonable period of time.

Commission Response

The commission disagrees that it cannot impose an administrative penalty against an entity that violates a weather preparedness requirement unless the entity fails to remedy the violation within a reasonable period of time. As the commenters point out, each of the weather preparedness statutes indicate the commission shall impose a penalty if a violation is not remedied in a reasonable period of time. However, neither of the weather preparedness statutes impose or suggest any limitation on PURA §15.023(a), which provides the commission with discretionary authority to issue a penalty for a violation of PURA, Title II or a rule or order adopted under Title II.

The interpretation that the commission is prevented from issuing an administrative penalty without first giving an entity an opportunity to remedy the violation fails on a policy level as well, as such a limitation would create a significant compliance loophole.

Under such an interpretation, an entity would be incentivized to delay implementing any costly weather preparedness measure until after it was identified by the Electric Reliability Council of Texas (ERCOT) or the commission, because the regulatory risk of noncompliance would be eliminated. If the violation is discovered, the entity would be assured a reasonable period of time to remedy the violation, regardless of the circumstances surrounding the violation. If it is not discovered, potentially costly upgrades could be avoided completely. Moreover, an entity could even fail to meet the same requirement multiple times, each time relying upon a built-in cure period to address any compliance issues.

The commission adopts amended §22.246(g)(5)(C) to clarify the commission's discretionary penalty authority under preexisting law.

The next interaction of potentially conflicting statutes involves potential exceptions to the commission's discretionary penalty authority under §15.023(a). The first exception originates from the aforementioned provision of the weather preparation statutes that requires the commission to impose a penalty if a weather preparation rule is violated and not remedied in a reasonable period of time. The second comes from PURA §15.024(c), which states that "(a) penalty may not be assessed under this section if the person against whom the penalty may be assessed remedies the violation before the 31st day after the date the person receives a formal notice of violation. A person who claims to have remedied an alleged violation has the burden of proving to the commission that the alleged violation was remedied and was accidental or inadvertent." Under the Code Construction Act §311.016, "may not" imposes a prohibition. Therefore, the commission is prohibited from imposing a penalty for a violation of Title II or a rule or order adopted under Title II if the entity can demonstrate that the violation was accidental or inadvertent and was remedied before the 31st day after receiving notice under Subsection (b).

Commission Response

The commission modifies §22.246 to reflect two exceptions to the commission's discretionary penalty authority. First, consistent with the weather preparedness statutes, under adopted §22.246(g)(5)(C)(ii), the commission is required to issue an administrative penalty for a violation of a weather preparedness rule that was not remedied within a specified timeframe. Second, consistent with PURA §15.024(c), under adopted §22.246(g)(5)(C)(ii), the commission is prohibited from issuing an administrative penalty for a violation of a weather preparedness statute, rule, or order if the violation is remedied within a specified timeframe, and was accidental or inadvertent. In this instance, the alleged violator has the burden of proving that each of these conditions was met. Each of these exceptions to the commission's general discretionary authority is justified because under the Code Construction Act, the more specific provisions of PURA §15.024(c) and the weather preparedness statutes control over PURA §15.023(a). The commission addresses the specified timeframes below. The commission also modifies the rule to clarify that neither of the above exceptions apply to a violation that is not remediable.

The third potential conflict of laws relates to the appropriate remedy period for purposes of the exceptions to the commission's discretionary administrative authority. Under preexisting law, the general remedy period for any violation is 30 days after the receipt of a formal notice of violation. Under the weather preparedness statutes, the remedy period is a reasonable period of time.
TPPA contends that these are two distinct remedy periods and argued that the commission should clarify that the two periods are different. Conversely, Joint ERCOT TDUs argue that the reasonable remedy period takes precedence over the generic 30-day remedy period, because the reasonable remedy period is specific to weather preparedness violations. Joint ERCOT TDUs further argue that a reasonable remedy period is “a fact question, dependent on the particular facts and circumstances attendant to the situation. A reasonable period of time for remedying a violation of a rule established pursuant to the Weatherization Statutes may not, therefore, be established by rule, or without any consideration of the particular facts and circumstances giving rise to a violation.”

Commission Response

The commission agrees with Joint ERCOT TDUs - while acknowledging that Joint ERCOT TDUs were making this argument in support of a different ultimate position - that there is only a single, reasonability-based remedy period for violations of weather preparation requirements. Weather preparedness violations pose a serious risk to reliability of the bulk electric system, and an entity that violates these rules must remedy those violations as expeditiously as reasonably possible. Applying a generic remedy period, as provided by preexisting law, or two separate remedy periods, as recommended by TPPA, would lead to contradictory results and would undermine the effectiveness of the commission’s statutorily mandated regulatory objectives. If, for example, the reasonable remedy period for a violation is 20 days, if an entity fails to remedy that violation within 20 days, the commission is required by the weather preparedness statutes to impose an administrative penalty. Affording that entity a second remedy period after it has received a formal notice of violation from the executive director clearly conflicts with the plain language of the weather preparedness statutes.

Under the adopted §22.246(g)(5)(C), the remedy period for both exceptions to the commission’s discretionary penalty authority is a “reasonable” period of time. The commission agrees with Joint ERCOT TDUs that the weather preparedness statutes establish a remedy period that is dependent upon the particulars of the violation and, potentially, the circumstances surrounding the violation.

The final potential conflict between preexisting law and the weather preparedness statutes is the process and timing surrounding the remedy periods. Under preexisting law, the remedy period begins after the entity has received a formal notice of violation from the executive director. Under the weather preparedness statutes, the remedy period, in many cases, will begin when ERCOT provides the entity with the results of a weather preparedness inspection. This is a significant distinction, because §22.246 provides specific notice and process requirements that are not applicable to a remedy period that takes place prior to the issuance of a formal notice of violation.

Commission Response

The process surrounding the application of the period for remedying violations is determined by the applicable substantive weather preparedness rules. However, because the commission has not yet adopted its final Phase II weather preparedness rules, adopted §22.246(g)(5)(D) establishes default procedural rules surrounding remedying weather preparedness violations that supplement the other notice of violation provisions of that section. These procedural provisions mirror the preexisting process for the generic remedy period under §22.246(g)(1).

Specifically, under adopted §22.246(g)(5)(D) an entity that remedies a violation discovered during an ERCOT inspection by the deadline provided by ERCOT is deemed to have remedied that violation in a reasonable period of time. If ERCOT has not provided a deadline, the executive director will provide the entity with a written notice describing the violation and a deadline for remediating the violation. Finally, if the commission disagrees that the deadline provided by ERCOT or the executive director is reasonable, the commission will determine what the deadline should have been. The commission will use this updated deadline to determine the applicability of the exceptions to the commission’s discretionary penalty authority and, if appropriate, as a factor in determining the magnitude of the administrative penalty assessed against the entity for the violation. This updated deadline does not, however, guarantee that the entity will be provided additional time to remedy the violation in the future. Accordingly, an entity should continue its remedial efforts even after it misses the deadline provided by ERCOT or the executive director.

§22.246(b)(5), Definition of violation

§22.246(b)(5) defines the term “Violation” as “(a)ny activity or conduct prohibited by PURA...commission rule, or commission order.”

TCPA recommended adding a subparagraph to §22.246(b)(5) that would clarify that with regard to weather preparedness standards, a violation does not occur until after ERCOT has conducted an inspection, found a potential violation, and provided the entity with a reasonable opportunity to cure the potential violation. TCPA argued this is required by PURA §35.0021(c).

Commission Response

The commission declines to modify the definition of violation as requested by TCPA. A violation occurs when an entity fails to comply with PURA, a commission rule, or a commission order. Whether ERCOT identifies this violation in one of its inspections or the entity eventually remedies the violation has no bearing on whether a violation occurred.

The plain language of PURA §35.0021 requires ERCOT to provide an entity with a reasonable period of time to “remedy any violation” and “report to the commission any violation” related to weather emergency preparedness. (Emphasis added). At no point does it refer to “potential violations” as suggested by TCPA. Moreover, acknowledging and documenting each failure to comply as a violation is important for establishing whether an entity has a history of violations, an important consideration in determining appropriate penalty amounts in any future enforcement proceedings related to that issue under §25.246(c)(3)(C).

§22.246(c), Penalty amounts

Existing §22.246(c) outlines the maximum penalty amounts that can be assessed for violations of PURA or a rule or order adopted under PURA and provides a list of penalty factors that the commission must consider when determining what level of penalty to impose for a particular violation. Proposed §22.246(c) clarifies that for violations of PURA §35.0021 and §38.075, or a rule or order adopted under those provisions, the commission may impose a penalty of up to $1,000,000 per violation per day.

LCRA recommended the addition of a new paragraph in §22.246(c) clarifying that the commission would not assess an administrative penalty for an entity’s first violation of a weather preparedness requirement if the risk posed by the violation is low or if the entity cures the violation in a reasonable period of time.
Commission Response

The commission declines to limit its ability to assess an administrative penalty for an entity’s first violation of a weather preparedness rule or statute. Neither PURA §35.002 or §38.075 include any penalty exemptions for first-time offenders. The commission will consider the facts and circumstances surrounding each violation in determining whether to assess an administrative penalty, including the history of previous violations and efforts made to correct the violation, as required by this subsection.

§22.246(c)(1), Separate violations

Under paragraph §22.246(c)(1), each day a violation continues is a separate violation for which an administrative penalty can be assessed.

TCPA requested that the commission insert language clarifying that an administrative penalty will not be assessed until after the entity has been provided a reasonable period of time to remedy a violation discovered in an inspection or to appeal the inspector’s determination that a violation has occurred. TCPA also requested language that a violation would not be assessed if a generation resource is following the process to mothball or retire a resource.

Commission Response

The commission declines to add language to §22.246(c)(1) that a penalty will not be assessed until after the entity has been provided a reasonable amount of time to remedy any potential violation discovered in an inspection or to appeal the inspection. Remedy periods are discussed in the commission’s response to general comments above. With regard to the ability of an entity to appeal the results of an ERCOT inspection before a penalty is issued, the commission, not ERCOT, retains authority to determine whether a violation has occurred, whether the violation was remedied in a reasonable amount of time, and whether the assessment of an administrative penalty is appropriate. The commission will not assess any administrative penalties without providing the entity an opportunity to request a hearing on any contested issues.

The commission also declines to specify that a violation will not be assessed if a generation resource is following the process to mothball or retire a resource as requested by TCPA. Whether a particular fact pattern constitutes a violation of the commission’s weather preparedness rules or which scenarios might excuse such a violation is beyond the scope of this rulemaking.

§22.246(c)(2), Maximum penalties

Proposed paragraph §22.246(c)(2) identifies the maximum administrative penalty of $1,000,000 for violations of PURA §35.002 and §38.075 and maximum administrative penalty of $25,000 for all other violations of PURA and commission rules.

TCPA pointed out typographical errors in citations of PURA §35.002 and §38.075 in §22.246(c)(2).

Commission Response

The commission makes the recommended changes.

TEC and LCRA each recommended modifying §22.246(c)(2) to limit the imposition of penalties to “continuing violations.” TEC’s suggested language appears to only permit penalties for continuing violations, and the LCRA’s proposed language only allows for a penalty of over $5,000 for a violation “that is a continuing violation that was not accidental or inadvertent and was not remedied within a reasonable period of time.”

TCPA made general comments regarding §22.246(c)(2) requesting that the commission clarify what constitutes a “separate violation” and proper metrics for consideration of a violation of the weatherization rule to mitigate the risk of loss by a respondent facing a prospective violation.

Commission Response

TEC and LCRA misconstrue the meaning of the defined term “continuing violation.” A continuing violation is not, as these parties suggest, merely an ongoing violation after parties have had an opportunity to remedy. A continuing violation is "any instance in which the person alleged to have committed a violation attests that the 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." In other words, if an entity attempts to avail itself of the provisions under §22.246(g)(1)(B) by attesting that a violation has been remedied and was accidental, but that attestation was invalid, that violation becomes a continuing violation. Under §22.246(g)(1)(E), the executive director will institute further proceedings against the entity, rather than permit the entity an opportunity to remedy the violation.

The commission adds adopted §22.246(g)(2)(D)(vii), which requires the executive director to institute further proceedings if the executive director determines a violation is a continuing violation.

§22.246(c)(3), Penalty factors

§22.246(c)(3) identifies aggravating and mitigating factors that the commission must consider when assessing a penalty for an administrative violation.

TCPA and LCRA recommended additional mitigating and aggravating factors be added to §22.246(c)(3) to inform the commission’s assessment of an administrative penalty. TCPA specifically recommended the addition of whether the violation was attributable to mechanical or electrical failures, whether the violation could have been reasonably anticipated and avoided, and whether the asset owner demonstrated good faith, including preventive or corrective actions.

LCRA recommended new penalty factors that account for “risk, severity, and repeat offenses” when assessing penalties for weatherization.

Commission Response

The commission declines to implement the specific recommendations of TCPA and general recommendations of LCRA regarding the addition of new penalty factors to §22.246(c)(3). Paragraph §22.246(c)(3) is intended to mirror penalty factors the commission is required to consider when establishing its penalty classification system under PURA §15.023(c). Further, the additional factors proposed by commenters are already encompassed by §22.246(c)(3)(A), (C), (E) and (F), which specify that the amount of an administrative penalty must be based on the seriousness of the violation, history of previous violations, efforts to correct the violation, and any other matter that justice may require.

§22.246(f)(2), Notice of report

Existing §22.246(f) allows the executive director to initiate an enforcement proceeding by providing the commission a report alleging a violation by a specific entity. Subparagraph §22.246(f)(2)(A) requires the executive director to provide notice
of this report to the entity alleged to have committed the violation by regular or certified mail.

TPCA, citing concerns related to increased remote work due to the pandemic, recommended that §22.246(f)(2)(A) require e-mail notice of the report from the executive director regarding the violation in addition to regular or certified mail.

Commission Response

PURA §15.024(b) requires that this notice be given by regular or certified mail and (b-1) specifies that notice is deemed to have been received on the fifth day after the commission sends written notice by mail addressed to the person's mailing address as maintained in commission records or, if sent by certified mail, on the date the written notice is received, or delivery is refused. Therefore, the commission cannot, by rule, materially alter the conditions upon which notice is deemed to have been received by imposing additional e-mail requirements. The executive director is not, however, prohibited from sending email notice in addition to notice by mail.

§22.246(g), Options for response

Subsection §22.246(g) provides a list of options for a respondent who has been issued a notice of violation or notice of continuing violation. The options consist of an opportunity to remedy the violation, pay the administrative penalty or disgorge excess revenue, or both, or request a hearing. The rule also identifies the consequences for failure to respond to a notice of violation or notice of continuing violation.

LCRA recommended the addition of a new paragraph under this subsection that would prohibit the commission from issuing an administrative penalty for violations of weather preparedness standards if a person self-reports the violation and certifies that the violation has been remedied. LCRA's proposed new paragraph would also require the self-report to be submitted in writing, under oath, supported by necessary documentation, and delivered to the executive director by certified mail.

Commission Response

The commission declines to restrict its penalty authority in circumstances where an entity self-reports and corrects a violation as requested by LCRA. Such a restriction on the commission's penalty authority would create a compliance loophole that would allow an entity to strategically delay compliance without consequence. Under §22.246(c)(3), when establishing the appropriateness and magnitude of an administrative penalty, the commission will consider efforts to correct the violation and any other matter that justice may require, including the manner in which the respondent has cooperated with the commission during an investigation of the alleged violation.

TPPA and Joint ERCOT TDU's each commented that §22.246(g)(1) did not properly apply to weather preparedness violations. TPPA recommended that the commission clarify that the 31-day cure period provided by §22.246(g) was not the same as the reasonable period of time that an entity has to remedy a weather preparedness violation under the weather preparedness statutes. TPPA argued that if ERCOT did not give entities a 31-day period following an inspection, it could conflict with this procedural rule.

Joint ERCOT TDU's, on the other hand, argued that all of §22.246(g) should not apply to weather preparedness violations and instead proposed an entirely new section applicable to such violations. Joint ERCOT TDU's proposal mirrors §22.246(g) and imposes an extremely detailed regulatory structure for the commission's processing of weather preparedness violations, including timelines and specific standards for responses and mitigation plans. Joint TDU's full proposal will not be fully detailed in this preamble.

Commission Response

The commission agrees with TPPA and Joint ERCOT TDU's that §22.246(g) does not fully align with the weather preparedness statutes with regards to the applicable remedy period. As discussed in the commission's response to General Comments above, this is primarily due to a conflict of laws between the weather preparedness statutes and preexisting law. As detailed above, the commission modifies §22.246(g)(1) to clarify that it does not apply to weather preparedness violations and adopts new §22.246(g)(5). This new paragraph clarifies the commission's penalty authority and adapts the procedural requirements of §22.246(g) to the requirements of the weather preparedness statutes. The commission declines to adopt TPPA's recommended approach for reasons discussed under General Comments. The commission declines to adopt Joint ERCOT TDU's approach, because it is unnecessarily detailed. The commission will further address the process surrounding weather preparedness violations in its Phase II weather preparedness rulemaking.

§22.246(g)(1)(C), Grace period

Under §22.246(g)(1)(C), if the executive director determines that an alleged violation was remedied within 30 days and the violation was accidental or inadvertent, no administrative penalty will be assessed.

LCRA recommended that §22.246(g)(1)(C) be amended to specify that no administrative penalty will be assessed for weather preparedness violations if the executive director determines that the violation was remedied within a reasonable period of time.

Commission Response

The commission declines to amend subparagraph §22.246(g)(1)(C) to specify that no administrative penalty will be assessed for weather preparedness violations if the executive director determines that the violation was remedied within a reasonable period of time. The commission addressed this issue of remediation in its response to general comments above.

§25.8, Classification system for violations of statutes, rules, and orders applicable to electric service providers.

§25.8(b), Classification system

Subsection 25.8(b) classifies violations of PURA and commission rules into C, B, and A class violations, in increasing order of severity and maximum assignable administrative penalty amount. The proposed rule added language to §25.8(b)(3)(A), which addresses class A violations, that a 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 proposed rule further clarifies that other class A violations retain the prior maximum assignable penalty amount of $25,000 per violation per day.

TPPA, TEC, and LCRA each criticized the proposed rule's grouping of all weather preparedness violations as class A violations with a million-dollar penalty ceiling. TPPA argued that two tiers
of class A violations is confusing and that establishing separate tiers for weather preparedness violations would set expectations and "provide valuable instruction to the market before any violations occur."

Each of these commenters argued that non-material violations, such as failure to file a report, should not result in million-dollar penalties. TEC and LCRA suggested that paperwork violations should be classified as class C violations, and LCRA further specified that a weather-preparedness violation should only be a class A violation if it "creates economic harm in excess of $5,000 to a person or persons, property, or the environment, or creates an economic benefit to the violator in excess of $5,000; creates a hazard or potential hazard to the health or safety of the public; or causes a risk to the reliability of a transmission or distribution system or a portion thereof."

**Commission Response**

The commission declines to classify "paperwork violations" as class C violations or otherwise adopt any language that would limit the commission's ability to assign significant administrative penalties for any violation of its weather preparedness rules or orders. As has been repeatedly pointed out by commenters, the weather preparedness statutes create a preparation standard, not a performance standard, and couple this standard with a million-dollar penalty ceiling. Therefore, it is clear that the commission is to utilize the increased penalty authority prior to the occurrence of any actual weather-related performance failures - not after it is too late to prevent any human suffering, loss of life, or property damage caused by those failures. Furthermore, even violations such as "paperwork violations," could materially interfere with the commission's and ERCOT's compliance regimen, which may require the inspection of hundreds of facilities and the review and evaluation of remediation plans for any instances of noncompliance identified during these inspections. Seemingly minor violations, such as missing submission deadlines or errors in those submissions, could impede the timely completion and review of inspections or otherwise interfere with the commission's and ERCOT's ability to evaluate and ensure the weather-readiness of the grid.

The commission disagrees with TPPA that having two tiers of class A violations is confusing. The language of the rule articulates, with precision, the maximum penalty associated with each type of violation.

The commission also disagrees with TPPA's argument that more nuanced penalty classifications of weather-preparedness violations would provide meaningful guidance to market participants. Establishing penalty categories for certain types of violations only provides meaningful guidance to an entity that is evaluating whether to comply with a particular rule based on the severity of the penalty for each class of infraction. The commission expects all entities to fully comply with all applicable weather-preparedness rules to ensure the reliability of the grid. The specter of significant administrative penalties is specifically meant to deter any economic calculation that might distract an entity from directing its full efforts to achieving compliance with these standards.

TPPA argued that the commission should create a separate tiering system for weatherization-related violations. TPPA noted that the "chief author" of SB 3, Senator Charles Schwertner, produced an explanatory document that clarified that it was his intent that the commission create a penalty matrix, "to ensure that the $1 million penalty cap is focus on extreme violations and not simple violations like paperwork errors."

**Commission Response**

The commission also declines to create a separate penalty classification system for weather-preparedness violations as requested by TPPA. The commission is not persuaded by TPPA's argument that a summary document distributed by one of the bill's authors prior to a committee hearing on the bill constitutes definitive legislative intent for how the statute should be interpreted. Moreover, the Legislature explicitly required creation of penalty classification systems in sections 6, 20, and 31 of SB 3, each addressing other issues. Had the Legislature intended the creation of a penalty classification system for electric weather-preparedness violations, it would have included a similar requirement. Finally, under PURA §15.023(d), a classification system established under PURA §15.023(c) "shall provide that a penalty in an amount that exceeds $5,000 may be assessed only if the violation is included in the highest class of violations in the classification system." Categorically limiting any type of weather-preparedness violation to $5,000 per violation per day is inappropriate, given the extremely high priority that both the commission and the Legislature places on compliance in this area.

TEC argued that a violation should only be a class A violation if it was a "continuing violation" and there had been "notice and a reasonable opportunity to cure the violation." TCPA argued that §25.6(b)(3)(A) should incorporate text reflecting that separate violations mean a company's distinct action or inaction that directly results in a violation, rather than 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."
(b) Classification system.

(1) Class C violations.

(A) Penalties for Class C violations may not exceed $1,000 per violation per day.

(B) The following violations are Class C violations:

(i) failure to file a report or provide information required to be submitted to the commission under this chapter within the timeline required;

(ii) failure by an electric utility, retail electric provider, or aggregator to investigate a customer complaint and appropriately report the results within the timeline required;

(iii) failure to update information relating to a registration or certificate by the commission within the timeline required; and

(iv) a violation of the Electric no-call list.

(2) Class B violations.

(A) Penalties for Class B violations may not exceed $5,000 per violation per day.

(B) All violations not specifically enumerated as a Class C or Class A violation are Class B violations.

(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. Penalties for all other Class A violations will not exceed $25,000 per violation per day.

(B) The following types of violations are Class A violations if they create economic harm in excess of $5,000 to a person or persons, property, or the environment, or create an economic benefit to the violator in excess of $5,000; create a hazard or potential hazard to the health or safety of the public; or cause a risk to the reliability of a transmission or distribution system or a portion thereof:

(i) A violation related to the wholesale electric market, including protocols and other requirements established by an independent organization;

(ii) A violation related to electric service quality standards or reliability standards established by the commission or an independent organization;

(iii) A violation related to the code of conduct between electric utilities and their competitive affiliates;

(iv) A violation related to prohibited discrimination in the provision of electric service;

(v) A violation related to improper disconnection of electric service;

(vi) A violation related to fraudulent, unfair, misleading, deceptive, or anticompetitive business practices;

(vii) Conducting business subject to the jurisdiction of the commission without proper commission authorization, registration, licensing, or certification;

(viii) A violation committed by ERCOT;

(ix) A violation not otherwise enumerated in this paragraph (3)(B) of this subsection that creates a hazard or potential hazard to the health or safety of the public;

(x) A violation not otherwise enumerated in this paragraph (3)(B) of this subsection that creates economic harm to a person or persons, property, or the environment in excess of $5,000, or creates an economic benefit to the violator in excess of $5,000; and

(xi) A violation not otherwise enumerated in this paragraph (3)(B) of this subsection that causes a risk to the reliability of a transmission or distribution system or a portion thereof.

(c) Application of enforcement provisions of other rules. To the extent that PURA or other rules in this chapter establish a range of administrative penalties that are inconsistent with the penalty ranges provided for in subsection (b) of this section, the other provisions control with respect to violations of those rules.

(d) Assessment of administrative penalties. In addition to the requirements of §22.246 of this title (relating to Administrative Penalties), a notice of violation recommending administrative penalties will indicate the class of violation.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. INFRASTRUCTURE AND RELIABILITY


This rule implements standards for emergency operations plans for electric utilities, transmission and distribution utilities, power generation companies (PGC), municipally owned utilities (MOUs), electric cooperatives, retail electric providers (REPs), and the Electric Reliability Council of Texas (ERCOT) as required by Tex. Util. Code §186.007 as amended by Senate Bill 3 (SB 3) in the 87th Legislature Regular Session.

The commission received comments on the proposed rule from City of Houston, Sharyland Utilities LLC (Sharyland), Texas Public Power Association (TPPA), Texas Electric Cooperative's Inc. (TEC), AEP Texas Inc., Electric Transmission Texas, LLC, and Southwestern Electric Power Company (collectively, AEP), Guadalupe Valley Electric Cooperative Inc. (GVEC),
Texas-New Mexico Power Company (TNMP), Entergy Texas Inc. (Entergy), the Lower Colorado River Authority and Lower Colorado River Authority Transmission Services (collectively, LCRA), the Steering Committee of Cities Served by Oncor (OCSC), Southwestern Public Service Company (SPS), Texas Competitive Power Advocates (TCPA), Oncor Electric Delivery Company LLC (Oncor), Office of Public Utility Counsel (OPUC), Enbridge Inc. (Enbridge), El Paso Electric Company (EPEC), CenterPoint Energy Houston Electric LLC (CenterPoint), Alliance for Retail Markets (ARM), Texas Legal Services Center (TLSC), Octopus Energy (Octopus), and East Texas Electric Cooperative Inc. (ETEC).

The following entities testified at a public hearing on the proposed rulemaking held on January 11, 2022: TLSC on behalf of itself and the Durable Medical Equipment Task Force (DMETF), the Texas Council of Medical Disabilities (TCMD) on behalf of itself and DMETF, Texas Medical Equipment Providers Association (TexMEP), Disability Rights Texas (DRT), Angel Medical Supply (AMS), Arc of Dallas-Fort Worth, Medical Legal Partnership (MLP), and Texas Parent to Parent (TPP). The following individuals also testified at the January 11, 2022, public hearing on the proposed rulemaking: Laura Taylor, Adrian Trigg, Laura Lehman, Amy Litzinger, Linda Litzinger, Ellen Bowman, Greta James, and Valerie Doggett.

General Comments

Entergy emphasized that its EOP has been developed over time based on many factors including the "collective operating experience" of the company and its affiliates. As such, Entergy requested that the proposed rule reflect practical considerations of individual companies and avoid requiring the "creation of a parallel plan in a different format" that serves the same purpose, as such an endeavor would consume considerable resources and risk confusion.

Commission Response

The rule does not require entities to create new or multiple EOPs. Existing plans that contain, at a minimum, the information detailed in the rule will satisfy the rule's requirements, as will a collection of pre-existing documents, such as specific procedural manuals, that each contain portions of the required information. The rule also does not require an entity to follow the outline of the rule when drafting its plan to be filed. Moreover, an entity must file an executive summary of its emergency operations plan that includes specific references to locate the mandatory content.

Enbridge argued that the proposed rule creates unnecessary administrative burdens, exposes utilities to unnecessary commercial harm with no proportionate benefit to grid reliability, and unintentionally limits a utility's discretion to manage safety programs. Enbridge contended that ERCOT or the commission is not best situated to unilaterally determine what is necessary for an EOP. Lastly, Enbridge noted that any change requested by either ERCOT or the commission requires a significant time investment to review, test, and implement and urged the commission to consider these factors in its rulemaking.

Commission Response

The commission disagrees with Enbridge's assessment of the proposed rule as unduly burdensome. Tex. Util. Code §186.007 explicitly requires the commission to analyze and evaluate emergency operations plans to assess the ability of the electric utility industry to withstand extreme events. Emergency operations plans must contain sufficient information for the commission to complete this determination. Moreover, this rule does not limit an entity's ability to tailor its emergency operations plan to its system. If an entity does not have plans that address one or more of the specific minimum requirements, then the entity must create that plan based on the entity's unique knowledge of its personnel, operations, system, and facilities. However, this rule does not require an entity to substantively alter the contents of its emergency operations plan, so long as that plan is complete. The commission more substantively addresses Enbridge's concerns in response to comments on subsection (D)(2).

ETEC highlighted that EOPs must be limited in scope to effectively assist utility personnel in responding to an emergency event. ETEC argued that the commission has authority under PURA §41.004(5)(A) "to require reports of electric cooperative operations only to the extent necessary to ensure the public safety" and requested the commission modify the rule as necessary to make clear that "no unintended jurisdictional expansion is created or implied."

Commission Response

The commission declines to modify the rule in response to the general comments of ETEC. The requirements of the adopted rule are within the commission's jurisdiction under Tex. Util. Code §186.007(a-1).

TCPA advised that an EOP is not a singular document, but a compendium of procedures implemented by various teams across an organization in response to certain emergency conditions. As a result, TCPA argued that the proposed rule requirements for a consolidated EOP would diminish the usefulness of emergency procedures that are located in a potentially voluminous consolidated EOP.

Commission Response

As previously noted, the rule does not require an entity to change existing emergency operations plans, except to the extent that those plans do not address the required criteria. The rule does not require a particular organization or format for the EOP. However, the executive summary must identify how the EOP - in whatever form it takes - fulfills the minimum requirements of this rule. ARM contended that the proposed rule significantly and unnecessarily adds to the requirements a REP must provide in its EOP and requested the commission revise the proposed rule so that the imposed requirements are not overly burdensome or risk disclosure of sensitive information.

Commission Response

The requirements of Tex. Util. Code §186.007 apply to retail electric providers. Therefore, the adopted rule applies to retail electric providers. The commission addresses the sensitivity of the information included in an EOP in response to comments on subsection (C).

City of Houston recommended that the proposed rule require an entity to notify affected critical infrastructure customers in advance of filing updated EOPs or annexes to provide those customers with an initial opportunity to provide feedback.

Commission Response

The commission declines to require entities to provide notice of changes to its EOP to a critical infrastructure customer prior to filing those changes with the commission as requested by the City of Houston. An entity may serve numerous critical infrastructure customers. Such a requirement could create significant delays.
in implementing changes to EOPs, as well as result in the disclosure of sensitive information to countless other entities. Moreover, an entity’s EOP is the repository of its own emergency procedures. With some limited exceptions, each entity is in the best position to determine when it needs input from third parties prior to implementing changes to its EOP.

**EOP Public Hearing**

On January 11, 2022, a public hearing was held relating to proposed §25.53. Commenters at the public hearing were individuals with disabilities or medically dependent on electricity due to the use of Durable Medical Equipment (DME), or their representatives, and other interested parties with comments that relate to residential critical load customers, emergency preparedness, and experiences from Winter Storm Uri.

**Commission Response**

The commission thanks the organizations and individuals who participated in the hearing held on January 11, 2022, and sincerely appreciates the personal stories shared by attendees. The commission endeavors to account for the collective concerns of the hearing participants and has taken those concerns into account where appropriate within the scope of the rules.

TLSC, DMETF, TCMD, TexMep DRT, AMS Arc of Dallas-Fort Worth, MLP, TPP, Ms. Taylor, Mr. Trigg, Ms. Lehman, Amy and Linda Litzinger, Ms. James, and Ms. Doggett, recommended that the proposed rule require providers of electricity to prioritize maintaining electric service for medically fragile individuals and those who are medically dependent on electricity when planning for load shed and power restoration during energy emergencies. DRT stated that the proposed rule does not specify the prioritization of residential critical customers in an EOP. TPP recommended that houses with a critical need, such as use of DME, receive uninterrupted power during an emergency.

**Commission Response**

The commission cannot require utilities to guarantee individuals an uninterrupted supply of power during an energy emergency, because the circumstances surrounding an energy emergency may make such a task impossible. Qualifying individuals can apply for critical status under §25.497, and under §25.52 customers with special in-house life-sustaining equipment are considered critical load. Under adopted subsection (e)(1)(B)(iii) of this rule, the entities that are responsible for implementing load shed must include a load shed annex that contains a procedure for maintaining an accurate registry of critical load customers. However, determining how utilities should prioritize among various critical load entities for load shed and power restoration purposes is beyond the scope of this rulemaking project. The commission anticipates addressing critical loads in a future rulemaking project, which may be informed by insights from analyzing the load shed annexes required by this rule.

TLSC and the Texas Council of Medical Disabilities (TCMD) on behalf of itself and the DMETF recommended the proposed rule include a disability annex as part of the required annexes under proposed subsection (e).

**Commission Response**

The commission declines to adopt the specific recommendations of TLSC, DMETF, and TCMD to include a separate disability annex. An annex is designed to address how an entity plans to respond in an emergency involving a specific type of hazard or threat. However, as previously discussed, adopted subsection (e)(1)(B)(iii) establishes a procedure for maintaining an accurate registry of critical load customers under the load shed annex. This annex also requires inclusion of processes for providing assistance to critical load customers in the event of an unplanned outage, for communicating with the critical load customers, for coordinating with government and service agencies as necessary during an emergency, and for training staff with respect to serving critical load customers.

Ms. Doggett, Ms. Lehman, MLP, and AMS recommended the commission take the extraordinary costs incurred by medically fragile individuals and individuals medically dependent on electricity associated with the winter storm into account in the proposed rulemaking. Ms. Doggett emphasized that the costs incurred when power is lost due to an emergency can quickly become unmanageable, such as purchasing a generator, in addition to pre-existing costs that include medication and therapy. Ms. Lehman and AMS commented on the expense and time commitment involved with dealing with Medicaid and Medicare for a backup generator or DME, which is often not covered. AMS stressed that backup DME can be crucial for individuals medically dependent on electricity during an emergency and is an unrecoverable, added expense for small medical suppliers and patients alike. MLP recommended the commission adopt a proactive, responsive approach to the proposed rule to assist all members of the community and to assist in mitigating historical inequities in power and housing.

**Commission Response**

Costs incurred by medically fragile individuals and those medically dependent upon electricity during a winter storm are beyond the scope of this rulemaking. However, the commission’s analysis of EOPs is an important part of its effort to focus on maintaining service during emergencies so that these costs are not incurred in the first place.

TLSC, TCMD, DRT, and Ms. Doggett stressed the importance of wellness checks for disabled individuals and those medically dependent on electricity.

**Commission Response**

The commission declines to modify the language of this rule to add a requirement for entities subject to this rule to conduct wellness checks. Wellness checks are addressed in Tex. Gov. Code Chapter 418, and are beyond the scope of this rulemaking.

Arc of Dallas-Fort Worth and Ellen Bowman emphasized that water supply is just as crucial as electricity during an emergency event and recommended that utilities that support disabled individuals, such as water companies, also be designated as critical and receive an uninterrupted supply of power.

**Commission Response**

The issue of water supply is beyond the scope of a rulemaking on electric industry EOPs, except as it relates to water facilities as critical customers of electric service. The commission is working with water utilities to ensure that electric utilities are provided with information regarding which water facilities are critical so that this information can be considered for load shed planning. The commission may address this topic further through a guidance document or as a part of future rulemakings on critical load.

TLSC commented that the confidentiality and sharing of critical load customer information should be addressed in the proposed rule, specifically as it relates to allowance for dissemination of
residential critical customer information from an entity during an emergency.

Commission Response
TLSC's proposal relates to 16 TAC §25.497 and is therefore outside the scope of this rulemaking. The commission notes that the load shed annex under adopted subsection (e)(1)(C) requires entities to plan for the sharing of critical customer information and therefore addresses TLSC's concerns regarding the sharing of critical customer information to relevant institutions during an emergency.

Lastly, TLSC encouraged the commission to hold further meetings and workshops similar to the hearing on other rulemakings related to emergency preparedness.

Commission Response
The commission is engaged in a wide array of rulemakings and policy projects related to the winter storm and will continue to hold hearings and workshops as appropriate.

Proposed §25.53(a) - Applicability
Proposed subsection (a) makes §25.53 applicable to each electric utility, transmission and distribution utility, power generation company (PGC), municipally owned utility, electric cooperative, and retail electric provider (REP), and the Electric Reliability Council of Texas (ERCOT). Proposed subsection (a) also clarifies that the term "entity" as used in proposed §25.53 is used in reference to the entities subsection (a) lists.

TPPA recommended the commission revise subsection (a) to encourage but not require distribution-only MOUs to file EOPs with the commission. TPPA argued that, as proposed, the rule would "present a substantial regulatory burden on distribution-only entities" due to the amount of information required in a specific format. TPPA maintained that the proposed rule would decentralized emergency response and therefore create more confusion during an emergency as smaller MOUs may be forced to create utility-specific EOPs rather than utilize existing citywide EOPs. Lastly, TPPA stated that distribution-only MOUs are served by transmission entities that are required to file an EOP, which would address the commission's grid reliability concerns as transmission utilities are "most responsible for emergency response" and therefore the entities that should bear "the regulatory and administrative burden" imposed by the proposed rule.

Commission Response
The commission declines to remove the requirement for distribution-only MOUs to file EOPs with the commission. Tex. Util. Code §186.007 requires MOUs, including distribution-only MOUs, as well as other types of entities listed under subsection (a) of the adopted rule to file EOPs with the commission. A distribution-only MOU is an essential part of the electric grid for the customers it serves. Therefore, the commission must have the ability to analyze a distribution-only MOU's EOP to make an adequate determination under Tex. Util. Code §186.007 regarding the ability of the electric grid to withstand extreme weather events.

Definition of "Entity"
TPCA, ARM, and OPUC recommended the last sentence of subsection (a) stating "The term 'entity' as used in this section refers to the above-listed entities" be deleted, and that the term "entity" be defined in subsection (b). ARM stated entities that share a parent company should be permitted to file a single EOP, with shared and unique sections specified.

Commission Response
The commission agrees with TPCA, ARM, and OPUC that a definition of "entity" should be added to subsection (b) and revises the subsection accordingly. The commission agrees with ARM's recommendation regarding duplicative requirements among commonly-owned entities, but finds that the issue is more appropriately addressed in subsection (c).

Proposed §25.53(b)(1) - "Annex"
Proposed subsection (b) lists the definitions exclusive to proposed §25.53 that are supplemental to the general definitions under §25.5 that are applicable to Chapter 25 of the Texas Administrative Code.

Proposed subsection (b)(1) defines the term "annex" for use within §25.53 as "a section of an emergency operations plan (EOP) that addresses how an entity plans to respond in an emergency involving a specified type of hazard or threat."

CenterPoint suggested "the incidence of a specified hazard or threat" be replaced with the phrase "specified emergencies" for subsection (b)(1) defining "annex."

Commission Response
In response to CenterPoint's comment, the commission revises the definition of "annex" to refer to "a section of an emergency operations plan (EOP) that addresses how an entity plans to respond in an emergency involving a specified type of hazard or threat."

Proposed §25.53(b)(2) - "Drill"
Proposed subsection (b)(2) defines the term "drill" for use within §25.53 as "an operations-based exercise that is a coordinated, supervised activity employed to test an entity's EOP. A drill may be used to develop or test new policies or procedures or to practice and maintain current skills."

CenterPoint suggested "that is a coordinated, supervised activity employed" be deleted from subsection (b)(2) defining "drill."

Commission Response
The commission disagrees with CenterPoint's recommendation to delete the reference to coordination and supervision in the definition of "drill. Coordination and supervision are essential elements of a drill and distinguish a drill from other activities that support an entity's preparation for emergencies.

Proposed §25.53(b)(3) - "Emergency"
Proposed subsection (b)(3) defines the term "emergency" for use within §25.53 as "any incident resulting from an imminent hazard or threat that endangers life or property or presents credible risk to the continuity of electric service. The term includes an emergency declared by local, state, or federal government; ERCOT; or a Reliability Coordinator that is applicable to the entity."

ARM, CenterPoint, AEP, EPEC, TPCA, Oncor, TNMP, Sharyland, TPPA, SPS, and Entergy generally opposed the proposed definition of "emergency" under proposed subsection (b)(3). TLSC supported the proposed definition of "emergency" in its testimony at the public hearing held on January 11, 2022, which is addressed under the heading for the same. ARM stated that the term "emergency" does not appear elsewhere in PURA or in
commission rules and stated that it is not clear what "presents credible risk to the continuity of electric service" means. ARM recommended that for administrative clarity, the commission adopt a similar definition for the term "emergency" as the term "emergency condition", as used in the ERCOT Nodal Protocols. ARM noted that governmental entities are more likely to declare a "disaster" such as for a hurricane, whereas ERCOT or other reliability coordinators are more likely to declare an "emergency" such as an energy emergency alert. ARM recommended clarifying the definition of "emergency" by indicating that not every "disaster" or "emergency" warrants usage of an entity's EOP and revising subsection (b)(3) accordingly. Specifically, ARM recommended the definition be modified to "better specify what may constitute endangerment to the continuity of electric service, with conforming changes to the definition of "emergency operations plan".

CenterPoint recommended revising the definition of "emergency" to include "existing or imminent hazards" and to give an entity reasonable discretion in classifying a hazard or threat as an emergency.

AEP and EPEC recommended limiting the proposed definition of "emergency" under (b)(3) "to situations that credibly risk continuity of electric service that also result in an emergency declaration by a local, state, or federal government, RTO, or ERCOT or other reliability coordinator." TCPA commented that the proposed definition of "emergency" under (b)(3) should be revised to include "existing or imminent hazards" and to give an entity reasonable discretion in classifying a hazard or threat as an emergency.

Oncor recommended a utility's EOP be triggered when there is a "system emergency" as defined under §25.5 (relating to Definitions) instead of "when there is a risk of service interruption to a single customer or small group of customers." Subsection 25.5(128) defines "system emergency" as a "condition on a utility's system that is likely to result in imminent significant disruption of service to customers or is imminently likely to endanger life or property." TNMP commented that the definition of "emergency" under (b)(3) improperly includes instances where the "credible risk" of service interruptions is small which are generally handled through a utility's standard service restoration procedures. TNMP argued that EOPs are generally in anticipation of or during significant events such as a hurricane and, like Oncor, recommended the proposed definition be consistent with the definition of "system emergency" under §25.58(128) and, consistent with historical practice, only encompass significant events rather than events that impact only a small number of customers.

Sharyland commented that the phrase "continuity of electric service" as used in (b)(3) was overly broad and any interruption of service, even when very limited or no customers experience outages, could therefore be classified as an "emergency." Sharyland emphasized that EOPs are typically utilized "in response to a credible, imminent threat to a significant portion of the system" which is consistent with the proposed rule and that the proposed rule should "focus on the response to major events that pose significant risks to the continuity of electric service on the grid." Accordingly, Sharyland recommended revising the definition of "emergency" to replace "to the continuity" with "of a significant interruption."

TPPA also commented that the proposed definition of "emergency" under (b)(3) is overly broad as it could feasibly encompass emergencies unrelated to the continuity of electric service and therefore unnecessarily increase the scope of EOPs beyond the intended focus on electric grid stability. Like Sharyland, TPPA expressed concern that the proposed definition "could be read to apply to incidental, limited, and brief interruptions of service that do not result from or cause emergency conditions." Accordingly, TPPA provided draft language striking "endangers life or property from the proposed definition of "emergency" and adding the term "sustained" prior to "continuity of electric service."

TPPA further recommended the term "emergency" be limited to "an emergency or disaster declared by local, state, or federal government; ERCOT; or a Reliability Coordinator that is applicable to the entity." TPPA argued that government entities "will declare states of emergency or disaster as appropriate" and that the commission should not list other events outside of that scope. TPPA noted that the language in the current version of §25.53 includes, but is not limited to, that circumstance. SPS also commented that the definition of "emergency" under subsection (b)(3) was overly broad and that an "emergency" for the same reasons as TNMP with the additional qualifier that the term be confined to emergency declarations "by entities empowered to coordinate regional or state-wide responses to such event." Specifically, SPS expressed that the focus of the EOP and this rulemaking is to "address significant, material threats to reliability" and that the rule should not contemplate emergencies that do not involve a threat to grid reliability. SPS extended this rationale to its comments regarding subsection (g) and provided draft language for proposed subsection (b)(3) replacing "the term includes" with "that results in".

Entergy also requested that the commission replace the use of the term "incident" with the defined term "emergency" under subsection (b)(3), as defined by AEP, where applicable as the term "incident" is undefined.

Commission Response

The commission revises the definition of emergency to clarify that, for purposes of this rule, whether an emergency exists for a particular entity depends on how a situation would impact that entity. A key factor in an entity's preparation for emergencies is the process and standards by which it determines whether an emergency exists.

The commission moves the reference to continuity of electric service from the definition of "emergency" to the definitions of "hazard" and "threat" because those terms are intended to cover all types of emergencies. Additionally, in response to comments that the term "emergency" should not include all credible risks to the continuity of electric service, the commission revises the definition of emergency to limit it to a hazard or threat that is sufficiently imminent and severe that an entity should take prompt action to prepare for and reduce the impact of harm that may result from the hazard or event. Furthermore, although the definitions of hazard and threat are comprehensive, the rule requirements for information on specific types of emergencies to be included in an EOP are limited to those that could readily cause a significant disruption of electric service. Entities are encouraged to address additional types of emergencies not otherwise required in the EOP.

Additionally, the definition of emergency expressly refers to an emergency declared by local, state, or federal governments; ERCOT; or another reliability coordinator designated by the North American Electric Reliability Corporation (NERC). However, the defined term is limited to such a declared emergency that is applicable to the entity. An entity must exercise judgment to determine whether any such declaration or situation referred to by
another designation, such as a disaster, constitutes an emergency under its EOP.

Proposed §25.53(b)(4) - "Emergency Operations Plan"

Proposed subsection (b)(4) defines the term "emergency operations plan" for use within §25.53 as "the plan and attached annexes, maintained on a continuous basis by an entity, intended to protect life and property and ensure continuity of adequate electric service in response to an emergency."

Enbridge opposed the inclusion of "providing adequate electricity during an emergency" in the definition of "emergency operations plan" under proposed subsection (b)(4). Enbridge argued that EOPs are not "intended to establish performance standards" and as such are not within the scope of the proposed rule. Enbridge emphasized that EOPs are intended to address "potential threats to life or property," prioritize safety of personnel, and preserve or restore the generation resource. Enbridge commented that the proposed rule inappropriately requires a specific performance standard that would distract from the objectives of an EOP and provided draft language striking "and ensure continuity of adequate electric service" from the proposed definition.

TCPA agreed with the intent of the proposed definition of "emergency operations plan" under subsection (b)(4) but expressed that each entity has limited control over the electric grid and that it is impossible to "ensure" continuity of electric service during an emergency. Consistent with its recommendations for subsection (b)(3) defining "emergency" ARM suggested that for administrative clarity, the commission adopt a similar definition for the term "emergency operations plan" under proposed subsection (b)(4), as the term "emergency condition" as used in the ERCOT Nodal Protocols.

Commission Response

The commission deletes the definition of "emergency operations plan" under proposed subsection (b)(4), because it is unnecessary. The rule contains various provisions that define an emergency operations plan. The commission moves the requirement that the plan be maintained on a continuous basis to adopted subsection (c)(3).

Proposed §25.53(b)(5) - "Hazard"

Proposed subsection (b)(5) defines the term "hazard" for use within §25.53 as "a natural, technological, or human-caused condition that is potentially dangerous or harmful to life, information, operations, the environment, or property."

TCPA recommended proposed subsection (b)(5) be deleted but, if the commission declines to do so recommended striking "information, operations, the environment" from the proposed definition of "hazard" and after "property" add "or the continuity of electric service."

ARM recommended the definition of "hazard" under proposed subsection (b)(5) be aligned with the definition of "emergency" under proposed subsection (b)(3) as each definition includes "references to 'information,' 'operations,' and 'the environment,' but not the continuity of electric service." ARM noted that such terms are both expansive and restrictive as they may require EOPs to include information that is not relevant to system or grid reliability, yet also limit the scope of hazards contemplated by EOPs. ARM therefore recommended that the term "hazard" instead be left to its plain meaning and that proposed subsection (b)(5) should be deleted from the proposed rule.

Commission Response

The commission declines to delete the definition of "hazard". The ordinary meaning of hazard lacks sufficient precision for the rule. In addition, the definition of "hazard" under adopted subsection (b)(5) along with the definition of "threat" under adopted subsection (b)(6) and revised definition of "emergency" under adopted subsection (b)(3) are intended to comprehensively define situations that an EOP should address. The commission revises the definition of "hazard" to include a "condition that is potentially dangerous or harmful to the continuity of electric service."

Proposed §25.53(b)(6) - "Threat"

Proposed subsection (b)(6) defines the term "threat" for use within §25.53 as "the intention and capability of an individual or organization to harm life, information, operations, the environment, or property."

TCPA recommended proposed subsection (b)(6) be deleted but, if the commission declines to do so recommended striking "information, operations, the environment" from the proposed definition of "threat" and after "property" adding "or the continuity of electric service." Consistent with its comments regarding subsection (b)(5) defining "hazard", ARM further recommended proposed subsection (b)(6) defining "threat" be deleted and the term left to its plain meaning.

Commission Response

Consistent with the discussion of the definitions of "emergency" and "hazard", the commission declines to delete the definition of "threat." The commission revises the definition of "threat", adding "including harm to the continuity of electric service" to the end of the definition.

Proposed §25.53(c) - Filing requirements

As a prefatory note, due to an inconsistency in the numbering for subsection (c) between the proposed version of the rule filed on the commission's website and the version of the rule published in the Texas Register, the headings, responses and other references to "proposed" provisions of (c) are referring to the numbering used in the version of the rule filed on the commission's website.

Proposed subsection (c) details the filing requirements for EOPs by an entity under this section.

LCRA requested the commission clarify the procedure for entities to file unredacted EOPs and "the applicability of the commission's existing procedural rules for the filing of confidential or voluminous materials." LCRA also urged the commission to establish a secure method for required parties to file unredacted EOPs that is only accessible to relevant commission staff and meets the industry leading cybersecurity and encryption specifications. Until that is established, LCRA recommended that the commission allow required entities to file confidential information in their EOPs with Central Records under §22.71(d) (relating to Confidential material). LCRA also requested that the rule clarify that the portions redacted or withheld by the filing party of the EOPs are confidential and not subject to public disclosure.

Commission Response

The commission declines to make the changes recommended by LCRA because they are not relevant to the adopted rule, which only requires the submission of a redacted copy of an entity's EOP to the commission. Under adopted subsection (c)(3)(E), an entity must make its unredacted plan available to commission staff at a designated location upon request.
and must file a complete plan with confidential portions removed for public inspection in accordance with Tex. Util. Code §186.007(f).

The commission’s procedural rules regarding electronic filings and confidential filings are currently under review. As a practical matter, the commission’s website is presently able to accept both public and confidential filings electronically.

In the alternative LCRA requested that the commission allow required entities to keep their unredacted EOPs available for inspection by appropriate commission staff at a designated location in Austin, as allowed in §22.144(h) (relating to requests for information and requests for admission of facts) for production of voluminous materials.

Commission Response

The commission agrees with LCRA’s alternative suggestion and reverts back to the language of the repealed version of this rule requiring an entity to make its unredacted plan available to commission staff at a location designated by commission staff under adopted subsection (c)(3)(E).

City of Houston requested that the summary after-action reports required under this subsection include details on critical infrastructure that was partially served by the provider, why it was not fully served, and changes that will address the issue. City of Houston further commented that this portion could be included in a confidential version of the after-action report and this information should be directly communicated to the critical infrastructure owner after such an event.

Commission Response

The intent of the rule is to require an entity to develop, maintain, and update its EOP on a regular basis, not to create a permanent forum for an entity to receive feedback on any individual emergency response. Therefore, the commission removes the proposed requirement that an entity provide an updated EOP 30 days after an activation of its EOP. The adopted rule instead requires an entity to capture its lessons learned from activations of its EOP during the previous calendar year, then provide a revised plan reflecting material changes in how it will respond to an emergency. Accordingly, City of Houston’s request regarding summary after-action reports is now moot. The commission notes that under adopted subsection (g), commission staff may require an entity to provide an after-action report following activation of an entity’s EOP.

OCSC supported the full disclosure of unredacted EOPs and recommended the commission impose minimum requirements on any utility making a claim of confidentiality "to show specifically why each component of the filing is confidential" in the interest of providing as much useful information to customers, particularly regarding communications plans. In addition, OCSC commented that it is crucial for the industry to align with ERCOT on emergency communications. Additionally, OCSC urged the commission to utilize information and data from filed EOPs for future policymaking efforts to maximize the benefit of agency efforts for the industry and consumers.

Commission Response

The commission disagrees with OCSC’s comments in favor of full disclosure of unredacted EOPs. An EOP is a written plan detailing an entity's processes and actions utilized for response to emergencies and for safeguarding health, property, and continuity of service in such events. It is not, as OCSC suggests, a "tool for customers." The inadvertent release of confidential information in an EOP could represent a threat to grid security and reliability. In consideration of other commenters' proposals and recommendations, the commission removes the requirement to file unredacted plans with the commission under adopted subsection (c)(1)(A) and instead permits entities to file a summary of its EOP and a complete EOP with confidential portions removed with the commission. The Commission agrees with OCSC that the commission's review of EOPs may provide valuable insights that inform future policy initiatives.

Proposed §25.53(c)(1) - Filing deadline and annual filing

Proposed subsection (c)(1) requires an entity to file an EOP by April 1, 2022, and beginning in 2023, to annually file an EOP by February 15 of each year in the manner prescribed by the commission.

ARM, TCPA, GVEC TEC, CenterPoint, EPEC, AEP, SPS, Oncor, TNMP, ETEC, and Enbridge expressed concern with the deadlines proposed and requested more time to file EOPs. ARM expressed concern for the initial April 1 deadline and the February 15 annual filing deadline. Because both deadlines correspond with other reporting obligations and deadlines for entities covered in the rule, ARM stressed that the standing April and February deadlines would be impractical for filing entities. ARM commented that a June 1 deadline is a part of entities' compliance calendar "and naturally aligns with the start of the summer peak season." As such, ARM recommended moving the initial deadline to file an EOP June 1, 2022, or 120 days after the rule becomes effective, and moving the annual filing deadline to June 1. TCPA also recommended this change but specified the change should be made to whichever timeline is later to remain consistent with the start of peak load seasons. GVEC and CenterPoint also recommended extending the initial filing deadline to June 1, 2022. Enbridge recommended a 6-month compliance deadline from rule adoption. Similarly, EPEC recommended a 120-day compliance deadline from rule adoption, while AEP, Oncor, TNMP and SPS recommended a 90-day deadline from the same.

Commission Response

The commission extends the initial filing deadline to April 15, 2022 to provide entities with more time to comply with the rule in recognition of the commission considering the rule for final adoption at a later date than projected when the April 1, 2022 deadline was proposed.

Additionally, to avoid competing with other regulatory reporting deadlines set for February 15 each year, the commission agrees to move the annual emergency operations plan reporting deadline to March 15 by adopting subsection (c)(3). The commission declines to establish June 1 as the future-year annual reporting deadline as that does not provide the commission sufficient time to analyze plans and submit subsequent reports to the Legislature.

CenterPoint commented that proposed §25.53 exceeds the requirements of SB 3’s amendments to Tex. Util. Code §186.007, which states that the commission shall require entities to file an updated plan if it finds that a plan does not contain sufficient information to determine if the entity can provide adequate electric services. CenterPoint notes that the commission "has not made any findings since Senate Bill 3’s effective date that an applicable entity's currently filed EOP 'does not contain adequate information to determine whether the entity can provide adequate elec-
The commission disagrees with CenterPoint's contention that the commission must find an EOP inadequate before requiring the entity to file an updated EOP. If, indeed, an entity's currently filed EOP adequately meets the requirements of this rule, that entity is not required to compile a new EOP. As discussed under the General Comments heading, existing plans that contain the information required in the rule will satisfy the rule's requirements, as will a collection of pre-existing documents, such as specific procedural manuals, that each contain portions of the required information. The commission does not require an entity to redraft or reformat its emergency operations plans. Only emergency operations plans that do not contain adequate information must be updated for purposes of the rule.

As a separate matter, the commission extends the initial filing deadline to June 1, 2022 for MOUs in recognition of the fact that the version of §25.53 that is currently being repealed did not apply to MOUs, and these entities may have to generate a completely new EOP.

AEP, CenterPoint, and LCRA commented that because each entity is required to file an updated EOP when a significant change is made, the annual EOP requirement should be removed from the rule as "the costs of an annual EOP filing outweigh the benefits." Like other commentors, ETEC recommended that entities only file new EOPs when substantial changes have been made. ETEC suggested that the annual affidavit remain for attesting to proper and continued training and allowing entities the option to attest that the previously filed EOP is unchanged instead of the annual filing requirement.

TEC similarly proposed changing the rule language to remove the automatic annual filing requirement. TEC argued that EOPs should only be required to be filed annually if the entity "activated its EOP" and needs to include an after-action report.

TPPA interpreted an EOP as "the collation of an entity's emergency procedure documents into a single document, using a template that matches, on a 1:1 basis." Therefore, due to the initial EOP deadline, TPPA recommended modifying the rule language to require entities to submit their current, existing EOPs. This would allow commission staff, or a consultant, to review EOPs and provide entities with analysis and recommendations as necessary. TPPA stated that such a process would be effective, targeted, and provide actionable steps without creating substantial regulatory burdens. For the longer term, TPPA recommended allowing flexibility for non-substantive changes to the form of the filing, if the filing clearly indicates where the information can be located.

The commission agrees with the comments from AEP, CenterPoint, TEC, LCRA and TPPA that the intent of the rule is to require an entity to develop an EOP with certain minimum requirements, maintain that EOP over time, and regularly revise the EOP to reflect material changes to how the entity would respond to a future emergency. The commission also agrees that filing an EOP can be burdensome, so the commission removes the requirement that an entity file an updated EOP when a significant change is made. Under adopted subsection (c)(3), the commission adopts requirements related to regular updates to an entity's EOP. Each year by March 15, an entity must either file a revised version of its EOP or provide an attestation that no material changes were made to the EOP in the previous calendar year. The adopted paragraph also requires an entity to update the information filed with its EOP if commission staff determines that the entity's EOP does not contain sufficient information to assess the entity's preparedness. Because the commission changes the requirement and circumstances under which an entity must provide a revised EOP, the commission deletes proposed subsection (c)(4)(D).

The commission agrees with TPPA regarding flexibility and form of the EOP document, as discussed in greater detail under the General Comments heading above. ARM requested that entities that share a parent company be permitted to file a single EOP. ARM also requested further specificity in the rule for which sections apply to commonly owned entities and which apply to particular entities to "minimize administrative burdens and increase the efficiency" for reporting entities.

The commission agrees with ARM's recommendation to permit joint filings of an EOP in certain circumstances. The commission revises the rule to allow for joint filing of an EOP and other documents required by the rule separate from the EOP, as well as the combining of annexes in certain circumstances. A jointly filed EOP must clearly identify which portions of the plan apply to individual entities and fulfill the requirements of the rule for each entity. Each subsidiary entity must either be subject to the parent EOP or have its own standalone plan.

In conjunction with the amendment to subsection (c)(1) described above, the commission adds subsection (c)(1)(E) and (c)(1)(F) to permit joint filing of an EOP and documents separate from an EOP by an entity that has control over other entities. Such joint filings would satisfy the filing obligations required under subsection (c)(1). The commission refrains from specifically defining "control" as the term in this context is best left to its plain meaning to maximize flexibility for entities in filing and compiling required documents and for the commission in reviewing and requiring updates under the rule. The commission also adds subsection (c)(1)(G) which permits an entity that must file similar annexes under subsection (e) for different facility types to file a combined annex as part of its EOP. The commission also adds subsection (c)(3)(F) which mirrors the requirements of subsection (c)(1)(E), (c)(1)(F), and (c)(1)(G) for updated filings and combined annexes.

ETEC expressed concern over the reporting period in the after-action report because for "an event starting on December 31, for example, (to) be included in the February 15 filing" entities would not have enough time to assess a major event in such a short period. Thus, ETEC recommended changing the reporting period to address events that occurred during the twelve months...
prior to October of the previous year. In the alternative, ETEC suggested moving the February 15 deadline to April 1 to cover events that occurred during the previous calendar year.

Commission Response

The commission declines to change the rule based on ETEC's comment. In ETEC's hypothetical, if an event begins on December 31, the entity will not have revised the plan as a result of that event prior to the start of the next calendar year. So, under adopted subsection (c)(3)(A), if an entity makes a material change to its plan in the previous calendar year, it must file with the commission an executive summary describing the changes made, updating any references to specific sections and page numbers that correspond with the rule's minimum requirements; file with the commission its complete, revised plan with confidential portions removed; and submit the revised, unredacted plan to ERCOT by March 15.

TEC noted that the commission has limited jurisdiction over retail electric distribution cooperatives that do not operate a transmission facility or generation resource. Therefore, commission staff's authority in the rule to review and require changes should exclude retail electric distribution cooperatives. Similarly the requirement for drills and other operational standards should be excluded. Alternatively, the rule should be modified to report only requirements for such organizations.

Commission Response

The commission disagrees with TEC's analysis of the commission's jurisdiction. Although PURA §41.001 states that with regards to the regulation of electric cooperatives, the provisions of Chapter 41 control over any other provision of Tex. Util Code, Title II, the statutory authority for this rule comes from Tex. Util Code §186.007, which is not in Tex. Util Code, Title II. Tex. Util Code §186.007 (a-1) explicitly applies to electric cooperatives.

Tex. Util. Code §186.007 requires the commission to evaluate the preparedness of the industry to respond to emergencies, and the information required under this section is required for this evaluation. For example, the commission requires each entity listed under adopted subsection (a) to conduct a drill as a means to self-evaluate its own level of preparedness, the results of which are reflected in material changes to the EOP filed with the commission.

SPS commented that the filed version of an EOP should be a summary version with the removal of confidential and security sensitive information.

In accordance with the concerns shared under heading(c)(1)(A), Oncor and TNMP provided draft language for subsection (c)(1). Oncor's proposed language required an entity to publicly file an EOP in its entirety with confidential portions redacted or removed within 90 days of rule adoption and otherwise make available a complete unredacted copy of the EOP available to the commission for inspection in Austin. TNMP provided similar proposed language but instead required a comprehensive summary to be filed publicly, rather than an EOP in its entirety with confidential portions redacted or removed.

ARM commented that requiring entities to file unredacted EOPs in their entirety to both the commission and ERCOT as required under proposed subsection (c)(1)(A) and (c)(1)(B) respectively is needlessly duplicative. Instead, ARM recommended requiring parties to file a complete unredacted EOP with ERCOT and a redacted public EOP with the commission to ensure preparedness and rule compliance without the burden of duplicative reporting requirements.

Commission Response

The commission agrees with many of the concerns expressed by commenters above and changes the rule to require an entity to submit to ERCOT its complete, unredacted plan; file with the commission an executive summary describing the changes made, updating any references to specific sections and page numbers that correspond with the rule's minimum requirements; and file with the commission its complete, revised plan with confidential portions removed.

Proposed §25.53(c)(1)(A) - Filing with the commission

AEP, CenterPoint, EPE, LCRA, Oncor, TNMP, SPS, TCPA, and Entergy opposed the inclusion of subsection (c)(1)(A) in the proposed rule due to confidentiality concerns related to the public filing of an unredacted EOP. SPS, TPPA and TNMP argued that the proposed rule conflicts with statutory language in Tex. Util Code §186.007 which states "the plan shall be provided to the commission in a redacted form for public inspection with the confidential portions removed. An entity within the ERCOT power region shall provide the entity's plan to ERCOT in its entirety." CenterPoint, AEP, EPE, Oncor, Entergy, SPS, and CenterPoint each argued that, despite being filed confidentially, the information risked being disclosed under the Texas Public Information Act (TPIA).

Entergy and SPS each contended that requesting a TPIA exemption is costly, burdensome, and requires action on short notice. Entergy argued that a utility should not be forced to defend an exemption from disclosing EOP customers that may harm customers. SPS argued that these exemption requests involved highly technical matters which the Attorney General and the courts may not be able to fully appreciate.

EPE, Oncor, SPS, and TCPA argued that EOPs contain information that, if disclosed, could be used by those planning an attack on critical infrastructure. TCPA cautioned that "public transparency must be tempered with securing sensitive or critical information regarding a utility's electric system." Oncor and EPE argued that portions of an EOP are designated as Critical Energy/Electric Infrastructure Information by the Federal Energy Regulatory Commission, and that the proposed rule might conflict with federal law.

CenterPoint, LCRA, and TCPA each recommended the commission revise the rule to ensure that any redacted information that was required to be filed was protected, to the maximum extent possible, from disclosure under the TPIA. CenterPoint argued that the "cyber security annex" and "physical security incident annex" is covered by TPIA §552.101's confidential information exception to the public information disclosure requirement under TPIA §552.021. CenterPoint provided draft language for proposed subsection (c)(1)(A) to specify that an unredacted EOP in its entirety must be filed confidentially under commission rule §22.71(d) (relating to Filing of Pleadings, Documents, and Other Materials), and, since it contains information related to critical infrastructure under Tex. Gov't Code §421.001(2), is therefore exempt from public disclosure under the TPIA. Alternatively, LCRA requested that the commission modify proposed subsection (c)(1)(A) by adding "The redacted portions of the EOP are considered confidential information and are excepted from public disclosure." to the end of the provision. TCPA proposed that unredacted EOPs should be submitted to ERCOT rather than the commission and that these EOPs
should be designated as "protected information" under §25.362 (relating to ERCOT Governance) and ERCOT Nodal Protocols.

EPE, Oncor, TNMP, SPS, and AEP recommended that filing a comprehensive summary of the EOP be considered an acceptable substitute for filing full unredacted EOPs with the commission. SPS and EPE noted that this was consistent with existing §25.53(b), which allows a utility to submit either an entire EOP or a comprehensive summary. EPE also requested an explanation of the additional benefit gained by not allowing a comprehensive summary in lieu of a submission of a complete EOP. EPE further stated that if the commission requires the filing of entire EOPs, instead of comprehensive summaries, additional time would be needed to comply, as combining procedures into one comprehensive document will be time consuming.

TPPA, AEP, Oncor, and TCPA proposed that, as an alternative to requiring an unredacted copy to be filed with the commission, for portions of a plan that are designated as confidential, entities be required to provide the unredacted plan for inspection. TPPA recommended in-camera inspection by the commission. AEP recommended inspection by commission staff at the entity's main office. Oncor recommended "a location in Austin."

Commission Response

The commission agrees with commenter concerns regarding the importance of protecting the confidentiality of sensitive information contained in EOPs. The commission modifies the rule to require entities to file with the commission an executive summary that, among other things, describes the contents and policies contained in the EOP. Entities must also file a complete copy of its EOP with all confidential portions removed and make its unredacted EOP available in its entirety to commission staff on request at a location designated by commission staff. Additionally, an entity with operations within the ERCOT power region must submit its unredacted EOP in its entirety to ERCOT, and ERCOT must designate the unredacted EOP as Protected Information under the ERCOT Protocols.

Proposed §25.53(c)(1)(B) - Filing with ERCOT

Proposed subsection (c)(1)(B) requires an entity operating within the ERCOT power region to file an unredacted EOP in its entirety with ERCOT.

CenterPoint, LCRA and TNM opposed the inclusion of proposed subsection (c)(1)(B) unless justification is provided for ERCOT to review other market participants' EOPs and to prevent conflict between commission and ERCOT rules. TNM also claimed that proposed subsection (c)(1)(B) is duplicative because "ERCOT Nodal Operating Guide 3.7(6) already requires a Transmission Owner to submit to ERCOT by each February 15, its emergency operations plan to mitigate operating emergencies." CenterPoint offered revised language for proposed subsection (c)(1)(B) to reflect that filed unredacted EOPs with ERCOT are protected information in accordance with the ERCOT Nodal Protocols. CenterPoint provided draft language adding "and ERCOT shall designate and treat such unredacted EOPs as Protected Information under section 1.3 of the ERCOT Nodal Protocols" to the end of proposed subsection (c)(1)(B).

Commission Response

The commission disagrees with CenterPoint, TCPA, and TNMP's recommendation to delete proposed subsection (c)(1)(B). Tex. Util. Code §186.007(f) requires an entity within the ERCOT power region to provide its plan to ERCOT in its entirety. The commission agrees with CenterPoint's recommendation to add language regarding the confidentiality of plans filed with ERCOT and adopts subsection (c)(1)(C) accordingly.

Proposed §25.53(c)(1)(C) - After-action report

Proposed subsection (c)(1)(C) requires an entity, beginning in 2023, to include in its annual EOP, for each incident in the prior calendar year that required the entity to activate its EOP, a summary after-action report that includes lessons learned and an outline of changes the entity made to the EOP as a result of the incident.

TPPA, AEP, LCRA, Oncor, TNMP, Enbridge, and TCPA opposed the inclusion of subsection (c)(1)(C) and recommended the provision be deleted.

TPPA contended that requiring an entity to provide an outline of changes to its EOP after an emergency event is better covered by proposed subsection (c)(4)(C), requiring a summary of lessons learned, is best accomplished by briefing the commission directly, and a set of after-action reports could form a blueprint for the next incident. TPPA contended that requiring an entity to provide an outline of changes to its EOP after an emergency event is better covered by proposed subsection (c)(4)(C), requiring a summary of lessons learned, is best accomplished by briefing the commission directly, and a set of after-action reports could form a blueprint for the bad actor and otherwise provide no benefit to the commission.

Similar to TPPA, AEP and LCRA recommended deleting proposed subsection (c)(1)(C) and moving the proposed requirement to another section. LCRA specifically recommended moving proposed subsection (c)(1)(C) to proposed subsection (c)(4)(C).

Oncor and TNMP opposed the inclusion of subsection (c)(1)(C) in the proposed rule if the term "emergency" is interpreted to include more than "system emergencies" because the requirement would be administratively burdensome to implement. Otherwise, if the term "emergency" is not interpreted in that manner, then Oncor and TNMP do not oppose the rule requirement. Enbridge expressed concern for the "lessons learned" requirement of proposed subsection (c)(1)(C) as such information is "highly commercially sensitive" and would result in harm to the entity and would inhibit an entity's ability to earnestly analyze its own responsiveness to emergency events.

TCPA opposed the requirements under proposed subsection (c)(1)(C) and recommended it be deleted. Because there are several incidents every year in which an entity uses procedures from its EOP which do not result in material information to report and SB3 does not require information described in this provision, TCPA stated that the requirement to file updated EOPs "will adequately address the issue that the PFP is signaling in proposed subsection (c)(1)(C)." Further, TCPA explained that requiring entities to file after-action reports after every incident, along with the other requirements, would be burdensome. If the commission is to keep such requirements TCPA requested that the rule be changed to only require a summary report of each type of emergency including lessons learned and any resulting EOP changes instead of a report per incident.

Commission Response

In response to multiple commenter suggestions, the commission deletes the after-action reporting requirement under subsection (c)(1)(C) and replaces it with adopted subsection (c)(3)(A) and (c)(3)(B). Under adopted subsection (c)(3)(A), if an entity has made a material change to its plan in the previous calendar year as the result of an activation, the entity must make a filing by March 15. This filing must include an executive summary that describes the changes made and updates any references to specific sections and page numbers that correspond with the rule's minimum requirements and the complete.
revised plan with confidential portions removed. The entity must also submit to ERCOT the revised, unredacted plan. If an entity did not revise its emergency operations plan in the previous calendar year as a result of an activation of its plan, the entity must file an attestation that the plan has not changed, updates to the list of emergency contacts, and the affidavit required under subsection (c)(4)(C). An entity is also required to provide an after-action report upon request, as detailed in adopted subsection (g).

ETEC, AEP, SPS, and ARM recommended changes to proposed subsection (c)(1)(C) if the commission does not adopt their proposals to delete the provision.

ETEC appreciated the need for the commission to have information from utilities such as after-action reports, mitigation plans, and affidavits regarding emergency events but was concerned that requiring entities to file these items with an EOP as proposed may clutter and reduce the effectiveness of the EOP. In ETEC’s view, such reports do not serve the objective of an EOP to guide personnel during an emergency. Therefore, ETEC requested that proposed subsection (c)(1)(C) be amended to allow separate filings for EOPs and after-action reports distinct from EOP filings. ETEC remarked that an EOP’s key purposes are “assignment of authority during an emergency, and clear organizational relationships” and therefore extraneous information should be excluded.

EPEC and ARM expressed concern that requiring an after-action report after every incident would be overly broad. EPEC proposed changing the after-action reporting requirement to only after significant incidents, such as after “emergencies” as defined in proposed subsection (b)(3). ARM recommended changing the report required under proposed subsection (c)(1)(C) to only require a general overview of the prior year’s activity.

AEP and SPS suggested narrowing the circumstances requiring an after-action report. AEP explained that sometimes their EOP is activated in response to a weather event that is not unusual or extreme and such a case would not “necessarily raise novel issues warranting a review and report of the event.” Because of this, AEP recommended that after-action reports should only apply to incidents when an entity activates its EOP in response to an official emergency declaration by local state, or federal government, ERCOT, or a reliability coordinator. SPS recommended changing the language of proposed subsection (c)(1)(C) from “incident” to “emergency” and also recommended amended language so EOP summaries may be filed in lieu of an entire unredacted EOP. SPS explained that rule language should be limited to emergency events as declared by appropriate governmental and regional coordinator authorities.

ARM recommended adding the phrase “if any” in the rule to clarify that an after-action report is only required if an incident occurred during the prior year.

Commission Response
The commission agrees with the concerns addressed by commenters and removes proposed subsection (c)(1)(C) from the rule. However, an entity will continue to be required to provide an after-action report on request, as detailed in adopted subsection (g).

Consistent with its general recommendations for the proposed rule, OPUC requested that costs incurred by an entity implementing its EOP in response to a prior incident be included as part of the reporting requirement under proposed subsection (c)(1)(C).

Commission Response
The commission declines to adopt OPUC’s proposed rule language. The monetary cost of EOP implementation does not bear on the intention of the rule to ensure emergency preparedness of entities to protect life, property, and continuity of service.

Proposed §25.53(c)(3) - New entity EOPs
Proposed subsection (c)(3) requires a person seeking registration as a PGC or certification as a REP to file an EOP at the time of its application for registration or certification, and, if operating in the ERCOT power region, to file the EOP with ERCOT within 10 days of approval.

AEP observed that there is no subsection (c)(2) and recommended renumbering the paragraphs in subsection (c).

Commission Response
The proposed language filed on the commission’s website contained a numbering error that was corrected for the version published in the Texas Register. For clarity, references to the proposed in this preamble use the numbering from the version of the proposed rule filed on the commission’s website. The commission has corrected this numbering issue for the adopted rule.

CenterPoint provided language for proposed subsection (c)(1)(C), relisted in CenterPoint’s redline as subsection (c)(2). CenterPoint’s proposed language would require an entity to file a summary after-action report and an affidavit affirming that the entity’s currently filed EOP includes all material updates and changes annually on June 1, among other changes.

Commission Response
As noted under heading (c)(1), the commission changes the annual reporting deadline to March 15 in order to address commenters’ concerns while still allowing the commission sufficient time to analyze the plans and prepare its report to the Legislature. The commission declines to reorganize subsection (c)(1)(C) into new subsection (c)(2) as recommended by CenterPoint.

CenterPoint recommended adding the phrase “after June 1, 2022” to clarify that this requirement only applied to persons who seek certification or registration after June 1, 2022. Because such persons would not be considered entities on June 1, 2022, CenterPoint explained that these persons cannot be required to file EOPs by June 1, 2022.

Commission Response
The commission disagrees with CenterPoint. The intention of the rule is to ensure all entities create and maintain an EOP. Accordingly, adopted subsection (c)(2) explicitly requires that to register as a PGC or certify as a REP, an applicant must submit to ERCOT its unredacted EOP and file with the commission an executive summary and complete copy of the plan with the confidential portions removed.

Proposed §25.53(c)(4) - Updated filings
Proposed subsection (c)(4) requires an entity to file an updated EOP with the commission within 30 days under the circumstances detailed in proposed subsection (c)(4)(A) through (c)(4)(D), which will be discussed in more detail under the corresponding headers below.
CenterPoint, LCRA, TEC, TPPA, TNMP and SPS opposed the requirement to file EOPs under proposed subsection (c)(4). CenterPoint requested that an entity only be required to update its EOP within 30 days after the entity makes a significant change to its currently filed EOP. LCRA agreed that it should take a significant change to an EOP to require an entity to file it with the commission, including, as an alternative to providing after action reports as a part of an EOP, when a significant change has been made to an EOP in response to an after-action report. TEC recommended removing the re-filing requirement altogether or alternatively excluding cooperatives from the re-filing requirements.

Commission Response

The commission makes several changes to adopted subsection (c)(3) to address the concerns raised by comments to proposed subsection (c)(4) concerning when an entity must file its EOP. First, the commission retains the requirement that an entity must update its EOP if commission staff determines that the entity’s EOP on file does not contain sufficient information to determine whether the entity can provide adequate electric service through an emergency as stated in adopted (c)(3)(F). Next, the commission removes the remaining proposed updated and annual first requirements from the rule, as discussed below, in favor of requiring a single annual filing under adopted (c)(3). An entity must file a complete EOP for this annual filing if it made a change to its EOP in the previous calendar year that would materially affect the way the entity would respond to an emergency. Such an entity must file with the commission an executive summary and a complete, revised copy of the plan with the confidential portions removed, and submit to ERCOT an unredacted revised EOP in its entirety. An entity that has not made a significant change to its EOP in the previous calendar year must attest to the same and file an updated affidavit and contact information.

To maintain consistency with the initial filing requirements under adopted subsection (c)(1) the commission adds several corresponding provisions for updated filings under (c)(3) including adopted subsection (c)(3)(D) regarding the confidentiality of unredacted revised plans submitted to ERCOT and (c)(3)(E) regarding the requirement to allow commission staff to review a revised copy of an entity’s EOP in its entirety at a location designated by commission staff.

The commission declines to revise the rule to except electric cooperatives from the filing requirements under this section for reasons described under the General Comments heading.

Proposed §26.53(c)(4)(A) - Insufficient information

Proposed subsection (c)(4)(A) requires an entity to file an updated EOP if commission staff determines the entity’s EOP does not contain sufficient information to determine whether the entity can provide adequate electric service through an emergency. Enbridge recommended the deletion of proposed subsection (c)(4)(A) because it provides the commission open-ended discretion "to enforce a performance standard during an emergency, which is not within the scope of this Project."

Commission Response

The commission disagrees with Enbridge that requiring an entity to update an EOP that does not contain sufficient information provides the commission open-ended discretion to "enforce a performance standard" during an emergency. Complete information is required for the commission to assess the ability of the electric grid to withstand extreme weather events in the upcoming year as required by statute. Adopted (c)(4)(A) does not require an entity to file an updated EOP based upon an assessment of its performance under the EOP or the particulars of its requirements; only whether it provides information addressing the required topics.

AEP, Enbridge, TCPA, and SPS expressed concern over delegating to commission staff the sole discretion of requiring an entity to update its EOP under proposed subsection (c)(4)(A). TPPA and CenterPoint expressed concern that the requirements under proposed subsection (c)(4) do not align with the statutory text of Tex. Util. Code §186.007(b) which grants the authority to require entities to file updated EOPs with the commission and not its staff.

TCPA opposed the inclusion of subsection (c)(4)(A) in the proposed rule, stating that "required updates to EOPs should track statutory requirements requiring a commission order" to comply with Tex. Util. Code §186.007(b). CenterPoint asserted that commission staff "may advise an entity to make an update to its EOP," but if the entity disagrees, commission staff's only recourse would be to initiate a show-cause hearing or file a show-cause motion, so to require EOP, C. TPPA indicate. CenterPoint asserted commission staff does not have the "unilateral authority to force an entity to change its EOP due to the entity's due process rights. Accordingly, CenterPoint recommended changing the language of proposed subsection (c)(4)(A) to include the phrase "within the time period specified in a commission order" and to reflect that any determination is to be made by the commission and not commission staff. Similarly, AEP recommended adding the qualifier "reasonably" to the rule to allow the option to have the commission make a final determination if parties cannot reach an agreement.

TPPA stated that it appreciated the need to informally communicate and coordinate with commission staff but expressed concern that the communications covered under proposed subsection (c)(4) could "result in simultaneous, conflicting instructions from multiple staffers" and due process concerns. TPPA recommended amending proposed subsection (c)(4) to strike the term "staff" from the provision and add a requirement to provide notice and hearing to an entity for a commission determination requiring an entity to update its EOP. TPPA asserted that developing an EOP is a significant endeavor made more demanding for MOUs due to their direct connection to local government.

Commission Response

The commission does not share TCPA's, CenterPoint's, TPPA's and AEP's concerns regarding allowing commission staff to request updated EOPs. An entity will not be required to change its operations via these provisions, merely update its documentation if it is incomplete. Moreover, there are no due process issues to consider. The commission does not operate by order alone nor does the statute require an order in this case. This is but one of many instances, such as responding to an informal complaint, where an entity is required to follow direction from commission staff to comply with a rule, and just like in those other instances, the entity cannot be issued a penalty or other punitive measure for noncompliance without an opportunity for a hearing in front of the commission.

TPPA's suggestion that the only way to avoid "simultaneous, conflicting instructions from multiple staffers" is to put the question before the commissioners ignores the fact that the organization of the commission is transparent and readily accessible on the commission's website. In the unlikely event that an entity believes that it is receiving conflicting or unreasonable requests
to file an updated EOP from commission staff, it can seek clarity by contacting the executive director’s office or another member of the commission’s leadership team.

SPS and TNMP recommended modifying proposed subsection (c)(4)(A) to allow entities to file a comprehensive detailed summary of its updated EOP instead of filing an updated EOP. TNMP also recommended making a complete unredacted copy of the EOP available to the commission for inspection.

Commission Response

The commission declines to make the changes suggested by SPS and TNMP. An entity is not permitted to submit a comprehensive EOP summary if required by commission staff to update its EOP. Under Tex. Util. Code §186.007(f), a redacted EOP must be submitted to the commission with the confidential information removed. Moreover, the commission declines to allow an entity to file an updated summary of its EOP, because the summary may not adequately or accurately capture the needed information. To analyze EOPs and assess the ability of the electric utility industry to provide adequate service during an emergency, the commission requires a complete picture of an entity’s plans to respond to and during an emergency. This requirement is not unduly burdensome as it only requires an entity to update the information, not necessarily submit an entire plan. However, entities within the ERCOT power region must submit this updated information in unredacted form to ERCOT.

TEC proposed changing the review and feedback process in this provision to exclude electric cooperatives that do not operate a transmission facility or generation resource. However, TEC explained that updates due to material changes would still be required.

Commission Response

The commission declines to change the rule as suggested by TEC for the reasons discussed under the General Comments heading.

Proposed §25.53(c)(4)(B) - Commission staff feedback

Proposed subsection (c)(4)(B) requires an entity to file an updated EOP in response to feedback provided from commission staff.

TNMP, CenterPoint, TEC, Oncor, AEP, and SPS opposed the inclusion of proposed subsection (c)(4)(B) in the proposed rule as any update required is already addressed by proposed subsection (c)(4)(A). TNMP recommended subsection (c)(4)(B) be revised to permit filing of a comprehensive detailed summary of its EOP in lieu of a completed unredacted copy but permit the unredacted copy to be available to the commission for inspection.

CenterPoint recommended deletion of proposed subsection (c)(4)(B) because it is vague, ambiguous, and duplicative of requirements already included in proposed subsection (c)(4)(C). Further, CenterPoint commented that commission staff "does not have the unilateral authority to force an entity to change its EOP" as an entity has due process rights.

TEC repeated its recommended edits for proposed subsection (c)(4)(A) for proposed subsection (c)(4)(B). SPS recommended the deletion of this provision as it is subsumed by their edited proposed subsection (c)(4)(A). Further, SPS commented that proposed subsection (c)(4)(B) is concerning as it provides no review process for the affected entities. Enbridge expressed concern over the inclusion of subsection (c)(4)(B) in the proposed rule because it is overly broad and does not provide space for an entity’s knowledge regarding their own asset, personnel, and safety programs. Consistent with its opposition to subsection (c)(4)(B), TCPA opposed the inclusion of subsection (c)(4)(B) in the proposed rule, stating that "required updates to EOPs should track statutory requirements requiring a commission order" in order to comply with Tex. Util. Code §186.007(b).

Commission Response

The commission agrees with commenters that proposed subsection (c)(4)(B) is largely duplicative of proposed subsection (c)(4)(A) and deletes the requirement in the adopted rule.

Proposed §25.53(c)(4)(C) - Significant changes

Proposed subsection (c)(4)(C) requires an entity file an updated EOP if the entity makes a significant change to its EOP no later than 30 days after the change takes effect. A significant change to an EOP includes a change that has a material impact on how the entity would respond to an emergency.

Oncor, CenterPoint, and SPS recommended modifications of proposed subsection (c)(4)(C). Oncor recommended modifying the rule so entities have the option to file "a comprehensive detailed summary of its updated EOP and make a complete unredacted copy of the updated EOP available to the commission for inspection" instead of filing a complete EOP. CenterPoint recommended that the confidentiality language it recommended apply to subsection (c)(1) also apply to updated filings.

SPS opposed the requirement under proposed subsection (c)(4)(C) to refine an EOP when significant changes are made to the plan. SPS supported the commission's goal to increase transparency, however expressed concern that the requirement to file, or refine, updated plans when significant changes are made would be needlessly burdensome to entities as well as the commission and would increase the risk of exposure of confidential information. Further, SPS commented that this requirement would "distract from the core objectives of this process to address significant, material threats to service reliability." SPS commented that the requirement to re-file EOPs with all its required annexes to be an "unduly onerous requirement" for a change to one portion of the EOP. Instead, SPS recommended requiring entities to file a comprehensive summary of their EOP in an initial filing 90 days after rule publication and an update to the summary within 30 days of a significant change to the EOP. Further, SPS also recommended requiring an executive outline detailing the changes to the EOP with the EOP summary.

Commission Response

The commission agrees with SPS that this requirement is burdensome and removes the requirement accordingly.

LCRA asked the commission to clarify whether a change in the list of employees is considered a "significant change," as there could be "employee turnover, job changes, (or) title changes... (that) could make this requirement extremely burdensome."

Consistent with its recommendations for proposed subsection (c), SPS recommended adding the word "summary" after each occurrence of the term "EOP." Similarly, TNMP suggested modifying proposed subsection (c)(4)(C) to provide for the filing of a comprehensive EOP summary.

Commission Response
The concerns of LCRA, SPS, and TNMP are moot as this requirement has been removed from the rule.

Proposed §25.53(c)(4)(D) - Updated EOP filings with ERCOT

Proposed subsection (c)(4)(D) requires an entity with operations within the ERCOT power region to submit its updated EOP under proposed subsection (c)(4)(A), (c)(4)(B), and (c)(4)(C) to ERCOT within 30 days of filing the updated EOP with the commission.

TNMP opposed proposed subsection (c)(4)(D) and recommended its deletion because Nodal Operating Guide 3.7(6) requires entities to provide the same information to ERCOT. LCRA suggested deletion of proposed subsection (c)(4)(D) as LCRA believes current ERCOT Protocols "should continue to govern submissions of EOPs to ERCOT." Currently, as LCRA pointed out, the ERCOT Nodal Operating Guide requires Transmission Operators to submit EOPs to ERCOT, as required by NERC, since ERCOT is considered the Balancing Authority and Reliability Coordinator for the ERCOT region. LCRA requested clarification as to why ERCOT would need to review other types of entities' EOPs.

Commission Response

The commission disagrees with LCRA's and TNMP's assessment that ERCOT Nodal Operating Guide §3.7(6) satisfies the requirements of Tex. Util. Code §186.007 and declines to make the requested change to the rule. Nodal Operating Guide §3.7(6) only applies to Transmission Operators operating in the ERCOT power region. Tex. Util. Code §186.007 and this rule apply to entities other than Transmission Operators operating in the ERCOT power region.

Commission Response

Tex. Util. Code §186.007(f) requires an entity within the ERCOT power region to provide its EOP to ERCOT in its entirety. As such, the commission disagrees with LCRA's assessment and declines to change the rule.

CenterPoint recommended updated EOP filings required under proposed (c)(4)(D) be subject to Protected Information requirements.

Commission Response

The commission agrees that any submission to ERCOT of an updated EOP is subject to protected information requirements. The requirement to submit to ERCOT unredacted plans is codified in adopted (c)(3)(A)(ii). The requirement that updated EOPs are subject to Protected Information requirements is codified as adopted (c)(3)(D).

Proposed §25.53(c)(5) - ERCOT EOP

Proposed subsection (c)(5) requires ERCOT to maintain a current EOP in its entirety, consistent with the requirements of proposed subsection (c) and available for review by the commission or the commission’s designee, notwithstanding the other requirements of proposed subsection (c).

TNMP requested deletion of proposed subsection (c)(5) as it is redundant. Specifically, TNMP indicated that Nodal Operating Guide 3.7(6) already requires similar information to be provided to ERCOT.

Commission Response

Adopted subsection (c)(5) is intended to require ERCOT to develop and maintain its own EOP consistent with the requirements of this rule. The commission amends the rule for clarity consistent with Oncor's recommendation discussed below under this heading.

TPPA recommended that proposed subsection (c)(5) be eliminated to require ERCOT to securely provide its unredacted EOP with the commission to market participants because ERCOT has access to the unredacted EOPs of market participants under proposed subsection (c)(4)(D). TPPA also suggested that a redacted version of ERCOT's EOP be published on its Market Information System or filed with the commission for public inspection.

Commission Response

The commission declines to change the rule according to TPPA's recommendations. Simply because an entity submitted its EOP to ERCOT does not entitle that entity or make it useful for that entity to receive a copy of ERCOT's EOP. ERCOT's procedures governing its interactions with market participants are enumerated in great length through the Nodal Protocols and the various Market Guides. All market participants have access to these documents and are bound by agreement with ERCOT to be familiar with the contents thereof.

Oncor recommended replacing a "current EOP" with "its own current EOP" in proposed subsection (c)(5) to more clearly indicate that ERCOT must create and maintain an EOP for itself.

Commission Response

The commission agrees with Oncor's recommendation and amends the rule accordingly.

Proposed §25.53(d) - Required EOP Information

Proposed subsection (d) requires an entity to include in its EOP common operational functions for all emergencies and annexes specific to certain types of emergencies listed under subsection (e). An entity that claims a provision of subsection (d) does not apply to it must include in its EOP filing to the commission the reasons for which the specific provision does not apply.

EPE, TCPA, ARM, LCRA, Oncor, and GVEC opposed the requirement of proposed subsection (d) to require an entity to consolidate its EOP in a single document. Consistent with its recommendations for proposed subsections (e) and (f), EPEC recommended the commission not require a consolidated EOP under proposed subsection (d) and instead permit a summary to be filed for the EOP and any required annexes.

Commission Response

As noted previously, the rule does not require an entity to adhere to a specific format for its EOP. The entire set of plans designed to prepare for an entity's response to an emergency must be filed with the commission with the confidential portions removed. An executive summary of the plan is also required. As such, the commission declines to change the rule based on the recommendations of EPE, TCPA, ARM, LCRA, Oncor, and GVEC. An entity is required to file a document which contains the minimum required information in whatever format best suits the entity.

Consistent with its recommendations for the definition of "emergency" under proposed subsection (b)(3), TCPA further recommended that an EOP's scope be limited to "reasonably foreseeable" emergencies under proposed subsection (d). ARM also recommended changing the language "every type of emergency" in proposed subsection (d) to "every reasonably foreseeable type of emergency" while Enbridge suggested the same language be replaced with "most common emergencies," so as to
differentiate between "emergency preparedness and the specific annexes." Oncor and TNMP stated the phrase "common operational functions that can be used for every type of emergency" does not appear in the existing version of §25.53 and is thus unclear in how it is used in proposed subsection (d). Oncor and TNMP emphasized that in order for an EOP to be effective, it must be designed to address "system emergencies" as defined in §25.5(128), not "every type of emergency" which may involve only "common operational functions" and not activation of the EOP.

Commission Response

The rule is designed to ensure that entities have considered and adequately prepared for emergency response. This preparation necessarily requires the development of operational functions that come into play regardless of emergency type and of procedures that are specific to particular types of emergencies. The commission clarifies the language of (d) accordingly.

The commission declines to adopt the other recommendations made by commenters, as this clarification should substantively address the underlying concerns. Furthermore, the commission's changes to the definition of "emergency" under adopted subsection (b)(3) partially address TCPA, ARM, and Enbridge's recommendations. In response to Oncor and TNMP's comments, the commission acknowledges the difference between "system emergency" as defined under §25.5(128) and the adopted rule's definition of "emergency" under subsection (b)(3). However, the adopted rule extends the definition of emergency to include hazards and threats. Oncor and TNMP's concerns are also addressed under heading (b)(3) defining "emergency" and the commission's revision of the same.

AEP requested the commission clarify the word "outline" in subsection (d) due to the ambiguity in what is meant for an entity to "outline" its responses to the types of emergencies the annexes are required to address under proposed subsection (e). Specifically, AEP noted that proposed subsection (c)(1)(A) requires a utility to file an "unredacted EOP in its entirety" and requested the commission determine whether the term "outline" is consistent with or differs from that requirement.

Commission Response

The commission has amended subsection (c)(1)(A) to permit a summary of the EOP and a complete revised copy of the plan with the confidential portions removed to be filed with the commission in lieu of a full, unredacted version. This revision addresses AEP's request for clarification of the same in relation to what is meant by the term "outline" in subsection (d). The commission declines to define the term "outline" as entities are best situated to determine the practices and procedures relevant to its industry, locale, and customers when returning to normal operations after disruptions caused by an incident. The intent of the rule is not to prescribe to each entity the manner in which it responds to an emergency but ensure that entities have considered and adequately prepared for emergency response via implementation of standard minimum plan content.

LCRA urged the commission to avoid overly prescribing EOP informational requirements in proposed subsection (d). Specifically, LCRA expressed concern that the proposed subsection may undermine the efficiency and effectiveness of an "integrated, enterprise-wide" approach to address emergency planning needs unique to the utility implementing the EOP.

Commission Response

The commission disagrees with LCRA's comments on subsection (d). The commission agrees that efficiency and effectiveness are important, however, emergency preparedness is equally important. The commission believes that the current language strikes a balance.

TPPA recommended that the requirements of subsection (d)(1), (d)(2), and (d)(4) regarding an approval and implementation section, record of distribution, and affidavit requirement, respectively, be a reporting requirement separate from the EOP itself. Otherwise, a cyclical timing issue in finalizing and distributing the EOP will result. GVEC made the same recommendation as TPPA in more general terms and also referenced the annexes required under subsection (e). GVEC elaborated that these additional requirements are not essential to a functioning EOP.

Commission Response

The commission agrees with TPPA and GVEC that the record of distribution required under proposed subsection (d)(2), list of emergency contacts under proposed subsection (d)(3), and affidavit required under proposed subsection (d)(4) should be filed separately from the EOP. Furthermore, the commission moves the requirements of (d)(2), (d)(3), and (d)(4) into adopted subsection (c)(4) as adopted subsection (c)(4)(A), (c)(4)(B), and (c)(4)(C), respectively, and amends the requirements to permit these documents to be filed separate from the EOP. The commission declines to adopt TPPA and GVEC's recommendation that the approval and implementation section under (d)(1) should be filed separately from the EOP as it contains information necessary for an entity's emergency planning such as the EOP's scope and applicability. The commission substantively addresses its rationale for the inclusion of adopted subsection (d)(1) under headings (d)(1)(B), (d)(1)(C), and (d)(1)(D).

CenterPoint asserted the best practice for updated EOPs would be to track each iteration of the document through version number or a similar system, such as a control number, rather than providing updated versions as considered in the proposed rule.

Commission Response

The commission agrees with CenterPoint that tracking EOP updates with a version number or some other system is more efficient than requiring the submission of each individual updated draft. The adopted rule does not require the submission of an updated draft after each significant change made to an entity's EOP.

Proposed §25.53(d)(1)(B) - Responsible Individuals

Proposed subsection (d)(1)(B) requires an approval and implementation section included in the EOP to list individuals responsible for maintaining, implementing, and revising the EOP.

SPS opposed the requirement of proposed subsection (d)(1)(B) and recommended it be deleted from the proposed rule. SPS stated the provision would be unduly burdensome to apply in practice due to employee turnover necessitating frequent changes to the EOP. ARM alternatively recommended that proposed subsection (d)(1)(B) permit identification of groups or teams responsible for EOP implementation activities which would alleviate the administrative burden of implementing the proposed subparagraph. TCPA argued that proposed subsection (d)(1)(B) is improper in specifying individuals to be identified in maintenance, implementation, and editing the EOP when instead specifying groups, teams, or other sustainable reference will reduce unnecessary and wasteful efforts in keeping the EOP updated.
**Commission Response**

The commission declines to modify the rule based on the comments filed on this subparagraph. The identification of specific individuals who are accountable for modifying and implementing EOPs is important to assess the emergency preparedness of an entity. However, the commission agrees with commenters that the identification of individuals by name would be burdensome. The commission clarifies that an entity can comply with (d)(1)(B) by listing the titles or specific designations of individuals responsible for maintaining and implementing the EOP and those who can change the EOP, so long as the title or designation is specific enough to identify the specific holder of that title or designation at any time. The commission agrees that efficiency and effectiveness are important, however, emergency preparedness is equally important. The commission believes that the current language strikes a balance.

TLSC requested proposed subsection (d)(1)(B) be amended to specifically identify employees responsible for emergency planning concerning customers medically dependent on electricity.

**Commission Response**

The commission declines to modify the rule to require entities to specifically identify employees responsible for emergency planning concerning customers medically dependent upon electricity. The rule requires the identification of all individuals responsible for maintaining and implementing an entity's EOP. To the extent that this includes emergency planning for customers medically dependent on electricity these individuals must also be identified.

**Proposed §25.53(d)(1)(C) - Revision control summary**

Proposed subsection (d)(1)(C) requires an approval and implementation section included in the EOP to maintain a revision control summary that outlines changes made to an EOP and records the dates that changes are made.

**Commission Response**

The commission disagrees with ARM and TCPA that the requirement of proposed subsection (d)(1)(C) to provide a revision control summary is "unduly burdensome." The commission agrees with TCPA that "material" changes should be tracked in a revision control summary but declines to adopt language only requiring the tracking of "material" changes. It is conceivable that there are organizational, clerical, or formatting changes to an EOP that may later be revealed to be material in drills or implementation of the EOP. Furthermore, dates of revision and the substance of EOP changes are known to the entity and needed by the commission to ensure revision integrity.

**Commission Response**

The commission agrees with CenterPoint's recommendation and amends subsection (d)(1)(C) accordingly.

**Proposed §25.53(d)(1)(D) - EOP date of adoption**

Proposed subsection (d)(1)(D) requires an approval and implementation section included in the EOP to contain a dated statement indicating when the current EOP was adopted by the entity.

**Commission Response**

The commission disagrees with ARM and CenterPoint that the requirement of proposed subsection (d)(1)(D) to provide a dated statement that the current EOP supersedes previous EOPs is "unnecessary." In the interest of clarity, each EOP summary, full version with confidential portions removed, or unredacted full version must contain a dated statement that the current EOP supersedes previous EOPs.

**Proposed §25.53(d)(1)(E) - Date of Approval**

Proposed subsection (d)(1)(E) requires an approval and implementation section included in the EOP to provide the date the EOP was most recently approved by the entity.

CenterPoint recommended a clerical change adding the word "states" to the beginning of proposed subsection (d)(1)(E).

**Commission Response**

The commission agrees with CenterPoint's recommended change for subsection (d)(1)(D) and implements its recommended language.

**Proposed §25.53(d)(2), §25.53(d)(2)(A), and §25.53(d)(2)(B) - Record of Distribution**

Proposed subsection (d)(2) requires an EOP to include a record of distribution that, under proposed subsection (d)(2)(A) and (d)(2)(B), must include names and titles of persons in the entity's organization receiving the EOP, and a record of dates when the EOP is issued to the listed persons.

**Commission Response**

ARM, AEP, LCRA, and TEC opposed the requirements of subsection (d)(2), as proposed, as administratively burdensome due to employee turnover and volume concerns.

LCRA requested the commission revise proposed subsection (d)(2) to permit an entity to "provide a record of employees with access to the EOP and the corresponding date when access was granted" provided the entity stores its EOP securely. AEP similarly recommended the list requirement be replaced with a description affirming the existence of distribution procedures to ensure relevant employees receive the EOP. LCRA emphasized that the provision "should not be interpreted to require 'distribution' by email or other similar means, if that is not how the entity maintains and controls access to its EOP." LCRA also recommended the commission address whether updating the list of employees with access to the EOP in accordance with proposed subsection (d)(2) constitutes a "significant change" requiring re-filing of the EOP with the commission under proposed subsection (c)(4)(C). LCRA commented that an update to the employee list should not be considered a "significant change" under proposed subsection (c)(4)(C), citing similar administra-
tive burden concerns as SPS and ARM in their comments under subsection (d)(1)(B) regarding employee turnover.

Commission Response
The commission declines to change the rule to permit an entity to only provide a description of its distribution process, as recommended by AEP. The commission finds identification of specific individuals relevant to its analysis of the overall state of the industry’s preparedness by demonstrating each entity’s broad and relevant awareness of EOP procedures and accountability to those procedures. The high turnover rates cited by commenters only increases the value of the commission knowing that an entity is tracking who has access to the EOP and when.

In response to LCRA’s comments, the commission declines to clarify what qualifies as “distribution” for the purposes of this paragraph. The entity should choose the most appropriate and efficient administrative process that ensures its relevant employees have access to its EOP and document the process accordingly.

As discussed under heading (c)(4), the commission has moved the record of distribution requirement of proposed subsection (d)(2) into adopted subsection (c)(4) for annual filings separate from an EOP, specifically as in adopted subsection (c)(4)(A). Therefore, LCRA's request for clarification does not need to be addressed further.

ARM, Enbridge, and SPS recommended proposed subsection (d)(2) be deleted. AEP also expressed concerns over preserving employee confidentiality for the proposed list. CenterPoint and Enbridge emphasized that each entity is unique in its business structure and operational models and that what should be considered important is that "the entity can confirm applicable personnel within its unique model have been trained.”

CenterPoint provided draft language for proposed subsection (d)(2)(A) which would require entities to report persons who have access to the EOP or include a statement that the EOP was distributed, or made accessible, to all persons in the entity's organization. CenterPoint also recommended language for subsection (d)(2)(B) which amended the subparagraph to include dates of distribution or accessibility to the EOP.

ARM and AEP commented that the affidavit under subsection (d)(4) satisfies the intended purpose of subsection (d)(2), as subsection (d)(4) requires a generalized affirmation from the entity's highest-ranking representative that relevant employees have been trained in accordance with and reviewed the entity's EOP. As an alternative, if the commission declines to delete proposed subsection (d)(2), ARM recommended proposed subsection (d)(2) be amended to be less prescriptive. ARM specifically requested that the commission "at a minimum delete the requirement to list individuals receiving the EOP" as it would unnecessarily increase the volume, complexity, and cost of compliance in developing and implementing an EOP and that a table may not be an ideal format due to the same.

TEC recommended that the list required under proposed subsection (d)(2) be limited to only management personnel who receive the EOP. TEC explained that this change would effectuate the same purpose of ensuring the EOP is distributed to the relevant individuals while making reporting the EOP to the commission easier to manage for entities.

Commission Response
The commission disagrees with ARM, Enbridge, AEP, TEC, SPS, and CenterPoint, as the list of personnel contemplated under subsection (d)(2) is necessary for the commission to audit whether personnel responsible for certain EOP procedures have in fact received the required training relevant to such responsibilities. An entity that decides to limit the list of responsible people must nonetheless provide the list to the commission and ERCOT. However, to make compliance with this requirement less onerous for entities and better align the rule with its intended purposes, the commission modifies the rule to require the titles and names of persons in the entity’s organization that have been provided and trained on the EOP. The commission further modifies the rule to require dates of distribution or accessibility, and training, as appropriate. An entity should interpret this requirement in a manner that best aligns with its EOP training and distribution practices, and provides the commission with a comprehensive and detailed accounting of the distribution of its EOP to relevant personnel.

Proposed §25.53(d)(3)
Proposed subsection (d)(3) requires an EOP to include a list of emergency contacts for the entity, including identification of single points of contact during an emergency.

LCRA asserted that the term "emergency contacts" and the request for "single points of contact during an emergency" in proposed subsection (d)(3) is unclear due to the plural and singular usages of the term "contact." LCRA further expressed that it is also unclear whether the emergency contacts should be inclusive or separate from the single points of contact. Accordingly, LCRA requested that the commission revise proposed subsection (d)(3) to be unambiguous and clarify the intention of requesting such information. LCRA requested clarification on whether submission to the commission for a representative, whose information is already on file with the commission, is different than the requested emergency contact in the proposed paragraph.

CenterPoint requested subsection (d)(3) be deleted from the proposed rule and recommended the provision regarding submission of emergency contact information be moved to proposed subsection (g). Specifically, CenterPoint argued that including a list of emergency contacts in an EOP has no clear benefit for the reasons discussed in subsection (d)(2) such as personnel turnover and business structure.

Commission Response
The intent of proposed subsection (d)(3), adopted as subsection (c)(4)(B), is to ensure each entity to which this rule applies provides and maintains an accurate list of representatives the commission can contact during an emergency. The commission requires a list of emergency contacts, which includes specifically identified individuals who can immediately address urgent requests and questions from the commission during an emergency. Whether the entity identifies one or more individuals to serve this function is left to the entity to decide; however, the commission recommends an entity have at least one primary and one back-up contact identified. The commission modifies the rule accordingly.

The commission declines to allow an entity to rely solely on the contact information on file with the commission in its Market Directories because there has been a consistent pattern of entities failing to keep contact information current without a required annual update. Therefore, the adopted rule requires an updated emergency contact list with an entity’s initial filing and with each annual update, as a supplement to the contact information con-
tained in the commission's Market Directories. The commission clarifies that for purposes of this requirement an entity must include all emergency contacts that are relevant to the entity's EOP planning including representatives, if applicable. If an entity has multiple emergency contacts the entity should highlight and place at the top of the list, the entity's main emergency contact.

The commission agrees with CenterPoint that the emergency contact list should not be included in an entity's EOP and relocates the requirement to subsection (c)(4)(B), which contains documents that must be filed with an entity’s EOP.

Entergy and SPS expressed concern that if the emergency contact information is available publicly, citizens may contact specific individuals while the emergency contact is working to address the emergency and that it risks listed emergency contacts becoming a potential target of a cyberattack. Entergy supported the intention of the proposed rule but requested that it be revised to provide the required emergency contact information in a redacted form for public filing and the unredacted form provided confidentially.

**Commission Response**

The commission agrees with Entergy and SPS that the list of emergency contacts can be filed confidentially.

TLSC proposed that subsection (d)(3) include a general hotline activated during disaster or emergency situations, providing a single point of contact during emergencies for individuals who are medically dependent on electricity.

**Commission Response**

The commission declines to adopt TLSC's recommendation to amend proposed subsection (d)(3) to require all entities to implement a general hotline activated during an emergency, because it is beyond the scope of this rulemaking to impose such a specific requirement. However, adopted subsection (d)(2) does lay out requirements that entities include a communications plan, which for most entities includes a plan for communicating with the public during an emergency. Nothing in the rule precludes an entity from voluntarily implementing a hotline to be activated during an emergency.

**Proposed §25.53(d)(4) - Affidavit**

Proposed subsection (d)(4) requires an EOP to include an affidavit from the entity's highest-ranking representative, official, or officer with binding authority over the entity to affirm a number of features of the EOP which are discussed in greater detail under the subparagraphs below.

CenterPoint, TCPA, and ARM opposed the inclusion of subsection (d)(4) in the proposed rule. Consistent with its recommendations for subsection (c)(2) and subsection (c)(2)(B), CenterPoint asserted that the affidavit required by proposed subsection (d)(4) should not be included in the EOP but instead be an annual filing separate from the EOP. For the same reason, CenterPoint recommended deleting proposed subsection (d)(4) in its entirety. ETEC claimed the affidavit required to be included in the EOP under proposed subsection (d)(4) is only required by the commission for verification or compliance purposes. ETEC elaborated that the affidavit is not a document that provides guidance or assistance during an emergency and therefore should not be included in the EOP. However, ETEC stated it is not opposed to submitting the same affidavit as detailed under subsection (d)(4) provided it is separate from being filed with the EOP.

**Commission Response**

The commission agrees with CenterPoint, TCPA, ARM, and ETEC that the affidavit requirement should be separate from the EOP. The commission's revision to proposed subsection (c)(1)(A) permits an entity to file with the commission a summary of the EOP, and the commission modifies the EOP to be included as a part of that summary. These changes substantively address CenterPoint, TCPA, ARM, and ETEC's concerns.

ARM and TCPA requested that proposed subsection (d)(4) retain the current rules requirement for an affidavit from an "owner, partner, officer, manager, or other official with responsibility for the entity's operations." ARM asserted the rule could create a compliance bottleneck that "might span multiple REP operations as well as generation operations for affiliated power generation companies that would all have to go through the same individual." ARM believed the entity should be given discretion to determine the person with the best knowledge of the entity's operations and, under proposed subsection (d)(4), would attest to those processes in the submitted affidavit included in the EOP. ARM referred to §25.71(d) (relating to General Procedures, Requirements and Penalties); §25.88(e)(2) (relating to Retail Market Performance Measure Reporting), and §25.91(d) (relating to Generating Capacity Reports), as containing language similar to its recommendations. Similarly, CenterPoint and TCPA requested an officer having binding authority over the entity should be able to make the affirmation under proposed subsection (d)(4), and not just the "highest-ranking" officer.

**Commission Response**

The commission disagrees with ARM, TCPA, and CenterPoint as the attestation required under the rule mirrors the attestation required under §25.55(c) and 25.55(f) for weather emergency preparedness reports. For consistency and to impress upon entities the necessity of emergency planning, the commission retains the requirement in the proposed rule for the attestation to be signed by the highest-ranking officer.

**Proposed §25.53(d)(4)(A) - Relevant Operating Personnel**

Proposed subsection (d)(4)(A) requires an affidavit to attest that the EOP has been reviewed and approved by appropriate executives.

Oncor recommended that proposed subsection (d)(4)(A) be amended to permit compartmentalization of training to personnel on portions of the EOP that are applicable to their work responsibilities and provided draft language consistent with this recommendation:

**Commission Response**

The commission agrees with Oncor's request to permit compartmentalization of training to personnel on portions of the EOP that are applicable to their work responsibilities and adopts Oncor's recommended language in adopted subsection (c)(4)(C)(i). The commission's intent for this provision is to require relevant personnel to be trained on the specific portions of an entity's EOP and required annexes to the extent applicable to their work functions.

LCRA recommended that proposed subsection (d)(4)(A) be deleted from the rule due to the subjectivity involved. Specifically, LCRA stated "it is impossible to affirm via affidavit an employee's personal and individual commitment that "cannot be objectively verified by an entity's highest-ranking official."

LCRA recommended proposed subsection (d)(4)(A) be modified to delete the phrasing "and such personnel are committed to
following the EOP except to the extent deviations are appropriate as a result of specific circumstances during the course of an emergency."

**Commission Response**

The commission modifies this provision to require the affidavit to include an attestation that relevant operating personnel are "instructed" to follow applicable portions of the EOP except to the extent deviations are appropriate as a result of specific circumstances during the course of an event.

Consistent with its recommendations for proposed subsection (d)(4), TCPA recommended the training requirement under proposed subsection (d)(4)(A) be more generalized.

**Commission Response**

The commission agrees with TCPA's recommendation and adopts its proposed language for relocated adopted subsection (c)(4)(C)(i).

**Proposed §25.53(d)(4)(C) - Required Drills**

Proposed subsection (d)(4)(C) requires an affidavit to attest that required drills have been conducted.

ETEC requested the commission clarify proposed subsection (d)(4)(C) which states "required drills have been conducted," in contrast to proposed subsection (f), which states that if the EOP was activated for an incident in the last 12 months, a drill is not required to be performed for that 12-month period. Accordingly, the two provisions could cause confusion, assuming that more than one drill is required per year.

**Commission Response**

The commission acknowledges the potential discrepancy identified by ETEC and adds a cross-reference to subsection (f) to adopted subsection (c)(4)(C)(iii).

**Proposed §25.53(d)(4)(D) - Distribution to Local Jurisdictions**

Proposed subsection (d)(4)(D) requires an affidavit to attest that the EOP or appropriate summary has been distributed to local jurisdictions as needed.

Sharyland, GVEC, and TEC opposed proposed subsection (d)(4)(D) unless the commission provided further clarification on the term "local jurisdictions." LCRA, TCPA, and CenterPoint recommended subsection (d)(4)(D) be deleted in its entirety. Sharyland requested clarification on the meaning of the term "local jurisdictions" as used in proposed subsection (d)(4)(D). Specifically, Sharyland requested the commission clarify the jurisdictions to which the utilities may be expected to distribute their EOPs or summaries. Similarly, GVEC and TEC argued that the term "local jurisdictions" in proposed subsection (d)(4)(D) is overly broad as it suggests "entities must have a plan for communicating with every conceivable local and state entity and official." GVEC argued that the term "local jurisdictions" is ambiguous and overly burdensome as entities are already required to have a public communications plan under proposed subsection (d)(5). GVEC recommended that the commission delete or narrow the scope of proposed subsection (d)(4)(D) in order to reduce the undue administrative burden and costs it would otherwise impose on entities as well as mitigate security risks involved with disclosure to local jurisdictions. TEC argued that the local jurisdiction distribution requirement under proposed subsection (d)(4)(D) undermines emergency operations at a time when resources may be strained. TEC recommended that the commission either "identify specific and limited governmental entities that should be included in a communication plan" or qualify proposed subsection (d)(4)(D) with "as appropriate in the circumstances for the entity."

CenterPoint asserted that "there is no legal mandate for entities to distribute their EOPs to local jurisdictions" and entities may not need or want to do so. CenterPoint further commented that the "as needed" qualification in the proposed subparagraph is ambiguous and should be clarified by the commission. Specifically, CenterPoint stated it is unclear what process would be used to determine the "need" of a local jurisdiction for an entity's EOP or who would be qualified to identify local jurisdictions that "need" the EOP using such a process.

**Commission Response**

The commission disagrees with Sharyland, GVEC, TEC, LCRA, TCPA, and CenterPoint and declines to delete the requirement for entities to coordinate with local jurisdictions in subsection (d)(4)(D). The rule does not require that an entity distribute its EOP to local jurisdictions. However, the entity must affirm that any local jurisdictions that need a copy of an entity's EOP have, in fact, received it. Emergency planning and an entity's obligations as a utility necessarily involve coordination with local jurisdictions served or impacted by the utility service the entity provides. As such, an entity must be aware of, and responsible for, identifying such local jurisdictions and distributing its EOP "as needed." The commission notes this requirement is adopted as subsection (c)(4)(C)(iv) in the final rule.

LCRA and TCPA argued that distribution of the EOP to "local jurisdictions" under proposed subsection (d)(4)(D) jeopardizes the sensitive nature of the information provided in the EOP. TCPA argued there were "few, if any, scenarios that would warrant distribution of an EOP or any of its component procedures to a local jurisdiction" due to confidentiality concerns. LCRA also commented that the term "local jurisdictions" was ambiguous as used in the proposed subparagraph.

**Commission Response**

LCRA and TCPA's confidentiality concerns are substantially addressed by the commission's amendment to proposed subsection (c)(1) permitting entities to submit an EOP summary and full, revised EOP with confidential portions removed to the commission and a full, unredacted EOP to ERCOT. Consistent with those changes and as discussed under heading (c)(1) the commission amends the proposed requirement to permit distribution of the EOP summary filed with the commission to local jurisdictions in lieu of a full, unredacted copy of an entity's EOP.

**Proposed §25.53(d)(4)(E) - Business Continuity Plan**

Proposed subsection (d)(4)(E) requires an affidavit to attest that the entity maintains a business continuity plan that addresses a return to normal operations after an emergency.

TPPA requested clarification on what is included in the "business continuity plan" cited under proposed subsection (d)(4)(E).

**Commission Response**

The commission declines to define the form and content of a business continuity plan required under adopted subsection (c)(4)(C)(v), as an entity is best situated to determine the practices and procedures relevant to its industry, locale, and customers when returning to normal operations after disruptions caused by an incident.
Proposed §25.53(d)(4)(F) - National Incident Management System Training

Proposed subsection (d)(4)(F) requires an affidavit to attest that the entity's emergency management personnel who interact with government officials at all levels have received specific Federal Emergency Management Agency (FEMA) and National Incident Management System (NIMS) training.

CenterPoint, TCPA, and ARM recommended that proposed subsection (d)(4)(F) be deleted. ARM recommended moving the requirement for an entity to list emergency management personnel who have received NIMS training into proposed subsection (d)(4)(A) if proposed subsection (d)(4)(F) is deleted. Alternatively, ARM recommended proposed subsection (d)(4)(F) require only one employee within an entity be required to have received the specified NIMS training. Consistent with its recommendations for proposed subsection (d)(4)(A), TCPA similarly recommended proposed subsection (d)(4)(F) be deleted and the training requirement be more generalized and moved to (d)(4)(A). ARM and TCPA argued that proposed subsection (d)(4)(A) is unnecessarily burdensome due to the time requirements to complete the training and that some or all of the listed training may not be available. ARM and TCPA further stated that the training requirement of proposed subsection (d)(4)(F) may create a communications bottleneck during an emergency if entities are restricted to communicating through personnel with the required training. Specifically, TCPA commented that an entity may have multiple teams of personnel who act as points of contact for government officials and that the specific training included in the proposed subparagraph are impractically lengthy and may be unavailable.

Commission Response

The commission declines to delete the proposed requirement as CenterPoint, ARM, and TCPA recommend. The commission also disagrees with ARM and TCPA that requiring NIMS training for specific personnel is unnecessarily burdensome. NIMS is a widely adopted national emergency management program among governmental entities, and the proposed amendment appropriately limits the requirement to emergency management personnel who are designated to interact with local, state, and federal emergency officials during emergency events. This provision strikes an appropriate balance between ensuring emergency preparedness and over-prescribing requirements for the same. This requirement is adopted as subsection (c)(4)(C)(vi).

The commission declines to adopt ARM’s recommendation to limit required NIMS training to only one employee within an entity. It is conceivable that an entity may be organizationally structured so that one employee is the only "emergency management personnel who are designated to interact with local, state, and federal emergency management officials during emergency events," however the intention of the rule is to ensure that all such personnel have received NIMS training to maximize emergency response. Artificially limiting the training requirement to a single employee at an entity is contrary to the intent of the rule.

The commission declines to make the training requirement more generalized and move it from proposed subsection (d)(4)(F) into proposed subsection (d)(4)(A) as TCPA recommends. The commission instead moves the requirements of subsection (d)(2), (d)(3), and (d)(4) to adopted subsection (c)(4) and changes the requirements to permit these documents to be filed separate from the EOP.

TPPA recommended that the NIMS training citations in proposed subsection (d)(4)(F) be updated to the title of the course instead of the specific course number, otherwise proposed subsection (d)(4)(F) risks quickly becoming outdated. Similarly, Sharyland recommended revising updating the training citations in proposed subsection (d)(4)(F).

Commission Response

The commission agrees with Sharyland's recommendation for subsection (d)(4)(F) and amends adopted subsection (c)(4)(C)(vi) accordingly. Specifically, the commission identifies that emergency management personnel should have received the latest NIMS training, specifically IS-100, ISs-200, IS-700, and IS-800.

TPPA further recommended that the commission clarify that non-emergency management personnel would not be covered by proposed subsection (d)(4)(F) and thus required to receive the specified NIMS training. Oncor interpreted the requirement of proposed subsection (d)(4)(F) as not to apply to "personnel designated to interact with ERCOT" as ERCOT is not a "political subdivision" and such personnel are required to take training programs from NERC, ERCOT, and Oncor itself. Therefore, Oncor argued that such personnel should be exempted from the requirements of the proposed subparagraph. Oncor provided draft language consistent with its recommendation by adding the sentence "the entity’s personnel who are designated to interact with ERCOT during emergency events are not subject to the requirements of this paragraph."

Commission Response

An employee that qualifies as emergency management personnel designated to interact with government officials must receive NIMS training. The commission agrees with TPPA that this requirement does not apply to non-emergency personnel, such as Mayors as per TPPA's example, that may also interact with government officials. The commission disagrees with Oncor that subsection (d)(4)(F) should explicitly exempt "personnel designated to interact with ERCOT." An entity may require certain personnel to only interact with ERCOT and other personnel to only interact with local, state, and federal emergency management officials. An entity is free to adopt such an organizational structure provided it complies with the requirements of this rule.

Proposed §25.53(d)(5) - Communication Plan

As discussed under heading (c)(1), the commission proposed subsection (d)(5) is adopted as subsection (d)(2).

Proposed subsection (d)(5) requires entities with transmission or distribution service operations, entities with generation operations, Retail Electric Providers (REPs), and ERCOT to develop a communications plan as detailed in subsection (d)(5)(A) through (d)(5)(D), respectively.

OPUC requested each subparagraph under proposed subsection (d)(5) include OPUC as a party to receive communications from an entity during an emergency as OPUC serves as a public information platform during emergencies. OPUC stated that including it would assist in the commission’s intended goal for the "widest possible dissemination" of information.

Commission Response

Adopted subsection (d)(2)(A) through (d)(2)(D) already include a requirement that entities describe the process for communicating with state government entities in their communication plans; however, the commission acknowledges OPUC's valuable role...
as an information platform during emergencies and agrees to require entities to specifically describe procedures for communicating with OPUC during emergencies.

Consistent with its general comments regarding notice of updates to an EOP or individual annexes, City of Houston requested that all entities, prior to changing or updating the communications plan under proposed subsection (d)(5), coordinate and collaborate with local municipalities and critical infrastructure owners on the communication plan.

Commission Response

The commission declines to adopt the City of Houston’s recommendation for proposed subsection (d)(5) requiring an entity to coordinate with local governments and critical infrastructure owners for input or refinement of its communication plan prior to filing with the commission. As noted in the commission’s response under the General Comments heading, communications between an entity and its stakeholders require different forms, formats, and timelines. To create a single requirement for all entities would unnecessarily hamper an entity from using the most effective method of communicating with its stakeholders. Proposed subsection (c)(1) of this section requires entities to file EOPs annually and proposed subsection (c)(4) requires an entity to file an updated EOP if commission staff determines that the entity’s EOP on file does not contain sufficient information to determine whether the entity can provide adequate electric service through an emergency. The commission maintains that these requirements provide the appropriate standard to determine whether an entity can effectively communicate during an emergency. The commission encourages an entity to take other reasonable measures, including communicating with its stakeholders for input and refinement of its communication plan but does not require it.

TPPA contended that a communication plan should be focused on "specific methods and forms of emergency communications" rather than processes on filing complaints. Additionally, TPPA responded that all entities are entitled to retain flexibility in communications given the nature of emergency events. TPPA expressed that proposed subsection (d)(5) may violate an entity's First Amendment rights, as, in TPPA's view, "a state agency requiring revisions to a communications plan, on pain of penalties if the plan is deemed inadequate, presents very serious First Amendment concerns" and argued that the commission should not regulate an entities’ communications with the public or media.

Commission Response

The commission declines to remove the provision in subsection (c)(4) that would allow commission staff to seek revisions to an entity’s communication plan as proposed by TPPA. The commission disagrees with TPPA’s contention that allowing commission staff to request an updated EOP poses a threat to an entity’s First Amendment rights if the requirement is applied to its communication plan. Requiring providers of a critical service, such as electricity, to maintain a plan for communicating with the public during a potentially life-threatening emergency is not a violation of the First Amendment, nor is allowing a state agency that is charged with ensuring the reliability of that service to complete a review of the adequacy of that plan.

Ensuring members of the public have access to critical information regarding their electric service during an emergency - which often carries with it the additional hazards of dangerous weather conditions, supply shortages, and unavailability of other critical services such as water or gas - is a compelling government interest. Further, the requirements of this rule are narrowly tailored by only requiring activation of these plans during an emergency, which is defined, in part, as a situation in which "the known, potential consequences of a hazard or threat are sufficiently imminent and severe that an entity should take prompt action to prepare for and reduce the impact of harm that may result from the hazard or threat" and by only requiring that an entity update its plan if it does not contain sufficient information for the commission to assess its adequacy.

TEC recommended clarifying that communications procedures in proposed subparagraphs §25.53(d)(5)(A) and (C) are for communicating and handling customer complaints during an emergency. SPS, AEP, and TNMP recommended adding the phrase "during an emergency" to modify "procedures."

Commission Response

The commission agrees with TEC, SPS, AEP, and TNMP’s comments relating to the need to clarify the term "during an emergency" in relation to the communications plan required under adopted subsection (d)(2). Specifically, the commission revises adopted subsection (d)(2)(A) and (d)(2)(C) as recommended by TEC to clarify that the procedures to include in an entity’s communication plan are intended for communicating and handling customer complaints during an emergency. Further, the commission modifies adopted subsection (d)(2)(B) in accordance with the recommendations of TEC, SPS, and AEP by adding the phrase "during an emergency" to clarify that the procedures to include in an EOP communication plan are intended for communication during an emergency.

Consistent with its comments regarding proposed subsection (d)(4)(D) relating to the term "local jurisdictions," TEC commented that "local and state governmental entities, officials, and emergency operations centers" in proposed subsection (d)(5)(A), (d)(5)(B), and (d)(5)(D) is overbroad and may challenge emergency operations. TEC recommended the commission "identify specific and limited governmental entities" to include in the proposed subparagraphs relating to the communications plan or else qualify the phrase as it appears in each subparagraph with "as appropriate in the circumstances for the entity."

Commission Response

The commission modifies adopted subsection (d)(2)(A), and (d)(2)(B), as requested by TEC, to add the phrase "as appropriate in the circumstances for the entity" to qualify the requirement that an entity describe the procedures for communicating with local and state governmental entities, officials, and emergency operation centers. The commission declines to modify adopted subsection (d)(2)(D) as requested by TEC due to the widespread audience ERCOT must reach. It is the commission’s intent that an entity’s communication plan addresses how the entity will communicate with appropriate local and state governmental entities, officials, and emergency operation centers during an emergency.

Proposed §25.53(d)(5)(A) - Communications Plan (Transmission and Distribution)

ETEC commented that the term "Reliability Coordinator" as it appears in proposed subsection (d)(5)(A) and (d)(5)(B) is undefined and therefore unclear. ETEC requested the commission add, or incorporate by reference a definition for the term "Reliability Coordinator" for clarity.
Commission Response

The term reliability coordinator is an industry term that is not ambiguous in context. However, to provide additional clarity, the commission modifies subsection (d)(2)(A) to specify that an entity with transmission or distribution service operations must include in its communication plan procedures for communicating with the reliability coordinator "for its power region."

LCRA requested the commission clarify that the "procedures for handling complaints" under proposed subsection (d)(5)(A), "specifically refers to complaints from the utility’s end-use retail customers." LCRA noted that without such language, an entity may receive unrelated complaints regarding utility rates, service boundary disputes, and others, which are not relevant to an entity's EOP. GVEC requested the commission amend proposed subsection (d)(5)(A) for general clarification regarding communications plans. Like LCRA, GVEC specifically requested language identifying the "type of complaint" referred to and recommended as an example "complaints related to the emergency event" as proposed language.

Commission Response

The commission acknowledges LCRA’s request to revise proposed subsection (d)(2)(A) to qualify that the procedures for complaints during emergencies be limited to retail end-use customers. Likewise, the commission acknowledges GVEC’s request to provide more detail and specificity concerning the communications plan to specify that complaints should be related to the emergency event. The commission maintains that the response to the comments of TEC under heading (d)(5) revising adopted subsection (d)(2)(A), and (C) as recommended by TEC to clarify that the procedures to include in an EOP are for communicating and handling customer complaints during an emergency, substantially address the concerns of LCRA and GVEC.

Proposed §25.53(d)(5)(B) - Communications Plan (Generation)

TPPA recommended proposed subsection (d)(5)(B) be deleted as it would require a generation entity to disclose its communications with fuel suppliers, which TPPA asserts is competitively sensitive information.

TCPA commented that the communications plan for generation entities under proposed subsection (d)(5)(B) does not need to require communication with the various groups listed as a result of every emergency due to potential ERCOT directives such as an ERCOT Operating Condition Notice (OCN). TCA elaborated that an OCN precedes declaration of an actual emergency and "do(es) not warrant a communication step." Requiring communications in similar events would be inefficient. ETEC commented that generation entities are neither open to the public nor do they typically communicate directly with the public, and instead are dispatched by the applicable reliability coordinator directly. As such, generation entities routinely ensure the applicable reliability coordinator and connected transmission and distribution providers receive updated communications. For these reasons, ETEC commented that the requirement of proposed subsection (d)(5)(B) is overly burdensome and requested that it be revised to "clarify and limit the outlets with whom entities with generation operations must communicate."

Communication Plan

The commission declines to adopt TPPA’s proposal to delete proposed subsection (d)(5)(B). The commission notes that having a plan in place for engaging in communication between an entity with generation operations and its fuel suppliers is vitally important to ensure a sufficient supply of fuel during emergency conditions and therefore declines to remove the requirement from an entity’s communication plan. However, the contents of the plan need not identify specific fuel suppliers.

In response to the comments of TCPA and ETEC, the commission refers to its response to TEC above. The commission modifies adopted subsection (d)(2)(B) to add the phrase "as appropriate in the circumstances for the entity" to qualify the requirement that an entity describe the procedures for communicating with local and state governmental entities, officials, and emergency operation centers. It is the commission’s intent that an entity’s communication plan addresses how the entity will communicate with appropriate local and state governmental entities, officials, and emergency operation centers during an emergency.

Proposed §25.53(d)(5)(C) - Communications Plan (REP)

Proposed §25.53(d)(5)(C) requires a REP to include as a part of its communication plan procedures for communicating with the public and handling complaints during an emergency.

ARM argued that complaint handling is an important REP function, but that "complaint handling would (not) be impacted by most emergencies" and the purpose of the requirements to address complaint handling during an emergency is unclear. ARM noted that §25.485 (relating to customer access and complaint handling) requires REPs to investigate and respond to complaints within 21 days as opposed to emergencies which are generally "acute events." ARM recommended deleting the provision.

Commission Response

The commission declines to remove the requirement that a REP’s EOP describe procedures for handling complaints during an emergency as requested by ARM. ARM is correct that §25.485 gives a REP 21 days to respond to complaints, but it also requires that REPs provide reasonable access to service representatives and have a toll free line that affords customers a prompt answer during normal business hours. Depending on the severity of the emergency, customer complaints may rise dramatically during the emergency and there must be procedures in place for the REP to collect and respond to the increased number of complaints in a timely manner. A REP’s communication plan should include the procedures that allow the REP to adapt to differing levels of complaints during an emergency. If, however, as ARM suggests, a REP believes that its standard complaint processing procedures can withstand the increased level of complaints associated with emergencies, it may submit its standard complaint handling procedures as its emergency procedure.

TLSC recommended that proposed subsection (d)(5)(C) specify procedures for communicating with customers medically dependent on electricity during an emergency.

Commission Response

The commission agrees with the concern raised by TLSC and acknowledges that medically dependent customers may need targeted communication during and prior to imminent emergencies to allow these customers to plan to evacuate or have a backup supply of electricity available. However, the commission declines to make the recommended change. Adopted subsection (d)(2)(A) and (d)(2)(C) require entities with transmission and distribution service operations and REPs respectively to describe the procedures for communicating with customers. This
requirement encompasses all customers, including the segment of customers that are medically dependent on electricity.

Octopus supported the intent of proposed subsection (d)(5)(C) in ensuring REPs have procedures in place to communicate with customers during an emergency. However, to ensure a REP can effectively do so, Octopus recommended the commission add a requirement that a REP verify that it has a current phone number or email address for each of its customers in case emergency communications are necessary as well as specify the medium of such emergency communications.

Commission Response

The commission declines to make the changes to adopted subsection (d)(2)(C) as requested by Octopus. The commission already requires a REP’s communication plan to address the procedures to communicate with customers during an emergency. Further, adopted subsection (c)(3)(A) requires an entity to file an updated EOP if the entity has made a significant change to its EOP. Otherwise, under adopted subsection (c)(3)(B), an entity may provide a summary of minor changes, an attestation that the changes are not significant, and the affidavit required under adopted subsection (c)(4)(C).

Proposed §25.53(d)(6) - Emergency Response Supplies

Proposed subsection (d)(6) requires an EOP to include a plan to maintain pre-identified supplies for emergency response.

TLSC requested inclusion of language in proposed subsection (d)(6) requiring an entity to “maintain pre-identified supplies for emergency response to customers medically dependent on electricity.”

Commission Response

The commission declines to revise subsection (d)(6) as requested by TLSC. The intent of proposed subsection (d)(6), adopted as (d)(3), is to ensure that an entity responding to an emergency has sufficient supplies to support its response efforts in ensuring continuity of electric service. However, the commission does not specify which supplies are required to be pre-identified, so an entity may include a plan for maintaining pre-identified supplies for emergency response to customers medically dependent on electricity, as appropriate or if required by another provision of law.

Proposed §25.53(d)(7) - Emergency Response Staffing

Proposed subsection (d)(7) requires an EOP to include a plan that addresses staffing during an emergency response.

Octopus recommended that emergency staffing plans required under proposed subsection (d)(7) require an entity to identify resources outside of the ERCOT service area, if any, as access to such resources could be crucial in their emergency response efforts.

Commission Response

The commission declines to revise proposed subsection (d)(7) as requested by Octopus. An entity’s plan for staffing must necessarily consider mutual aid assistance or other forms of staffing if the entity’s staff is insufficient to adequately respond to an emergency. This includes securing staff needed from areas unaffected by the emergency. The commission further notes that the scope of this rule is not limited to entities operating in the ERCOT power region but to all entities operating in the State of Texas, regardless of power region.

Proposed §25.53(e) and §25.53(e)(1) - Annexes Required in EOP

Proposed subsection (e) and proposed subsection (e)(1) list the annexes that must be included in the EOP for transmission and distribution facilities owned by an electric cooperative, an electric utility, a municipally owned utility, or a transmission and distribution utility.

ARM generally opposed the requirement to file separate annexes in subsection (e) as operationally unnecessary, administratively burdensome, and risking competitively sensitive information. ARM stated that while a REP should be prepared for different types of emergencies, separate annexes should only be required if a REP’s existing EOP does not include procedures for the emergencies listed within (e). Similarly, consistent with ARM’s comments for subsection (d), EPEC recommended not requiring the annexes be consolidated into the EOP as subsection (e) requires because it will be time-consuming to combine them and that annexes are distributed on an as-needed basis among business units or personnel within a utility. Additionally, in EPEC’s view, a comprehensive summary should be sufficient for the needs of the commission and a combined EOP is not helpful for utilities when undertaking EOP procedures.

Commission Response

The commission disagrees with ARM’s assessment of subsection (e) of the proposed rule as operationally unnecessary, administratively burdensome, and risking competitively sensitive information. The proposed rule does not require an entity to create a new or separate set of procedures for responding to different types of emergencies, unless an entity’s existing EOP does not fulfill the rule’s minimum requirements, nor does the rule mandate a particular format or organizational structure for the EOP. EOP summaries and confidentiality are substantively addressed by the commission under headings (c), (c)(1), and (c)(1)(A).

TLSC expressed concern that the proposed rule did not adequately address the needs of vulnerable members of the public, such as individuals with disabilities or those medically dependent on electricity. TLSC generally requested the commission clearly make the safety of critical care and chronic condition customers a priority in this rulemaking and emphasized that Texans who rely on DME may lack physical and financial resources to provide their own back-up power necessary for continued use of their essential equipment.

TLSC maintained that the critical load customer registry is crucial for emergency planning for power outages and could be used to be more inclusive of vulnerable individuals and emphasize public awareness during a load shed event. TLSC argued that local utility providers should use the critical load customer registry to identify vulnerable populations within their jurisdiction and incorporate the risks and needs of those individuals in EOPs. TLSC emphasized that “residential customers integrated into the community living in single family homes and apartments who are medically dependent on electricity should be treated separately from other critical load customers” such as hospitals or natural gas production facilities.

TLSC opposed commercial entities having priority over residential customers, particularly residential customers under critical care or suffering from chronic conditions. TLSC proposed that each annex listed under subsection (e) be required to include procedures detailing the exchange of protected customer infor-
mation, identifying customers medically dependent on electricity, how power dependent needs will be identified and planned for, how wellness checks will be conducted, identifying supplies and equipment available for emergency response, and generally be inclusive of the needs of vulnerable populations.

Commission Response
The commission substantively addresses the comments, concerns, and recommendations from the January 11, 2022 public hearing that overlap with TLSC's proposals under the heading EOP Public Hearing.

Regarding TLSC's comments that are not substantively discussed under that heading or elsewhere in this preamble, the commission responds as follows. In response to TLSC's proposal for residential customers medically dependent on electricity to be treated separately from critical load customers, the critical load rule already accounts for such a distinction under §25.497(2) and (3).

The commission disagrees with TLSC that commercial entities have priority over residential customers under current commission rules. The commission, as required by statute, provides discretion to utilities in determining how to prioritize between different types of critical load during energy emergencies. Each type of critical load is deemed to be critical based on its importance to public welfare, and the commission has not categorically prioritized any one type of critical load over another. However, PURA §38.076 requires the commission to adopt rules to "allocate load shedding" and "categorize types of critical load." The commission will implement this statutory requirement in a future rulemaking project. The treatment of different types of critical loads is an ongoing area of focus of the commission but is beyond the scope of this rulemaking.

GVEC contended that some of the items required by subsections (d), such as affidavits, and (e), such as distribution logs, pre-event plans, and after-action reports, are substantially different from and additional to essential EOP information. GVEC proposed that such additional materials be separated into a different document in order to preserve the functionality of an EOP for its intended use.

Commission Response
The commission agrees with GVEC's recommendation as addressed in the commission's responses under heading (c). The commission has also substantively responded to GVEC's concerns in other headings. Specifically, under heading (c)(1), the commission moves the requirements of subsection (d)(2), (d)(3), and (d)(4) into subsection (c) and permits these documents to be filed separate from the EOP. Further, the commission removes the requirement for an entity to file an after-action report after each activation of its EOP by deleting proposed subsection (c)(1)(C). Additionally, under headings (e)(1)(A)(iii) and (e)(1)(B)(iii), and (e)(2)(A)(iv) and (e)(2)(B)(iii), the commission removes the requirements for pre- and post-event meetings and merges the hot and cold weather annex requirements into a single annex for both transmission and generation entities under proposed subsection (e)(1) and (e)(2), respectively. Lastly, as discussed under heading (c), (c)(1), and (c)(1)(A), the commission amended adopted subsection (c)(1)(A) by permitting a summary of the EOP and complete copy of the EOP with confidential portions removed to be filed with the commission in lieu of a full unredacted EOP.

Consistent with its comments for subsection (d), LCRA generally opposed rigid requirements for the contents of an EOP, specifically with regard to the annexes that must be included under (e), as organizational needs may vary by entity.

Commission Response
The commission disagrees with LCRA's assessment that the proposed rule's requirements for annexes under subsection (e) are rigid. The proposed rule does not require an entity to make changes to its existing EOP, unless the plan does not satisfy the rule's minimum requirements, nor does the rule prescribe a specific organization or format for an entity's EOP. Further, Tex. Util. Code §186.007 requires the commission to analyze EOPs to determine the ability of the electric utility industry to withstand extreme events. Subsection (e) details the annexes that at a minimum should be addressed in an entity's EOP, as those related hazards and threats have the potential to affect the continuity of electric service. The commission agrees that organizational needs vary by entity, as do potential hazards and threats. Therefore, the proposed rule allows an entity to include additional annexes, if necessary, or to provide an explanation of why any required provision in this section is inapplicable.

TPPA proposed the inclusion of a provision within subsection (e) permitting the submission of a single annex for vertically integrated utilities that operate transmission and distribution lines as well as generation resources, such as MOUs, provided the filing entity clearly indicates that the annex covers both. TPPA further opined that due to anticipated time constraints between the new rule and the proposed filing date of EOPs, proposed §25.53(e) should be significantly diminished in scope or removed as a requirement. TPPA emphasized that the rulemaking effort should focus on requiring EOPs so that the commission can submit its statutorily required weather emergency preparedness report to the Legislature required under Tex. Util. Code §186.007. TPPA insisted that many of the annexes listed under proposed §25.53(e) "do not relate to weather emergency or weatherization preparedness" and concluded that the primary EOP under proposed §25.53(d), in conjunction with §25.55, is sufficient in providing information from utilities.

Commission Response
The commission agrees with TPPA that a single annex with proper notation may be submitted for entities that operate both transmission and distribution lines and generation resources and modifies the rule accordingly.

The commission declines to adopt TPPA's recommendation to diminish the scope of or remove subsection (e). The commission disagrees that this rule should focus exclusively on weather emergency preparedness. While the report required under Tex. Util. Code §186.007 focuses on weather emergency preparedness, §186.007(a-1) - (4) directs the commission to make recommendations on improving emergency operations plans in order to ensure the continuity of electric service.

Oncor recommended adding subsection (e)(5) to include the requirement of PURA §39.918(g) that mandates a transmission and distribution utility to provide in its EOP "a detailed plan for the use of (facilities that provide temporary emergency electric energy)" as described under PURA §§39.918(b)(1) - (2). Oncor provided draft language regarding the same.

Commission Response
The commission agrees with Oncor that the proposed rule should include language to reflect the requirement under PURA.
§39.918(g) for a transmission and distribution utility to include in its EOP a detailed plan for the use of facilities that provide temporary emergency electric energy. The commission adopts subsection (e)(1)(H) accordingly.

Proposed §25.53(e)(1)(A) and (e)(1)(B) - Cold Weather and Hot Weather Emergency Annexes (Transmission and Distribution)

Proposed subsection (e)(1)(A) and (e)(1)(B) list the requirements for cold weather and hot weather emergency annexes, respectively, that must be included within an EOP for transmission and distribution facilities owned by an electric cooperative, an electric utility, or a municipally owned utility.

ETEC opposed the inclusion of a mitigation plan under (e)(1)(A)(i), (e)(1)(B)(i), (e)(2)(A)(i), and (e)(2)(B)(i) as inconsistent with subsection (d)'s requirement that "an entity's EOP ... outline the entity's response to the types of emergencies specified." ETEC recommended that the requirement under (e)(1)(A)(i) and (e)(1)(B)(i) for an EOP to include a mitigation plan be removed, because mitigation considerations occur prior to the scope of an emergency response plan. ETEC also argued that federal agencies such as FEMA require mitigation plans to be separate from the EOP and used as reference. Alternatively, ETEC recommends modifying the language for the proposed clauses (e)(1)(A)(i) and (e)(1)(B)(i) to specify that operational plans are intended to restore power caused by a cold or hot weather emergency.

If the commission rejects ETEC's alternative recommendation regarding proposed (e)(1)(A)(i) and (e)(1)(B)(i), ETEC further recommended specifically excluding non-TSPs from meeting the requirements of §25.55 through the addition of "if applicable" to the proposed rule clauses to remove any ambiguity.

Consistent with its comments for proposed subsection (e)(1)(A)(ii) and proposed subsection (e)(1)(B), Oncor recommended that the separate cold weather and hot weather annexes under proposed subsection (e)(1)(A) and (e)(1)(B) be combined into a single "Emergency Restoration" annex as such operational plans are essentially the same. Oncor provided draft language consistent with its recommendation.

Commission Response

The commission agrees with ETEC that mitigation plans should remain separate from an entity's EOP. The commission also agrees with Oncor's recommendation to combine the required cold weather and hot weather annexes into a single requirement. Subsection (e)(1) is revised accordingly.

Proposed §25.53(e)(1)(A)(i) and (e)(1)(B)(i) - Separate and Distinct Operational Plans

Proposed clauses (e)(1)(A)(i) and (e)(1)(B)(i) require cold weather and hot weather annexes to contain operational plans that are separate and distinct from the operational plans developed under §25.55 (relating to Weather Emergency Preparedness).

LCRA, TPPA, Sharyland, and TEC commented on the ambiguity of the term "separate and distinct" in proposed clauses (e)(1)(A)(i) and (e)(1)(B)(i) as the term relates to weather emergency preparedness plans required under §25.55.

LCRA and TPPA requested the commission clarify the term "separate and distinct," as it relates to §25.55 as it appears in proposed clauses (e)(1)(A)(i) and (e)(1)(B)(i) regarding cold and hot weather annexes, respectively. LCRA argued the term is unclear as to whether it is administrative or substantive in nature. LCRA contended that, if interpreted as a procedural requirement administratively, a §25.55 plan may not be used to satisfy proposed §25.53, alternatively, if interpreted as a substantive requirement, a utility may either not reference or must be entirely dissimilar to plans created under §25.55. LCRA proposed draft language for the rule merging the cold and hot weather annex and deleting the requirement that such an annex be "separate and distinct" from the report required under §25.55.

TPPA requested the commission elaborate on "whether the reference to 'separate and distinct' is meant to mean separate and distinct operational plans or separate and distinct weather emergencies." TPPA maintained that if separate and distinct operational plans is the intended meaning, that would require utilities to prepare two different response procedures which is detrimental to emergency response. If separate and distinct weather emergencies is the intended meaning, TPPA argued it is therefore not clear "what kinds of cold weather emergencies entities should plan for, but not weatherize for." Sharyland recommended that "separate and distinct" be deleted from clauses (e)(1)(A)(i) and (e)(1)(B)(i).

Sharyland, like LCRA, requested the commission make clear whether the operational plans developed under proposed §25.53 must be "separate and distinct" from operational plans developed under §25.55 or future rules relating to §25.55. In Sharyland's view, operational plans developed under §25.55 and future rules relating to it should be a "major component of hot and cold weather emergency preparedness standards" under (e)(1)(A) and (e)(1)(B), respectively. Therefore, absent any difference, the phrase "separate and distinct" should be deleted from the proposed clauses. Alternatively, if the commission does not adopt Sharyland's recommendation to delete "separate and distinct" from clauses (e)(1)(A)(i) and (e)(1)(B)(i), Sharyland requests clarification as to why the weather emergency preparedness provisions of §25.55 should not be part of the hot and cold weather annexes of the EOP. TEC recommended that "separate and distinct" be deleted from clauses (e)(1)(A)(i) and (e)(1)(B)(i) as the term is unclear what operational plans intended to mitigate the hazards of cold weather would be separate and distinct from those required under section §25.55. Additionally, TEC argued that the removal of the language would provide utilities with the flexibility to include operational plans that are appropriate for its EOP.

Commission Response

The commission acknowledges LCRA, TPPA, Sharyland, and TEC's concerns regarding the ambiguity of the requirement under subsection (e)(1) that the hot and cold weather annexes be "separate and distinct from the weather preparation standards required under §25.55." The commission revises the rule to clarify that all entities are required to address weather emergencies in their EOPs in a manner that is not simply duplicative of the weather preparedness standards prescribed under §25.55. Specifically, the commission clarifies the intent of §25.53 is for an entity to adequately plan its actions immediately prior to and during an emergency. In contrast, §25.55 is intended to ensure long-term mitigation planning for entities to, among other things, winterize facilities and assets during blue sky conditions. Therefore, a hot and cold weather annex submitted under §25.53 may necessarily include information from the required reports under §25.55, but unless the §25.55 report adequately addresses the immediacy requirement implicit in §25.53, it is insufficient for purposes of a hot and cold weather annex.
Proposed §25.53(e)(1)(A)(iii) and (e)(1)(B)(iii) - Pre- and Post-Weather Emergency Meetings (Transmission and Distribution)

Proposed clauses (e)(1)(A)(iii) and (e)(1)(B)(iii) both require pre- and post-weather emergency meetings for transmission and distribution facilities to review lessons learned from cold weather and hot weather emergency incidents and to ensure necessary supplies and personnel are available through the weather emergency.

Sharyland, ETEC, TPPA, and TEC generally opposed, in whole or in part, the requirements of proposed clauses (e)(1)(A)(iii) and (e)(1)(B)(iii) for entities to hold pre- and post- cold or hot weather emergency meetings. Sharyland recommended proposed clauses (e)(1)(A)(iii) and (e)(1)(B)(iii) be revised with a condition that the meetings required under each clause be limited to when a significant interruption to electric service is expected or has already occurred. Sharyland elaborated, stating that there may be weather emergencies that either are not expected to or do not cause significant interruptions to the continuity of electric service and that requiring a meeting in such situations would be both unnecessary and non-productive. ETEC specifically opposed requiring a post-emergency meeting under proposed clauses (e)(1)(A)(iii) and (e)(1)(B)(iii) as "proposed new rule section (c)(1)(C) already contains a general requirement for an after-action report" and such a meeting would occur as a part of preparing the after-action report. ETEC proposed deleting "and post-" to proposed clauses (e)(1)(A)(iii) and (e)(1)(B)(iii) to clarify that separate, additional meetings are not required.

TPPA cautioned that pre-event meetings are not always feasible and recommended modifying proposed clauses (e)(1)(A)(iii) and (e)(1)(B)(iii) accordingly. TPPA also commented that it is unclear the meetings required under (e)(1)(B)(iii), (e)(2)(A)(iv) and (e)(2)(B)(iii) "as required by an entity's EOP, would be considered the activation of an EOP, which would itself generate additional reporting requirements." TEC recommended the meeting requirements under (e)(1)(A)(iii) and (e)(1)(B)(iii) be changed to a reporting requirement describing a utility's "procedures to review lessons learned from past weather emergency incidents." TEC argued that such a change would better effectuate the intent of the rule "without improperly dictating to electric cooperatives the number of meetings or manner in which a review is conducted."

Commission Response

The commission declines to adopt the specific recommendations of Sharyland, ETEC, TPPA, and TEC for clauses (e)(1)(A)(iii) and (e)(1)(B)(iii) as the commission has substantively addressed these concerns under this heading and under heading (e)(2)(A)(iv) and (e)(2)(B)(iii). Specifically, the commission removes the requirements for pre- and post-event meetings and merges the hot and cold weather annex requirements into a single annex for both transmission and generation entities under proposed subsection (e)(1) and (e)(2), respectively. This change corresponds with a revision of the merged cold and hot weather annexes to include in the required checklist for transmission facility personnel, lessons learned from past responses to cold or hot weather emergency.

Proposed §25.53(e)(1)(C) - Load Shed Annex

Proposed subsection (e)(1)(C) lists the requirements for a load shed annex that must be included within an EOP. TPPA opposed the inclusion of a load shed annex in the EOP and recommended deleting (e)(1)(C) from the proposed rule and claimed the Legislature recently affirmed that the commission "must provide discretion for entities to prioritize power delivery and power restoration of critical customers." Alternatively, if the commission rejects TPPA's proposal to remove the load shed annex from (e)(1)(C), TPPA recommended removing language permitting commission staff to request amendments under proposed subsection (c)(4), as conflicting with the statutory language of SB 3, as discussed in that section.

Commission Response

The commission declines to remove the load shed annex requirement from the proposed rule, as requested by TPPA. It is imperative for all transmission and distribution utilities to have a procedure for load shed as part of the required annexes included in its EOP. The commission disagrees with TPPA that this conflicts with the language in SB 3 requiring the commission to provide discretion to entities to prioritize power delivery and power restoration among various critical customers. This rule does not direct how critical loads should be prioritized. The commission also disagrees that allowing commission staff to verify that the requirements of this subparagraph are met and requesting an amendment if they are not diminishes entities' discretion with regards to load shed priorities.

OPUC recommended the commission add subsection (e)(1)(C)(iv) which would additionally require "a procedure or plan for communicating with the public regarding impending load shed whenever possible during an emergency." OPUC expressed understanding that public communication may not be possible in every situation but requested that an effective communication plan be in place where possible in order to "warn and provide the public with valuable information regarding impending load shed events."

Commission Response

The commission agrees with the importance of providing valuable information to customers and the public before and during emergencies, including load shed events. However, the commission declines to adopt OPUC's recommendation to add a requirement in the rule for an electric cooperative, an electric utility, a municipally owned utility, or a transmission and distribution utility to include in its load shed annex "a procedure or plan for communicating with the public regarding impending load shed whenever possible during an emergency," because it is redundant. Adopted subsection (d)(2)(A) of the rule requires an entity with transmission or distribution service operations to have procedures for communicating with the public, customers, and others during an emergency.

Proposed §25.53(e)(1)(C)(i) - Procedures for Load Shed

Proposed subsection (e)(1)(C)(i) requires a load shed annex to contain procedures for controlled shedding of load for planned or forced interruptions of service.

Oncor and TNMP opposed the inclusion of the phrase "whether caused by planned or forced interruption of service" within (e)(1)(C) and recommended striking the language as, in their view, controlled load shedding is historically neither a 'planned interruption' or a 'forced interruption' and instead is a routine event. Oncor and TNMP explained that forced interruptions of service are generally not emergencies that initiate the EOP, as opposed to load shedding. Oncor specifically argued that the proposed rule is also inconsistent with the definition of "forced interruptions" under §25.52 (relating to Reliability and Continuity of Service), which defines forced outages as "(i) interruptions,
exclusive of major events, that result from conditions directly associated with a component requiring that it be taken out of service immediately, either automatically or manually, or an interruption caused by improper operation of equipment or human error." TNMP stated it did not oppose describing its load shed procedures under the (e)(1)(C)(i). Oncor and TNMP provided identical draft language for (e)(1)(C)(i) which deletes the reference to planned or forced interruption of service.

Commission Response

The commission modifies this provision by removing the phrase "whether caused by planned or forced interruption of service," as requested by Oncor and TNMP. The commission emphasizes, however, that a load shed annex must include procedures for the controlled shedding of load, regardless of cause, during an emergency.

Proposed §25.53(e)(1)(C)(iii) - Procedures for Load Shed

Proposed subsection (e)(1)(C)(iii) requires a load shed annex to contain a registry of critical load customers that must be updated at least annually, and contain procedures for maintaining an accurate registry, providing assistance to and communicating with critical load customers, and training staff with respect to serving critical load customers.

CenterPoint, Oncor, AEP, ETEC, and TPPA, opposed the requirement of (e)(1)(C)(iii) requiring a load shed annex to include a registry of critical load customers. Specifically, CenterPoint argued a critical customer registry would contain highly sensitive proprietary customer information and therefore should not be filed publicly or be a part of the EOP. CenterPoint also opposed the inclusion of a process for assisting critical customers in the event of an outage as vague and that an electric utility is not obliged to provide "assistance" to critical customers during an unplanned outage. Similarly, consistent with its confidentiality concerns with the requirement of proposed subsection (c)(1)(A) concerning full unredacted public disclosure of an EOP, AEP opposed filing an unredacted version of the registry of critical load customers with the commission for the same reasons.

ETEC also opposed filing an unredacted version of the registry of critical load customers with the commission as part of the load shed annex as contrary to the existing rule and therefore recommended removal of (e)(1)(C)(iii). ETEC argued that the proposed rule risked "unintended disclosure of sensitive and protected information (including medical information)" and does not provide much value in reviewing an entity's EOP. ETEC recommended that the EOP should "continue to include the location of the registry and the methods used to maintain its accuracy" to ensure a list of critical customers is available to the entity's operating personnel.

Consistent with its comments raising First Amendment concerns with commission staff review of communications plans under proposed subsection (d)(5), TPPA raised the same First Amendment concerns specifically regarding proposed subsection (e)(1)(C)(iii). In TPPA's view, the proposed rule is beyond the scope of SB 3 in requiring a registry of critical load customers and creates a "fundamental customer privacy issue that may prove counterproductive to critical load registration efforts." Specifically, TPPA claimed that customers may be more reluctant to seek critical status if their information will be shared with a state agency. TPPA further argued that the requirement to update the load shed annex every time a customer is added or removed would be administratively burdensome. Lastly, TPPA maintained that the requirement would be misleading to critical load customers, as critical load status does not guarantee that load shed will not occur.

Oncor and TNMP also opposed the requirement of (e)(1)(C)(iii) and recommended it be removed from the rule. Oncor elaborated that only a small portion of critical load customers are totally exempted from load shed for health and welfare reasons and that the current rule conflicts with its business model and billing system and thus would be misleading to use and therefore not useful. Further, Oncor and TNMP argued that (e)(1)(C)(iii) is ambiguous and that the rule must clarify which "critical load customers" should be on the registry required under (e)(1)(C)(iii). Specifically, Oncor and TNMP requested clarification on whether the term "critical load customers" is inclusive of all the customers identified in §25.52(c)(1) - (2) (relating to Reliability and Continuity of Service) and §25.497 (relating to Critical Load Customers) as well as Texas Water Code (TWC) §13.1396 (relating to Coordination of Emergency Operations) or whether the term is inclusive only of customers considered "critical loads" as defined in §§25.5(21) (relating to Definitions) and §25.52(c)(1).

Additionally, Oncor opposed the inclusion of the phrase "directly served, if maintained by an electric utility, an electric cooperative, or a municipally owned utility" as it appears to modify "critical load customers" and is thus unclear. Oncor stated it is "not responsible for and has no knowledge of critical load customers that may be served behind a wholesale distribution point of delivery." Oncor emphasized that such communication informs wholesale customers of a load shed event, and it is "incumbent on electric providers... to communicate with their retail customers." Oncor recognized that the current version of §25.53 includes a similar provision, but expressed that the term is undefined and maintained that "the primary assistance utilities provide to critical load customers is the restoration of their electric service." TNMP expressed concern that including the list of critical customer names within the load shed plan could be confusing to critical customers. Specifically, inclusion on the critical customer list does not ensure exemption from load shed except for customers that are determined to be critical to public health, community welfare, or supporting the integrity of the electric system, and thus prioritized. TNMP further recommended that the critical load customer registry should be included in a separate, dedicated annex to avoid procedural confusion.

Commission Response

CenterPoint, ARM, ETEC, and TPPA's concerns regarding confidentiality are substantively addressed by the commission's revision to proposed subsection (c)(1)(A) permitting a summary of the EOP and full redacted EOP to be filed with the commission, as addressed under headings (c), (c)(1), and (c)(1)(A). Further, the commission agrees with TNMP, Oncor, and TPPA's recommendations and revises the language of adopted subsection (e)(1)(C)(iii) to clarify that an entity must only submit a procedure for maintain an accurate registry of critical load customers. The commission further modifies the requirement to clarify that this registry must include critical load customers as defined under 16 TAC §25.52(22), §25.52(c)(1) - (2) and §25.497 and TWC §13.1396. The commission also adds language that this procedure must include the entity's process for coordinating with government and service agencies as necessary during an emergency.

Proposed §25.53(e)(1)(E) - Wildfire annex
Proposed subsection (e)(1)(E) requires an electric cooperative, an electric utility, a municipally owned utility, or a transmission and distribution utility to include in its EOP a wildfire annex for its transmission and distribution facilities.

Consistent with its recommendations for subsection (e)(1)(A)(i) and (e)(1)(B)(i) requiring a cold and hot weather emergency response annex to be included in the EOP, ETES recommended limiting clauses (e)(1)(A)(i) and (e)(1)(B)(i) to wildfire annexes only and deleting the reference to a mitigation plan for hazards associated with wildfires.

Commission Response

The commission agrees with ETES’s recommendation for proposed (e)(1)(E). Consistent with the commission’s response to ETES’s recommendations for proposed subsection (e)(1)(A)(i) and (e)(1)(B)(i), the commission agrees that mitigation plans are separate from an EOP. The commission accepts ETES’s proposed revision to (e)(1)(E).

TPPA recommended the requirement for a wildfire emergency annex under (e)(1)(E) to be limited to “transmission and distribution entities serving counties predominantly of ‘Medium to High Risk’ or ‘High Risk,’ as described by Texas A&M Forest Service’s Texas Wildfire Risk Explorer or an alternative source” in order to more effectively allocate a utility’s resources.

Commission Response

The commission declines to adopt TPPA’s recommendation to qualify the requirement for a wildfire emergency annex under proposed (e)(1)(E). Texas A&M Forest Service’s Texas Wildfire Risk Explorer identifies most counties as at least “Medium to High Risk.” Even if the commission accepted the recommendation to limit (e)(1)(E) to “counties predominantly of ‘Medium to High Risk’ or ‘High Risk,’” the challenge becomes defining “predominantly.” Further, the commission agrees that organizational needs vary by entity, so do potential hazards and threats. Accordingly, adopted subsection (d) provides that if an entity deems that a certain provision does not apply to an entity, including the requirement for a wildfire emergency annex, the entity is able to include an explanation in its EOP.

Proposed §25.53(e)(1)(G) and (e)(1)(H) - Cybersecurity Annex and Physical Security Annex (Transmission and Distribution)

Proposed subsection (e)(1)(G) and (e)(1)(H) requires an electric cooperative, an electric utility, a municipally owned utility, or a transmission and distribution utility to include in its EOP for its transmission and distribution facilities, a cybersecurity and a physical security annex.

CenterPoint, Oncor, Sharyland, AEP, and TNMP opposed the inclusion of (e)(1)(G) and (e)(1)(H) in the proposed rule and recommended the subparagraphs be deleted. CenterPoint stressed that "the information... contained in these annexes is too sensitive to be filed in unredacted form, even under seal." CenterPoint expressed willingness to provide commission staff access to such annexes upon request but argued that such annexes should not be filed. Oncor argued that cybersecurity and physical security are addressed by other means via implementation of SB 64, SB 936, §25.367 (relating to Cybersecurity Monitor), and NERC Reliability Standards. Sharyland further cited Department of Energy reporting requirements as a pre-existing reporting obligation. AEP generally expressed its opposition citing that the proposed provisions are unnecessary "due to regulation and monitoring by multiple other existing means and the sensitivity of the subject matter.”

TNMP emphasized the redundancy of filing cybersecurity and physical security annexes due to pre-existing NERC requirements and further argued that the sensitive nature of the system and operational data should preclude public filing in order to preserve grid security. TNMP alternatively recommended that if the commission preserves the requirements of (e)(1)(G) and (e)(1)(H), that the commission permit utilities to file a "summary description" of each. SPS opposed the inclusion of proposed subsection (e)(2)(G) - (H) in addition to (e)(1)(G) - (H), citing confidentiality and disclosure concerns. Unlike TNMP, SPS opposed providing a summary of the annexes citing compliance with NERC requirements and separate fulfilment of disclosure with the commission under §25.367. SPS concluded that the EOP is operationally based and therefore should not include sensitive information. TCPA emphasized that the cybersecurity annex under proposed subsection (e)(1)(G) should be "carefully scoped to avoid heightened risks associated with public disclosure" and recommended removal of the requirement for "any additional annexes as needed or appropriate to the entity's particular circumstances" as duplicative. For proposed subsection (e)(1)(H) specifically, ETES argued that it is unclear "what type of physical threat the commission is envisioning." Specifically, ETES commented that a physical security threat like sabotage is normally a single site and would not require activation of the EOP. ETES continued that the EOP is intended for larger-scale events and, absent further clarification by the commission, recommended deletion of subsection (e)(1)(H). However, ETES supported the inclusion of subsection (e)(2)(H) for generation assets and highlighted the importance of physical security for such facilities.

Commission Response

The commission understands the sensitivity of cyber and physical security annexes and agrees with the disclosure, confidentiality, and general concerns of CenterPoint, Oncor, Sharyland, AEP, TNMP, SPS, TCPA, and ETES. As discussed under heading (c), the commission revises the rule to require an entity to file a summary of the EOP with citations identifying where the entity’s plan addresses the rule’s minimum requirements, including cyber and physical security annexes, and a complete copy of the plan with the confidential portions removed. The commission further agrees with CenterPoint’s recommendation that a copy of such annexes be made available to the commission for review upon request. The rule does not require an entity to develop emergency procedures that might conflict with existing NERC regulatory standards but does provide the commission the opportunity to review and analyze those plans as part of preparing its report to the Legislature.

Proposed §25.53(e)(2) - Required Annexes (Generation)

Proposed subsection (e)(2) is the header section for the list of annexes an electric cooperative, an electric utility, a municipally owned utility, or a PGC must include in its EOP for its generation resources.

AEP, Oncor, CenterPoint, and TNMP commented that the annexes required under proposed subsection (e)(2) for generation entities are redundant due to pre-existing reporting obligations under PURA §39.918(g). AEP argued that failing to exclude emergency generation facilities authorized under PURA §39.918 from ordinary "generation resources", would require TDUs to provide numerous, superfluous, and redundant annexes as emergency power restoration facilities are authorized to be used only in cases when widespread outages are already occurring.
AEP further contended that the proposed rule does not address the statutory requirement of PURA §39.918(g) which "requires a TDU that leases and operates facilities under PURA §39.918(b)(1) or that procures, owns, and operates facilities under PURA §39.918(b)(2) to include in the utility's EOP a detailed plan on the utility's use of those facilities." Oncor and TNMP also expressed redundancy concerns, arguing that emergency power generation resources under PURA §39.918 should not be considered "generation resources" for subsection (e)(2) and instead recommended the facilities be explicitly excluded. Oncor and TNMP argued that a restoration plan exclusive to emergency power generation resources would govern any operational plans and requirements for such facilities and therefore there is no need to develop separate plans and annexes for purposes of (e)(2)(A) through (l) as such matters have already been addressed.

Accordingly, AEP, Oncor, CenterPoint, and TNMP provided draft language specifically excluding generation resources authorized under PURA §39.918 from the annex requirements of proposed subsection (e)(2). TNMP also provided draft language for subsection (e)(2) and proposed new subsection (e)(6) to provide for PURA §39.918(g) which requires a TDU that leases, operates, or owns facilities under §39.918(b) to include "a detailed plan for the use of those facilities" in its emergency operations plan.

Commission Response

The commission agrees with AEP, Oncor, TNMP, and CenterPoint that the proposed rule should include language to reflect the requirement under PURA §39.918(g) for a transmission and distribution utility to include in its EOP a detailed plan for the use of facilities that provide temporary emergency electric energy. The commission also agrees that the requirement should not result in a transmission and distribution utility filing superfluous or redundant plans. The commission revises the rule as recommended by AEP and TNMP.

Proposed §25.53(e)(2)(A) and (e)(2)(B) - Cold Weather and Hot Weather Emergency Annexes (Generation)

Proposed subsection (e)(2)(A) and (e)(2)(B) require entities to file cold and hot weather annexes that include operational plans that are "separate and distinct" from the weather preparations required under §25.55.

TCPA and TEC argued that the requirement that these operational plans be "separate and distinct" is ambiguous and should be removed. TEC argued the phrase is confusing as it is unclear how such plans would be "separate and distinct" from plans required under §25.55 (relating to Weather Emergency Preparedness). TCPA argued that subsection (e)(2)(A) and (e)(2)(B) significantly overlap with the planning requirements of §25.55 and recommended that preparations made under §25.55 should be able to fulfill the requirements of (e)(2)(A) and (e)(2)(B).

Commission Response

Consistent with the commission's response to similar concerns raised under clauses (e)(1)(A)(i) and (e)(1)(B)(i), the commission agrees with the assessments of TCPA and TEC regarding the ambiguity of the requirements in the proposed rule that the hot and cold weather annexes be "separate and distinct from the weather preparation standards required under §25.55." The commission revises the rule to remove these requirements to provide entities with necessary discretion and to avoid unintentionally creating dual standards.

Proposed $\S\S25.53(e)(2)(A)(iv)$ and (e)(2)(B)(iv) - Cold Weather and Hot Weather Pre- and Post- Emergency Meetings (Generation)

Proposed clauses (e)(2)(A)(iv) and (e)(2)(B)(iv) both require pre- and post-weather emergency meetings for generation resources to review lessons learned from cold weather and hot weather emergency incidents and to ensure necessary supplies and personnel are available through the weather emergency.

TCPA endorsed the general objective of clauses (e)(2)(A)(iv) and (e)(2)(B)(iv) but commented that the imposed requirements are overly-prescriptive as meetings may be inefficient means of communication. Instead, TCPA recommended revising (e)(2)(A)(iv) and (e)(2)(B)(iv) to generally require that generators have a plan for communicating lessons learned with relevant personnel and to ensure adequate supplies and staffing for emergencies. Consistent with its recommendations for (e)(1)(A)(iii) and (e)(1)(B)(iii), TPPA recommended modifying this provision to only require pre-event meetings when feasible.

Commission Response

The commission declines to adopt the specific recommendations of TCPA and TPPA for proposed clauses (e)(2)(A)(iv) and (e)(2)(B)(iv) and (e)(2)(B)(iii) and instead deletes both clauses. This change corresponds with a revision and consolidation of (e)(2)(A) and (e)(2)(B) to include, in the required checklist for generation resource personnel, lessons learned from past responses to a cold or hot weather emergency. The commission maintains these changes substantially address the concerns of commenters.

Proposed §25.53(e)(2)(G) and (e)(2)(H) - Cybersecurity Annex and Physical Security Annex (Generation)

Proposed subsection (e)(2)(G) and (H) require an electric cooperative, an electric utility, a municipally owned utility, or a PGC to include in its EOP for its generation resources a cybersecurity and physical security annex.

Consistent with its recommendations for clauses (e)(1)(G) and (e)(1)(H), AEP and SPS opposed the inclusion of (e)(2)(G) and (e)(2)(H) and recommended the provisions be removed from the proposed rule due to pre-existing regulation and monitoring as well as confidentiality concerns.

Enbridge opposed the inclusion of proposed subsection (e)(2)(G) and (e)(2)(H) and recommended the provisions be removed. Like SPS, Enbridge cited that "disclosure of the (cybersecurity and physical security) policies and protections outside of an entity's secure network represents an inherent threat to the life, property, and systems required to operate generation resources safely and reliably." As an alternative, Enbridge recommended the commission change the requirement that entities "confirm their policies are aligned to leading industry standards and guidelines" such as from the National Institute of Standards and Technology, the Department of Homeland Security, and the International Organization of Standardization.

Enbridge provided draft language consistent with its recommendation for each subparagraph to only confirm the existence of a cybersecurity and physical security annex without disclosing either, an assurance that both annexes are incorporated into the entity's broader EOP, and that relevant staff are trained annually on each.

Commission Response

The commission acknowledges the sensitivity of cyber and physical security annexes and agrees with the disclosure and confi-
dentify concerns of SPS, AEP, and Enbridge. As discussed under heading (c), the commission revises the rule to require an entity to file a summary of the EOP with citations identifying where the entity's plan addresses the rule's minimum requirements, including cyber and physical security annexes and a complete, redacted version of the plan with the confidential portions removed. The rule does not require an entity to develop emergency procedures that might conflict with existing NERC regulatory standards but does provide the commission the opportunity to review and analyze those plans as part of preparing its report to the Legislature.

Proposed §25.53(e)(4) - Required ERCOT Annexes

Proposed subsection (e)(4) requires ERCOT to include a pandemic annex, weather emergency annex, hurricane annex, a cybersecurity annex, a physical security annex, and any additional annexes as needed or appropriate under proposed subsection (e)(4)(A) through (e)(4)(F), respectively.

TPPA recommended that any annex required of an entity's EOP under the proposed rule also be required of ERCOT's EOP, including the requirement of pre- (where feasible) and post-weather emergency meetings and a wildfire annex.

Commission Response

The commission disagrees with TPPA that every EOP requirement should apply equally to ERCOT. ERCOT plays a unique role in the management of the grid and it is unclear why ERCOT should be required to file each of the annexes required of other entities. For example, ERCOT does not serve load and, therefore, does not need a load shed annex.

Proposed §25.53(f) - Drills

Proposed subsection (f) requires an entity to conduct annual drills to test and subsequently assess its EOP's effectiveness if the EOP has not been activated in response to an incident within the last twelve months. Entities must notify commission staff of the planned annual drill at least 30 days prior of at least one drill each year, in the form and manner prescribed by the commission and appropriate TDEM District Coordinators. Additionally, subsection (f) requires an entity that operates in a hurricane evacuation zone to test its hurricane annex annually.

CenterPoint, Oncor, and TNMP commented that the language in subsection (f) regarding the 12-month drill requirement is ambiguous in its applicability. CenterPoint and Oncor provided draft language for proposed subsection (f) specifying that the requirement is “per calendar year.”

Commission Response

The commission agrees with CenterPoint, Oncor, and TNMP that the annual drill requirement under proposed subsection (f) should be unambiguous and adopts Oncor and TNMP's draft language regarding the same as it best effectuates the intent of the rule to ensure an EOP is either utilized or drilled at least once each calendar year.

City of Houston recommended that drills required under subsection (f) should be coordinated with drills by applicable local governments or agencies affected by or noted in the EOP and annex prior to the execution of the drill to ensure coordination and communication between such organizations.

Commission Response

An entity is not prohibited from coordinating drills with other local entities, but the commission declines to adopt City of Houston's recommendation to require them to do so. The commission agrees that coordination with local entities is important and addresses this topic in adopted subsection (d)(2), as discussed under heading (d)(5), which requires an EOP to include a communications plan for communicating with, among other organizations, local governments, and in proposed subsection (f) which requires entities to coordinate with appropriate TDEM District Coordinators following annual drills or implementation of an EOP.

TPPA commented the drills required under proposed subsection (f) are outside of the scope of Tex. Code §186.007 which, in TPPA’s view, is intended to “improve EOP filings with the commission to ensure transparency and a common working understanding among all parties involved in an emergency.” TPPA recommended the commission modify the proposed rule to more closely reflect the relevant statutory provisions and delete proposed subsection (f). Alternatively, TPPA recommended that proposed subsection (f) exempt MOUs as it conflicts with the commission’s limited jurisdiction over MOUs under PURA §40.004. As a further alternative, TPPA requested the commission clarify what exercises constitute a “drill” as the term is ambiguous. TEC similarly recommended that an electric cooperative that does not operate a transmission facility or generation resource be exempt from the requirements of subsection (f) and instead require electric cooperatives to submit a summary of its drilling plans.

Commission Response

The commission disagrees with TPPA and TEC’s requests to limit the application of proposed subsection (f) to certain entities. Tex. Code §186.007 requires the commission to evaluate the preparedness of the industry to respond to emergencies. The commission requires all affected entities listed under adopted subsection (a) to conduct a drill as a means to self-evaluate its own level of preparedness, the results of which are reflected in material changes to the EOP filed with the commission.

In response to TPPA’s request for clarification on what constitutes a drill, the commission does not prescribe specific requirements for drills, beyond requiring them to be operations-based. An entity should use its best judgment in determining what type of exercise appropriately tests its operational preparedness.

EPEC commented that, in order to comply with subsection (f), a utility may need to increase the number and types of drills, which would require time to develop and implement. As such, EPEC recommended the April 1, 2022 date of compliance under proposed subsection (c)(1) be extended.

Commission Response

The commission disagrees with EPEC’s request for an extended compliance period past the April 15, 2022, initial filing deadline. The commission requires sufficient time to thoroughly review and evaluate existing EOPs. Moreover, the commission notes that an entity is not required to conduct a drill by April 15, 2022. An entity is required to conduct a drill annually and attest that it has completed all required drills. If the required annual drill is completed after April 15, 2022, its completion can be attested to in subsequent annual filings.

OPUC endorsed requiring annual drills to assess the effectiveness of utilities’ EOPs. However, OPUC argued that 12 months is a significant length of time to allow an un-tested EOP to remain in place and recommended that if a utility files a new EOP or updates a pre-existing EOP, the utility must conduct a drill within

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three months of filing. OPUC provided draft language consistent with its recommendation.

Commission Response

The commission disagrees with OPUC on the need for a new or updated EOP to conduct a drill on a shortened timeline. The requirement to conduct a drill on an EOP within the calendar year is sufficient and requiring more frequent drilling could unintentionally overburden an entity that is making a diligent effort to keep its EOP up to date.

SPS recommended that the term "emergency" replace the use of the word "incident" in subsection (f) for consistency with the rule as a whole and provided draft language for the same.

Commission Response

The commission agrees with SPS that replacing the term "incident" with the defined term "emergency" better clarifies the intention of this language in subsection (f) and makes the change.

Proposed §25.53(g) - Reporting Requirements

Proposed subsection (g) requires entities upon activation of the State Operations Center by TDEM and subsequent request by commission staff, to provide updates on the status of operations, outages, and restoration efforts until all incident-related outages are restored or unless otherwise notified by commission staff. Additionally, subsection (g) permits commission staff to request, at their discretion, an after action or lessons learned report to be filed by an affected entity by a certain date.

CenterPoint, ETEC, and SPS all recommended similar changes to proposed subsection (g). CenterPoint recommended changing the heading of subsection (g) from "Reporting Requirements" to "Emergency contacts and status updates during an emergency" to more accurately describe the contents of the subsection and to minimize confusion with other reporting requirements required under proposed §25.53. Additionally, consistent with their recommendations for the deletion of subsection (d)(3), CenterPoint and SPS recommended moving the emergency contact requirement of subsection (d)(3) to subsection (g). SPS further specified that the dissemination of such information from a utility to the commission be done through an electronic internet portal or other secure mechanism.

Commission Response

The commission disagrees with CenterPoint on changing the heading for subsection (g) as the current title adequately encompasses the purpose of the subsection. The commission also declines to move the emergency contact requirement of proposed subsection (d)(3) into subsection (g) per CenterPoint and SPS's recommendation as that requirement has been moved to subsection (c)(4) as a filing separate from the EOP.

CenterPoint and ETEC recommended deletion of the last sentence of subsection (g) which allows commission staff to request an after action or lessons learned report from an affected entity by a certain date. CenterPoint stated that the sentence is unnecessary given the requirement in proposed subsection (c)(1)(C) for utilities to file annual reports and based on PURA §§14.201-14.207, which permit commission staff to request these reports on a more frequent basis.

ETEC also asserted that the last sentence of proposed subsection (g) regarding entity reporting requirements, which requires entities to file an after-action report be filed by an entity if directed to do so by the commission staff, was "redundant" as after-action reports are required for all events under proposed subsection (c)(1)(C). As such, ETEC also suggested deleting this reporting requirement from proposed subsection (c)(1)(C).

Commission Response

The commission also disagrees with CenterPoint and ETEC on removing the last sentence of subsection (g), which requires after-action and lessons learned reports from entities to be submitted with the commission after an emergency. The commission maintains that to effectuate the intent of the proposed rulemaking, commission staff must be able to request an entity to file documents relevant to emergency preparedness. It is foreseeable that emergency status updates, after action reports, or lessons learned reports may not be filed by entities as required under proposed subsection (c) or elsewhere in the proposed rule. Therefore, it is necessary for commission staff to retain discretionary authority to request updates or reports from entities as such documents are necessary for comprehensive emergency preparedness. The commission has also made the after-action reporting requirement less onerous by permitting a summary and redacted version of the EOP to be filed with the commission as discussed under headings (c), (c)(1), and (c)(1)(A) as well as deleting the separate after-action reporting requirement under heading (c)(1)(C) relating to the same.

SPS recommended, consistent with its recommendations and concerns regarding utility discretion in planning and for subsection (c)(4) and comments on supplemental reporting for proposed subsection (d)(1) through (d)(4), if its recommendations for subsection (b)(3) defining the term "Emergency" are not accepted by the commission, that events for which after action or lessons learned reporting is required be limited to instances where an emergency has been declared by "a local, state, or federal government; ERCOT; or a Reliability Coordinator that is applicable to the entity." SPS maintained that such a change ensures reporting is "appropriately scoped to target events that present a credible risk to the continuity of service" and are only classified as an emergency "if the circumstances are of sufficient magnitude that emergency conditions are declared by entities empowered to coordinate regional or state-wide responses to such event." SPS provided draft language consistent with its recommendation.

Commission Response

The commission agrees with SPS regarding to what constitutes an emergency, however, declines to adopt SPS' specific language for subsection (g) as SPS' concerns are substantially addressed by the commission's amendments to other rule provisions. Specifically, the revisions to the definition of "emergency" under adopted subsection (b)(3), the movement of the emergency contacts requirement to adopted (c)(4)(B) as a filing separate from the EOP, and that documents under subsection (c)(4) may be filed confidentially. Therefore, SPS recommendations for subsection (g) are unnecessary.

Consistent with its comments regarding procedural rights and recommendations regarding subsection (c)(4)(A) and (c)(4)(B), TCPA highlighted its due process concerns with the last sentence of the subsection permitting permission staff to request action or lessons learned reports and file them with the commission by a specific date. TCPA argued that this sentence should be revised to specify that the commission, not commission staff, may require such reporting. TCPA noted that this recommendation is only for the reporting requirement in subsection (g), "as it would be inefficient and potentially infeasible to produce a
commission order for the in-event updates contemplated in the first part of subsection (g).” TCPA stated that, if its proposal is adopted by the commission, commission orders generally provide deadlines for response, and as such the date specification in the last sentence of (g) should be deleted. Similarly, TPPA argued that requests for after action or lessons learned reports are proper only from the commission, not its staff. TPPA further commented that any additional reporting requirements such as those contemplated by subsection (f) should be considered extraneous to the EOP itself for purposes of filing the EOP.

**Commission Response**

The commission disagrees with TCPA and TPPA that proposed subsection (g) poses a threat to the constitutional due process rights of entities and that commission staff do not have the authority to request EOP updates under subsection (g) or changes as stated elsewhere in the rule. The commission has substantively addressed these concerns under the General Comment heading and headings (c)(4) and (d)(5).

Oncor and TNMP recommended that subsection (g) be revised to clarify that once "service has been restored to all customers capable of receiving service," updates from the utility to the commission are no longer required. Oncor and TNMP elaborated that providing continuous updates on restoration activities for customers unable to receive electric service, potentially for weeks or months, is unlikely to benefit those customers or the commission. Oncor and TNMP provided identical draft language consistent with their recommendations.

**Commission Response**

The commission agrees with Oncor and TNMP that the language in proposed subsection (g) should be revised to clarify that updates should only be issued until service is restored to customers capable of receiving service. The commission modifies the adopted rule accordingly.

TEC noted that the current version of the reporting requirements that appears in proposed subsection (g) applies only to "affected" entities during an activation of the State Operations Center (SOC) by TDEM. TEC suggested the term "affected" remain in the proposed rule to avoid situations where a utility may be required to report to commission staff when it or its customers are entirely unaffected by an emergency event, such as a utility located in the Panhandle being forced to report during a hurricane in the Gulf of Mexico.

**Commission Response**

The commission agrees with TEC’s recommendation and adds language to subsection (g) clarifying the applicability to affected entities.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this rule, the commission makes other minor modifications for the purpose of clarifying its intent.

**16 TAC §25.53**

**Statutory Authority**

The rule is repealed under the following provisions of PURA: §14.001, which provides the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by PURA that is necessary and convenient to the exercise of that power and jurisdiction, and §14.002, which provides the commission with the authority to make, adopt, and enforce rules reasonably required in the exercise of its powers and jurisdiction. Cross reference to statute: PURA §14.001 and 14.002.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency’s legal authority.

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Andrea Gonzalez
Rules Coordinator
Public Utility Commission of Texas
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Proposal publication date: December 17, 2021
For further information, please call: (512) 936-7244

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**16 TAC §25.53**

**Statutory Authority**

The new rule is adopted under the following provisions of PURA §14.001, which provides the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by PURA that is necessary and convenient to the exercise of that power and jurisdiction, and §14.002, which provides the commission with the authority to make, adopt, and enforce rules reasonably required in the exercise of its powers and jurisdiction. The rule is also adopted underTex. Util. Code §186.007, which requires the commission to: analyze the EOPs developed by electric utilities, power generation companies, municipally owned utilities, electric cooperatives that operate generation facilities in this state, and retail electric providers; prepare a weather emergency preparedness report; and require entities to submit updated EOPs if the EOP on file does not contain adequate information to determine whether the entity can provide adequate electric services.


**§25.53. Electric Service Emergency Operations Plans.**

(a) Application. This section applies to an electric utility, transmission and distribution utility, power generation company (PGC), municipally owned utility, electric cooperative, and retail electric provider (REP), and to the Electric Reliability Council of Texas (ERCOT).

(b) Definitions.

(1) Annex -- a section of an emergency operations plan that addresses how an entity plans to respond in an emergency involving a specified type of hazard or threat.

(2) Drill -- an operations-based exercise that is a coordinated, supervised activity employed to test an entity's EOP or a portion of an entity's EOP. A drill may be used to develop or test new policies or procedures or to practice and maintain current skills.

(3) Emergency -- a situation in which the known, potential consequences of a hazard or threat are sufficiently imminent and severe that an entity should take prompt action to prepare for and reduce the impact of harm that may result from the hazard or threat. The term

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includes an emergency declared by local, state, or federal government, or ERCOT or another reliability coordinator designated by the North American Electric Reliability Corporation and that is applicable to the entity.

(4) Entity -- an electric utility, transmission and distribution utility, PGC, municipally owned utility, electric cooperative, REP, or ERCOT.

(5) Hazard -- a natural, technological, or human-caused condition that is potentially dangerous or harmful to life, information, operations, the environment, or property, including a condition that is potentially harmful to the continuity of electric service.

(6) Threat -- the intention and capability of an individual or organization to harm life, information, operations, the environment, or property, including harm to the continuity of electric service.

(c) Filing requirements.

(1) An entity must file an emergency operations plan (EOP) and executive summary under this section by April 15, 2022. Notwithstanding the foregoing, a municipally owned utility must provide its EOP and executive summary in the manner prescribed by the commission in this paragraph no later than June 1, 2022. Each individual entity is responsible for compliance with the requirements of this section. An entity filing a joint EOP or other joint document under this section on behalf of one or more entities over which it has control is jointly responsible for each entity's compliance with the requirements of this section.

(A) An entity must file with the commission:

(i) an executive summary that:

(I) describes the contents and policies contained in the EOP;

(II) includes a reference to specific sections and page numbers of the entity's EOP that correspond with the requirements of this rule;

(III) includes the record of distribution required under paragraph (4)(A) of this subsection; and

(IV) contains the affidavit required under paragraph (4)(C) of this subsection;

(ii) a complete copy of the EOP with all confidential portions removed.

(B) For an entity with operations within the ERCOT power region, the entity must submit its unredacted EOP in its entirety to ERCOT.

(C) ERCOT must designate an unredacted EOP submitted by an entity as Protected Information under the ERCOT Protocols.

(D) An entity must make its unredacted EOP available in its entirety to commission staff on request at a location designated by commission staff.

(E) An entity may file a joint EOP on behalf of itself and one or more other entities over which it has control provided that:

(i) the executive summary required under subparagraph (A)(i) of this paragraph identifies which sections of the joint EOP apply to each entity; and

(ii) the joint EOP satisfies the requirements of this section for each entity as if each entity had filed a separate EOP.

(F) An entity filing a joint EOP under subparagraph (E) of this paragraph may also jointly file one or more of the documents required under paragraph (4) of this subsection provided that each joint document satisfies the requirements for each entity to which the document applies.

(G) An entity that is required to file similar annexes for different facility types under subsection (e) of this section, such as a pandemic annex for both generation facilities and transmission and distribution facilities, may file a single combined annex addressing the requirement for multiple facility types. The combined annex must conspicuously identify the facilities to which it applies.

(2) A person seeking registration as a PGC or certification as a REP must meet the filing requirements under paragraph (1)(A) of this subsection at the time it applies for registration or certification with the commission and must submit the EOP to ERCOT if it will operate in the ERCOT power region, no later than ten days after the commission approves the person's registration or certification.

(3) An entity must continuously maintain its EOP. Beginning in 2023, an entity must annually update information included in its EOP no later than March 15 under the following circumstances:

(A) An entity that in the previous calendar year made a change to its EOP that materially affects how the entity would respond to an emergency must:

(i) file with the commission an executive summary that:

(I) describes the changes to the contents or policies contained in the EOP;

(II) includes an updated reference to specific sections and page numbers of the entity's EOP that correspond with the requirements of this rule;

(III) includes the record of distribution required under paragraph (4)(A) of this subsection; and

(IV) contains the affidavit required under paragraph (4)(C) of this subsection;

(ii) file with the commission a complete, revised copy of the EOP with all confidential portions removed; and

(iii) submit to ERCOT its revised unredacted EOP in its entirety if the entity operates within the ERCOT power region.

(B) An entity that in the previous calendar year did not make a change to its EOP that materially affects how the entity would respond to an emergency must file with the commission:

(i) a pleading that documents any changes to the list of emergency contacts as provided under paragraph (4)(B) of this subsection;

(ii) an attestation from the entity's highest-ranking representative, official, or officer with binding authority over the entity stating the entity did not make a change to its EOP that materially affects how the entity would respond to an emergency; and

(iii) the affidavit described under paragraph (4)(C) of this subsection.

(C) An entity must update its EOP or other documents required under this section if commission staff determines that the entity's EOP or other documents do not contain sufficient information to determine whether the entity can provide adequate electric service through an emergency. If directed by commission staff, the entity must file its revised EOP or other documentation, or a portion thereof, with the commission and, for entities with operations in the ERCOT power region, with ERCOT.
(D) ERCOT must designate any revised unredacted EOP submitted by an entity as Protected Information under the ERCOT Protocols.

(E) An entity must make a revised unredacted EOP available in its entirety to commission staff on request at a location designated by commission staff.

(F) The requirements for joint and combined filings under paragraph (1) of this subsection apply to revised joint and revised combined filings under this paragraph.

(4) In accordance with the deadlines prescribed by paragraphs (1) and (3) of this subsection, an entity must file with the commission the following documents:

(A) A record of distribution that contains the following information in table format:

(i) titles and names of persons in the entity’s organization receiving access to and training on the EOP; and

(ii) dates of access to or training on the EOP, as appropriate;

(B) A list of primary and, if possible, backup emergency contacts for the entity, including identification of specific individuals who can immediately address urgent requests and questions from the commission during an emergency; and

(C) An affidavit from the entity’s highest-ranking representative, official, or officer with binding authority over the entity affirming the following:

(i) relevant operating personnel are familiar with and have received training on the applicable contents and execution of the EOP, and such personnel are instructed to follow the applicable portions of the EOP except to the extent deviations are appropriate as a result of specific circumstances during the course of an emergency;

(ii) the EOP has been reviewed and approved by the appropriate executives;

(iii) drills have been conducted to the extent required by subsection (f) of this section;

(iv) the EOP or an appropriate summary has been distributed to local jurisdictions as needed;

(v) the entity maintains a business continuity plan that addresses returning to normal operations after disruptions caused by an incident; and

(vi) the entity’s emergency management personnel who are designated to interact with local, state, and federal emergency management officials during emergency events have received the latest IS-100, IS-200, IS-700, and IS-800 National Incident Management System training.

(5) Notwithstanding the other requirements of this subsection, ERCOT must maintain its own current EOP in its entirety, consistent with the requirements of this section and available for review by commission staff.

(d) Information to be included in the emergency operations plan. An entity’s EOP must address both common operational functions that are relevant across emergency types and annexes that outline the entity’s response to specific types of emergencies, including those listed in subsection (e) of this section. An EOP may consist of one or multiple documents. Each entity’s EOP must include the information identified below, as applicable. If a provision in this section does not apply to an entity, the entity must include in its EOP an explanation of why the provision does not apply.

(1) An approval and implementation section that:

(A) introduces the EOP and outlines its applicability;

(B) lists the individuals responsible for maintaining and implementing the EOP, and those who can change the EOP;

(C) provides a revision control summary that lists the dates of each change made to the EOP since the initial EOP filing pursuant to subsection (c)(1) of this section;

(D) provides a dated statement that the current EOP supersedes previous EOPs; and

(E) states the date the EOP was most recently approved by the entity.

(2) A communication plan.

(A) An entity with transmission or distribution service operations must describe the procedures during an emergency for handling complaints and for communicating with the public; the media; customers; the commission; the Office of Public Utility Counsel (OPUC); local and state governmental entities, officials, and emergency operations centers, as appropriate in the circumstances for the entity; the reliability coordinator for its power region; and critical load customers directly served by the entity.

(B) An entity with generation operations must describe the procedures during an emergency for communicating with the media; the commission; OPUC; fuel suppliers; local and state governmental entities, officials, and emergency operations centers, as appropriate in the circumstances for the entity; and the applicable reliability coordinator.

(C) A REP must describe the procedures for communicating during an emergency with the public, media, customers, the commission, and OPUC, and the procedures for handling complaints during an emergency.

(D) ERCOT must describe the procedures for communicating, in advance of and during an emergency, with the public, the media, the commission, OPUC, governmental entities and officials, the state emergency operations center, and market participants.

(3) A plan to maintain pre-identified supplies for emergency response.

(4) A plan that addresses staffing during emergency response.

(5) A plan that addresses how an entity identifies weather-related hazards, including tornadoes, hurricanes, extreme cold weather, extreme hot weather, drought, and flooding, and the process the entity follows to activate the EOP.

(6) Each relevant annex, as detailed in subsection (e) of this section, and other annexes applicable to an entity.

(e) Annexes to be included in the emergency operations plan.

(1) An electric utility, a transmission and distribution utility, a municipally owned utility, and an electric cooperative a must include in its EOP for its transmission and distribution facilities the following annexes:

(A) A weather emergency annex that includes:

(i) operational plans for responding to a cold or hot weather emergency, distinct from the weather preparations required un-
under §25.55 of this title (relating to Weather Emergency Preparedness); and

(ii) a checklist for transmission or distribution facility personnel to use during cold or hot weather emergency response that includes lessons learned from past weather emergencies to ensure necessary supplies and personnel are available through the weather emergency;

(B) A load shed annex that must include:

(i) procedures for controlled shedding of load;

(ii) priorities for restoring shed load to service; and

(iii) a procedure for maintaining an accurate registry of critical load customers, as defined under 16 TAC §25.52(22) of this title (relating to Definitions), §25.52(c)(1) and (2) of this title (relating to Reliability and Continuity of Service) and §25.497 of this title (relating to Critical Load Industrial Customers, Critical Load Public Safety Customers, Critical Care Residential Customers, and Chronic Condition Residential Customers), and TWC §13.1396 (relating to Coordination of Emergency Operations), directly served, if maintained by the entity. The registry must be updated as necessary but, at a minimum, annually. The procedure must include the processes for providing assistance to critical load customers in the event of an unplanned outage, for communicating with critical load customers during an emergency, coordinating with government and service agencies as necessary during an emergency, and for training staff with respect to serving critical load customers;

(C) A pandemic and epidemic annex;

(D) A wildfire annex;

(E) A hurricane annex that includes evacuation and re-entry procedures if facilities are located within a hurricane evacuation zone, as defined by the Texas Division of Emergency Management (TDEM);

(F) A cyber security annex;

(G) A physical security incident annex;

(H) A transmission and distribution utility that leases or operates facilities under PURA §39.918(b)(1) or procures, owns, and operates facilities under PURA §39.918(b)(2) must include an annex that details its plan for the use of those facilities; and

(I) Any additional annexes as needed or appropriate to the entity’s particular circumstances.

(2) An electric cooperative, an electric utility, or a municipally owned utility that operate a generation resource in Texas; and a PGC must include the following annexes for its generation resources other than generation resources authorized under PURA §39.918:

(A) A weather emergency annex that includes:

(i) operational plans for responding to a cold or hot weather emergency, distinct from the weather preparations required under §25.55 of this title;

(ii) verification of the adequacy and operability of fuel switching equipment, if installed; and

(iii) a checklist for generation resource personnel to use during a cold or hot weather emergency response that includes lessons learned from past weather emergencies to ensure necessary supplies and personnel are available through the weather emergency;

(B) A water shortage annex that addresses supply shortages of water used in the generation of electricity;

(C) A restoration of service annex that identifies plans intended to restore to service a generation resource that failed to start or that tripped offline due to a hazard or threat;

(D) A pandemic and epidemic annex;

(E) A hurricane annex that includes evacuation and re-entry procedures if facilities are located within a hurricane evacuation zone, as defined by TDEM;

(F) A cyber security annex;

(G) A physical security incident annex; and

(H) Any additional annexes as needed or appropriate to the entity’s particular circumstances.

(3) A REP must include in its EOP the following annexes:

(A) A pandemic and epidemic annex;

(B) A hurricane annex that includes evacuation and re-entry procedures if facilities are located within a hurricane evacuation zone, as defined by TDEM;

(C) A cyber security annex;

(D) A physical security incident annex; and

(E) Any additional annexes as needed or appropriate to the entity’s particular circumstances.

(4) ERCOT must include the following annexes:

(A) A pandemic and epidemic annex;

(B) A weather emergency annex that addresses ERCOT’s plans to ensure continuous market and grid management operations during weather emergencies, such as tornadoes, wildfires, extreme cold weather, extreme hot weather, and flooding;

(C) A hurricane annex that includes evacuation and re-entry procedures if facilities are located within a hurricane evacuation zone, as defined by TDEM;

(D) A cyber security annex;

(E) A physical security incident annex; and

(F) Any additional annexes as needed or appropriate to ERCOT’s particular circumstances.

(f) Drills. An entity must conduct or participate in at least one drill each calendar year to test its EOP. Following an annual drill the entity must assess the effectiveness of its emergency response and revise its EOP as needed. If the entity operates in a hurricane evacuation zone as defined by TDEM, at least one of the annual drills must include a test of its hurricane annex. An entity conducting an annual drill must, at least 30 days prior to the date of at least one drill each calendar year, notify commission staff, using the method and form prescribed by commission staff on the commission’s website, and the appropriate TDEM District Coordinators, by email or other written form, of the date, time, and location of the drill. An entity that has activated its EOP in response to an emergency is not required, under this subsection, to conduct or participate in a drill in the calendar year in which the EOP was activated.

(g) Reporting requirements. Upon request by commission staff during an activation of the State Operations Center by TDEM, an affected entity must provide updates on the status of operations, outages, and restoration efforts. Updates must continue until all incident-related outages of customers able to take service are restored or unless otherwise notified by commission staff. After an emergency, commission staff may require an affected entity to provide an after
action or lessons learned report and file it with the commission by a date specified by commission staff.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Andrea Gonzalez
Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936-7244

PART 11. TEXAS BOARD OF NURSING

CHAPTER 213. PRACTICE AND PROCEDURE

22 TAC §213.10
The Texas Board of Nursing (Board) adopts amendments to 22 Texas Administrative Code §213.10, relating to Notice and Service, without changes to the proposed text published in the January 7, 2022, issue of the Texas Register (47 TexReg 11) and will not be republished.

Reasoned Justification. The Texas Nurse Portal (Portal), which was launched by the Board on June 15, 2020, is a paperless, confidential, and secure system that allows individuals to apply for nurse licensure by examination and endorsement and renew their licenses. The use of the Portal has moved the Board toward a paperless workflow in the Board's offices and allows the Board to communicate with applicants and licensees directly through the Portal. This online communication is often more efficient and reliable than more traditional methods, such as certified, registered, or first class mail.

The adopted amendments add the Portal as a new avenue to provide notice to applicants and licensees in circumstances where state law does not specifically require notice to be sent via first class, registered, or certified mail. In those cases, Board notice will continue to be given as specified in existing subsections (a) - (e) of the rule. Notices sent via the Portal may include mandatory notices required by the Nursing Practice Act and the Nurse Licensure Compact for multistate privilege licensure, as well as courtesy notices and routine communication provided by the Board. Further, the Board has already adopted rules incorporating the use of the Portal into its communication with applicants and licensees as it relates to the change of an applicant or licensee's name and/or address (46 TexReg 555). The adopted amendments are consistent with the Board's uniform transition to a more efficient online licensure system.

How the Section Will Function. Adopted §213.10(f) provides that, notwithstanding (a) - (e) of the section, notice required by a rule adopted by the Interstate Commission of Nurse Licensure Compact Administrators will be considered effective and service will be considered complete when made electronically through the Texas Nurse Portal accessible through the Board's website. Additionally, adopted §213.10(g) provides that, notwithstanding (a) - (e) of the section, notice not specifically required by state to be provided through first class, certified, or registered mail, return receipt requested, may be made electronically through the Texas Nurse Portal accessible through the Board's website and will be considered effective and complete when made through this method. Subsections (a) - (e) contain provisions relate to notice provided via registered or certified mail and will not apply to notice provided under the adopted amendments.

Public Comment. The Board did not receive any comments on the proposal.

ADOPTED RULES March 11, 2022 47 TexReg 1275
Statutory Authority. The amendments are adopted under the authority of the Occupations Code §301.151. Section 301.151 addresses the Board's rulemaking authority.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 23, 2022.

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Jena Abel
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Texas Board of Nursing

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Proposal publication date: January 7, 2022
For further information, please call: (512) 305-6822

CHAPTER 217. LICENSURE, PEER ASSISTANCE AND PRACTICE

22 TAC §217.5

The Texas Board of Nursing (Board) adopts amendments to 22 Texas Administrative Code §217.5, relating to Temporary License and Endorsement, without changes to the proposed text published in the January 7, 2022, issue of the Texas Register (47 TexReg 12) and will not be republished.

Reasoned Justification. The amendments are being adopted under the authority of the Occupations Code §301.151 and House Bill (HB) 139, effective September 1, 2021. HB 139, enacted during the 87th Regular Legislative Session, requires a state agency that issues a license that has a residency requirement for license eligibility to adopt rules regarding the documentation necessary for a military spouse applicant to establish residency, including by providing to the agency a copy of the permanent change of station order for the military service member to whom the spouse is married.

Current Board Rule 217.5(h) includes in its eligibility requirements for a military spouse applicant proof of residency in Texas. However, proof of residency in Texas is not necessary for the issuance of single state licensure for these applicants. A military spouse applicant wishing to obtain a multistate license under the Nurse Licensure Compact must declare Texas as his/her home state on the application and submit proof of residency required under the Occupations Code Chapter 304 and related compact rules. However, a military spouse applicant is not required to obtain a multistate license to practice nursing in the State of Texas; a military spouse applicant may practice nursing in Texas by obtaining a single state license, which does not require proof of residency. In an effort to conform to the requirements of HB 139, remove any unnecessary impediments to single state licensure in Texas for military spouse applicants, and clarify the applicability of the existing rule, the adopted amendments eliminate the language in subsection (h)(1)(B) relating to proof of residency.

How the Section Will Function. Section 217.5(h) relates to out-of-state licensure of military spouse applicants. The adopted amendments eliminate the need for a military spouse applicant to submit proof of residency in Texas in order to obtain single state licensure and practice in Texas.

Public Comment. The Board did not receive any comments on the proposal.

Statutory Authority. The amendments are adopted under the authority of the Occupations Code §301.151 and HB 139, which amends the Occupations Code §55.004.

Section 301.151 addresses the Board's rulemaking authority. Section 55.004 addresses residency requirements for license eligibility for military spouse applicants.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Jena Abel
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For further information, please call: (512) 305-6822

PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 283. LICENSING REQUIREMENTS FOR PHARMACISTS

22 TAC §283.4

The Texas State Board of Pharmacy adopts amendments to §283.4, concerning Internship Requirements. These amendments are adopted without changes to the proposed text as published in the December 24, 2021, issue of the Texas Register (46 TexReg 8880). The rule will not be republished.

The amendments specify that a person may not have previously failed the NAPLEX or Texas Pharmacy Jurisprudence Examination to be designated an extended-intern as a resident in a residency program accredited by the American Society of Health-System Pharmacists and correct grammatical errors.

No comments were received.

The amendments are adopted under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this adoption: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 23, 2022.
The Texas State Board of Pharmacy adopts amendments to §291.29, concerning Professional Responsibility of Pharmacists. These amendments are adopted without changes to the proposed text as published in the December 24, 2021, issue of the Texas Register (46 TexReg 8883). The rule will not be republished.

The amendments establish the determination of a valid prescription issued as a result of teledentistry dental services, in accordance with House Bill 2056, or telemedicine medical services.

No comments were received.

The amendments are adopted under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this adoption: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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TRD-202200658
Timothy L. Tucker, Pharm.D.
Executive Director
Texas State Board of Pharmacy
Effective date: March 15, 2022
Proposal publication date: December 24, 2021
For further information, please call: (512) 305-8097

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The amendments establish extend the time period for a pharmacist to dispense prescription drug orders for Schedule II controlled substances issued by a practitioner in another state to the end of the thirtieth day after the date the prescription is issued to be consistent with federal law and correct a citation reference.

No comments were received.

The amendments are adopted under §§551.002 and 554.051 of the Texas Pharmacy Act (Chapters 551 - 569, Texas Occupations Code). The Board interprets §551.002 as authorizing the agency to protect the public through the effective control and regulation of the practice of pharmacy. The Board interprets §554.051(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act.

The statutes affected by this adoption: Texas Pharmacy Act, Chapters 551 - 569, Texas Occupations Code.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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the Texas Register (46 TexReg 8175). These rules will not be republished.

BACKGROUND AND JUSTIFICATION

The purpose of the amendments is to increase administrative efficiencies and improve processes for Early Childhood Intervention (ECI) contractors, add requirements related to criminal background checks of ECI service providers, and strengthen transition services for children and families enrolled in ECI.

The proposed changes also contain non-substantive changes that will improve clarity, update references based on the administrative transfer of ECI rules to 26 TAC Chapter 350, and align abbreviations with HHSC rule conventions.

COMMENTS

The 31-day comment period ended January 3, 2022. During this period, HHSC received comments regarding the proposed rules from five commenters, including three ECI program directors, a parent, and an outreach specialist with Texas School for the Deaf. A summary of comments relating to the rules and HHSC’s responses follow.

Comment: The three ECI program directors requested amending §350.313 to allow early intervention specialist (EIS) applicants to submit 40 clock hours of continuing education to substitute for three hours of semester course credit related to early intervention missing from their transcript, up to the maximum 15 hours required.

Response: While HHSC agrees that allowing some continuing education to substitute for semester course credit will assist contractors in hiring qualified applicants, the agency believes reviewing up to 200 clock hours for a potential EIS candidate would create a significant burden on the ECI state office and potentially reduce the quality of pre-service preparation. Therefore, the requested change was not made in full, but a change was made to further assist ECI contractors in hiring qualified applicants. The change allows EIS applicants to submit 40 clock hours of continuing education for missing up to three hours of semester course credit relevant to early childhood intervention.

Comment: One program director requested amending §350.313 to allow conditional employment for an EIS to be hired and finish their 40 clock hours within 30 days of hiring, rather than the hours being completed prior to employment.

Response: HHSC agrees and revises the rule as suggested.

Comment: One program director requested amending §350.313 to allow former EISes to submit clock hours of continuing education to reinstate their credential rather than having them re-start the EIS credentialing process if they have been inactive for more than two years.

Response: HHSC agrees with the substance of the comment but believes the time period an EIS was inactive should not be open-ended. HHSC amended the rule to increase the time an EIS may move from inactive to active status without having to re-start the credentialing process from 24 months to 48 months.

Comment: A commenter asked to replace “hearing impaired” and “auditory impairment” with “deaf and hard of hearing” throughout Chapter 350 to align with the Person First Respectful Language Initiative.

Response: HHSC agrees and amended the language in §§350.823, §350.1009, and §350.1413. There are other instances where the phrase can be replaced in rules that were not open for public comment. HHSC will address this in a future rule project to ensure the public has the opportunity to comment on the proposed changes.

Comment: A commenter supported all amendments in Chapter 350.

Response: No changes are necessary in response to this comment.


SUBCHAPTER A. GENERAL RULES

26 TAC §350.103

STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

§350.103. Definitions.

The following words and terms, when used in this chapter, will have the following meanings, unless the context clearly indicates otherwise.

(1) Assessment--As defined in 34 CFR §303.321(a)(2)(ii), the ongoing procedures used by appropriate qualified personnel throughout the period of a child's eligibility for early childhood intervention (ECI) services to assess the child's individual strengths and needs and determine the appropriate services to meet those needs.

(2) Child--An infant or toddler, from birth through 35 months, as defined in 34 CFR §303.21.

(3) Child Find--As described in 34 CFR §§303.115, 303.302, and 303.303, activities and strategies designed to locate and identify, as early as possible, infants and toddlers with developmental delay.

(4) Complaint--A formal written allegation submitted to the Texas Health and Human Services Commission (HHSC) stating that a requirement of the Individuals with Disabilities Education Act (IDEA) or an applicable federal or state regulation has been violated.

(5) Comprehensive Needs Assessment--Conducted by an interdisciplinary team as defined in paragraph (25) of this section as a part of the Individualized Family Services Plan (IFSP) development process, the process for identifying a child's unique strengths and needs, and the family's resources, concerns, and priorities in order to develop an IFSP. The comprehensive assessment process gathers information across developmental domains regarding the child's abilities to participate in the everyday routines and activities of the family.

(6) Condition with a High Probability of Resulting in Developmental Delay--A medical diagnosis known and widely accepted within the medical community to result in a developmental delay over the natural course of the diagnosis.

(7) Consent--As defined in 34 CFR §303.7 and meeting all requirements in 34 CFR §303.420.

(8) Contractor--A local private or public agency with proper legal status and governed by a board of directors or govern-
ing authority that accepts funds from HHSC to administer an early childhood intervention program.

(9) Co-visits--When two or more service providers deliver different services to the child during the same period of time. Co-visits are provided when a child will receive greater benefit from services being provided at the same time, rather than individually.

(10) Days--Calendar days, except for local education agency (LEA) services which are defined as "school days."

(11) Developmental Delay--As defined in Texas Human Resources Code §73.001(3) and determined to be significant in compliance with the criteria and procedures in Subchapter H of this chapter (relating to Eligibility, Evaluation, and Assessment).

(12) Developmental Screenings--General screenings provided by the early childhood intervention program to assess the child's need for further evaluation.

(13) Early Childhood Intervention Program--In addition to the definition of early intervention service program as defined in 34 CFR §303.11, a program operated by the contractor with the express purpose of implementing a system to provide early childhood intervention services to children with developmental delays and their families.

(14) Early Childhood Intervention Services--Individualized early childhood intervention services determined by the IFSP team to be necessary to support the family's ability to enhance their child's development. Early childhood intervention services are further defined in 34 CFR §303.13 and §303.16 and §350.1105 of this chapter (relating to Capacity to Provide Early Childhood Intervention Services).

(15) ECI Professional--An individual employed by or under the direction of an HHSC Early Childhood Intervention Program contractor who meets the requirements of qualified personnel as defined in 34 CFR §303.13(c) and §303.31, and who is knowledgeable in child development and developmentally appropriate behavior, possesses the requisite education and experience, and demonstrates competence to provide ECI services.

(16) EIS--Early Intervention Specialist. A credentialed professional who meets specific educational requirements established by HHSC ECI in §350.313(a) of this chapter (relating to Early Intervention Specialist (EIS)) and has specialized knowledge in early childhood cognitive, physical, communication, social-emotional, and adaptive development.

(17) Evaluation--The procedures used by qualified personnel to determine a child's initial and continuing eligibility for early childhood intervention services that comply with the requirements described in 34 CFR §303.21 and §303.321.

(18) FERPA--Family Educational Rights and Privacy Act of 1974, 20 USC §1232g, as amended, and implementing regulations at 34 CFR Part 99. Federal law that outlines privacy protection for parents and children enrolled in the ECI program. FERPA includes rights to confidentiality and restrictions on disclosure of personally identifiable information, and the right to inspect records.

(19) Group Services--Early childhood intervention services provided at the same time to no more than four children and their parent or parents or routine caregivers per service provider to meet the developmental needs of the individual infant or toddler.

(20) HHSC--Texas Health and Human Services Commission. The entity designated as the lead agency by the governor under the Individuals with Disabilities Education Act, Part C. HHSC has the final authority and responsibility for the administration, supervision, and monitoring of programs and activities under this system. HHSC has the final authority for the obligation and expenditure of funds and compliance with all applicable laws and rules.

(21) HHSC ECI--The Texas Health and Human Services Commission Early Childhood Intervention Services. The state program responsible for maintaining and implementing the statewide early childhood intervention system required under the Individuals with Disabilities Education Act, Part C, as amended in 2004.

(22) IFSP--Individualized Family Service Plan as defined in 34 CFR §303.20. A written plan of care for providing early childhood intervention services and other medical, health, and social services to an eligible child and the child's family when necessary to enhance the child's development.

(23) IFSP Services--The individualized early childhood intervention services listed in the IFSP that have been determined by the IFSP team to be necessary to enhance an eligible child's development.

(24) IFSP Team--An interdisciplinary team that meets the requirements in 34 CFR §303.24(b) and works collaboratively to develop, review, modify, and approve the IFSP. It includes the parent; the service coordinator; all ECI professionals providing services to the child, as planned on the IFSP; certified Teachers of the Deaf and Hard of Hearing, as appropriate; and certified Teachers of Students with Visual Impairments, as appropriate.

(25) Interdisciplinary Team--In addition to the definition of multidisciplinary team as defined in 34 CFR §303.24, a team that consists of at least two ECI professionals from different disciplines and the child's parent. One of the ECI professionals must be a Licensed Practitioner of the Healing Arts (LPHA). The team may include representatives of the LEA. Professionals on the team share a common perspective regarding infant and toddler development and developmental delay and work collaboratively to conduct evaluation, assessment, IFSP development, and to provide intervention.

(26) LEA--Local educational agency as defined in 34 CFR §303.23.

(27) LPHA--Licensed Practitioner of the Healing Arts. A licensed physician, registered nurse, licensed physical therapist, licensed occupational therapist, licensed speech language pathologist, licensed professional counselor, licensed clinical social worker, licensed psychologist, licensed dietitian, licensed audiologist, licensed physician assistant, licensed marriage and family therapist, licensed intern in speech language pathology, licensed behavior analyst, or advanced practice registered nurse who is an employee or subcontractor of an ECI contractor. LPHA responsibilities are further described in §350.312 of this chapter (relating to Licensed Practitioner of the Healing Arts (LPHA)).

(28) Medicaid--The medical assistance entitlement program administered by HHSC.

(29) Native Language--As defined in 34 CFR §303.25.

(A) When used with respect to an individual who is limited English proficient (as that term is defined in section 602(18) of the Individuals with Disabilities Education Act), native language means:

(i) the language normally used by that individual, or, in the case of a child, the language normally used by the parents of the child; and

(ii) for evaluations and assessments conducted pursuant to 34 CFR §303.321(a)(5) and (a)(6), the language normally used by the child, if determined developmentally appropriate for the child by qualified personnel conducting the evaluation or assessment.
(B) When used with respect to an individual who is deaf or hard of hearing, blind or visually impaired, or for an individual with no written language, "native language" means the mode of communication that is normally used by the individual (such as sign language, braille, or oral communication).

(30) Natural Environments--As defined in 34 CFR §303.26, settings that are natural or typical for a same-aged infant or toddler without a disability, may include the home or community settings, includes the daily activities of the child and family or caregiver, and must be consistent with the provisions of 34 CFR §303.126.

(31) Parent--As defined in 20 USC §1401 and 34 CFR §303.27.

(32) Personally Identifiable Information--As defined in 34 CFR §99.3 and 34 CFR §303.29.

(33) Pre-Enrollment--All family-related activities from the time the referral is received up until the time the parent signs the initial IFSP.

(34) Primary Referral Sources--As defined in 34 CFR §303.30(c).

(35) Public Agency--HHSC and any other state agency or political subdivision of the state that is responsible for providing early childhood intervention services to eligible children under the Individuals with Disabilities Education Act, Part C.

(36) Qualifying Medical Diagnosis--A diagnosed medical condition that has a high probability of developmental delay as determined by HHSC, as described in 350.811 of this chapter (relating to Eligibility Determination Based on Medically Diagnosed Condition That Has a High Probability of Resulting in Developmental Delay).

(37) Referral Date--The date the child's name and sufficient information to contact the family was obtained by the contractor.

(38) Routine Caregiver--An adult who:

(A) has written authorization from the parent to participate in early childhood intervention services with the child, even in the absence of the parent;

(B) participates in the child's daily routines;

(C) knows the child's likes, dislikes, strengths, and needs; and

(D) may be the child's relative, childcare provider, or other person who regularly cares for the child.

(39) Service Coordinator--The contractor's employee or subcontractor who:

(A) meets all applicable requirements in Subchapter C of this chapter (relating to Staff Qualifications);

(B) is assigned to be the single contact point for the family;

(C) is responsible for providing case management services as described in §350.405 of this chapter (relating to Case Management Services); and

(D) is from the profession most relevant to the child's or family's needs or is otherwise qualified to carry out all applicable responsibilities.

(40) Surrogate Parent--A person assigned to act as a surrogate for the parent in compliance with the Individuals with Disabilities Education Act, Part C and this chapter.

(41) Telehealth services--Healthcare services, other than telemedicine medical services, delivered by a health professional licensed, certified, or otherwise entitled to practice in Texas and acting within the scope of the health professional's license, certification, or entitlement to a patient who is located at a different physical location than the health professional using telecommunications or information technology.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Karen Ray
Chief Counsel
Health and Human Services Commission
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Proposal publication date: December 3, 2021
For further information, please call: (512) 438-5429

SUBCHAPTER B. PROCEDURAL SAFEGUARDS AND DUE PROCESS PROCEDURES


STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

§350.203. Responsibilities.

(a) The contractor shall be responsible for:

(1) establishing or adopting procedural safeguards that meet the requirements of the federal and state regulations listed in §350.101 of this chapter (relating to Purpose) and that also meet additional requirements of this subchapter;

(2) implementing the procedural safeguards; and

(3) providing oral and written explanation to the parent regarding procedural safeguards during the pre-enrollment process and at other times when parental consent is required.

(b) The contractor must make reasonable effort to provide appropriate interpreter or translation services in the child's native language as defined in 34 CFR §303.25 or other communication assistance necessary for a parent or child with limited English proficiency or communication impairments to participate in early childhood intervention services. Interpreter, translation, and communication assistance services are provided at no cost to the family.

(c) The contractor must provide the family with the Early Childhood Intervention Parent Handbook. The contractor must document that the following were explained:
(1) the family's rights;
(2) the early childhood intervention process; and
(3) early childhood intervention services.

The contractor must explain the contents of the IFSP to the parents and obtain informed written consent from a parent before providing any early childhood intervention services. The parent has the right to:

(1) be present and participate in the development of the IFSP;
(2) have decisions about early childhood intervention services made based on the individualized needs of the child and family;
(3) receive a full explanation of the IFSP, including the identified strengths and needs of the child and family, priorities of the family, the developmental goals for the child and the recommended services to meet those goals, and any identified service coordination and case management goals;
(4) consent to some, but not all, early childhood intervention services;
(5) receive all IFSP services for which the parent gives consent;
(6) request an administrative hearing or file a complaint with the Texas Health and Human Services Commission if the parent does not agree with the IFSP team members;
(7) indicate disagreement in writing in the parent's native language with a part of the IFSP, even though the parent consents to early childhood intervention services;
(8) have the IFSP written in the parent's native language, as defined in §350.103 of this chapter (relating to Definitions), or mode of communication; and
(9) receive a copy of the IFSP.


(a) An individual or organization may file a complaint with the Texas Health and Human Services Commission (HHSC) alleging that a requirement of the Individuals with Disabilities Education Act, Part C or applicable federal and state regulations has been violated. The complaint must be in writing, be signed, and include the nature of the violation and a statement of the facts on which the complaint is based.

(b) A complaint may be filed directly with HHSC without having been filed with the contractor or local program.

(c) The alleged violation must have occurred not more than one year before the date that the complaint is received by the public agency unless a longer period is reasonable because the alleged violation continues for that child or other children.

(d) Procedures for receipt of a complaint are as follows.

(1) All complaints received by HHSC concerning early childhood intervention services shall be forwarded to the HHSC Director of ECI who will log and assign all complaints, monitor the resolution of those complaints, and maintain a copy of all complaints for a seven-year period.

(2) A complaint should be clearly distinguished from a request for an administrative hearing under 40 TAC Chapter 101, Subchapter E, Division 3 (relating to Division for Early Childhood Intervention Services) and from a request for a hearing under §350.227 of this chapter (relating to Opportunity for a Hearing) concerning the requirements of the Federal Education Rights and Privacy Act.


(a) After receipt of the complaint, the Texas Health and Human Services Commission (HHSC) Director of Early Childhood Intervention (ECI) will assign a staff person to conduct an individual investigation, on-site if necessary, to make a recommendation to the HHSC Director of ECI for resolution of the complaint. The child's and family's confidentiality is protected during the complaint resolution process.

(1) The complainant will have the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint.

(2) All relevant information will be reviewed and an independent determination made as to whether a violation of the requirements of the Individuals with Disabilities Education Act occurred.

(b) The HHSC Director of ECI will resolve the complaint within 60 days of the receipt date.

(c) An extension of the time limit under subsection (b) of this section shall be granted only if exceptional circumstances exist with respect to a particular complaint.

(d) Complainants shall be informed in writing of the final decision of the HHSC Director of ECI. The HHSC Director of ECI will address the complaint and contain:

(1) findings of fact and conclusions; and
(2) reasons for the final decision.

(e) To ensure effective implementation of the HHSC Director of ECI's final decision and to achieve compliance with any corrective actions, the HHSC Director of ECI will assign a staff person to provide technical assistance and appropriate follow-up to the parties involved in the complaint as necessary.

(f) In resolving a complaint in which there is a finding of failure to provide appropriate services, the HHSC Director of ECI will remediate the denial of those services, including, as appropriate, the awarding of monetary reimbursement or other corrective action appropriate to the needs of the child and the child's family; and appropriate future provision of services for all infants and toddlers with disabilities and their families.

(g) When a complaint is filed, the HHSC Director of ECI will offer mediation services as an alternative to proceeding with the complaint investigation. Mediation may be used when both parties agree to it. A parent's right to a due process hearing or complaint investigation will not be denied or delayed because the parent chose to participate in mediation. The complaint investigation will continue and be resolved within 60 days even if mediation is used as the resolution process.

(h) If a written complaint is received that is also the subject of a request for an administrative hearing under 40 TAC Chapter 101, Subchapter E, Division 3 (relating to Division for Early Childhood Intervention Services) or a request for a hearing under §350.227 of this chapter (relating to Opportunity for a Hearing) concerning the requirements of the Federal Education Rights and Privacy Act, or contains multiple issues, of which one or more are part of those hearings, the part of the complaint that is being addressed in those hearings is set aside until the conclusion of the hearings. However, any issue in the complaint that is not a part of such action must be resolved within the 60-day timeline using the complaint procedures.

§350.218. Mediation.
(a) At any time, a party or all parties to a dispute involving a matter with respect to the provision of appropriate early childhood intervention services or a potential or actual violation of the Individuals with Disabilities Education Act, Part C or other applicable federal or Texas statutes or regulations or rules may request mediation of that dispute by sending the request in writing to the Texas Health and Human Services Commission (HHSC) Director of Early Childhood Intervention (ECI). A request for mediation must:

(1) be in writing and signed by the requesting party;

(2) state the dispute to be mediated with some detail showing it is a matter with respect to the provision of appropriate early childhood intervention services to a particular child or children, or that it is a matter with respect to a potential or actual violation of the Individuals with Disabilities Education Act, Part C or other applicable federal or Texas statutes or regulations or rules;

(3) name the opposing party or parties and, if they have agreed to mediation, contain their signatures;

(4) give contact information for all parties to the extent known by the requestor; and

(5) show that the request for mediation has also been sent to all other parties or that attempts have been made to do so, if possible.

(b) If the request for mediation is also a complaint pursuant to §350.215 of this subchapter (relating to Early Childhood Intervention Procedures for Filing Complaints), it will be handled both as a complaint and as a request for mediation under subsection (c) of this section. If the request for mediation is also a request for a due process hearing, it will be handled both as a request for a due process hearing and a request for mediation under subsection (c) of this section. If the request for mediation does not clearly designate itself as a complaint request or request for a due process hearing, or if it does not comply with the filing requirements for those procedures, it will be handled only as a request for mediation under this section.

(c) If the parties to a request for a due process hearing as described in 40 TAC §101.1107 (relating to Administrative Hearings Concerning Individual Child Rights) agree to mediate the dispute in accordance with 40 TAC §101.947 (relating to Mediation Procedures), those procedures shall apply, but the mediation shall also comply with the requirements of federal regulation 34 CFR §303.431.

(d) If the parties to a complaint filed with HHSC under §350.215 of this subchapter agree to mediate the dispute in accordance with §350.217 of this subchapter (relating to Procedures for Investigation and Resolution of Complaints), the procedures in this section apply except for those in subsections (b) and (c) of this section.

(e) If not all parties have agreed to mediation, HHSC will make reasonable efforts to contact the other parties and give them the opportunity to agree to or to decline mediation. If neither HHSC nor the requesting party is able to obtain agreement to mediate by all parties within a reasonable time, HHSC may notify the requesting party and treat the original request for mediation as having been declined by the other party or parties.

(f) The parties may agree to mediate some or all of the disputes described in the request for mediation, and they may amend the disputes to be mediated by agreeing in writing.

(g) If HHSC is not a party to the dispute being mediated, HHSC will not be a party to any mediation resolution agreement and will not sign it, but HHSC may assist in the enforcement of it if requested.

§350.233. Release of Personally Identifiable Information.

(a) Unless authorized to do so under 34 CFR §99.31 or the Uninterrupted Scholars Act (Public Law 112-278), parental consent must be obtained before personally identifiable information is:

(1) disclosed to anyone other than officials or employees of Early Childhood Intervention (ECI) participating agencies collecting or using the information; or

(2) used for any purpose other than meeting a requirement under this chapter.

(b) A contractor may request that the parent provide a release to share information with others for legitimate purposes. However, when such a release is sought:

(1) the parent must be informed of their right to refuse to sign the release;

(2) the release form must list the agencies and providers to whom information may be given and specify the type of information that might be given to each;

(3) the parent must be given the opportunity to limit the information provided under the release and to limit the agencies, providers, and persons with whom information may be shared. The release form must provide ample space for the parent to express in writing such limitations;

(4) the release must be revocable at any time;

(5) the consent to release information form must have a time limit:

(A) not to exceed seven years after the child exits services or other applicable record retention period, as described in §350.237 of this subchapter (relating to Record Retention Period) for billing records; or

(B) not to exceed one year for all other consents to release information; and

(6) if the parent refuses to consent to the release or some personally identifiable information, the program will not release the information.

(c) The contractor may disclose personally identifiable information without prior written parental consent if the disclosure meets one or more of the following conditions:

(1) the disclosure is to another Texas Health and Human Services Commission (HHSC) ECI contractor during a transfer of services;

(2) the disclosure is restricted to limited personal identification, as defined in §350.1203 of this chapter (relating to Definitions), being sent to the Local Education Agency (LEA) for child find purposes, unless the parent opted-out of the notification in accordance with §350.1213 of this chapter (relating to LEA Notification Opt Out);

(3) the disclosure is to the Texas Department of Family and Protective Services for the purpose of the investigation of suspected child abuse or neglect;

(4) the disclosure is in response to a court order or subpoena;

(5) the disclosure is to a federal or state oversight entity, including:

(A) United States Department of Health and Human Services, or its designee;

(B) Comptroller General of the United States, or its designee;
(C) Office of the State Auditor of Texas, or its designee;
(D) Office of the Texas Comptroller of Public Accounts, or its designee;
(E) Medicaid Fraud Control Unit of the Texas Attorney General's Office, or its designee;
(F) HHSC, including:
   (i) Office of Inspector General;
   (ii) Managed Care Organization Program personnel from HHSC, or designee;
   (iii) any other state or federal entity identified by HHSC, or any other entity engaged by HHSC; and
   (iv) any independent verification and validation contractor, audit firm, or quality assurance contractor acting on behalf of HHSC;
(G) state or federal law enforcement agency; or
(H) State of Texas Legislature general or special investigating committee or its designee; or
(6) the disclosure meets the requirements of the Uninterrupted Scholars Act, which provides that:
   (A) the disclosure is to a caseworker or other representative of a State or local child welfare agency or tribal organization authorized to access the child's case plan;
   (B) the child is in foster care and the child welfare agency or organization is legally responsible, in accordance with State or tribal law, for the care and protection of the student; and
   (C) the disclosure must pertain to addressing the educational needs of the child.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Karen Ray
Chief Counsel
Health and Human Services Commission
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SUBCHAPTER C. STAFF QUALIFICATIONS
26 TAC §§350.309, 350.310, 350.313, 350.315

STATUTORY AUTHORITY
The amendments are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

§350.310. Criminal Background Checks.

(a) The contractor must complete a fingerprint-based criminal background check on every new hire, volunteer, or other person who will be working under the auspices of the contractor before the person has direct contact with children or families, including employees who have had a fingerprint-based check as a requirement of their professional licensure.

(b) The contractor must complete a fingerprint-based criminal background check renewal on any employee, or any other person who will be working under the auspices of the contractor who has direct contact with children or families, at least every 24 months, unless the contractor uses Federal Bureau of Investigations (FBI) Rap Back and gets alerts of any new arrests and convictions. Employees who are covered by the FBI Rap Back service must complete fingerprint-based criminal background checks at least every five years. Employees deemed "unfingerprintable" by the Texas Department of Public Safety or other fingerprinting entity must have a name-based background check completed every 24 months. If at any time a contractor has reason to suspect an employee has been convicted of a crime specified in §745.661 of this title (relating to What types of criminal convictions may affect a subject's ability to be present at an operation?), the contractor must complete a fingerprint-based criminal background check renewal on the employee in question.

(c) The contractor must ensure that all therapists providing Medicaid services for Early Childhood Intervention children are correctly enrolled with the Texas Medicaid Program. This requirement includes disclosing all criminal convictions and arrests as required by 1 TAC §371.1005 (relating to Disclosure Requirements). The Texas Health and Human Services Commission (HHSC) Office of Inspector General may recommend denial of an enrollment or re-enrollment based on criminal history, in accordance with 1 TAC §371.1011 (relating to Recommendation Criteria).

(d) HHSC Child Care Licensing maintains three charts of criminal history requirements for people who regularly enter licensed child care facilities.

   (1) The three charts are published on the HHSC website:
      (A) Licensed or Certified Child Care Operations: Criminal History Requirements;
      (B) Foster or Adoptive Placements: Criminal History Requirements; and
      (C) Registered Child Care Homes and Listed Family Homes: Criminal History Requirements.

   (2) The contractor must review each employee's criminal background check to ensure that staff members who regularly enter regulated child care facilities or foster homes to provide early childhood intervention services do not have criminal convictions that would result in an absolute bar to entering them in compliance with §745.661 of this title.

(e) If a criminal background check reveals criminal convictions that are not on the HHSC Child Care Licensing charts of criminal history requirements or would result in the individual being eligible for a HHSC Child Care Licensing risk assessment, the program director may conduct a risk assessment. The risk assessment process must include, at a minimum, consideration of:

   (1) the number of convictions;
   (2) the nature and seriousness of the crime;
   (3) the age of the individual at the time the crime was committed;

   (4) the length of time since the conviction;
   (5) the type of employment that would result from the conviction;
   (6) the potential for the individual to have access to children or families;
   (7) the potential for the individual to have access to contact with children or families;
   (8) the potential for the individual to have access to contact with children or families;
   (9) the potential for the individual to have access to contact with children or families;

   (f) The contractor must not hire or otherwise employ an individual with a criminal conviction unless the contractor determines that the individual is suitable for employment.
(4) the relationship of the crime to the individual's fitness or capacity to serve in the role of an early childhood intervention professional;

(5) the amount of time that has elapsed since the person's last conviction; and

(6) any relevant information the individual provides or otherwise demonstrates.

§350.313. Early Intervention Specialist (EIS).

(a) The contractor must comply with the Texas Health and Human Services Commission (HHSC) Early Childhood Intervention (ECI) requirements related to minimum qualifications for an EIS.

(1) An EIS must meet one of the following criteria:

(A) be registered as an EIS before September 1, 2011;

(B) hold a bachelor's or graduate degree from an accredited university with a bachelor or graduate degree specialization in:

(1) early childhood development;

(2) early care and early childhood;

(3) early childhood special education; or

(4) human development and family studies;

(C) hold a bachelor's or graduate degree from an accredited university in a field related to early childhood intervention. For each of the following fields, transcripts of degree coursework must reflect successful completion of at least nine semester credit hours relevant to early childhood intervention and three semester course credit hours that focus on early childhood development or early childhood special education. Related fields include:

(1) psychology;

(2) social work;

(3) counseling;

(4) special education (without early childhood emphasis); and

(5) sociology;

(D) hold a bachelor's or graduate degree from an accredited university with three years of experience within the last ten years working for an Individuals with Disabilities Education Act, Part C program in the United States or a United States territory providing special instruction, as defined in 34 CFR §303.13(b)(14), or specialized skills training, as defined in §350.501(a)(4) of this chapter, to infants and toddlers with developmental delays or disabilities and their families.

(2) If an EIS has not completed three of the required hours of semester course credit relevant to early childhood intervention provided in paragraph (1)(C) and (D) of this subsection, the EIS must complete forty clock hours of continuing education that is relevant to early childhood intervention within three years prior to employment as an EIS. If the contractor hires an EIS who does not have the necessary hours, the EIS must complete these hours no more than 30 days after the EIS's hire date.

(3) If an EIS has not completed the required three hours of semester course credit in early childhood development or early childhood special education provided in paragraph (1)(C) and (D) of this subsection, the EIS must complete forty clock hours of continuing education in early childhood development or early childhood special education within three years prior to employment as an EIS. If the contractor hires an EIS who does not have the necessary hours, the EIS must complete these hours no more than 30 days after the EIS's hire date.

(4) Coursework or previous training in early childhood development or early childhood special education is required to ensure that an EIS understands the development of infants and toddlers because the provision of specialized skills training for which an EIS is solely responsible depends on significant knowledge of typical child development. Therefore, the content of the three hours of coursework described in paragraph (1)(C) and (D) of this subsection, and the forty clock hours of continuing education described in paragraph (2) of this subsection must relate to the growth, development, and education of the young child and may include courses or training in:

(1) child growth and development;

(2) child psychology;

(3) children with special needs; or

(4) typical language development.

(b) The contractor must comply with HHSC ECI requirements related to continuing education for an EIS. An EIS must complete:

(1) a minimum of 20 contact hours of approved continuing education every two years; and

(2) an additional three contact hours of continuing education in ethics every two years.

(c) The contractor must comply with HHSC ECI requirements related to supervision of an EIS.

(1) The contractor must provide an EIS supervision as defined in §350.309(e) of this chapter (relating to Minimum Requirements for All Direct Service Staff) as required by HHSC ECI.

(2) An EIS supervisor must:

(1) have two years of experience providing ECI services, or 2 years of experience supervising staff who provide other early childhood intervention services to children and families; and

(B) be an active EIS or hold a bachelor's degree or graduate degree from an accredited university with a specialization in:

(i) child development, special education, psychology, social work, sociology, nursing, rehabilitation counseling, human development, or related field; or

(ii) an unrelated field and have at least 18 hours of semester course credit in child development.

(d) Requirements for EIS active status and EIS inactive status are as follows.

(1) Only an EIS with active status is allowed to provide early childhood intervention services to children and families. An EIS on inactive status may not perform activities requiring the EIS active status.

(2) An EIS goes on inactive status when:

(A) the EIS fails to submit the required documentation by the designated deadline.
(i) Orientation to ECI training must be completed within 30 days, from the EIS's start date.

(ii) If an EIS is required to submit the clock hours described in subsection (a)(2) or (a)(3) of this section, the clock hours must be completed no more than 30 days after the EIS's hire date.

(iii) If an EIS is transferring from another program, the Orientation to ECI training must be completed within 30 days from the EIS's start date unless the EIS has documentation he or she has completed the current Orientation module.

(iv) All credentialing activities (Final Individualized Professional Development Plan) must be completed within one year from the EIS's start date.

(v) If, due to exceptional circumstances, an EIS is unable to submit documentation of completion of credentialing activities by the designated due date, the EIS’s supervisor must contact the HHSC ECI EIS credentialing specialist as soon as he or she is aware the due date will not be met. The credentialing specialist and his or her supervisor will work with the EIS's supervisor and the EIS to determine an appropriate course of action.

(B) the EIS fails to submit documentation of required continuing education and ethics training by the designated deadline. An EIS may return to active status from inactive status by submitting the required documentation in accordance with subsection (b) of this section.

(C) the EIS is no longer employed by a contractor. An EIS may return to active status from inactive status by:

(i) submitting 10 contact hours of continuing education for each year of inactive status; and

(ii) submitting documentation of three contact hours of ethics training within the last two years.

(3) An EIS who has been on inactive status for longer than 48 months from his or her first missed continuing education submission date must complete all credentialing activities, including the current Orientation to ECI and EIS Individualized Personnel Development Plan.

(4) EIS active status is considered reinstated after the information is entered into the EIS Registry and is approved by HHSC ECI.

(e) The contractor must comply with HHSC ECI requirements related to ethics for an EIS. An EIS who violates any of the standards of conduct in §350.314 of this subchapter (relating to EIS Code of Ethics) is subject to the contractor’s disciplinary procedures. Additionally, the contractor must complete an EIS Code of Ethics Incident Report in the EIS Registry.

(f) Contractors must contact the HHSC ECI state office when hiring a new EIS to verify if an EIS Code of Ethics Incident Report has been recorded in the EIS Registry.

§350.315. Service Coordinator.

(a) Early Childhood Intervention (ECI) case management may only be provided by an employee or subcontractor of an ECI contractor. The contractor must comply with the Texas Health and Human Services Commission (HHSC) ECI requirements related to minimum qualifications for service coordinators.

(1) A service coordinator must meet one of the following criteria:

(A) be a licensed professional in a discipline relevant to early childhood intervention;

(B) be an Early Intervention Specialist (EIS) or meet the qualifications for an EIS as defined in §350.313 of this subchapter;

(C) be a Registered Nurse (with a diploma, an associate's, bachelor's or advanced degree) licensed by the Texas Board of Nursing; or

(D) hold a bachelor's degree or graduate degree from an accredited university with a specialization in:

(i) child development, special education, psychology, social work, sociology, nursing, rehabilitation counseling, or human development or a related field; or

(ii) an unrelated field with at least 18 hours of semester course credit in child development or human development.

(2) Before performing case management activities, a service coordinator must complete HHSC ECI required case management training that includes, at a minimum, content which results in:

(A) knowledge and understanding of the needs of infants and toddlers with disabilities and their families;

(B) knowledge of the Individuals with Disabilities Education Act, Part C;

(C) understanding of the scope of early childhood intervention services available under the early childhood intervention program and the medical assistance program; and

(D) understanding of other state and community resources and supports necessary to coordinate care.

(3) A service coordinator must complete all assigned activities on the service coordinator's Individualized Professional Development Plan within one year from the service coordinator's start date.

(4) A service coordinator must effectively communicate in the family’s native language or use an interpreter or translator.

(b) A service coordinator who was employed as service coordinator by a contractor before March 1, 2012 and does not meet the requirements of subsection (a)(1) of this section may continue to serve as a service coordinator at the contractor’s discretion.

(c) The contractor must comply with HHSC ECI requirements related to continuing education for service coordinators. A service coordinator must complete:

(1) three contact hours of training in ethics every two years;

(2) an additional three contact hours of training specifically relevant to case management every year; and

(3) if the service coordinator does not hold a current license or credential that requires continuing professional education, an additional seven contact hours of approved continuing education every year.

(d) The contractor must comply with HHSC ECI requirements related to supervision of service coordinators.

(1) A contractor's supervision of service coordinators must meet the requirements outlined in §350.309(e) of this subchapter (relating to Minimum Requirements for All Direct Service Staff).

(2) A contractor's ECI program staff member who meets the following criteria is qualified to supervise a service coordinator:

(A) has completed all service coordinator training as required in subsection (a)(2) and (a)(3) of this section;

(B) has two years of experience providing case management in an ECI program or another applicable community-based organization; and
(C) is an active EIS or holds a bachelor’s degree or graduate degree from an accredited university with a specialization in:

(i) child development, special education, psychology, social work, sociology, nursing, human development or a related field; or

(ii) an unrelated field with at least 18 hours of semester course credit in child development or human development.

(c) Requirements for service coordinator active status and inactive status are as follows.

(1) A service coordinator is on inactive status when the service coordinator fails to complete required training activities by the designated deadlines in subsections (a) and (c) of this section. Service coordinator active status is reinstated after the required training activities are completed and approved by the service coordinator’s supervisor.

(2) A service coordinator is on inactive status when the service coordinator is no longer employed by a contractor.

(A) A service coordinator returns to active status when the service coordinator:

(i) is employed by an ECI program within 24 months or less from the last day of employment;

(ii) submits 10 clock hours of continuing education for every year of inactive status; and

(iii) submits documentation of three clock hours of ethics training completed within the last two years and not used to meet previous training requirements.

(B) A service coordinator who has been on inactive status for longer than 24 months must complete the training requirements outlined in subsections (a)(2) and (a)(3) of this section.

(f) The contractor must comply with HHSC ECI requirements related to ethics of service coordinators. Service coordinators must meet the established rules of conduct and ethics training required by their license or credential. A service coordinator who does not hold a license or credential must meet the rules of conduct and ethics established in §350.314 of this subchapter (relating to EIS Code of Ethics).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency’s legal authority.

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SUBCHAPTER E. SPECIALIZED REHABILITATIVE SERVICES
26 TAC §§350.501, 350.505, 350.507

STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.0065, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

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SUBCHAPTER F. PUBLIC OUTREACH
26 TAC §350.617

STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.0065, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of ser-
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SUBCHAPTER G. REFERRAL, PREENROLLMENT, AND DEVELOPMENTAL SCREENING

26 TAC §350.706, §350.708
STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

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SUBCHAPTER H. ELIGIBILITY, EVALUATION, AND ASSESSMENT

26 TAC §§350.811, 350.817, 350.823
STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

§350.823. Continuing Eligibility Criteria.

(a) The contractor must determine the child’s eligibility for continued early childhood intervention services at least annually if the child is younger than 21 months of age at the previous eligibility determination. A child who is determined eligible at 21 months of age or older remains eligible for Early Childhood Intervention (ECI) until the child’s third birthday or until the child has reached developmental proficiency, whichever happens first.

(b) The contractor must comply with all requirements in 34 CFR §303.321(a)(3), including ensuring that informed clinical opinion may be used as an independent basis to establish a child’s continued eligibility.

1. Continuing eligibility is based on one of the following:

(A) a qualifying medical diagnosis confirmed by a review of the child’s medical records with:

(i) interdisciplinary team documentation of the continued need for early childhood intervention services; and

(ii) documentation in the child’s record of any change in medical diagnosis;

(B) a visual impairment or deafness or hard of hearing as defined by the Texas Education Agency in 19 TAC §89.1040 (relating to Eligibility Criteria) with:

(i) interdisciplinary team documentation of the continued need for early childhood intervention services; and

(ii) documentation in the child’s record of any change in hearing or vision status; or

(C) a developmental delay determined by the administration of the standardized tool designated by the Texas Health and Human Services Commission (HHSC) ECI, with the child demonstrating a documented delay of at least 15 percent in one or more areas of development, including the use of adjusted age as specified in §350.819 of this subchapter (relating to Age Adjustment for Children Born Prematurely), as applicable.

2. Continuing eligibility for a child whose initial eligibility was based on a qualitative determination of developmental delay must be determined after six months.

(A) Eligibility is re-determined through an evaluation using the standardized tool designated by HHSC ECI.

(B) The child must demonstrate a documented delay of at least 15 percent in one or more areas of development. If applicable, use adjusted age as specified in §350.819 of this subchapter.

(c) If the parent fails to consent or fails to cooperate in re-determination of eligibility, the child becomes ineligible. The contractor must send prior written notice of ineligibility and consequent discontinuation of all ECI services to the family at least 14 days before the contractor discharges the child from the program, unless the parent:

1. immediately consents to and cooperates in all necessary evaluations and assessments; and

2. consents to all or part of a new Individualized Family Service Plan.

(d) The family has the right to oppose the actions described in subsection (c) of this section using their procedural safeguards including the rights to use local and state complaint processes, request mediation, or request an administrative hearing in accordance with 40
TAC §101.1107 (relating to Administrative Hearings Concerning Individual Child Rights).

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SUBCHAPTER J. INDIVIDUALIZED FAMILY SERVICE PLAN (IFSP)
26 TAC §§350.1004, 350.1007, 350.1009

STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

§350.1009. Participants in Initial and Annual Individualized Family Service Plan (IFSP) Meetings.

(a) The initial IFSP meeting and each annual meeting to evaluate the IFSP must be conducted by the IFSP team as defined in 34 CFR §303.343(a).

(b) The initial IFSP meeting and the annual meeting to evaluate the IFSP must be conducted by an interdisciplinary team that includes, at a minimum, the parent and at least two professionals from different disciplines or professions.

(1) At least one professional must be an Early Childhood Intervention (ECI) service coordinator.

(2) At least one professional must be a Licensed Practitioner of the Healing Arts (LPHA).

(3) At least one ECI professional must have been involved in conducting the evaluation. This may be the service coordinator, the LPHA, or a third professional.

(4) If the LPHA attending the IFSP meeting did not conduct the evaluation, the contractor must ensure that the most recent observations and conclusions of the LPHA who conducted the evaluation were communicated to the LPHA attending the initial IFSP meeting and incorporated into the IFSP.

(5) Other team members may participate by other means acceptable to the team.

(c) With parental consent, the contractor must also invite to the initial IFSP meeting and annual meetings to evaluate the IFSP:

(1) Early Head Start and Migrant Head Start staff members, if the family is jointly served; and

(2) representatives from other agencies serving or providing case management to the child or family, including Medicaid managed care programs.

(d) If a child:

(1) is documented to be deaf or hard of hearing as described in §350.813(a) of this chapter (relating to Determination of Hearing and Auditory Status), the IFSP team for an initial IFSP meeting and annual IFSP evaluation meetings must include a certified teacher of the deaf and hard of hearing; or

(2) has a documented visual impairment as described in §350.815(a) of this chapter (relating to Determination of Vision Status), the IFSP team for an initial IFSP meeting and annual IFSP evaluation meetings must include a certified teacher of the visually impaired.

(e) Unless there is documentation that the Local Education Agency has waived notice, the contractor must:

(1) provide the certified teacher required in subsection (d) of this section at least a 10-day written notice before the initial IFSP meeting, any annual meetings to evaluate the IFSP or any review and evaluation that affects the child's deaf and hard of hearing or vision services; and

(2) keep documentation of the notice in the child's ECI record.

(f) The IFSP team cannot plan deaf and hard of hearing or vision services or make any changes that affect those services if the certified teacher required in subsection (d) of this section is not in attendance.

(g) The IFSP team must route the IFSP to the certified teacher required in subsection (d) of this section for review and signature when changes to the IFSP do not affect the child's deaf and hard of hearing or vision services.

(h) The certified teacher of the deaf and hard of hearing and the certified teacher of the visually impaired required in subsection (d) of this section may submit a request within five days of the IFSP meeting to have another IFSP meeting if the teacher disagrees with any portion of the IFSP.

(i) The certified teacher required in subsection (d) of this section is not required to attend an IFSP review when changes do not affect the child's deaf and hard of hearing or vision services, but the contractor must obtain the teacher's input.

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SUBCHAPTER K. SERVICE DELIVERY
26 TAC §350.1104, §350.1105
The amendments are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

§350.1104. Early Childhood Intervention Services Delivery.

(a) Early childhood intervention services needed by the child must be initiated in a timely manner and delivered as planned in the Individualized Family Service Plan (IFSP). Only qualified staff members, as described in Subchapter C of this chapter (relating to Staff Qualifications), are authorized to provide early childhood intervention services.

(b) The contractor must ensure that early childhood intervention services are appropriate, as determined by the IFSP team, and based on scientifically based research, to the extent practicable. In addition to the requirements in 34 CFR §303.13, early childhood intervention services, with the exception cited in subsection (c) of this section, must be provided:

1. according to a plan and with a frequency that is individualized to the parent and child to effectively address the goals established in the IFSP;
2. only to children who are located in the state of Texas at the time of service delivery;
3. in the presence of the parent or other routine caregiver, with an emphasis on enhancing the family’s capacity to meet the developmental needs of the child; and
4. in the child’s natural environment, as defined in 34 CFR §303.26, unless the criteria listed in 34 CFR §303.126 are met and documented in the case record and may be provided via telehealth with the written consent of the parent. If the parent declines to consent to telehealth for some or all services, those services must be provided in person.

(c) Family education and training, as defined in §350.1105(5) of this subchapter (relating to Capacity to Provide Early Childhood Intervention Services):

1. must be provided:
   (A) according to a plan and with a frequency that is individualized to the parent and child to effectively address the goals established in the IFSP; and
   (B) with a parent or other routine caregiver, with an emphasis on enhancing the family’s capacity to meet the developmental needs of the child; and
2. may be provided:
   (A) when a child who resides in Texas is not located in the state at the time of service; and
   (B) in a setting other than a child's natural environment.

(d) Early Intervention services must:

1. address the development of the whole child within the framework of the family;
2. enhance the parent’s competence to maximize the child’s participation and functional abilities within daily routines and activities; and
3. be provided in the context of natural learning activities in order to assist caregivers to implement strategies that will increase child learning opportunities and participation in daily life.

(e) The contractor must provide a service coordinator and an interdisciplinary team for the child and family throughout the child’s enrollment.

(f) The contractor must make reasonable efforts to provide flexible hours in programming in order to allow the parent or routine caregiver to participate.

(g) The contractor must comply with all requirements in Subchapter B of this chapter (relating to Procedural Safeguards and Due Process Procedures) when planning and delivering early childhood intervention services.

(h) Services must be monitored by the interdisciplinary team at least once every six months to determine:

1. what progress is being made toward achieving goals;
2. if services are reducing the child's functional limitations, promoting age appropriate growth and development, and are responsive to the family's identified goals for the child; and
3. whether modifications to the plan are needed.

(i) Monitoring occurs as part of the IFSP review process and must be documented in the case record.

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SUBCHAPTER L. TRANSITION

26 TAC §§350.1205, 350.1207, 350.1211

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SUBCHAPTER N. FAMILY COST SHARE SYSTEM


STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

§350.1413. Individualized Family Service Plan (IFSP) Services Subject to Out-of-Pocket Payment from the Family:

(a) IFSP services subject to out-of-pocket payment from the family are:

(1) assistive technology;
(2) behavioral intervention;
(3) occupational therapy services;
(4) physical therapy services;
(5) speech-language pathology services;
(6) nutrition services;
(7) counseling services;
(8) nursing services;
(9) psychological services;
(10) health services;
(11) social work services;
(12) transportation;
(13) specialized skills training;
(14) family education and training; and
(15) any IFSP services to children with visual impairments or who are deaf or hard of hearing that are not required by an individualized education program (IEP) pursuant to Texas Education Code §29.003(b)(1).

(b) The family pays out-of-pocket up to their maximum charge. The family’s maximum charge is determined based on their placement on the Texas Health and Human Services Commission (HHSC) Early Childhood Intervention (ECI) Sliding Fee Scale, as described in §350.1431 of this subchapter (relating to HHSC ECI Sliding Fee Scale).

§350.1419. Private Insurance

(a) The contractor must obtain written parental consent to bill and to release personally identifiable information to private insurance.

(b) The contractor must obtain written parental consent when initially seeking to use their private insurance and each time there is an increase (in frequency, length, duration, or intensity) in the provision of services in the IFSP that requires the contractor to obtain written parental consent.

(c) If private insurance denies payment of the claim, the contractor must bill the family up to their maximum charge, based on their placement on the sliding fee scale.

(d) The contractor must adjust the amount billed to the family if the contractor or parent successfully disputes a denied claim.

(e) The contractor must not deny or delay a child’s services if:

(1) the family does not have private insurance; or
(2) the parent does not give consent to bill or to release personally identifiable information to their private insurance.

If the parent does not give consent, the contractor bills the family up to their maximum charge, based on their placement on the sliding fee scale.

(f) A family with private insurance will not be charged disproportionately more than a family without private insurance.

(g) If a child is covered by private insurance only, once the contractor has verified that the private insurance plan will not pay for certain Early Childhood Intervention (ECI) services for a child, the contractor is not required to continue to bill the private insurance plan for those services for that child. The contractor must continue to bill for any services that the private insurance company does cover. The contractor must verify coverage for ECI services with the private insurance plan at least annually.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency’s legal authority.

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Karen Ray
Chief Counsel
Health and Human Services Commission
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For further information, please call: (512) 438-5429

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 57. FISHERIES

SUBCHAPTER N. STATEWIDE RECREATIONAL AND COMMERCIAL FISHING PROCLAMATION

DIVISION 2. STATEWIDE RECREATIONAL FISHING PROCLAMATION

31 TAC §57.983

The Texas Parks and Wildlife Commission in a duly noticed meeting on January 27, 2022, adopted new §57.983, concern-
ing Spotted Seatrout - Special Provisions, without changes to the proposed text as published in the December 24, 2021, issue of the Texas Register (46 TexReg 8984). The rule will not be republished. The new rule establishes temporary bag, length, and possession limits for spotted seatrout in middle and lower coast bay systems to reflect the department’s continuing concern over the impact of Winter Storm Uri in February 2021 on spotted seatrout populations. The rule is intended to increase spawning potential in order to accelerate the fishery’s recovery.

During the week of February 14th, 2021, Texas experienced extreme winter weather that caused the die-off of an estimated 3.8 million fish coastwide, with at least 61 species affected. Among recreational game fish, spotted seatrout comprised the majority of the mortalities, particularly on the lower coast. In response, the department adopted an emergency rule effective April 1, 2021, (46 TexReg 2527) to protect spotted seatrout in the Upper and Lower Laguna Madre from over-harvest. The emergency rule expired September 27, 2021; however, department monitoring and sampling efforts confirmed that the spotted seatrout populations in the areas affected by the emergency rule were impacted significantly by the freeze and showed declines from historical averages. The data also confirmed that other areas of the lower coast and mid-coast bays that were not subject to the provisions of the emergency rule were also negatively impacted by the freeze event. Spring gill net sampling indicated that four bay systems experienced catch rates much lower than the ten-year average: Lower Laguna Madre, Upper Laguna Madre, San Antonio, and Matagorda. Spring gill net sampling indicated that catch rates were approximately 34% and 44% below the ten-year mean in San Antonio and Matagorda bays, respectively. Aransas Bay also experienced declines in catch rates of 10 - 12%. Corpus Christi Bay experienced a modest increase in catch rates. While other environmental variables also impact seatrout catch rates, such as lowered salinities due to high spring rainfall, the extent of the declines seen after the freeze mortality indicate that the freeze likely had a large impact on the abundance of spotted seatrout in several of the bay systems. The new rule imposes bag, possession, and length limits identical to those imposed by the emergency rule (minimum length limit of 17 inches, maximum length limit of 23 inches, possession limit of three fish) over a larger geographical area and specifies a date certain of August 31, 2023, for those limits to expire, at which time the harvest regulations would revert to the previous limits coastwide. The rule includes all bays from Matagorda Bay to the Lower Laguna Madre, which is intended to speed recovery of trout populations in the four bay systems most severely impacted, including adjacent bays that were less affected by the freeze but genetically connected to the vulnerable populations. Corpus Christi Bay is also included to prevent negative impacts resulting from increases in fishing pressure resulting from angler effort being shifted from surrounding systems, as well as to reduce angler confusion and aid in law enforcement of the new rule. Historical data indicate that gill net catch rates returned to pre-freeze levels within 2-3 years following other major freeze events in the 1980’s; accordingly, the rule will remain in effect until August 31, 2023.

The department received 637 comments opposing adoption of the rule as proposed. Of those 637 comments, 519 expressed a reason or rationale for opposing adoption. Those comments, accompanied by the department’s response to each, follow. Three-hundred eighteen commenters opposed adoption specifically because of the proposed 17 to 23-inch slot limit. The majority of those commenters (189) expressed a desire for the slot to include smaller-sized fish. Some commenters offered justification for their opposition to the 17 to 23-inch slot, asserting, variably, that the slot limit as proposed would target breeding females (75), that the catch-and-release mortality of smaller fish would be higher (67), or that the proposed slot limit would make it very difficult to catch any fish at all (9). The department disagrees with the comments and responds that protecting fish under 17 inches will accelerate recovery of the fishery. The majority of the spawning stock is fish between 12 and 17 inches in length, and fish from 15 to 16 inches in length comprise the majority of landings (the current minimum length limit is 15 inches). By protecting smaller fish, the department’s intent is to protect the majority of the stock. The department believes that with this protection, recruitment will increase during the next two years. While spotted seatrout are sexually dimorphic (larger females than males), the 17 to 23-inch size slot still protects the majority of fish (male and female). Studies on catch-and-release mortality do not indicate any significant correlations between fish size and decreased survival post-release, indicating that release mortality can be expected to be similar regardless of size class. Finally, while the majority of fish caught are smaller than the new slot limit would allow to be retained, the department notes that 39% of the catch consists of fish that are legal to retain under the new slot limit, which the department believes will provide an incentive for angling effort. No changes were made as a result of the comments.

Sixty commenters opposed adoption and stated that the current slot limit should be maintained. The department disagrees and responds that the slot limit as proposed was selected to accelerate recovery of the fishery; it will protect the majority of the fishery’s spawning stock biomass (including the size classes most heavily targeted), which will lead to increased recruitment and faster population recovery. No changes were made as a result of the comments.

Fifty-six commenters opposed adoption and stated a preference for a narrower range between the minimum and maximum size limits of the slot limit. The department disagrees and responds, as noted previously, that the slot limit was selected to accelerate recovery of the fishery (via harvest restrictions) while balancing the public’s desire to harvest spotted seatrout. The department is charged with both sustainable fishery management and providing for public enjoyment of the resource where possible. The slot limit was selected to protect the majority of the fishery’s spawning stock biomass and protect size classes most heavily targeted, while still offering an opportunity to harvest spotted seatrout. No changes were made as a result of these comments.

Thirteen commenters opposed adoption that stated the slot should include larger fish. The department disagrees and reiterates that the slot limit was selected to accelerate recovery of the fishery via protection of spawning stock biomass and heavily targeted size classes. The department’s intent is to increase the numbers of spawners and recruitment by protecting more fish from harvest for the next two spawning seasons. No changes were made as a result of the comments.

Eighty-eight commenters specifically opposed adoption of the proposed three-fish bag limit. The department disagrees with the comments and responds that the rule as adopted represents an acceptable balance between the public’s desire to harvest spotted seatrout and the department’s statutory duty to ensure the sustainability of spotted seatrout populations. The purpose of the bag limit reduction is to accelerate the fishery’s recovery. The rule will reduce harvest of spawning-capable fish for two
full spawning seasons, allowing for increased recruitment. No changes were made as a result of the comments.

Sixty-eight commenters opposed adoption and stated that the data used to inform the proposal, specifically the spring gill net catch rates, are wrong or untrustworthy. Commenters cited anecdotal observations and personal fishing experiences as evidence of abundance, attributed low catch rates to low salinities, or otherwise expressed general distrust of department data. The department disagrees with the comments and responds that the data used to guide the department's management decisions are fishery-independent data collected according to acknowledged and scientifically validated protocols. Gill net catch data are invaluable, as they provide a relative measure of spotted seatrout abundance. These data are analyzed by the department in addition to other data, such as environmental factors and angler behavior, and management decisions are formulated accordingly. Numerous peer-reviewed studies, management decisions, and reports have been based on these same data. Personal fishing experiences are not consistent with scientific method or rigor and are in no way equivalent to or substitutes for the spatial or temporal extent of the spring gill nets surveys conducted by the department, nor are they controlled by a sampling design. Additionally, the department disagrees that freshwater inflow is the only factor affecting the distribution of spotted seatrout, and, in any case, the inflow data are not in conflict with the management goal. No changes were made as a result of the comments.

Sixty-four commenters opposed adoption and stated that the proposed rule does not go far enough and that more restrictive harvest measures are necessary. The department disagrees with the comments and responds that the rule as adopted is believed to be an acceptable balance between the department's desire to protect the fishery and the public's desire to harvest spotted seatrout. The department is charged with both sustainable fishery management and providing for the public enjoyment of the resource. The new harvest rule will protect more spawning-capable fish from harvest for the next two full spawning seasons, which is expected to increase recruitment. No changes were made as a result of the comments.

Sixty-four commenters opposed adoption and stated that additional limitations should be imposed on guides and commercial anglers. The department disagrees with the comments and responds that the rules as adopted apply equally to all anglers whether they are on a guided fishing trip or not. The department also notes that guides are prohibited from personally retaining fish caught during a guided trip. A small subset of the comments stated that the department should limit commercial anglers. The department responds that if the commenters are referring to fishing guides, the previous department response is applicable; otherwise, the department responds that there is no commercial fishery for spotted seatrout. No changes were made as a result of the comments.

Sixty-one commenters opposed adoption and stated that despite the inclusion of a date certain for expiration of the rule's effectiveness the department will make the rule permanent. The department disagrees with the comments and responds that the two-year window is a good-faith calculation, based on recovery rates observed from prior freeze events and a thorough evaluation of the freeze impact on catch rates and spotted seatrout abundance, as to how long the temporary harvest restrictions should remain in place in order to recover the fishery to the extent that the temporary rule is no longer necessary. The department will continue to monitor the resource and determine what management actions, if any, are necessary. No changes were made as a result of the comments.

Forty-nine commenters opposed adoption and stated that regulations are not needed to recover from a freeze event. The department disagrees and responds that the department has a statutory duty to protect and conserve fisheries resources. Given the magnitude of spotted seatrout mortality during the fish kill assessment and reduced catch rates from spring gill net sampling conducted after the freeze, a temporary reduction in harvest will accelerate the fishery's recovery. No changes were made as a result of the comments.

Thirty-six commenters opposed adoption and stated the rule would make angling for seatrout not worth the time, expense, or effort. The department disagrees with the comment and responds that the three-fish bag limit and 17 to 23-inch slot limit for spotted seatrout is necessary to ensure the sustainability of the fishery and provides a balance between an accelerated recovery and allowing for fishing opportunity and harvest. The department also responds that there are many other species of fish which are legal to harvest in addition to spotted seatrout. No changes were made as a result of the comments.

Fifty-one commenters opposed adoption and stated either that the geographical boundary of the rule's applicability should be different or that the rule should apply to the entire Texas coast. The department disagrees with the comments and responds that the rule as proposed specifically targets the areas most impacted by the freeze. The upper boundary at Farm to Market Road 457 in Matagorda County was chosen because it separates the ecosystems that were more impacted by the freeze event and therefore in need of more conservative management (Matagorda Bay southward) from those that the department considers to be able to sustain more liberal harvest pressure (Galveston Bay northward) and because it is convenient for purposes of compliance and enforcement. The bays included in the rule showed signs of seatrout population decline that were not seen in the bays of the upper coast. No changes were made as a result of the comments.

Thirty-four commenters opposed adoption and stated either that the sale of croaker should be prohibited or that croaker should be designated as a game fish. The department disagrees with the comments and responds that although croaker (and other species like pinfish and pigfish) is effective bait, department data indicate that more seatrout are caught on live shrimp than any other bait. Department data indicate that, on average, guided trips using live croaker catch trout more than other baits, but private fishing trips using live croaker catch trout at the same rate as other baits. Additionally, department data do not indicate that croaker populations have been adversely affected by their use as bait; therefore, classifying croaker as a game fish would not provide any benefit, either to the species or any user group. No changes were made as a result of the comments.

Thirty-three commenters opposed adoption and stated that the negative economic impacts from the reduced harvest are too large to justify the rule, or that the department did not properly consider the economic impact. The department disagrees and responds that, as explained in the preamble of the proposed rule, the rule regulates recreational angling by individual licensees and there are no direct negative economic impacts to any person required to comply with the rule. No changes were made as a result of the comments.
Twenty-nine commenters opposed adoption and stated that the department should create a tag that allows retention of oversize fish. The department disagrees with the comments and responds that the intent of the rule is to recover the fishery as quickly as possible while still allowing for reasonable angling opportunity and that allowing the retention of oversize fish would frustrate the point of the rule, which is to protect as many spawning-age fish as possible. No changes were made as a result of the comments.

Twenty-two commenters opposed adoption and stated that the rule’s “sunset” provision should be modified or eliminated. The department disagrees with the comments and responds that the sunset provision is designed to clearly signal the department’s intent that the rule be temporary. No changes were made as a result of these comments.

Sixteen commenters opposed adoption and stated that improving the habitat quality for seatrout, whether by restoration or environmental regulation, is more important for recovery of the fishery than reduction of harvest. The department disagrees and responds that although there are a variety of long-term factors affecting all coastal resources, in this case the sudden, significant negative impacts to seatrout populations caused by the severe freeze event necessitate a swift reaction to stabilize and restore spawning biomass, which simply cannot be achieved in the short-term via habitat improvement or environmental regulation. The department also notes that various factors beyond the control of the department at the current time (budgetary constraints, jurisdictional conflicts, regulatory authority) prevent the department from engaging in the suggested activities at the scale necessary to reverse long-term trends. No changes were made as a result of these comments.

Sixteen commenters opposed adoption and stated that predation on seatrout by other marine animals contributes to population declines and should be addressed. The department disagrees with the comments and responds that predation occurs in any natural system and there is no data to suggest that it is a major factor affecting spotted seatrout populations. No changes were made as a result of the comments.

Ten commenters opposed adoption and stated concern that the rule would shift fishing pressure to trout populations on the upper coast. The department disagrees with the comments and responds that while it is certainly possible that anglers may choose to fish in waters where the bag limit for seatrout is higher, it is highly unlikely that such a shift would occur at a magnitude that would result in a measurable effect on northern seatrout populations. The department also notes that no significant shifts in pressure were observed during the period of effectiveness of the emergency rule and that it will continue to monitor fishing pressure along the northern coast to determine if additional changes are warranted. No changes were made as a result of the comments.

Ten commenters opposed adoption and stated that better or different data analyses are needed to justify the rule change. The department disagrees with the comments and responds that changes in relative abundance were evaluated in the context of environmental conditions and interannual variability. No changes were made as a result of the comments.

Nine commenters opposed adoption and stated that extending the applicability of the rule to the Gulf of Mexico is unnecessary. The department disagrees with the comments and responds that the seatrout in the Gulf of Mexico and those in the bays are the same population. No changes were made as a result of these comments.

Eight commenters opposed adoption and stated that fishing tournaments should be regulated to protect seatrout populations. The department disagrees with the comments and responds that tournament participants are licensed recreational anglers who must comply with size and bag limits that have been established on the basis of harvest and population data. Thus, the presence or absence of tournaments is immaterial. No changes were made as a result of these comments.

Six commenters opposed adoption and stated that better enforcement is needed on current seatrout regulations to protect the population. The department disagrees with the comments and responds that based on creel surveys, compliance with current spotted seatrout bag and size limits is high. Additionally, there is no evidence to suggest that unlawful take is a factor in current population status. No changes were made as a result of these comments.

Three commenters opposed adoption and stated that there should be more restrictive harvest regulations for non-resident anglers. The department disagrees with the comments and responds that there is no evidence to suggest that harvest impacts of non-resident anglers are a contributory factor in current population trends. The department also notes that differential harvest regulations for resident and non-resident licensees would be difficult to enforce. Finally, the department notes that non-resident anglers pay higher license fees than residents, which helps to fund resource conservation. No changes were made as a result of the comments.

Three commenters opposed adoption and stated that department gill net surveys should be discontinued because they kill large numbers of seatrout. The department disagrees with the comments and responds that survey mortality from gill nets is an infinitesimally small portion of the total population and that data collection is a necessary tool for fishery management. No changes were made as a result of the comments.

Two commenters opposed adoption and stated that treble hooks should be banned and/or unspecified gear restrictions be implemented. The department disagrees with the comments and responds that the literature suggests that hooking location and angler skill level are significant predictors of post-release survival, but that gear type does not appear to be related to unintentional release mortality. No changes were made as a result of the comments.

One commenter opposed adoption and stated that public hearings are unnecessary. The department disagrees and responds that public hearings are a method used by the department to ensure that the regulated community is informed about possible department management actions and the reasons for them, in addition to offering a valuable opportunity for the department to listen to the concerns of the regulated community. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule will ensure that only the wealthy will fish. The department disagrees with the comment and responds that fisheries management decisions are driven solely by biological factors. No changes were made as a result of the comment.

One commenter opposed adoption and stated that limiting the number of boats is a more effective way to protect the spotted seatrout fishery. The department disagrees with the comment...
and responds that there is no effective, efficient, or economically
viable way to differentiate boats being used to catch seatrout from boats used for all other purposes. No changes were made
as a result of the comment.

The department received 1,052 comments supporting adoption
of the proposed rule.

The new rule is adopted under the authority of Parks and Wildlife
Code, Chapter 61, which requires the commission to regulate
the periods of time when it is lawful to hunt, take, or possess
game animals, game birds, or aquatic animal life in this state; the
means, methods, and places in which it is lawful to hunt, take,
or possess game animals, game birds, or aquatic animal life in
this state; the species, quantity, age or size, and, to the extent
possible, the sex of the game animals, game birds, or aquatic
animal life authorized to be hunted, taken, or possessed; and
the region, county, area, body of water, or portion of a county
where game animals, game birds, or aquatic animal life may be
hunted, taken, or possessed.

The agency certifies that legal counsel has reviewed the adop-
tion and found it to be a valid exercise of the agency’s legal au-
thority.

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2022.

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James Murphy
General Counsel
Texas Parks and Wildlife Department
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For further information, please call: (512) 389-4775

TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC
ACCOUNTS

CHAPTER 16. BROADBAND DEVELOPMENT
SUBCHAPTER A. BROADBAND POLE
REPLACEMENT PROGRAM

34 TAC §§16.1 - 16.17

The Comptroller of Public Accounts adopts new §16.1, con-
cerning definitions, §16.2, concerning grant funds distribution
methods, §16.3, concerning notice and applications, §16.4,
concerning eligible applicants, §16.5, concerning authorized
officials, §16.6, concerning federal funding, §16.7, concerning
preferences, §16.8, concerning reimbursement awards, §16.9,
concerning payment, §16.10, concerning requirements, §16.11,
concerning reports, §16.12, concerning noncompliance, §16.13,
concerning grant reduction or termination, §16.14, concerning
records retention, §16.15, concerning request for records and
audit, §16.16, concerning conflict with laws, rules, regulations,
and guidance, and §16.17, concerning references, with changes
to the proposed text as published in the December 31, 2021,
issue of the Texas Register (46 TexReg 9229). The rules will be
republished. The new sections will be located in new Chapter
16 (Broadband Development), Subchapter A (Broadband Pole
Replacement Program).

The new sections comply with House Bill 1505, §1 and §4, 87th
Legislature, 2021, R.S., which establish the broadband pole re-
placement fund and the Texas broadband pole replacement
program, and require the comptroller to prescribe rules for the pro-
gram.

Section 16.1 provides definitions.

Section 16.2 describes methods that the Broadband Develop-
ment Office (office) may use to distribute grant funds.

Section 16.3 sets forth notice and application requirements.

Section 16.4 provides grant eligibility requirements.

Section 16.5 sets forth requirements for designating an appli-
cant’s authorized official.

Section 16.6 authorizes the office to establish eligibility and pro-
gram requirements and preferences, and make award decisions,
based upon any criteria required by federal law, regulation, or
guidance applicable to the type of funding used to make a reim-
bursement award, if federal funding is used to make the reim-
bursement award.

Section 16.7 provides preferences that the office may use to
make reimbursement award decisions.

Section 16.8 describes reimbursement award requirements.

Section 16.9 sets forth the time period within which a reimburse-
ment award must be paid to a grantee after a notice of a reim-
bursement award is issued.

Section 16.10 sets forth requirements for the administration and
use of a reimbursement award.

Section 16.11 provides requirements for the submission of re-
ports and documentation by a grantee.

Section 16.12 describes the process for addressing a grantee’s
noncompliance with any term or condition of a reimbursement
award or any applicable laws, rules, regulations, or guidance re-
ating to the reimbursement award, and the remedies that could
result from such noncompliance.

Section 16.13 sets forth requirements for reducing or terminatin-
g a reimbursement award.

Section 16.14 provides records retention requirements.

Section 16.15 describes requirements for providing records,
documentation, or other information required by the office and
authorizes the office, upon reasonable notice, to audit the
activities of a grantee as necessary to ensure that grant funds
are used for the intended purpose of the reimbursement award
and that the grantee has complied with the terms, conditions,
and requirements of the reimbursement award.

Section 16.16 requires that a state or federal law, rule, regula-
tion, or guidance applicable to the type of funding used to make
a reimbursement award prevails over this subchapter to the ex-
tent necessary to avoid a conflict between the relevant law, rule,
regulation, or guidance and this subchapter.

Section 16.17 identifies the legislation that enacted the statutory
provisions that apply to these rules so that it is clear which pro-
visions apply because the legislature recently enacted two sets
of statutory provisions that have the same numbers and are in-
cluded in subchapters that have the same title ("Subchapter R").
The comptroller received the following comments regarding adoption of the new sections:

Lumen and Texas Cable Association (TCA) recommend adding a petition/challenge process for broadband providers. Lumen suggests adding a provision to §16.8(b) that would allow a broadband provider to petition the office "to show that it is providing broadband service in an area where an application for a grant has been made" to "ensure that the limited funds in the pole replacement fund are used for truly unserved areas." TCA suggests that "(u)nserved areas should be designated based on the most reliable broadband deployment data, with a Challenge process for existing providers." In addition, TCA contends that "proposed awards should be published, and existing broadband providers should be afforded a reasonable opportunity to demonstrate that: (1) the provider already offers Internet service capable of achieving a download speed of 25 megabits per second or faster; and an upload speed of 3 megabits per second or faster in the area to be supported by the award, or (2) that the area is the subject of a federal or state grant to deploy broadband service, the conditions of which limit the availability of a grant to unserved areas."

The comptroller declines to revise the language in §16.8(b) in response to the comments described in the preceding paragraph. Under §403.503(f), Government Code, a pole must be located in an unserved area based on Federal Communication Commission data at the time of the request or must be located in an area that is the subject of a federal or state grant to deploy broadband service, the conditions of which limit the availability of a grant to unserved areas. This statute does not provide for alternate methods of determining an unserved area. Additionally, §403.503(h), Government Code, requires a reimbursement award to be issued not later than the 60th day after an application is received. Administratively, providing for a petition/challenge process is not feasible.

Lumen suggests changing "may" to "shall" in §16.3(a) and (b) to require the office "to publish a notice of funding opportunity in specific locations," and suggests requiring the notice to "have specific requirements, so that the public and all interested parties can easily access the same information about each funding opportunity; thereby placing all providers on level footing."

In response to the comments described in the preceding paragraph, the comptroller changes "may" to "shall" in §16.3(a) to require the office to publish a notice of funding availability (NOFA) because the comptroller recognizes the importance of issuing a NOFA to ensure that interested parties have information about each funding opportunity. However, the comptroller declines to revise the language in §16.3(b) in response to the comment described in the preceding paragraph because §16.3(b) provides potential options of information that may or may not need to be included in a NOFA.

SA Digital Connects supports the focus of §16.2, concerning grant funds distribution method, on the "deployment of broadband services to the greatest unserved areas, recognizing that unserved areas exist in both unincorporated and urban geographic locations." It also supports all recommendations presented in §16.7, concerning preferences, with particular emphasis on paragraphs (2) - (5) and (7) - (14).

No changes are necessary in response to the comments described in the preceding paragraph. The proposed rules will permit the office to focus on deploying broadband to the greatest number of unserved areas in an expeditious, equitable, and efficient manner within the scope of state and federal law.

AT&T Texas and TCA recommend removing the preference in §16.7(5) regarding the "involvement of broadband networks owned, operated by, or affiliated with local governments, non-profits, or cooperatives." AT&T Texas contends that, while the other preferences listed in §16.7 "seem reasonable, . . . . favor should not be given to a certain subset of broadband providers, particularly not government-owned networks, which have historically been unsuccessful and ultimately create an additional burden on local taxpayers." TCA contends that, although the federal guidance encourages states to give preference to these entities, it is optional but not required, and is "of questionable value to the success of the Program."

The comptroller declines to remove the language in §16.7(5) in response to the comments described in the preceding paragraph. The involvement of these entities is encouraged by the U.S. Department of the Treasury, which will need to approve Texas’s grant plans before the state will receive funding. Effectively promoting broadband development Projects Fund (CCPF) states that Treasury encourages Recipients to prioritize Projects that involve broadband networks owned, operated by or affiliated with local governments, non-profits, and co-operatives - providers with less pressure to generate profits and with a commitment to serving entire communities.

To the degree that the federal guidance does not materially detract from the performance of the program or the underlying state statute, the office believes it is in the state’s best interest to incorporate them into the program.

Texas Rural Broadband Coalition, Powell Law Group, LLP, Texas Conservative Coalition Research Institute (TCCRI), Connect The Future Texas (CTF Texas), Charter Communications (Charter), TCA, and Allan B. Ritter, Chairman of the Board, Ritter Lumber Company, recommend removing the requirements in §16.3(b)(2), concerning minimum and maximum caps on applicants, and the requirements in §16.3(b)(3), concerning geographic distributions, because they will: serve no purpose; slow down the distribution of program funds; impede the program from effectively promoting broadband development projects; create deployment barriers in unserved areas; inadvertently disadvantage eligible communities; and run counter to the program goals. TCA contends that the per applicant maximum caps in §16.3(b)(2) are not required by the federal guidance; will limit service to later-in-time or otherwise less competent applicants; and will limit the ability of applicants who are best positioned to provide service to obtain grant funding if they have reached their maximum cap. TCA also contends that the geographic location requirements in §16.3(b)(3) are already provided for in the program’s state statutory eligibility requirements.

In response to TCA’s comments described in the preceding paragraph, the comptroller changes “applicant” to “application” in §16.3(b)(2) regarding minimum and maximum caps in order to make this provision consistent with the intent of this section - to allow a NOFA to include a limit per application, not per applicant. In addition, the comptroller declines to revise the language in §16.3(b)(3) relating to the geographic distribution of funds. This provision is necessary to ensure that Texans from across the state will have the opportunity to benefit from this program. Many individuals and communities from around the state lack affordable, reliable, high-quality broadband internet that is necessary for full participation in school, healthcare, employment, social services, government programs and civic life. The needs
of Texans are widespread and are not limited to a single region or area. The office expects that geographic location may be one of a number of criteria used to ensure that funds are deployed in an expeditious, equitable, and efficient manner within the scope of state and federal law.

Connected Nation Texas (CN Texas) contends that "{t}hough it is important to assess the number of households or businesses that would either become served or receive affordable service with the award of public dollars, it is important to note that poles may need to be replaced several miles before a network reaches those target locations"; "{t}herefore, it may be difficult to quantify the direct effect of pole replacement in such situations."

No changes are necessary in response to the comment described in the preceding paragraph.

TCA and CN Texas address middle-mile projects. TCA recommends removing the language in §16.7(8) regarding "middle-mile projects that have commitments in place to support new or improved last-mile service" because the Texas Legislature "has chosen to create a program more narrowly focused on last-mile connections only" and because this "category is not pertinent to the broadband pole replacement fund." CN Texas recommends "that the program provide flexibility in supporting the extension of middle-mile infrastructure to unserved areas as well." It states that "{w}hile the pole replacement program is intended to support new last-mile service delivery, it is often the case that middle-mile infrastructure needs to be extended in order to make last-mile service delivery possible." CN Texas also states that while state law requires poles qualifying for reimbursement to be located in unserved areas, "there are likely scenarios in which there is a need to replace a pole in an area that is technically served but is essential in order to deliver service to an unserved area."

In response to TCA's comment described in the preceding paragraph, the comptroller removes proposed §16.7(8) regarding middle-mile projects and renumbers the remaining paragraphs accordingly. Section 403.503(d), Government Code, expressly limits reimbursement to poles in unserved areas by stating that "{a} pole owner or a provider of qualifying broadband service who pays or incurs the costs of removing and replacing an existing pole in an unserved area for the purpose of accommodating the attachment of an eligible broadband facility may apply to the comptroller for a reimbursement award . . . ." Regarding CN Texas's comment, the office will maintain flexible policies to deploying broadband to the greatest number of unserved areas in an expeditious, equitable, and efficient manner within the scope of state and federal law.

CTF Texas, Charter, TCCRI, and TCA recommend allocating program funds on a rolling basis, rather than in scheduled distributions or tranches, to minimize delays and distribute funds to eligible areas as efficiently as possible. TCA contends that nothing in the federal guidance requires the funds to be disbursed in tranches for less than the amount available in the pole replacement fund. TCA also recommends paying eligible applicants as their applications are reviewed, or, alternatively, paying reimbursements at regular intervals.

No changes are necessary in response to the comments described in the preceding paragraph. The proposed rules allow flexibility in grant application and approval, and are broad enough to include the methods described in this comment.

CTF Texas, Charter, and TCCRI recommend that the office take advantage of the flexibility provided by the federal guidance "to prioritize the Fund's pole replacement goals" and to "focus on those criteria that are consistent with a pole replacement fund and that will speed broadband deployment."

No changes are necessary in response to the comments described in the preceding paragraph. The office seeks to deploy the program in an expeditious, equitable, and efficient manner within the scope of state and federal law.

Texas Electrical Cooperatives, Inc. (TEC) recommends removing §16.3(b)(9), which allows a NOFA to include "pricing data related to the broadband service to be enabled through pole replacement." TEC contends that pricing data is not appropriate for inclusion in a NOFA because the office "will not set or regulate the rate or pricing of broadband service"; "{t}he ultimate pricing of broadband service is determined by the entity providing service"; and "it is unclear . . . how this information would be gathered by the Office for inclusion in the NOFA or how it would be used by applicants."

In response to the comment described in the preceding paragraph, the comptroller removes proposed §16.3(b)(9) regarding pricing data and renumbers the remaining paragraph accordingly.

TEC recommends removing the portion of §16.3(e) that allows the office to require applicants to submit preliminary information prior to submitting a complete application. Although TEC agrees that "it would be useful for applicants to know whether they are eligible prior to engaging in a lengthy application process," it contends that "it is unclear how knowledge of other potential applicants would inform the decision of a broadband provider to proceed with an application." TEC states that "{p}rojects should stand on their own merit and providers should not be deterred or dissuaded by the potential for others to also apply for pole replacement awards." It also states that this change would encourage more applicants to participate in the grant program.

The comptroller declines to revise the language in §16.3(e) in response to the comment described in the preceding paragraph. This provision will assist the office to expediently discharge its statutory duty to administer the program by providing the office with the ability to estimate future administrative and funding needs, and to assist applicants in the application process.

TCA recommends requiring "eligible applicants to offer (or to enable through the pole replacement project) retail broadband service capable of conforming to CCPF speed requirements and other technical capabilities" because, although state law makes projects eligible for reimbursement under the program if they provide service at 25/3 Mbps, the "federal guidance contains technical requirements for broadband networks supported by CCPF that are considerably more demanding and require faster upload and download speeds."

The comptroller declines to revise the language in the proposed rules in response to the comment described in the preceding paragraph. Sections 403.503(a)(3) and (4), Government Code, specify that 25/3 Mbps is the determining threshold. The comptroller does not have the authority to promulgate rules with requirements that conflict with state statute. The proposed rules will allow the agency to approve funding based on the requirements of CCPF, the federal funding source, without violating the state statute.

TCA suggests requiring "that applicants receiving broadband support from another source, such as a federal or municipal grant program, to demonstrate (through accounting records) that the funds from the other program were used for other
expenses, and that reimbursement from the Texas Broadband Pole Replacement Fund will not result in double recovery."

In response to the comment described in the preceding paragraph, the comptroller adds §16.10(d), which states: "Grant funds shall not be used for costs that will be reimbursed by any other federal or state funding source. The office may require an applicant/grantee to demonstrate through accounting records that funds received from another funding source are not used for costs that will be reimbursed by the pole replacement program."

TCA recommends that the comptroller "look to applicants' demonstrated commitments to hiring workers or workers from historically disadvantaged communities." TCA states that "(p)hrasing the requirement as one to 'prioritize' workers from these communities might be misinterpreted as requiring applicants to adopt explicit hiring quotas, which are neither required by federal guidance for the CCPF nor necessary to demonstrate such a commitment."

The comptroller declines to revise the language in the proposed rules in response to the comment described in the preceding paragraph. Although CCPF guidance states that applicants should prioritize these workforce related issues, the office recognizes that the program will be utilized across the state, and workforce issues may not be consistent. The proposed rules are intended to ensure that the program is able to be utilized as widely as possible.

TCA recommends "limit(ing) eligibility to reimbursement from the Fund as needed for the Program to comply with federal funding conditions, and then pay out eligible claims for reimbursement to the greatest extent possible." TCA states that, "(l) to the extent prioritization of otherwise-eligible applications is necessary at all, it should be limited to some period after the Fund has already been substantially depleted, e.g., in the final quarter before the funds have been awarded."

The comptroller declines to revise the language in the proposed rules in response to the comment described in the preceding paragraph. The proposed rules allow a range of reimbursement methods that are broad enough to include the method suggested.

TCA recommends adding several priorities to §16.7. Specifically, it recommends: prioritizing "applicants who are paying a larger share of the total network deployment costs with private funds relative to any support from broadband grants or other public sources" to "best leverage the Fund's resources to reach a greater number of unserved homes and small businesses"; prioritizing reimbursement to applicants who will not own the pole being replaced because they will obtain no benefit from the pole replacement expense, so that the fund can more effectively remove barriers to broadband deployment; and "(p)rioritizing applicants with a proven track record, who can demonstrate their technical and managerial qualification through the successful completion of past deployment projects and provision of service to existing broadband customers" to "help ensure the successful completion of deployment projects supported by the Fund."

The comptroller declines to revise the language in the proposed rules in response to the comments described in the preceding paragraph. The proposed rules allow a range of prioritization that is broad enough to include the suggested priorities.

TCA recommends removing §16.7(13) regarding "community involvement in the pole replacement planning process" from the list of possible preferences because "this criterion is not applicable to the types of expenses supported by the Fund."

The comptroller declines to remove the language in §16.7(13) in response to the comment described in the preceding paragraph. Community involvement is encouraged by the U.S. Department of the Treasury, which will need to approve Texas's grant plans before the state will receive funding. CCPF guidance states that "(w)hen determining the communities to be served by Broadband Infrastructure Projects. Recipients may choose to consider any available data including but not limited to . . . interviews with community members and business owners, (and) reports from community organizations . . . ." To the degree that such federal guidance does not materially detract from the performance of the program or the underlying state statute, the office believes it is in the state's best interest to incorporate them into the program.

TCA suggests adding a provision to §16.15, regarding request for records and audit, that would state that "(l) f the office engages a private contractor to act as the designee for the purposes of this section, no contract for those purposes may include remuneration based on an amount deemed noncompliant under this section."

The comptroller declines to revise the language in the proposed rules in response to the comment described in the preceding paragraph. If the office chooses to enter into a contract for any services, it will adhere to all applicable procurement and contracting requirements.

TCA recommends making certain additional simplifying and clarifying edits to the rules.

The comptroller declines to make changes to the rules in response to the comment described in the preceding paragraph. After making the changes described in this preamble, no additional changes are necessary.

The comments submitted by TCA, as described above, are supported by CTF Texas and Charter.

The new sections are adopted under Government Code, §403.503(c), as added by 87th Legislature, 2021, R.S., Chapter 659 (House Bill 1505), §1 and §4, which require the comptroller to prescribe rules for the Texas broadband pole replacement program.

The new sections implement Government Code, Subchapter R, as added by 87th Legislature, 2021, R.S., Chapter 659 (House Bill 1505), §1, concerning infrastructure and broadband funding.

§16.1. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Applicant--A person that has submitted an application for a reimbursement award under this subchapter.


(3) Eligible broadband facility--Has the meaning assigned by Government Code, §403.503(a)(1).

(4) Eligible pole replacement cost--Has the meaning assigned by Government Code, §403.503(a)(2).
(5) Grantee--An applicant that receives a reimbursement award under this subchapter.

(6) Grant funds--Monies in the pole replacement fund.

(7) NOFA--Notice of Funding Availability.

(8) Office--The Broadband Development Office established within the comptroller's office under Government Code, Chapter 4901.

(9) Pole--Has the meaning assigned by Government Code, §403.503(a)(5).

(10) Pole owner--Has the meaning assigned by Government Code, §403.503(a)(6).

(11) Pole replacement fund--Has the meaning assigned by Government Code, §403.501(1).

(12) Pole replacement program--Has the meaning assigned by Government Code, §403.501(2).

(13) Qualifying broadband service--Has the meaning assigned by Government Code, §403.503(a)(3).

(14) Unserved area--Has the meaning assigned by Government Code, §403.503(a)(4).

§16.2. Grant Funds Distribution Method.

To ensure that grant funds are used to maximize the deployment of broadband services to the greatest number of unserved areas, the office may:

(1) distribute the funds by geographic location; and

(2) issue a NOFA for less than the amount available in the pole replacement fund.

§16.3. Notice and Applications.

(a) The office shall, as necessary, publish a NOFA in the Texas Register or the Electronic Business Daily and on the comptroller's website.

(b) The notice may include:

(1) the total amount of grant funds available for reimbursement awards;

(2) the minimum and maximum amount of grant funds available for each application;

(3) limitations on the geographic distribution of grant funds;

(4) eligibility requirements;

(5) application requirements;

(6) reimbursement award and evaluation criteria;

(7) the date by which applications must be submitted to the office;

(8) the anticipated date of reimbursement awards; and

(9) any other information necessary for awarding the reimbursement as determined by the office.

(c) All applications for a reimbursement award submitted under this subchapter must comply with the requirements of Government Code, §403.503(g), and any requirements contained in a NOFA published by the office.

(d) Applicants must apply for a reimbursement award using the procedures, forms, and certifications prescribed by the office.

(e) The office may require applicants to submit preliminary information to the office prior to submitting a completed application for a reimbursement award to enable the office to determine each applicant's eligibility to apply for a reimbursement award and to compile aggregate information that applicants may use in determining whether to complete the application process.

(f) During the review of an application, an applicant may be instructed to submit to the office additional information necessary to complete the review. Such requests for information do not serve as notice that the office intends to fund an application.

§16.4. Eligible Applicants.

An applicant is eligible to apply to the office for a reimbursement award under this subchapter if the applicant:

(1) is a pole owner or a provider of qualifying broadband service; and

(2) pays or incurs eligible pole replacement costs of removing and replacing an existing pole in an unserved area for the purpose of accommodating the attachment of an eligible broadband facility.

§16.5. Authorized Officials.

(a) Each applicant/grantee must designate an authorized official to act on its behalf and the applicant/grantee must provide the office with:

(1) the authorized official's name, title, mailing address, telephone number, and email address; and

(2) the applicant's/grantee's physical address.

(b) An applicant/grantee shall notify the office as soon as practicable of any change in the information provided by it under subsection (a) of this section.

§16.6. Federal Funding.

If CCPF or any other federal funding is used to make a reimbursement award, the office may establish eligibility and program requirements and preferences, and make award decisions, based upon any criteria required by federal law, regulation, or guidance applicable to the type of funding used to make the reimbursement award.

§16.7. Preferences.

The office may give preference to applications and make awards decisions based upon the following factors:

(1) cost effectiveness and overall impact;

(2) geographic location;

(3) the latest state or federal broadband data;

(4) the number of households or businesses that will be served due to the reimbursement being requested;

(5) involvement of broadband networks owned, operated by, or affiliated with local governments, non-profits, or cooperatives;

(6) completion of the pole replacement and payment of all costs of the pole replacement;

(7) investments in fiber-optic infrastructure;

(8) affordability of broadband services in a target area;

(9) participation in federal programs that provide low-income consumers with subsidies for broadband internet access services;

(10) documentation of existing broadband internet service performance;

(11) download speeds and upload speeds, including user speed tests resulting from completion of the pole replacement;
(12) community involvement in the pole replacement planning process, including feedback from community members, community organizations, and business owners;

(13) business practices and workforce information, including the following:

(A) the applicant's workforce meets high safety and training standards;

(B) the applicant prioritizes the hiring of local workers or workers from historically disadvantaged communities;

(C) the applicant ensures that its contractors and subcontractors meet high labor standards; and

(D) the applicant has no recent violations of federal and state labor and employment laws; and

(14) any additional factors listed in a NOFA published by the office.


(a) The office must provide a notice of a reimbursement award or a notice of denial to an applicant, in writing, not later than 60 calendar days after the date that the office receives a completed application from the applicant. An application will not be considered complete for purposes of this section unless an applicant has provided all the information necessary for the office to review the application, including any additional information requested by the office to complete the review.

(b) All grant funding decisions made by the office are final and are not subject to appeal.

(c) The approval of a reimbursement award shall not obligate the office to make any additional, supplemental, or other reimbursement award.

§16.9. Payment.

A reimbursement award must be paid to a grantee not later than 30 calendar days after the date the office issues a notice of a reimbursement award under §16.8(a) of this subchapter.

§16.10. Requirements.

(a) The administration and use of a reimbursement award are subject to:

(1) the terms and conditions of the reimbursement award;

(2) the requirements of Government Code, Chapter 403, Subchapter R; and

(3) any other state or federal law, rule, regulation, or guidance applicable to the type of funding used to make the reimbursement award.

(b) Grant funds may be used only for the purpose of supporting the pole replacement program, including the costs of program administration and operation.

(c) A grantee is the entity legally and financially responsible for compliance with state and federal laws, rules, regulations, and guidance applicable to the reimbursement award.

(d) Grant funds shall not be used for costs that will be reimbursed by any other federal or state funding source. The office may require an applicant/grantee to demonstrate through accounting records that funds received from another funding source are not used for costs that will be reimbursed by the pole replacement program.

§16.11. Reports.

(a) A grantee shall submit reports and documentation as may be required by the office to substantiate that grant funds awarded were used for the intended purpose of the reimbursement award and that the grantee has complied with the terms, conditions, and requirements set forth in §16.10 of this subchapter.

(b) A grantee must submit reports and documentation to the office in the office-prescribed format no later than the office-designated deadlines for their submission.


(a) If the office has reason to believe that a grantee has violated any term or condition of a reimbursement award or any applicable laws, rules, regulations, or guidance relating to the reimbursement award, the office shall provide written notice of the allegations to the grantee and provide the grantee with an opportunity to respond to the allegations.

(b) If the office finds on substantial evidence that a grantee has materially violated the requirements of Government Code, §403.503, with respect to reimbursements or portions of reimbursements, the office may direct the grantee to refund the reimbursement or a portion of the reimbursement with interest at the applicable federal funds rate as specified by Business and Commerce Code, §4A.506(b).

(c) If the office finds that a grantee has failed to comply with any term or condition of a reimbursement award, or any applicable laws, rules, regulations, or guidance relating to the reimbursement award, other than the requirements described in subsection (b) of this section, the office may:

(1) direct the grantee to refund the reimbursement award or a portion of the reimbursement award;

(2) withhold reimbursement award amounts to a grantee under this subchapter pending correction of the deficiency;

(3) disallow all or part of the cost of the activity or action that is not in compliance;

(4) terminate the reimbursement award in whole or in part;

(5) prohibit the grantee from being eligible for future reimbursement awards under the pole replacement program; or

(6) exercise any other legal remedies available at law.

§16.13. Grant Reduction or Termination.

(a) If a grantee seeks to terminate any approved reimbursement award, it must notify the office immediately.

(b) The office may reduce or terminate any reimbursement award when circumstances require reduction or termination, including when:

(1) a grantee is found to be noncompliant under §16.12(c) of this subchapter;

(2) the grantee and the office agree to the reduction or termination of a reimbursement award;

(3) grant funds are no longer available to the office; or

(4) conditions exist that make it unlikely that objectives of the reimbursement award will be accomplished.

(c) If a reimbursement award is reduced or terminated by the office, the office shall notify the grantee in writing.


(a) A grantee must maintain all financial records, supporting documents, and all other records pertinent to the reimbursement award for at least four years following the submission of a final report.

(b) If any litigation, claim, or audit is started, or any open records request is received, before the expiration of the four-year records retention period, a grantee must retain the records related to the
litigation, claim, audit, or open records request until the completion of the litigation, claim, audit, or open records request and resolution of all issues which arise from it or until the end of the regular four-year records retention period, whichever is later.

(c) A grantee may retain records in an electronic format.

§16.15. Request for Records and Audit.

(a) A grantee shall, upon written request from the office or its designee, provide any records, documentation, or other information required by the office to verify that the grantee has complied with the terms, conditions, and requirements set forth in §16.10 of this subchapter. The office or its designee may make such a written request at any time before the end of the four-year records retention period set forth in §16.14 of this subchapter. If the office or its designee requests records, documentation, or other information from the grantee in writing, the grantee must submit the requested information within 30 calendar days.

(b) The office or its designee may, before the end of the four-year records retention period set forth in §16.14 of this subchapter, audit a grantee to ensure that grant funds are used for the intended purpose of the reimbursement award and that the grantee has complied with the terms, conditions, and requirements set forth in §16.10 of this subchapter.


If a state or federal law, rule, regulation, or guidance applicable to the type of funding used to make the reimbursement award conflicts with this subchapter, the state or federal law, rule, regulation, or guidance applicable to the type of funding used to make the reimbursement award prevails over this subchapter to the extent necessary to avoid the conflict.

§16.17. References.

All references in this subchapter to statutory provisions in Government Code, Chapter 403, Subchapter R, refer to the provisions added by 87th Legislature, 2021, R.S., Chapter 659 (House Bill 1505), §1.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 22, 2022.

TRD-202200676
Victoria North
General Counsel for Fiscal and Agency Affairs
Comptroller of Public Accounts
Effective date: March 17, 2022
Proposal publication date: December 31, 2021
For further information, please call: (512) 475-2220

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 13. TEXAS COMMISSION ON FIRE PROTECTION

CHAPTER 455. MINIMUM STANDARDS FOR WILDLAND FIRE PROTECTION CERTIFICATION

37 TAC §455.3

The Texas Commission on Fire Protection (commission) adopts amendments to 37 Texas Administrative Code Chapter 455, Minimum Standards For Wildland Fire Protection Certification, concerning §455.3, Minimum Standards for Basic Wildland Fire Protection Certification. The amended section is adopted without changes to the text as published in the December 10, 2021, issue of the Texas Register (46 TexReg 8340). The rule will not be republished.

The amended section to rule §455.3 is adopted to approve a request from the Texas A&M Forest Service to add an online hybrid course for Wildland Fire Protection Certification.

The intent is to allow individuals seeking basic wildland fire protection certification to take several courses online in lieu of having to attend an in-person course.

No comments were received from the public regarding the adoption of the amendments.

The amended section is adopted under Texas Government Code, §419.008 which authorizes the commission to adopt or amend rules to perform the duties assigned to the commission. The rule is also adopted under Texas Government Code §419.032, which authorizes the commission to adopt rules establishing the requirements for certification.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 22, 2022.

TRD-202200621
Michael Wisko
Executive Director
Texas Commission on Fire Protection
Effective date: March 14, 2022
Proposal publication date: December 10, 2021
For further information, please call: (512) 936-3812

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 2. DEPARTMENT OF ASSISTIVE AND REHABILITATIVE SERVICES

CHAPTER 101. ADMINISTRATIVE RULES AND PROCEDURES

SUBCHAPTER C. COUNCILS, BOARD, AND COMMITTEES

DIVISION 3. EARLY CHILDHOOD INTERVENTION ADVISORY COMMITTEE


The Texas Health and Human Services Commission (HHSC) adopts the repeal of §§101.501, 101.503, 101.505, 101.507,


BACKGROUND AND JUSTIFICATION

The purpose of the repeal is to move the ECI advisory committee requirements from 40 TAC Chapter 101 to 1 TAC Chapter 351, Subchapter B, Division 1 and format the advisory committee rule so it aligns with other HHSC advisory committee rules.

The repeal of 40 TAC Chapter 101, Subchapter C, Division 3, will remove rules related to ECI from the chapter related to the Department of Assistive and Rehabilitative Services, which was abolished September 1, 2016, and relocate them to 1 TAC Chapter 351, where other HHSC advisory committee rules are located. The new rule was published elsewhere in the December 3, 2021, issue of the Texas Register.

COMMENTS

The 31-day comment period ended January 3, 2022.

During this period, HHSC did not receive any comments regarding the proposed repeal.

STATUTORY AUTHORITY

The repeal is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Chapter 73 of the Texas Human Resources Code, which provides HHSC with the authority to administer the Early Childhood Intervention Program in Texas.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 25, 2022.

TRD-202200673
Karen Ray
Chief Counsel
Department of Assistive and Rehabilitative Services
Effective date: March 17, 2022
Proposal publication date: December 3, 2021
For further information, please call: (512) 438-5429

ADOPTED RULES  March 11, 2022  47 TexReg 1301