ADMINISTRATIVE PENALTIES AGAINST ELECTRICITY MARKET PARTICIPANTS UNDER THE TEXAS PUBLIC UTILITY REGULATORY ACT

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I. INTRODUCTION

The Public Utility Commission of Texas (the Commission or the PUC) can punish participants in Texas' electricity markets[1] that violate the Public Utility Regulatory Act (PURA)[2] or the Commission's rules or orders in a variety of ways.[3] In recent years, the administrative penalty has become the

[1] Daniel M. Gonzales, Comment, *Shockingly Certain: Why is the Public Utility Commission of Texas Steadfast in Its Resolve to Keep Texas' Energy Market Deregulated Amidst Turmoil?*, 10 TEX. TECH ADMIN. L.J. 497, 501 (2009). Texas essentially has two electric markets subject to different regulatory requirements. *Id.* at 500. The Electric Reliability Council of Texas (ERCOT) region covers about eighty-five percent of the state, is not synchronously interconnected with electric utilities outside of Texas, and is open to wholesale and retail competition. *Id.* The state's western portion is not open to competition and is served by vertically integrated electric utilities that continue to operate as monopolies that are synchronously interconnected with electric utilities outside of Texas. *Id.* The ERCOT region operates through companies that serve uniquely as generators of electricity, transporters and distributors of electricity, or retail electric providers. *Id.* In the areas of the state not open to competition, the Commission regulates the rates, services, and service quality of the integrated electric utilities that continue to operate as monopolies. *Id.*

[2] TEX. UTIL. CODE ANN. tit. II (West 2007).

[3] The remedies available are injunctive relief, *id.* § 15.021, a contempt order, *id.* § 15.022, an administrative penalty, *id.* § 15.023(a), a civil penalty, *id.* § 15.028(a), and even a criminal penalty, *id.* § 15.030(a)–(c) (making it a third-degree felony to willfully and knowingly violate PURA). In addition, the Commission, in certain circumstances, can seek to modify or revoke the offending market participant's certification or registration, *id.* § 39.356(a)–(c), or obtain a cease and desist order, *see, e.g.*, Tex. Pub. Util. Comm'n, *Application of AEP Texas North Company and Taylor Electric Cooperative, Inc. for Clarification of Service Area Boundary in Taylor County*, Docket No. 31064, at 7 (July 24, 2006), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=31064&TXT_ITEM_NO=111 (final order directing Taylor Electric Cooperative to cease and desist from serving certain customers). Finally, as part of its power to protect retail customers, the Commission can order a retail electric provider to make a customer whole for fraudulent practices or for charging a rate that has not been agreed to by the customer. *See* TEX. UTIL. CODE ANN. § 17.004(a)(1). It cannot, however, do so in other situations. *See* Tex. Pub. Util. Comm'n, *Notices of Violation by TXU Corporation, et al., of PURA § 39.157(a) and P.U.C. Subst. R. § 25.503(g)(7)*, Docket No. 34061, at 4 (June 27, 2007), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=34061&TXT_ITEM_NO=44 (preliminary order noting that "[u]nder [the Commission's] authority to assess administrative penalties in Chapter 15 of PURA, no provision grants the Commission the authority to order refunds as a penalty").

The Sunset Advisory Commission recently recommended that PURA be amended to give the Commission authority to issue emergency cease and desist orders. Sunset Advisory Commission, Commission Decisions 20-h (July 2010), http://www.sunset.state.tx.us/82ndreports/puc/puc_dec.pdf.

Commission's sanction of choice[4] because (1) the procedure for imposing such penalties is straightforward,[5] (2) Commission Staff believes that large administrative penalties can be imposed against wrongdoers,[6] and (3) the administrative penalty is the only non-death-penalty sanction that the Commission can impose directly against wrongdoers.[7]

PURA Section 15.023 is the administrative-penalty provision.[8] It provides, in full:

> (a) The commission may impose an administrative penalty against a person regulated under this title who violates this title or a rule or order adopted under this title.
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> (b) The penalty for a violation may be in an amount not to exceed $25,000. Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty.
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> (c) The commission by rule shall establish a classification system for violations that includes a range of administrative penalties that may be assessed for each class of violation based on:
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> (1) the seriousness of the violation, including:
>
> (A) the nature, circumstances, extent, and gravity of a prohibited act; and

[4] For example, in fiscal year 2009, the Commission collected $3.7 million in fines from eleven administrative-penalty proceedings. Sunset Advisory Commission, *supra* note 3, at 14.

[5] *See infra* Part III.

[6] *See infra* Part IV.

[7] An injunction can be obtained by the Commission through the Attorney General's office, TEX. UTIL. CODE ANN. § 15.021(a), in a district court in Travis County, the county in which the violation is alleged to have occurred, or the county in which the alleged violator resides, *id.* § 15.031(1)–(3). A contempt order for a failure to comply with "a lawful order of the commission" can be obtained from a court by the Commission represented by the Attorney General's office. *Id.* §§ 12.004, 15.022(1). To obtain a civil penalty, a suit must be filed by the attorney general on his or her own initiative or at the Commission's request. *Id.* § 15.028(d). Moreover, civil penalties under PURA Section 15.028(a) can only be sought against a small number of types of market participants. *See id.* § 15.028(a).

The revocation or modification of a market participant's certification or registration is the most drastic remedy and, if imposed against a very large participant, could reduce needed competition in the relevant ERCOT market. *See id.* § 17.156.

[8] *Id.* § 15.023.

> (B) the hazard or potential hazard created to the health, safety, or economic welfare of the public;
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> (2) the economic harm to property or the environment caused by the violation;
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> (3) the history of previous violations;
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> (4) the amount necessary to deter future violations;
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> (5) efforts to correct the violation; and
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> (6) any other matter that justice may require.
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> (d) The classification system established under Subsection (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.[9]

This article's purpose is to provide a comprehensive guide for participants in Texas' electricity markets regarding administrative penalties under PURA and to provide a thorough analysis of the reasoning that supports the Commission's recent answer to what had been a pressing question in administrative-penalty practice before the Commission: what is the proper penalty unit under PURA Section 15.023? Part II identifies the persons against whom an administrative penalty can be imposed and the violations for which a penalty can be imposed. Part III sets forth the procedure for assessing an administrative penalty. Part IV explains the proper penalty unit for an administrative penalty, including a discussion of Commission Staff's position on the issue and the recent controlling Commission decision. Part V discusses the payment of an administrative penalty. Part VI describes judicial review of an administrative penalty.

II. THE PERSONS AGAINST WHOM, AND THE VIOLATIONS FOR WHICH, AN ADMINISTRATIVE PENALTY CAN BE IMPOSED

PURA Section 15.023(a) sets forth both the persons against whom, and the violations for which, an administrative penalty can be imposed.[10] It provides that the Commission can "impose an administrative penalty

[9] *Id.*

[10] *Id.* § 15.023(a).

against a person regulated under [PURA] who violates [PURA] or a rule or order adopted under [PURA]."[11]

A. Who Is Subject to an Administrative Penalty?

Two requirements must be met for an alleged violator to be subject to an administrative penalty: it must be a "[(1)] person [(2)] regulated under [PURA]."[12] "Person" is defined by PURA Section 11.003(14) as "includ[ing] an individual, a partnership of two or more persons having a joint or common interest, a mutual or cooperative association, and a corporation, but . . . not . . . an electric cooperative."[13] "Corporation" is

[11] *Id.* Besides Section 15.023, the following PURA provisions specifically provide for the imposition of an administrative penalty for their violation: Section 17.156(a), *id.* § 17.156(a) ("If the commission finds that a billing utility violated [Subchapter 17.D of PURA], the commission may implement penalties and other enforcement actions under Chapter 15."); Section 39.151(j), *id.* § 39.151(j) (providing for an administrative penalty for failures to "observe all scheduling, operating, planning, reliability and settlement policies, rules, guidelines, and procedures established by . . . ERCOT"); Section 39.157(a), *id.* § 39.157(a) ("On a finding that market power abuses or other violations of this section are occurring, the commission shall require reasonable mitigation of the market power . . . by imposing an administrative penalty as authorized by Chapter 15 . . . ."); Section 39.357, *id.* § 39.357 ("[T]he commission may impose an administrative penalty as provided by Section 15.023 for violations described by Section 39.356, [relating to actions by retail electric providers, power generators, and aggregators]."); and Section 39.1025, *id.* § 39.1025 (relating to violations of the electric no-call list). In addition, the following PUC Substantive Rules provide for administrative penalties, directly or indirectly: Rule 25.71(f), (h), 16 TEX. ADMIN. CODE 25.71(f), (h) (2010) (Tex. Pub. Util. Comm'n, General Procedures, Requirements and Penalties) (relating to failures by electric service providers to provide reports on a timely basis); Rule 25.272(i)(5)(A)(iii), *id.* § 25.272(i)(5)(A)(iii) (relating to violations of the code of conduct for electric utilities and their affiliates); Rule 25.484, *id.* 25.484 (relating to violations of the electric no-call list); Rule 25.492(a) (relating to failures by aggregators and retail electric providers to comply with PURA and Commission orders); Rule 25.503(f)(2), *id.* 25.503(f)(2) (relating to market participant's failures to comply "with ERCOT procedures and any official interpretation of the Protocols issued by ERCOT or the commission."); and Rule 25.503(m), *id.* 25.503(f)(2) (permitting the Commission to "seek or impose any legal remedy it determines appropriate for the violation of" PUC Substantive Rule 25.503, relating to "Oversight of Wholesale Market Participants").

[12] TEX. UTIL. CODE ANN. § 15.023(a).

[13] *Id.* § 11.003(14). The Commission's Substantive Rules define "person" identically. *See* 16 TEX. ADMIN. CODE § 25.5(80). The PUC Procedural Rule relating to administrative penalties oddly defines "person" slightly different as "[i]nclud[ing] a natural person, partnership of two or more persons having a joint or common interest, mutual or cooperative association, and corporation." *Id.* § 22.246(b)(2).

broadly defined by PURA Section 11.003(7) as "a domestic or foreign corporation, joint-stock company, or association . . . that has any of the powers or privileges of a corporation not possessed by an individual or partnership.[14] The term does not include a municipal corporation or electric cooperative, except as provided by [PURA]."[15]

Oddly, these definitions do not specifically mention limited liability companies, an entity form favored in Texas.[16] This omission, however, is immaterial, as "person" includes any natural person or entity of any type, such as limited liability companies, besides electric cooperatives and municipal corporations.[17] Aside from the fact that the use of the word "includ[ing]" in Section 11.003(14)'s definition of person (and the Commission's procedural and substantive rules' definitions of the term) does not purport to establish an exclusive list of the type of entities that are regulated under PURA,[18] the Texas Code Construction Act makes clear that "including" is a "term[] of enlargement and not of limitation or exclusive enumeration, and use of the term[] does not create a presumption that components not expressed are excluded."[19] Additionally, the term "person" when used in a statute or administrative rule typically includes all types of legal entities.[20]

The types of persons participating in Texas' electric markets that are

[14] TEX. UTIL. CODE ANN. § 11.003(7).

[15] *Id.* The Commission's Substantive Rules define "corporation" identically. *See* 16 TEX. ADMIN. CODE § 25.5(20).

[16] *See supra* notes 12–13.

[17] *See* TEX. UTIL. CODE ANN. § 11.003(14).

[18] *See id.*

[19] TEX. GOV'T CODE ANN. § 311.005(13) (West 2005); *accord* Republic Ins. Co. v. Silverton Elevators Inc., 493 S.W.2d 748, 752 (Tex. 1973) (holding that it is a "well settled rule that the words 'include,' 'including,' and 'shall include' are generally employed as terms of enlargement rather than limitation or restriction."); H.G. Sledge, Inc. v. Prospective Inv. & Trading Co., 36 S.W.3d 597, 603 (Tex. App.—Austin 2000, pet. denied) ("The Commission's use of the word 'include' in the provision signifies that the list is not exclusive."). *See also* Fed. Land Bank v. Bismarck Lumber Co., 314 U.S. 95, 99–100 (1941) ("We recently had occasion under other circumstances to point out that the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.").

[20] *See, e.g.*, TEX. GOV'T CODE ANN. § 311.005(2) (defining "person" as including "corporation, organization, . . . partnership, association, and any other legal entity."); *H.G. Sledge*, 36 S.W.3d at 603 (holding that the word "person" in an administrative regulation was not limited to the specific types of persons enumerated in the regulation because the regulation used the term "include").

regulated under PURA and subject to administrative penalties include aggregators, distribution service providers, electric utilities, power generation companies, power marketers, qualified scheduling entities (QSEs), qualifying small power producers, retail electric providers, river authorities, transmission and distribution utilities, and transmission service providers.[21] It is, however, unclear whether the Commission can impose an administrative penalty against a municipal corporation or an electric cooperative. The lack of clarity stems from the fact, as noted above, that PURA Section 11.003(14) excludes from the definition of "person" electric cooperatives[22] and PURA Section 11.003(7) generally excludes from the definition of corporations "municipal corporation[s] and electric cooperative[s],"[23] whereas PURA Section 39.151(j) specifically provides for the imposition of administrative penalties against, among others, "municipally owned utilit[ies]" and "electric cooperative[s]" for a failure to "observe all scheduling, operating, planning, reliability, and settlement policies, rules, guidelines, and procedures established by . . . ERCOT."[24] As PURA Section 39.157 gives the Commission broad powers to address market power without specifically excluding municipal corporations and electric cooperatives from the Commission's reach in this regard,[25] and PUC Substantive Rule 25.503, which was promulgated pursuant to the foregoing statutes,[26] specifically applies to such entities,[27] the Commission

[21] *See* TEX. UTIL. CODE ANN. § 39.151(j). These terms are defined in PUC Substantive Rule 25.5. *See* 16 TEX. ADMIN. CODE § 25.5 (2010) (Tex. Pub. Util. Comm'n, Definitions); *see also* TEX. UTIL. CODE ANN. § 31.002 (defining some of the terms).

[22] *See supra* note 17.

[23] *See supra* note 15. In addition, PURA § 41.004 limits the Commission's jurisdiction over electric cooperatives "[e]xcept as specifically provided otherwise in [PURA]." TEX. UTIL. CODE ANN. § 41.004.

[24] TEX. UTIL. CODE ANN. § 39.151(j).

[25] *See id.* § 39.157(a).

[26] 16 TEX. ADMIN. CODE § 25.503(a).

[27] *Id.* § 25.503(b), (c)(4). PUC Substantive Rule 25.503 is titled "Oversight of Wholesale Market Participants" and sets forth (1) the standards used by the Commission in monitoring the activities of entities participating in Texas' wholesale-electric market, which are defined as "market entities," (2) the standards used by the Commission in enforcing PURA provisions, PUC Substantive Rules, and ERCOT Protocols applicable to the wholesale market, (3) market entities' ethical standards, (4) market entities' duties and prohibitions, (5) the procedure market entities can use to obtain official interpretations and clarifications of ERCOT Protocols, (6) ERCOT's role in enforcement actions, (7) the informal fact-finding review procedure available to Commission Staff for reviewing compliance with the rule, and (8) market entities' record maintenance requirements.

can impose an administrative penalty against a municipal corporation or an electric cooperative at least for violations of an ERCOT scheduling, operating, planning, reliability, or settlement policy, rule, guideline, or procedure; market-power abuses; and violations of PUC Substantive Rule 25.503.[28]

B. For What Type of Violations Can an Administrative Penalty Be Imposed?

Under PURA Section 15.023(a), an administrative penalty can be imposed for a "viola[tion]" of "[PURA] or a rule or order adopted under [PURA]."[29] Although PURA does not define violation, the Commission's procedural rules do, defining the term as "[a]ny activity or conduct prohibited by . . . (PURA), commission rule, or commission order."[30] Thus, any activity or conduct that violates PURA or a Commission rule or order can support an administrative penalty's imposition.[31]

The question then becomes what is a Commission rule or order? The answer to the latter is clear. PURA defines "order" to mean "all or part of a final disposition by [the Commission] in a matter other than rulemaking without regard to whether the disposition is affirmative or negative or injunctive or declaratory . . . includ[ing]: (A) the issuance of a certificate of convenience and necessity; and (B) the setting of a rate."[32]

An interesting question exists regarding whether an administrative penalty can be imposed for violations of both the Commission's substantive and procedural rules because both are adopted under PURA.[33] The Commission appears to have concluded that only violations of its

See id. § 25.503. Subsection (c)(4) of the Rule specifically includes "a municipally owned utility and an electric cooperative" in the definition of "market entity," thereby subjecting such entities to the rule's provisions. *Id.* § 25.503(c)(4).

[28] *See supra* notes 24–27.

[29] TEX. UTIL. CODE ANN. § 15.023(a). For those PURA provisions that specifically provide for an administrative penalty's imposition, *see supra* note 11.

[30] 16 TEX. ADMIN. CODE § 22.246(b)(3).

[31] *See id.*

[32] TEX. UTIL. CODE ANN. § 11.003(13)(A)–(B).

[33] *Compare id.* § 14.002 (authorizing the Commission to "adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction," that is, substantive rules), *with id.* § 14.052 (authorizing the Commission to "adopt and enforce rules governing practice and procedure before the commission," that is, procedural rules).

substantive rules are subject to administrative penalties. For example, PUC Substantive Rule 25.8, which provides the classification system for administrative penalties required by PURA Section 15.023(c), does not specifically mention violations of the Commission's procedural rules.[34] Nor have there been any administrative-penalty proceedings involving such rules.

In addition to Commission rules and orders, persons participating in the competitive ERCOT region[35] can be penalized for violations of ERCOT's scheduling, operating, planning, reliability, and settlement policies, rules, guidelines, and procedures.[36] This is because PURA Section 39.151(j) and PUC Substantive Rule 25.503(f)(2) require such persons to comply with such requirements,[37] and a failure to do so violates both the statute and rule, thereby subjecting the violator to an administrative penalty.[38]

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[34] *See* 16 TEX. ADMIN. CODE § 25.8(b)(1)–(3).

[35] ERCOT is a quasi-governmental entity that manages the electric grid and coordinates activities in the ERCOT region. *See id.*

[36] *See* TEX. UTIL. CODE ANN. § 39.151(j).

[37] *Id.* PURA Section 39.151(j) provides, in full: "A retail electric provider, municipally owned utility, electric cooperative, power marketer, transmission and distribution utility, or power generation company shall observe all scheduling, operating, planning, reliability, and settlement policies, rules, guidelines, and procedures established by the independent system operator in ERCOT." *Id.* PUC Substantive Rule 25.503(f)(2) similarly requires that "[a] market participant shall comply with ERCOT procedures and any official interpretation of the Protocols issued by ERCOT or the commission." 16 TEX. ADMIN. CODE § 25.503(f)(2). Failure to comply with this subsection may result in the revocation, suspension, or amendment of a certificate as provided by Section 39.357 or in the imposition of an administrative penalty as provided by Section 15.023. *See id.*; TEX. UTIL. CODE ANN. §§ 15.023(a), 39.157(a).

[38] *See, e.g.*, Tex. Pub. Util. Comm'n, *Agreed Notice of Violation and Settlement Agreement Relating to Luminant Energy Company LLC's Violation of PURA § 39.151(j) and P.U.C. Subst. R. § 25.503(f)(2), Relating to Failure to Adhere to ERCOT Protocol § 6.10.5.4(1) Concerning Load Acting as Resource Service Requirements*, Docket No. 37634, at 1 (Apr. 5, 2010), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=37634&TXT_ITEM_NO=18 (order implementing settlement agreement requiring defendant to pay an administrative penalty); Notice of Violation at 1–4, *Notice of Violation by International Power America, Inc, Hays Energy Limited Partnership, Midlothian Energy Limited Partnership, and ANP Funding I, LLC of PURA § 39.151(j) and P.U.C. Subst. R. § 25.503(f) and (g), Relating to Failure to Adhere to ERCOT Protocols §§ 5.8.1.1, 5.8.1.2, and 6.5.1.1(1)(e) Concerning Governor in Service Requirements and Frequency Bias Requirements, and of P.U.C. Subst. R. § 25.503(f)(10), Relating to Failure to Comply with Requests for Information by ERCOT Within the Time Specified by ERCOT Instructions* (Tex. Pub. Util. Comm'n. Sept. 12, 2007) (No. 34738), http://interchange.puc.state.tx.us/WebApp/Interchange/

III. THE ADMINISTRATIVE-PENALTY-ASSESSMENT PROCEDURE

The procedure for assessing administrative penalties is set forth in PURA Section 15.024 and has three broad steps: (1) a recommendation that an administrative penalty be imposed, (2) the alleged violator's response to the recommended penalty assessment, and (3) the resolution of a contested penalty recommendation.[39]

A. The Penalty's Recommendation.

The Commission's Executive Director has the responsibility for determining, in the first instance, whether a violation of PURA or a Commission rule or order has occurred and whether the violation merits an administrative penalty's imposition.[40] "Upon receiving an allegation of a violation or of a continuing violation, the executive director shall determine whether an investigation should be initiated."[41] The Director, however, need not conduct an investigation.[42]

application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=34738&TXT_ITEM_NO=1 (notice that the Public Utility Commission is recommending an assessment of administrative penalties); Tex. Pub. Util. Comm'n., *Agreed Notice of Violation and Settlement Agreement Relating to Suez Energy Marketing NA, Inc.'s Violation of PURA § 39.151(j) and P.U.C. Subst. R. § 25.503(f)(2), Relating to Failure to Adhere to ERCOT Protocols §§ 6.5.4(2) and 6.5.4(13) Concerning Load Acting as Resource Scheduling Requirements*, Docket No. 34134, at 5–6 (June 11, 2007), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=34134&TXT_ITEM_NO=3 (order approving settlement agreement requiring defendant to pay administrative penalty).

[39] TEX. UTIL. CODE ANN. § 15.023.

[40] *Id.*; 16 TEX. ADMIN. CODE § 22.246(c)–(d). As a practical matter, the investigation is prompted by either the Commission or its Staff. *Id.* § 22.241. The Commission on its own motion or that of its Staff "may at any time institute formal investigations" of any person subject to its jurisdiction. *Id.* In addition, PUC Substantive Rule 25.503(l) allows Commission Staff to "initiate an informal fact-finding review based on a complaint or upon its own initiative to obtain information regarding facts, conditions, practices, or matters that it may find necessary or proper to ascertain in order to evaluate whether any market entity has violated any provision of" PUC Substantive Rule 25.503, relating to "Oversight of Wholesale Market Participants." *Id.* § 25.503(l). Subsection (3) of the rule further provides that, "If after conducting its fact-finding review, the commission staff determines that a market entity may have violated this section, the commission staff may request that the commission initiate a formal investigation against the market entity pursuant to § 22.241 . . . ." *Id.* § 25.503(l)(3).

[41] 16 TEX. ADMIN. CODE § 22.246(d).

[42] *See id.* ("Upon receiving an allegation of a violation or a continuing violation, the executive director shall determine whether an investigation should be initiated."). Commission Staff

If, after conducting an investigation, a determination is made that a violation has occurred, an administrative penalty need not be assessed.[43] This is made clear by the language of Section 15.024 and its corresponding procedural rule, Rule 22.246(e), both of which provide that, if the Executive Director determines that a violation has occurred, the Director "may" recommend the imposition of an administrative penalty.[44] The statute's use of the word "may" gives the Executive Director broad discretion in deciding whether to recommend an administrative penalty's imposition.[45]

Once it is determined that a violation has occurred and that an administrative penalty is warranted, the Executive Director may issue a report to the Commission recommending the penalty's assessment.[46] Nothing in PURA or the Commission's substantive or procedural rules, however, sets a deadline for the Executive Director to commence an investigation, to complete one, or to issue the requisite report to the Commission after the investigation is completed.

Moreover, nothing in PURA or the Commission's substantive or procedural rules requires the Executive Director to issue a report to the Commission regarding an investigation that does not result in a recommendation for the imposition of an administrative penalty. And, there is no procedure allowing the Commission to reverse the Executive Director's determination that no violation has occurred or that, if one has occurred, no administrative penalty should be assessed.

Not all violations, however, are subject to the same penalty. As required by PURA Section 15.023(c), the Commission has developed a three-tiered classification system for violations: Class A, Class B, and Class C violations.[47]

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conducts the investigation, makes the determination about whether a violation occurred, prepares the requisite notice of violation, and conducts the settlement negotiations. *See* TEX. UTIL. CODE ANN. § 15.027(c) (allowing the Executive Director to "delegate any power or duty relating to an administrative penalty given the executive director . . . to a person designated by the executive director").

[43] *See* TEX. UTIL. CODE ANN. § 15.024(a); 16 TEX. ADMIN. CODE § 22.246(e).

[44] *See supra* note 43.

[45] *See* TEX. GOV'T CODE ANN. § 311.016(1)–(2) (West 2005). According to the Code Construction Act, which governs PURA's construction, "'may' creates discretion or grants permission or a power," whereas "'shall' imposes a duty." *Id.*; *see also* Mid-Century Ins. Co. v. Ademaj, 243 S.W.3d 618, 623 (Tex. 2007) (holding that "may" in a statute is discretionary).

[46] *See* TEX. UTIL. CODE ANN. § 15.024(a); 16 TEX. ADMIN. CODE § 22.246(e).

[47] 16 TEX. ADMIN. CODE § 25.8(b).

"Class A violations" are the most serious and are subject to a penalty of up to "$25,000 per violation per day."[48] They are violations that "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 to the health or safety of the public; or cause a risk to the reliability of a transmission or distribution system."[49]

"Class C violations" are the least serious and are subject to a penalty of up to "$1,000 per violation per day."[50] They are for (1) a failure to report or provide timely information required to be submitted to the Commission, (2) a failure by an electric utility, retail electric provider, or aggregator to investigate a customer complaint and appropriately and timely report the investigation's results, (3) a failure to timely update information relating to a registration or certificate issued by the Commission, and (4) a violation of the electric no-call list.[51]

"Class B violations" are all "violations not specifically enumerated as a Class C or Class A violation."[52] They are subject to a penalty of up to "$5,000 per violation per day."[53]

When the Executive Director issues a report to the Commission regarding a violation, the report must (1) recommend the penalty's imposition, (2) state the factual basis for its imposition, and (3) recommend the penalty's amount.[54] Once issued to the Commission, the Executive Director has fourteen days to give "written notice of the report to" the alleged violator.[55] The notice must be given by certified mail, return receipt requested[56] and must include:

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[48] *Id.* § 25.8(b)(3)(A).

[49] *Id.* § 25.8(b)(3)(B).

[50] *Id.* § 25.8(b)(1)(A).

[51] *Id.* § 25.8(b)(1)(B).

[52] *Id.* § 25.8(b)(2)(B).

[53] *Id.* § 25.8(b)(2)(A).

[54] TEX. UTIL. CODE ANN. § 15.024(a) (West 2007) (stating that "[i]f the executive director determines that a violation has occurred, the executive director may issue to the commission a report" recommending an administrative penalty's imposition); 16 TEX. ADMIN. CODE § 22.246(e) (stating that "[i]f, based on the investigation . . . the executive director determines that a violation or a continuing violation has occurred, the executive director may issue a report to the commission" recommending an administrative penalty's imposition).

[55] TEX. UTIL. CODE ANN. § 15.024(b); 16 TEX. ADMIN. CODE § 22.246(e)(2).

[56] *See* TEX. UTIL. CODE ANN. § 15.024(b) (stating that the Executive Director's notice "may be given by certified mail"); 16 TEX. ADMIN. CODE § 22.246(e)(2) ("Within 14 days after the

> (A) [A] brief summary of the alleged violation or continuing violation;
>
> (B) a statement of the amount of the recommended penalty;
>
> (C) 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 penalty, or both the occurrence of the violation or continuing violation and the amount of the penalty;
>
> (D) a copy of the report issued to the commission pursuant to this subsection; and
>
> (E) a copy of [PUC Procedural Rule 22.246, which sets for the procedures governing administrative penalties].[57]

report is issued, the executive director shall, by certified mail, return receipt requested, give written notice of the report to the [alleged violator] . . . .").

[57] 16 TEX. ADMIN. CODE § 22.246(e)(2)(A)–(E) (The notice must: (1) include a brief summary of the alleged violation; (2) state the amount of the recommended penalty; and (3) inform the person that the person has a right to a hearing on the occurrence of the violation, the amount of the penalty, or both the occurrence of the violation and the amount of the penalty). *See* TEX. UTIL. CODE ANN. § 15.024(b)(1)–(3). If the notice relates to a violation of PUC Substantive Rule 25.503, which relates to "Oversight of Wholesale Market Participants," the notice must also provide:

> (A) [A] statement either that—
>
> > (i) the commission staff has conducted the investigation allowed by [PUC Substantive Rule 25.503(l)]; or
> >
> > (ii) the market participant has failed to [cooperate with the investigation];
>
> (B) a summary of the evidence indicating to the commission staff that the market participant has violated one of the provisions of [PUC Substantive Rule 25.503];
>
> (C) a summary of any evidence indicating to the commission staff that the market participant benefited from the alleged violation or materially harmed the market; and
>
> (D) a statement that the staff has concluded that the market participant failed to demonstrate during the course of the investigation, the applicability of an exclusion or affirmative defense under [PUC Substantive Rule 25.503(h)].

See 16 TEX. ADMIN. CODE § 25.503(l)(4)(A)–(D).

An interesting question, not yet considered by an administrative law judge (ALJ), the Commission, or the courts, is what happens if the alleged violator does not receive the requisite notice or if it is defective? That is, is the notice requirement jurisdictional so that a failure to give proper notice deprives the Commission of jurisdiction over the alleged violation? Although Section 14.024(b)'s use of the word "must" means that the notice requirement is mandatory,[58] "just because a statutory requirement is mandatory does not mean that compliance with it is jurisdictional."[59] Typically, when a statute does not expressly state that a notice requirement is jurisdictional, Texas courts "look[] to two factors to determine if the Legislature intended [the] provision to be jurisdictional: (1) the presence or absence of specific consequences for noncompliance, and (2) the consequences that result from each possible interpretation."[60]

Nothing in Section 15.024(b) or any other PURA provision relating to administrative penalties expressly provides that the notice requirement is jurisdictional.[61] Nor does Section 15.024(b) or any other PURA provision set forth any specific consequences for noncompliance with the notice requirement.[62] Significantly, the consequences from interpreting the notice requirement as jurisdictional would be severe—it would absolve the alleged violator of liability for an administrative penalty for even the most serious violations of PURA or a Commission rule or order, which "cannot be the result the Legislature intended, especially where an interpretation which concludes that the provision is not jurisdictional would still protect [the alleged violator's] rights."[63]

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[58] City of Desoto v. White, 288 S.W.3d 389, 395 (Tex. 2009) (noting that Section 311.016(3) of "[t]he Code Construction Act explains that 'must' creates or recognizes a condition precedent") (internal quotation marks omitted); Helena Chem. Co. v. Wilkins, 47 S.W.3d 486, 493 (Tex. 2001) ("The term 'must' creates or recognizes a condition precedent. While Texas courts have not interpreted 'must' as often as 'shall,' both terms are generally recognized as mandatory, creating a duty or obligation.") (citation omitted).

[59] *City of Desoto*, 288 S.W.3d at 395 (quoting Albertson's, Inc. v. Sinclair, 984 S.W.2d 958, 961 (Tex. 1999)); *accord Helena Chem. Co.*, 47 S.W.3d at 494 ("Even if a statutory requirement is mandatory, this does not mean that compliance is necessarily jurisdictional.").

[60] *Helena Chem. Co.*, 47 S.W.3d at 495 (citations omitted); *see City of Desoto*, 288 S.W.3d at 395–96 (discussing factors).

[61] TEX. UTIL. CODE ANN. § 15.024.

[62] *Id.*

[63] *See City of Desoto*, 288 S.W.3d at 396–97. The administrative-penalty proceeding's abatement until the Executive Director provides proper notice adequately protects the alleged

Texas courts generally have held that notice provisions similar to Section 15.024(b) are not jurisdictional and further have held that the proper remedy for no, or a defective, notice is the proceeding's abatement until proper notice is given.[64] Accordingly, if the alleged violator does not receive proper notice, it should move for the ALJ to abate the proceeding until proper notice is received.[65] A failure to do so likely will result in a waiver of the alleged violator's right to notice under Section 15.024(b).[66]

B. The Alleged Violator's Response to the Notice

The alleged violator has five options once it receives the Executive Director's notice.

violator's rights and effects Section 15.024(b)'s purpose, which is to allow the alleged violator to make an informed decision regarding how to respond to the notice of violation. *See* TEX. UTIL. CODE ANN. § 15.024.

[64] *See, e.g.*, *City of Desoto*, 288 S.W.3d at 399 ("We nonetheless conclude that an abatement is the appropriate remedy because it cures the notice omission: it allows the City to notify White of his appellate rights without dismissing a case against a potentially unfit [police] officer, and it allows White an opportunity to make an appellate election with full knowledge of the consequences of choosing each path."); Univ. of Tex. Med. Branch v. Barrett, 159 S.W.3d 631, 632–33 (Tex. 2005) (holding that an employee's failure to wait the full sixty days, as required by Texas Government Code Section 554.006(d), before commencing suit under the Texas Whistleblower Act is not jurisdictional because the statute's purpose "is adequately protected by abating a prematurely filed action until the end of the 60-day period"); Hubenak v. San Jacinto Gas Transmission Co., 141 S.W.3d 172, 184 (Tex. 2004) (holding that abatement for a reasonable period of time, rather than dismissal, is the appropriate remedy until the parties meet the pre-suit requirement that they "are unable to agree" on the amount of damages in a condemnation proceeding); Hines v. Hash, 843 S.W.2d 464, 468–69 (Tex. 1992) (holding that abatement was the proper remedy for failure to give the pre-suit notice required by the DTPA); Schepps v. Presbyterian Hosp. of Dallas, 652 S.W.2d 934, 938 (Tex. 1983) (holding that abatement was the proper remedy for failure to give the requisite notice before filing a healthcare-liability action).

[65] *See City of Desoto*, 288 S.W.3d at 400–01.

[66] *See id.* (holding that a police offer waived his right to notice regarding his appellate rights when he failed to change his election after a hearing examiner gave him the right to do so); Univ. of Tex. Sw. Med. Ctr. at Dallas v. Loutzenhiser, 140 S.W.3d 351, 359 (Tex. 2004) ("The failure of a non-jurisdictional requirement mandated by statute may result in the loss of a claim, but that failure must be timely asserted and compliance can be waived."), *superseded by statute*, TEX. GOV'T CODE ANN. 311.034 (West 2005 & Supp. 2010); *Hines*, 843 S.W.2d at 469 (failure to request an abatement waived pre-suit notice under the DTPA).

1. The "Do-Nothing" Option

The alleged violator's first option is to do nothing.[67] If it fails to respond to the notice of violation, the Executive Director "shall set a hearing, provide notice of the hearing to [the alleged violator], and refer the case to SOAH [(the State Office of Administrative Hearings)] pursuant to § 22.207 of [the Commission's Procedural Rules]."[68] Any such hearing will ultimately determine whether the violation occurred and, if so, the penalty's amount.

2. The "Accept-the-Penalty" Option

The alleged violator's second option is to accept the penalty. Within thirty days after its receipt of the Executive Director's notice of violation, the alleged violator "may accept the determination and recommended penalty" through a written statement sent to the Executive Director.[69] Such acceptance requires the Commission to approve the Executive Director's determination regarding the violation's occurrence and the penalty amount by entering an order to that effect at an open meeting.[70]

Oddly, PUC Procedural Rule 22.246(f)(2) provides that if the alleged violator chooses this option, it also must "take all corrective action required by the Commission."[71] Nothing in PURA, however, allows the Executive Director in the notice of violation or the Commission in an administrative

[67] *See* TEX. UTIL. CODE ANN. § 15.024(f); 16 TEX. ADMIN. CODE § 22.246(h) (2010) (Tex. Pub. Util. Comm'n, Administrative Penalties).

[68] 16 TEX. ADMIN. CODE § 22.246(h); *accord* TEX. UTIL. CODE ANN. § 15.024(f) ("If the person . . . fails to timely respond to the notice, the executive director shall set a hearing and give notice of the hearing to the person.").

[69] *See* TEX. UTIL. CODE ANN. § 15.024(e) ("If the person accepts the executive director's determination and recommended penalty, the commission by order shall approve the determination and impose the recommended penalty."); 16 TEX. ADMIN. CODE § 22.246(f)(2) ("Within 30 days after the date the person receives the [executive director's] notice . . . the person may accept the determination and recommended penalty through a written statement sent to the executive director.").

[70] *See* TEX. UTIL. CODE ANN. § 15.024(e) ("If the person accepts the executive director's determination and recommended penalty, the commission by order shall approve the determination and impose the recommended penalty."); 16 TEX. ADMIN. CODE § 22.246(f)(2) ("The commission by written order shall approve the determination and impose the recommended penalty.").

[71] 16 TEX. ADMIN. CODE § 22.246(f)(2).

penalty proceeding to require corrective action.[72] Moreover, nothing in the procedural rule sets forth how the Commission determines what corrective action the violator must take, and if so, how the violator can object to it.[73] Consequently, it appears that, notwithstanding Procedural Rule 22.246(f)(2), neither the Executive Director nor the Commission has authority to require corrective action in connection with the imposition of an administrative penalty.[74]

3. The "Contest-the-Penalty" Option

The alleged violator's third option is to contest the violation's occurrence, the penalty's amount, or both.[75] "Not later than the 20th day after [its receipt of] the notice," the alleged violator can make a written request to the Executive Director requesting a hearing on the violation's occurrence, the penalty's amount, or both the violation's occurrence and the penalty's amount.[76] In such event, the Executive Director "shall set a hearing, provide notice of the hearing to the [alleged violator], and refer the case to SOAH pursuant to § 22.207 of [the Commission's Procedural Rules]."[77]

4. The "Remedy-the-Violation" Option

The alleged violator's fourth option is to "[w]ithin 40 days of the date of receipt of" the Executive Director's notice, "file with the Commission proof that the alleged violation . . . . was remedied before the 31st day after the date [it] received the report of violation and that the alleged violation was accidental or inadvertent."[78] The proof shall be "evidenced in writing,

[72] *See* TEX. UTIL. CODE ANN. § 15.024. Similarly, PURA Section 15.026, relating to judicial review of an administrative penalty, does not mention corrective action. *See id.* § 15.026. Rather, it refers only to a review of the violation's occurrence and the penalty's amount. *See id.* § 15.026(b).

[73] *See* 16 TEX. ADMIN. CODE § 22.246.

[74] *See supra* notes 71–73 and accompanying text.

[75] *See* 16 TEX. ADMIN. CODE § 22.246(f)(3).

[76] TEX. UTIL. CODE ANN. § 15.024(d); 16 TEX. ADMIN. CODE § 22.246(f)(3). If the notice requires corrective action, the alleged violator should also request a hearing regarding it and should promptly move to dismiss that portion of the notice as violative of PURA Section 15.024. *See supra* Part III.B.2.

[77] 16 TEX. ADMIN. CODE § 22.246(h).

[78] *Id.* § 22.246(f)(1)(B). This option is not available for market-power abuses. *See* TEX.

under oath, and supported by necessary documentation."[79] The violator has the burden of proving both the violation's timely remediation and its inadvertent or accidental nature.[80]

Nothing in PURA or the Commission's substantive or procedural rules, however, sets forth what types of violations can be remedied or defines the terms remedied, accidental, or inadvertent. Accordingly, the terms have their ordinary meanings.[81]

The procedure for determining whether the violation, in fact, was timely remedied and was accidental or inadvertent is set forth in PUC Procedural Rules 22.246(f)(1)(C)–(E) as follows:

> (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 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 shall make a determination as to what further proceedings are necessary.

UTIL. CODE ANN. § 39.157(a).

[79] 16 TEX. ADMIN. CODE § 22.246(f)(1)(B).

[80] *See* TEX. UTIL. CODE ANN. § 15.024(c) ("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."); 16 TEX. ADMIN. CODE § 22.246(f)(1)(B) (same).

[81] *See*, *e.g.*, Geters v. Eagle Ins. Co., 834 S.W.2d 49, 50 (Tex. 1992) ("In interpreting a statute, however, we give words their ordinary meaning."); Sexton v. Mt. Olivet Cemetery Ass'n, 720 S.W.2d 129, 138 (Tex. App.—Austin 1986, writ ref'd n.r.e.) (stating that a court "may not by implication enlarge the meaning of a[n undefined] word in the statute beyond its ordinary meaning").

"[A]ccidental" means "[n]ot having occurred as a result of anyone's purposeful act; esp[ecially] resulting from an event that could not have been prevented by human skill or reasonable foresight." BLACK'S LAW DICTIONARY 1705 (9th ed. 2009); *accord* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 11 (Anne H. Soukhanov et al. eds., 3d ed. 1992) (defining "accidental" as "[o]ccurring unexpectedly, unintentionally, or by chance"). "[I]nadvertent" is defined as "1. Not duly attentive. 2. Marked by unintentional lack of care." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra*, at 910; *see* BLACK'S LAW DICTIONARY, *supra*, at 827 (defining "inadvertence" as "[a]n accidental oversight; a result of carelessness"). "[R]emed[ied]" is defined as "[t]o set right; remove, rectify, or counteract." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra*, at 1526.

> (E) If the executive director determines that the alleged violation is a continuing violation, the executive director shall institute further proceedings, including referral of the matter for hearing pursuant to subsection (h) of this section[, which sets forth the hearing requirements for a contested administrative-penalty proceeding].[82]

Unfortunately, these Rules are not a model of clarity. For example, they do not specify how the Executive Director determines if the Rules' requirements are met or if the determination is reviewable by the Commission.[83] Presumably, the Executive Director, through Commission Staff, can either conduct an informal or formal investigation of the matter or refer it to SOAH for hearing on any or all of the issues.[84]

If the Executive Director, without a hearing, or the Commission, after a contested hearing, determines that the violation has been timely remedied and was accidental or inadvertent, no penalty can be assessed against the violator.[85] A determination by the Executive Director, without a hearing, that the violation was timely remedied and was inadvertent or accidental is not subject to review by the Commission.[86]

It is unclear, however, what happens if the Executive Director determines that the violation was not remedied timely, or was not accidental or inadvertent or if, and, if so, how, the alleged violator can contest the Executive Director's determination.[87] This lack of clarity stems from

[82] 16 TEX. ADMIN. CODE § 22.246(f)(1)(C)–(E).

[83] *See id.*

[84] *See id.* §§ 22.241 (providing for formal investigations), 22.246(h) (providing that the Executive Director can set such a hearing "if the executive director determines that further proceedings are necessary").

[85] *See id.* § 22.246(f)(1)(C), (h)(4)(B).

[86] *See id.* § 22.246(f)(1), (h). It is unclear whether the Executive Director and the Commission can later revisit the issue because Procedural Rule 22.246(b)(4) defines "continuing violation" as "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." *Id.* § 22.246(b)(4). Moreover, Procedural Rule 22.246 Subsections (d) and (e) respectively give the Executive Director power to investigate such a violation and recommend an administrative penalty's assessment for it. *See id.* § 22.246(d)–(e).

[87] *See id.* § 22.246(f)(1)(A)–(E).

Subdivisions (D) and (E), which are redundant and inconsistent.[88] Subdivision (D), by its express language, governs a situation in which the Executive Director determines that the violation either was not remedied or was not accidental or inadvertent.[89] Subdivision (E), by its express language, governs a situation in which the Executive Director determines that the violation is a "continuing violation,"[90] that is, a violation to which the alleged violator "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."[91] Although these situations appear to be the same, Subdivision (D) provides that "the executive director shall make a determination as to what further proceedings are necessary," whereas Subdivision (E) provides that the Director "shall institute further proceedings, including referral of the matter for hearing" before SOAH.[92] The confusion is compounded by the fact that PUC Procedural Rule 22.246(e) appears to require that a formal notice of violation be issued for a continuing violation.[93]

Nonetheless, as practical matter, if there is a dispute regarding whether the alleged violation was accidental and inadvertent or whether it was timely remedied, it is highly likely that the issue(s) will be referred to SOAH and revolved in a contested proceeding.[94]

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[88] *See id.* § 22.246(f)(1)(D)–(E).

[89] *See id.* § 22.246(f)(1)(D).

[90] *See id.* § 22.246(f)(1)(E).

[91] *Id.* § 22.246(b)(4).

[92] *Id.* § 22.246(f)(1)(D)–(E). Nothing in Procedural Rule 22.246(f) specifically governs the situation in which the Executive Director determines that the violation was not timely remedied. Presumably, such a situation also falls within Subdivisions (D) and (E). *See id.* § 22.246(f).

[93] *Id.* § 22.246(e).

[94] *See* Referral to SOAH at 2, *Notice of Violation by Cap Rock Energy of P.U.C. Subst. R. § 25.28(b) Relating to Bill Payments and Adjustments*, (Tex. Pub. Util. Comm'n Nov. 10, 2004) (No. 30215), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=30215&TXT_ITEM_NO=11 (request of referral to SOAH listing as issues whether the alleged violation was inadvertent or accidental and whether it was timely remedied); *see also* Tex. Pub. Util. Comm'n, *Notice of Violation by Cap Rock Energy of P.U.C. Subst. R. § 25.28(b) Relating to Bill Payments and Adjustments*, Docket No. 30215 and Tex. Pub. Util. Comm'n, *Notice of Violation by Cap Rock Energy of PURA § 36.004(a) Relating to Equality of Service and Rates and P.U.C. Subst. R. § 25.241(b) Relating to Form and Filing of Tariff*, Docket No. 30216, at 24–26 (Nov. 16, 2005), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=30216&TXT_ITEM_NO=108 (proposal for decision finding that the alleged violations were neither inadvertent or

5. The "Settlement-Conference" Option

The alleged violator's last option is to request a settlement conference.[95] PUC Procedural Rule 22.246(g) provides that either the Executive Director or the alleged violator may request a "settlement conference . . . to discuss the occurrence of the violation or continuing violation, the amount of the penalty, and the possibility of reaching a settlement prior to hearing."[96] As the only timing requirement is that the request be made before a SOAH hearing commences, there is no reason why the alleged violator cannot request one before the deadline to respond to the Executive Director's notice of violation expires.[97]

Any settlement discussions are governed by Texas Rule of Evidence 408, which provides, in pertinent part:

> Evidence of (1) furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statement made in compromise negotiations is likewise not admissible.[98]

Of course, if a settlement is not reached before the deadline for responding to the notice of violation, the respondent should comply with PUC Procedural Rule 22.246(f) or obtain an extension of time from the Executive Director to respond to the notice.[99]

If a settlement is reached, PUC Procedural Rule 22.246(g) governs.[100] It provides, in pertinent part:

> (1) If a settlement is reached:
>
> (A) the parties shall file a report with the executive

accidental nor timely remedied).

[95] 16 TEX. ADMIN. CODE § 22.246(g).

[96] *Id.*

[97] *See id.*

[98] TEX. R. EVID. 408.

[99] *See* 16 TEX. ADMIN. CODE § 22.246(f).

[100] *Id.* § 22.246(g).

> director setting forth the factual basis for the settlement;
>
> (B) the executive director shall issue a report of the 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 SOAH, the matter shall be returned to the commission. If the settlement is approved, the commission shall issue an order memorializing commission approval and setting forth commission orders associated with the settlement agreement.[101]

Thus, irrespective of when the settlement is reached, it must be approved by the Commission, which can reject or accept the settlement.[102]

C. The Hearing

If the alleged violator contests the violation and/or the recommended penalty's amount or fails to timely respond to the notice of violation or continuing violation, or if the Executive Director determines that further proceedings are necessary, the Executive Director "shall set a hearing, provide notice of the hearing to the person, and refer the case to SOAH pursuant to § 22.207 [of the Commission's Substantive Rules, relating to the referral of contested cases to SOAH]."[103] Commission Staff represents the Executive Director before SOAH and the Commission in a contested administrative-penalty proceeding.

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[101] *Id.* § 22.246(g)(1)–(2).

[102] *E.g.*, Tex. Pub. Util. Comm'n, *Agreed Notice of Violation and Settlement Agreement Relating to Suez Marketing NA, Inc.'s Violations of PURA § 39.159(j) and P.U.C. Subst. R. § 25.503(f)(2), Relating to Failure to Adhere to ERCOT Protocols § 6.5.4(2) Concerning Load Acting as Resource Service Requirements*, Docket No. 35650, at 3 (Oct. 29, 2008), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=35650&TXT_ITEM_NO=5 (order rejecting a settlement).

[103] 16 TEX. ADMIN. CODE § 22.246(h). The hearing is conducted by SOAH's utility division. TEX. UTIL. CODE ANN. § 14.053(a) (West 2007) ("The utility division of [SOAH] shall conduct each hearing in a contested case that is not conducted by one or more commissioners.").

1. Third Parties Cannot Intervene in an Administrative-Penalty Proceeding.

On occasion, third parties have attempted to intervene in administrative-penalty proceedings. Although no court has considered the question, the Commission has rejected such an attempt, reasoning as follows:

> Neither PURA nor Commission rules require that a notice of violation be provided to any party other than the alleged violator. Staff bears the burden of proving that a violation occurred, and the intervention by third parties can interfere with Staff's exercise of its prosecutorial responsibilities and discretion. While third parties may have an interest in the outcome of an enforcement proceeding, third parties may be entitled to seek relief, if necessary through other means, such as the complaint process. For these reasons, the Commission determines that it would be inappropriate for third parties to intervene in Commission enforcement proceedings.[104]

[104] Tex. Pub. Util. Comm'n, *Notice of Violation by Cap Rock Energy of P.U.C. Subst. R. § 25.28(b) Relating to Bill Payments and Adjustments*, Docket No. 30215 and Tex. Pub. Util. Comm'n, *Notice of Violation by Cap Rock Energy of PURA § 36.004(a) Relating to Equality of Service and Rates and P.U.C. Subst. R. § 25.241(b) Relating to Form and Filing of Tariff*, Docket No. 30216, at 2 (May 27, 2005), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=30215&TXT_ITEM_NO=47 (footnote omitted) (order granting appeal of prior order). The Commission's holding in Dockets 30215/30216 is controlling and binding in all administrative-penalty proceedings. *See, e.g.*, Office of Pub. Util. Counsel v. Pub. Util. Comm'n, 185 S.W.3d 555, 571 (Tex. App.—Austin 2006, pet. denied) (holding that an "agency should follow its own precedent or explain departure from it"); Tex. Pub. Util. Comm'n, *Application of LCRA Transmission Services Corp. to Amend its Certificate of Convenience and Necessity for a 138-KV Transmission Line in Kendall and Bexar Counties, Order on Rehearing*, Docket No. 29684, at 4 (Mar. 22, 2006), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=29684&TXT_ITEM_NO=497 ("[T]he Commission, balancing the factors in PURA and in the Commission rules and following recent Commission precedent, approves LCRA's route . . . ."). Accordingly, motions to intervene in administrative-penalty proceedings uniformly have been rejected since *Cap Rock*. *See, e.g.*, Tex. Pub. Util. Comm'n, *Notices of Violation by TXU Corporation, et al., of PURA § 39.157(a) and P.U.C. Subst. R. § 25.503(g)(7)*, Docket No. 34061, at 1 (July 3, 2007), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=34061&TXT_ITEM_NO=49 (order denying motions to intervene); Tex. Pub. Util. Comm'n, *Notices of Violation*

2. The Hearing and the Commission's Final Order.

Once referred to SOAH, the case proceeds in accordance with the five steps set forth in PUC Procedural Rule 22.246(h).[105] First, the Commission provides the ALJ with a list of issues or areas that must be addressed at the hearing to resolve the case.[106] Before doing so, the Commission typically requires the alleged violator, and permits Commission Staff, to identify any issues that should, or should not, be addressed in the proceeding, as well as any threshold legal or policy issues that need to be briefed and resolved to prepare the issues or areas for resolution.[107]

After those issues are set forth in a preliminary order, the ALJ will conduct the hearing pursuant to Chapter 22 of the Commission's procedural rules.[108] The first step of the hearing process is the scheduling conference where a schedule will be hammered out.[109] Thereafter, the parties will engage in pre-hearing discovery.[110]

Discovery consists of depositions, requests for information,[111] which include requests for inspection or production of documents and tangible things and interrogatories,[112] and requests for admissions.[113] Subpoenas can be issued to obtain the depositions and documents of non-parties.[114]

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by TXU Corporation, et al., of PURA § 39.157(a) and P.U.C. Subst. R. § 25.503(g)(7), Docket No. 34061, at 2 (May 17, 2007), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=34061&TXT_ITEM_NO=23 (order denying cities' motion to intervene).

[105] 16 TEX. ADMIN. CODE § 22.246(h).

[106] *See id.* § 22.246(h)(1).

[107] *See, e.g.*, Tex. Pub. Util. Comm'n, *Notices of Violation by TXU Corporation, et al., of PURA § 39.157(a) and P.U.C. Subst. R. § 25.503(g)(7)*, Docket No. 34061, at 1–2 (May 1, 2007), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=34061&TXT_ITEM_NO=10 (order of referral).

[108] *See* 16 TEX. ADMIN. CODE § 22.246(h)(2).

[109] *See, e.g.*, Tex. Pub. Util. Comm'n, *Notices of Violation by TXU Corporation, et al., of PURA § 39.157(a) and P.U.C. Subst. R. § 25.503(g)(7)*, Docket No. 34061, at 1–2 (May 9, 2007), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=34061&TXT_ITEM_NO=15 (order providing notice of prehearing conference).

[110] *See* 16 TEX. ADMIN. CODE § 22.141.

[111] *See id.* §§ 22.141(b), 22.143.

[112] *See id.* §§ 22.141(b), 22.144.

[113] *See id.* §§ 22.141(b), 22.144(a).

[114] *See id.* § 22.145(a). Unlike in a civil action in which the parties determine who to

An issue that may arise as discovery progresses is whether the Executive Director (or Commission Staff) can amend the notice of violation after it has been referred to SOAH for hearing. It appears that such amendments are proper, even if they add related or similar violations.[115] No such amendment, however, should be allowed if it will prejudice the respondent or if it alleges an unrelated violation.[116]

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subpoena without the trial court's involvement, in an administrative-penalty proceeding, as in any other contested administrative proceeding, a subpoena can be issued only by the ALJ upon a showing of good cause and a finding that the information sought may be necessary and proper for the proceeding's prosecution or defense. *See, e.g.*, TEX. GOV'T CODE ANN. § 2001.089 (West 2008); 16 TEX. ADMIN. CODE § 22.145(a). There is no reason why non-parties cannot be subpoenaed in an administrative-penalty proceeding. *See, e.g.*, Tex. Pub. Util. Comm'n, *Notices of Violation by TXU Corporation, et al., of PURA § 39.157(a) and P.U.C. Subst. R. § 25.503(g)(7)*, Docket No. 34061, at 1 (Nov. 6, 2007), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTC_NO=34061&TXT_ITEM_NO=157 (order denying appeal of prior order based on lack of standing). And, if subpoenaed, a non-party lacks standing to oppose the subpoena's issuance in the first instance. *See id.* After the subpoena's issuance, the non-party can either move to quash the subpoena under PUC Procedural Rule 22.145(d) or move for a protective order under PUC Procedural Rule 22.142(c). *See id.* ("The Commission denies all appeals of [an order issuing subpoenas on non-parties] because under [PUC P.R.] § 22.123, non-parties lack standing to appeal the order. Non-parties are, however, afforded the right to file a motion to quash and a motion for a protective order. Subsequent to a ruling by the [ALJ] on these motions, the non-parties can file appeals to the Commission.") (footnotes omitted).

[115] *See* Tex. Pub. Util. Comm'n, *Notices of Violation by TXU Corporation, et al., of PURA § 39.157(a) and P.U.C. Subst. R. § 25.503(g)(7)*, Docket No. 34061, at 1 (Aug. 27, 2007), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=34061&TXT_ITEM_NO=94 (order granting abatement of administrative-penalty proceeding so that a revised notice of violation could be issued to correct an error in the original notice of violation); Tex. Pub. Util. Comm'n, *Notice of Intent to Assess an Administrative Penalty by the Office of Customer Protection Against Axces, Inc. for Continued Violation of P.U.C. Subst. R. § 26.130, Selection of Telecommunications Utilities, Pursuant to Procedural Rule 22.246, Administrative Penalties*, Docket No. 20934, at 6–9 (May 22, 2001), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=20934&TXT_ITEM_NO=211 (discussing earlier amended notices of violation, including those adding additional violations); *see also* 16 TEX. ADMIN. CODE § 22.76(a)(2) (allowing amendments of complaints up to seven days before the hearing with leave of the ALJ).

[116] *See* Tex. Pub. Util. Comm'n, *Notice of Intent to Assess an Administrative Penalty by the Office of Customer Protection Against Axces, Inc. for Continued Violations of P.U.C. Subst. R. § 26.130, Selection of Telecommunications Utilities, Pursuant to Procedural Rule 22.246, Administrative Penalties*, Docket No. 20934, at 6–9 (May 22, 2001) (striking an amended notice of violation adding thirty additional violations because the respondent was prejudiced by the

The Commission's procedural rules provide for dispositive motions—dismissal motions,[117] and summary-decision motions.[118] They also provide for the certification of issues to the Commission,[119] which when properly used can resolve an administrative-penalty proceeding quickly and economically.[120] Finally, as discussed above, at any time before the hearing

amendment as it was filed shortly before the discovery close).

[117] *See* 16 TEX. ADMIN. CODE § 22.181(a)(1). Although the Texas Rules of Civil Procedure do not provide for dismissal motions, the Federal Rules of Civil Procedure do. *See* FED. R. CIV. P. 12(b). A dismissal motion under PUC Procedural Rule 22.181 is similar to a dismissal motion under Federal Rule of Civil Procedure 12(b), and Federal Rule 12(b)'s standards apply. *See* Tex. Pub. Util. Comm'n, *Notices of Violation by TXU Corporation, et al., of PURA § 39.157(a) and P.U.C. Subst. R. § 25.503(g)(7)*, Docket No. 34061, at 1–2 (Feb. 8, 2008), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=34061&TXT_ITEM_NO=196 (applying Federal Rule 12(b)(6)'s standard because "neither PURA nor the Commission's Procedural Rules specify the standard" for ruling on a dismissal motion) (footnote omitted). Unlike under federal procedure, however, an ALJ's order denying a dismissal motion, in whole or in part, can be appealed to the Commission. *See, e.g.*, 16 TEX. ADMIN. CODE § 22.123(a)(1) (allowing appeals from an ALJ's interim order if the order "immediately prejudices a substantial or material right of a party, or materially affects the course of the hearing, other than evidentiary rulings"); Tex. Pub. Util. Comm'n, *Inquiry of the Public Utility Commission of Tex. Concerning the Fixed Fuel Factor of Gulf States Utilities Company and Application of Gulf States Utilities Company for Authority to Change Rates*, Docket Nos. 6477, 6525, 6660, 6748, and 6842, 12 Tex. P.U.C. Bull. 899, 901 (Dec. 2, 1985) ("[D]enial of a motion to dismiss is handled by examiner's order, which a party can appeal to the Commission.").

[118] *See* 16 TEX. ADMIN. CODE § 22.182. A summary-decision motion is the equivalent of a summary judgment motion under Texas Rule of Civil Procedure 166a. *See* TEX. R. CIV. P. 166(a). However, unlike under Texas civil procedure, an ALJ's order denying summary decision, in whole or in part, is immediately appealable to the Commission. *See* 16 TEX. ADMIN. CODE § 22.182(e) ("An order granting or denying partial summary decision is appealable to the commission.").

[119] *See* 16 TEX. ADMIN. CODE § 22.127. Under PUC Procedural Rule 22.127, the following types of issues can be certified: (1) commission's interpretation of its rules and applicable statutes; (2) which rules or statutes are applicable to a proceeding; or (3) whether commission policy should be established or clarified as to a substantive or procedural issue of significance to the proceeding. *See id.* § 22.127(b). The certification procedure is similar to that under Section 51.014(d) of the Texas Civil Practice and Remedies Code and 28 U.S.C. § 1292(b). *Compare id.* § 22.127, *with* 28 U.S.C. § 1292(b) (2006), *and* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d) (West 2008).

[120] *See* Tex. Pub. Util. Comm'n, *Agreed Notice of Violation and Settlement Agreement Relating to Luminant Energy Company LLC's Violation of PURA § 39.151(j) and P.U.C. Subst. R. § 25.503(f)(2), Relating to Failure to Adhere to ERCOT Protocol § 6.10.5.4(1) Concerning Load Acting as Resource Service Requirements*, Docket No. 37634, at 2–3 (Nov. 13, 2009), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Resul

begins, either Commission Staff or the alleged violator may request a settlement conference.[121]

If the proceeding is not resolved on a dispositive motion or settled, a hearing will be held pursuant to PUC Procedural Rule 22.203.[122] Upon the hearing's completion, the ALJ:

> (3) [S]hall promptly issue to the commission a proposal of 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, or of a commission rule or commission order pursuant to those chapters; and
> >
> > (C) the amount of the proposed penalty.[123]

Based on the ALJ's proposal for decision, the Commission may determine that (1) "a violation or continuing violation has occurred and impose a penalty,"[124] (2) a violation has occurred but that the respondent has "remedied the violation within 30 days and proved that the violation

ts.asp?TXT_CNTR_NO=37634&TXT_ITEM_NO=2 (order certifying issue to the Commission). Docket 37634 illustrates the use of the certification procedure. *See id.* at 1–3. In that proceeding, there was no dispute regarding whether the respondent committed the alleged violation: a failure to timely deploy Load acting as Resource (LaaR). *See id.* at 1. Rather, the dispute related to how to calculate the maximum penalty for the violation. *See id.* at 2–3. Accordingly, Commission Staff and the respondent reached a high-low settlement and certified the penalty-calculation issue to the Commission. *See id.* at 1–2.

[121] *See* 16 TEX. ADMIN. CODE § 22.246(g).

[122] *See id.* § 22.203. As in other contested proceedings, direct and rebuttal testimony in an administrative-penalty proceeding is pre-filed, with the parties only cross-examining the witnesses. *See id.* § 22.225(a)(1). The Texas Rules of Evidence, as applied in nonjury civil cases, are applied at the hearing. *See id.* § 22.221(a).

[123] *Id.* § 22.246(h)(3); s*ee also id.* § 22.261(a) (relating to "[p]roposals for [d]ecision"). If the notice of violation sought corrective action by the respondent, the proposal for decision should also deal with the requested corrective action. *See* 16 TEX. ADMIN. CODE § 22.261(a).

[124] *Id.* § 22.246(h)(4)(A).

was accidental or inadvertent, and that no penalty will be imposed,"[125] or (3) "no violation or continuing violation has occurred."[126] The Commission's determination is set forth in its final order, which must be in writing and signed by a majority of the Commissioners.[127]

Once issued, notice of the final order must be provided by first class mail to the respondent's attorney of record (or to the respondent, if it is pro se) and include a statement that the respondent has a right to judicial review of the order.[128]

IV. THE PROPER PENALTY UNIT

PURA Section 15.023(b) governs the amount of any administrative penalty that may be included in a final order.[129] That section provides: "The penalty for a violation may be in an amount not to exceed $25,000. Each day a violation continues or occurs is a separate violation for purposes

[125] *Id.* § 22.246(h)(4)(B).

[126] *Id.* § 22.246(h)(4)(C). The Commission's review of the ALJ's final order is governed by PUC Procedural Rule 22.262, which permits oral argument and which provides, in pertinent part:

> (a) Commission Action. The commission may change a finding of fact or conclusion of law made by the [ALJ] or vacate or modify an order issued by the [ALJ] only if the commission:
>
> (1) determines that the [ALJ]:
>
> (A) did not properly apply or interpret applicable law, commission rules or policies, or prior administrative decisions; or
>
> (B) issued a finding of fact that is not supported by a preponderance of the evidence; or
>
> (2) determines that a commission policy or a prior administrative decision on which the [ALJ] relied is incorrect or should be changed.
>
> (b) Reasons to Be in Writing. The commission shall state in writing the specific reason and legal basis for its determination under subsection (a) of this section.
>
> (c) Remand. The commission may remand the proceeding for further consideration.

Id. § 22.262 (a)–(c).

[127] *See id.* § 22.263(a)(1).

[128] *See id.* §§ 22.246(h)(5), 22.263(b); *accord* TEX. GOV'T CODE ANN. § 2001.142(b) (West 2008).

[129] *See* TEX. UTIL. CODE ANN. § 15.023(b) (West 2007).

of imposing a penalty."[130] Two questions arise from this language. The first is whether the statute's "each day" language limits the total penalty a violator can be assessed for a day, regardless of the number of violations occurring on that day, to $25,000, or whether a violator can be charged $25,000 for each violation occurring on that day? The second is what is the proper penalty unit? That is, can a violation be measured by the megawatt or other unit involved in the alleged violation?[131]

A. The Daily Limit Applies to Each Violation

Neither the courts nor the Commission have considered whether the daily penalty limit applies to each individual violation or simply each calendar day on which any number of violations occur. Nonetheless, in the largest administrative-penalty proceeding in Texas history, Docket 34061, the ALJs rejected the respondents' argument that penalties were to be measured by the day, rather than by the violation:

> Under PURA § 15.023, each separate violation may be assessed a $5,000 penalty [now $25,000]. If a violation continues for more than one day, each day it continues is grounds for another penalty assessment. However, that does not mean that the only measure of penalty is by-the-day. Rather, each violation may be assessed a penalty, regardless of the number of violations that occur during a single day. Thus, if a regulated entity commits multiple violations in one day, each violation may be assessed a separate penalty. Committing several violations on the

[130] *Id.* As originally enacted, Section 15.023(b) provided for a maximum penalty of $5,000. Act of May 8, 1997, 75th Leg., R.S., ch. 166 § 1, 1997 Tex. Gen. Laws 713, 739 (amended 2005) (current version at TEX. UTIL. CODE ANN. § 15.23(b)). The maximum penalty was increased to $25,000 in 2005. Act of May 29, 2005, 79th Leg., R.S., ch, 797 § 7, 2005 Tex. Gen. Laws 2728, 2729 (current version at TEX. UTIL. CODE ANN. § 15.23(b)). The recent Sunset Advisory Commission Final Report recommends that the penalty amount be increased to $100,000 for violations of ERCOT's reliability protocols or the PUC's wholesale reliability rules. *See* Sunset Advisory Commission, *supra* note 3, at 17.

[131] The imposition of an administrative penalty does not preclude the Commission from imposing other statutorily-authorized penalties against the respondent. *See* TEX. UTIL. CODE ANN. § 15.032(a). Rather, PURA Section 15.032 expressly provides that administrative penalties are "cumulative of any other penalty." *Id.*

same day does not render the entity immune from multiple penalties.[132]

B. Penalties Are Not Counted by the Megawatt (or Other Unit of Measurement) Involved in the Wrongful Activity or Conduct, but Rather Are Imposed for Each Wrongful Act Constituting a Violation

Beginning with Docket 34061,[133] the Executive Director and Commission Staff have argued that, for purposes of administrative penalties, each megawatt involved in the allegedly wrongful action or activity can constitute a separate violation subject to a separate administrative penalty.[134] As a result, the Executive Director has sought

[132] *See* Tex. Pub. Util. Comm'n, *Notices of Violation by TXU Corporation, et al., of PURA § 39.157(a) and P.U.C. Subst. R. § 25.503(g)(7)*, Docket No. 34061, at 3–4 (July 22, 2008), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=34061&TXT_ITEM_NO=222 (order ruling on cross motions for summary decisions).

[133] Notice of Violation at 1–3, *Notice of Violation by TXU Corp., et al., of PURA § 39.157(a) and P.U.C. Subst. R. § 25.503(g)(7)* (Tex. Pub. Util. Comm'n Mar. 28, 2007) (No. 34061), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=34061&TXT_ITEM_NO=2; Revised Notice of Violation at 1–3, *Notice of Violation by TXU Corp., et al., of PURA § 39.157(a) and P.U.C. Subst. R. § 25.503(g)(7)* (Tex. Pub. Util. Comm'n Sept. 14, 2007) (No. 34061), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=34061&TXT_ITEM_NO=105.

[134] *See, e.g.*, Tex. Pub. Util. Comm'n, *Agreed Notice of Violation and Settlement Agreement Relating to Luminant Energy Company LLC's Violation of PURA § 39.151(j) and P.U.C. Subst. R. § 25.503(f)(2), Relating to Failure to Adhere to ERCOT Protocol § 6.10.5.4(1) Concerning Load Acting as Resource Service Requirements*, Docket No. 37634, at 3 (Feb. 25, 2010), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=37634&TXT_ITEM_NO=13 (order on certified issue); Tex. Pub. Util. Comm'n, *Agreed Notice of Violation and Settlement Agreement Relating to Eagle Energy Partners, LP's Violation of PURA § 39.151(j) and P.U.C. Subst. R. § 25.503, Relating to Failure to Adhere to ERCOT Protocol § 6.10.5.4 Concerning Load Acting as Resource Service Requirements*, Docket No. 37075, at 2–3 (July 8, 2009), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=37075&TXT_ITEM_NO=3 (order approving agreed notice of violation and settlement agreement); Tex. Pub. Util. Comm'n, *Agreed Notice of Violation and Settlement Agreement Relating to Tenaska Power Services Co.'s Violation of PURA § 39.151(j) and P.U.C. Subst. R. § 25.503(f)(2), Relating to Failure to Adhere to ERCOT Protocol § 6.5.4(2) Concerning Load Acting as Resource*

enormous administrative penalties from alleged violators of PURA and the Commission's rules. Docket 34061 is illustrative. In that proceeding, the respondents were accused of abusing their market power in the balancing-energy segment of the ERCOT market by economically withholding power.[135] Notwithstanding the fact that the alleged withholding took place

Service Requirements, Docket No. 36993, at 2–3 (June 19, 2009), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=36993&TXT_ITEM_NO=3 (same); Tex. Pub. Util. Comm'n, *Agreed Notice of Violation and Settlement Agreement Relating to Eagle Energy Partners, LP's Violation of PURA § 39.151(j) and P.U.C. Subst. R. § 25.503, Relating to Failure to Adhere to ERCOT Protocol § 6.10.5.4 Concerning Load Acting as Resource Service Requirements*, Docket 36607 at 2–3 (Feb. 27, 2009), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=36607&TXT_ITEM_NO=3 (same); Tex. Pub. Util. Comm'n, *Agreed Notice of Violation and Settlement Agreement Relating to Occidental Power Services, Inc.'s Violation of PURA § 39.151(j) and P.U.C. Subst. R. § 25.503, Relating to Failure to Adhere to ERCOT Protocol § 6.5.4(2) Concerning Load Acting as Resource Service Requirements*, Docket No. 36442, at 2–3 (Jan. 22, 2009), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=36442&TXT_ITEM_NO=5 (same); Tex. Pub. Util. Comm'n, *Agreed Notice of Violation and Settlement Agreement Relating to Suez Energy Marketing NA, Inc.'s Violations of PURA § 39.159(j) and P.U.C. Subst. R. § 25.503(f)(2), Relating to Failure to Adhere to ERCOT Protocols § 6.5.4(2) Concerning Load Acting as Resource Service Requirements*, Docket No. 35650, at 4 (Oct. 29, 2008), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=35650&TXT_ITEM_NO=5 (same); Tex. Pub. Util. Comm'n, *Agreed Notice of Violation and Settlement Agreement Relating to Tenaska Power Services Co.'s Violation of PURA § 39.151(j) and P.U.C. Subst. R. § 25.503(f)(2), Relating to Failure to Adhere to ERCOT Protocols §§ 6.5.4(2) and 6.10.5.4(2) Concerning Load Acting as Resource Scheduling Requirements*, Docket No. 34182, at 2–4 (May 31, 2007), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=34182&TXT_ITEM_NO=5; Tex. Pub. Util. Comm'n, *Agreed Notice of Violation and Settlement Agreement Relating to Reliant Energy Power Supply, LLC's Violation of PURA § 39.151(j) and P.U.C. Subst. R. § 25.503(f)(2), Relating to Failure to Adhere to ERCOT Protocols §§ 6.5.4(2), 6.10.5.4 and 6.5.1.1(4) Concerning Load Acting as Resource Service Requirements*, Docket No. 34210, at 2–5 (May 31, 2007), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=34210&TXT_ITEM_NO=3 (same).

[135] *See* Notice of Violation at 2, *Notice of Violation by TXU Corp., et al., of PURA § 39.157(a) and P.U.C. Subst. R. § 25.503(g)(7)* (Tex. Pub. Util. Comm'n Mar. 27 2007) (No. 34061) http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=34061&TXT_ITEM_NO=1 (containing investigation of the wholesale market activities of TXU from June 1 to September 30, 2005). One of the principal issues in Docket 34061 was what constituted the relevant product market. *See* Tex. Pub. Util. Comm'n, *Notices of Violation by TXU Energy Corporation, et al., of PURA § 39.157(a) and*

in only half of the intervals of a four-month period, the Executive Director, under a per-megawatt penalty unit, initially sought a $210 million dollar penalty, which was later reduced to $171 million.[136] Whether a per-megawatt penalty unit is proper involves a question of statutory construction. The purpose of statutory construction is to effectuate the Legislature's intent.[137] Legislative intent is determined primarily by looking to the plain and common meaning of the words used in the statute.[138] Moreover, in construing Section 15.023, the statute's objective and legislative history, as well as a particular construction's consequences, must also be considered.[139] As discussed below, when Section 15.023 is properly construed, it is clear a per-megawatt penalty unit is unsupportable.

P.U.C. Subst. R. § 25.503(g)(7), Docket No. 34061, at 5–6 (Feb. 8, 2009), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=34061&TXT_ITEM_NO=196 (order denying motion to dismiss). Commission Staff took the position that spot, or balancing-energy, electricity sales constitute a product market separate and distinct from electricity sales pursuant to bilateral contracts. *See* Commission Staff's Response to the Luminant Parties' Motion to Dismiss at 15–16, *Notice of Violation by TXU Energy Corp, et al., of PURA § 39.157(a) and P.U.C. Subst. R. § 25.503(g)* (Tex. Pub. Util. Comm'n Nov. 29, 2007) (No. 34061), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=34061&TXT_ITEM_NO=186. The respondents, on the other hand, contended that there was a single product market that includes both balancing-energy sales and bilateral contracts. *See* The Luminant Parties' Motion to Dismiss at 40–43, *Notice of Violation by TXU Corp., et al., of PURA § 39.157(a) and P.U.C. Subst. R. § 25.503(g)(7)* (Tex. Pub. Util. Comm'n Nov. 9, 2007) (No. 34061), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=34061&TXT_ITEM_NO=167. Because the proceeding settled, the issue was never resolved.

[136] *Compare* Notice of Violation at 2, *Notice of Violation by TXU Corp., et al., of PURA § 39.157(a) and P.U.C. Subst. R. § 25.503(g)(7)* (Tex. Pub. Util. Comm'n Mar. 28, 2007) (No. 34061), *with* Revised Notice of Violation at 2, *Notice of Violation by TXU Corp., et al., of PURA § 39.157(a) and P.U.C. Subst. R. § 25.503(g)(7)*, (Tex. Pub. Util. Comm'n Sept. 14, 2007) (No. 34061), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=34061&TXT_ITEM_NO=105.

[137] *See In re* Entergy Corp., 142 S.W.3d 316, 322 (Tex. 2004) ("In construing PURA or any other statute, our objective is to determine and give effect to the Legislature's intent."); Warner v. Glass, 135 S.W.3d 681, 683 (Tex. 2004) (holding the same).

[138] *Warner*, 135 S.W.3d at 683 (recognizing that in construing a statute courts "begin with the plain and common meaning of the statute's words"); Fitzgerald v. Advanced Spine Fixation Sys., Inc., 996 S.W.2d 864, 865 (Tex. 1999) (same).

[139] TEX. GOV'T CODE ANN. § 311.023(1), (3), (5) (West 2005) ("In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the: (1) object sought to be obtained; . . . (3) legislative history; . . . [and]

1. Nothing in Section 15.023's Language Supports a "Per-Megawatt" Penalty Unit

Applying Section 15.023 as written, it is clear that the proper penalty unit under Section 15.023 is not the megawatt (or other unit of measurement) involved in the wrongful action. Section 15.023(a) allows the Commission to impose an administrative penalty against a regulated person who violates PURA or a Commission rule or order.[140] Section 15.023(b), in turn, makes each such violation a separate violation for purposes of imposing a penalty of up to $25,000.[141] When read together, the unambiguous language of Section 15.023(a) and (b) makes clear that a violation for the purpose of imposing an administrative penalty under Section 15.023 is the respondent's breach of a PURA provision or a Commission rule or order, and not the megawatts or other units of measurement involved in the breach.

This conclusion is confirmed by several factors. Initially, it is confirmed by the Commission's definition of the word violation and by the word's standard definition.[142] The Commission's procedural rules regarding administrative penalties define violation not in terms of the megawatts (or any other unit of measurement) involved, but rather as "[a]ny activity or conduct prohibited by . . . (PURA), commission rule or commission order."[143] Just as important, those rules forbid the division of an individual action into multiple penalties.[144] In fact, the only multiplier permitted by Section 15.023 or the Commission's rules is the number of days the prohibited activity or conduct continues.[145]

(5) consequences of a particular construction . . . ."); Paccar Fin. Corp. v. Potter, 239 S.W.3d 879, 882 (Tex. App.—Dallas 2007, no pet.) (applying Section 311.023 of the Code Construction Act).

[140] *See* TEX. UTIL. CODE ANN. § 15.023(a) (West 2007) ("The commission may impose an administrative penalty against a person regulated under this title who violates this title or a rule or order adopted under this title.").

[141] *Id.* § 15.023(b) ("The penalty for a violation may be in an amount not to exceed $25,000. Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty.").

[142] *See* 16 TEX. ADMIN. CODE § 22.246(b)(3) (2010) (Tex. Pub. Util. Comm'n, Administrative Penalties).

[143] *Id.*

[144] *Id.* § 22.246(c)(2) ("The penalty for each separate violation may be in an amount not to exceed $25,000 per day . . . .").

[145] TEX. UTIL. CODE ANN. § 15.023(b) ("Each day a violation continues or occurs is a

Even if the Commission had not defined violation as activity or conduct in its rules, the word still would have to be so defined. It is well established in Texas that when a statute does not define a word, the word must be given its ordinary meaning.[146] The ordinary meaning of violation, like the Commission's definition, is prohibited activity or conduct; for example, Black's Law Dictionary defines violation as "1. An infraction or breach of the law; a transgression" and as "2. The act of breaking or dishonoring the law; the contravention of a right or duty."[147] The case law is in accord; for example, violation was defined in *City of New York v. Castro* as the "existence of the prohibited conduct set out in the Penal Law."[148]

Thus, it is the engagement in the activity or conduct prohibited—for example, the submission of a balancing-energy bid that constitutes economic withholding or the failure to timely deploy Load acting as Resource (LaaR)—and not the unit, such as megawatts, dollars, minutes, or kilowatts, involved in the activity or conduct, that constitutes the violation within Section 15.023(b)'s meaning.

2. A "Per-Megawatt" Penalty Unit Is Inconsistent with Section 15.023's Structure

A per-megawatt penalty unit is also inconsistent with Section 15.023's structure. For example, Section 15.023(b) permits a penalty only for each separate violation of PURA or a Commission rule or order.[149] Use of a per-megawatt penalty unit would allow the Commission to improperly divide a single violation of PURA or a Commission rule or order into tens,

separate violation for purposes of imposing a penalty."); 16 TEX. ADMIN. CODE § 22.246(c)(1) ("Each day a violation continues or occurs is a separate violation for which a penalty can be levied . . . .").

[146] Geters v. Eagle Ins. Co., 834 S.W.2d 49, 50 (Tex. 1992) ("In interpreting a statute, however, we give words their ordinary meaning."); Sexton v. Mount Olivet Cemetery Ass'n, 720 S.W.2d 129, 138 (Tex. App.—Austin 1986, writ ref'd n.r.e.) (A court "may not by implication enlarge the meaning of a[n undefined] word in the statute beyond its ordinary meaning").

[147] BLACK'S LAW DICTIONARY, *supra* note 81, at 1705.

[148] 559 N.Y.S.2d 508, 510 (N.Y. App. Div. 1990); *accord* Phoenix Indem. Co. v. Conwell, 47 A.2d 827, 828 (N.H. 1946) (defining "[v]iolation" as an infringement, transgression, or nonobservance of the law); Fairfield Sanitary Landfill, Inc. v. Fairfield Cnty. Dist. Bd. of Health, 589 N.E.2d 1334, 1342 (Ohio Ct. App. 1990) (defining "violation" as "essentially nonperformance of a duty").

[149] TEX. UTIL. CODE ANN. § 15.023(b) ("Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty.").

hundreds, or even thousands of violations for penalty purposes depending on the number of megawatts involved.[150]

[150] This is illustrated by Docket 37634, and the other administrative-penalty proceedings relating to untimely LaaR deployments. *See, e.g.*, Commission Staff's Initial Brief on Certified Issue at 35, *Notice of Violation and Settlement Agreement Relating to Luminant Energy Company LLC's Violation of PURA § 39.151(j) and P.U.C. Subst. R. § 25.503(f)(2), Relating to Failure to Adhere to ERCOT Protocol § 6.10.5.4(1) Concerning Load Acting as Resource Service Requirements* (Tex. Pub. Util. Comm'n Dec. 8, 2009) (No. 37634), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=37634&TXT_ITEM_NO=7. In these proceedings, the respondents failed to timely deploy their LaaR in response to a single ERCOT deployment instruction. *See id.* Notwithstanding this fact, the Executive Director justified penalties in excess of Section 15.203(b)'s $25,000 maximum penalty on the premise that each LaaR megawatt not timely deployed constituted a separate violation. *See, e.g.*, *id.*; *see also* Tex. Pub. Util. Comm'n, *Agreed Notice of Violation and Settlement Agreement Relating to Eagle Energy Partners, LP's Violation of PURA § 25.503, Relating to Failure to Adhere to ERCOT Protocol § 6.10.5.4 Concerning Load Acting as Resource Service Requirements*, Docket No. 37075, at 3–4 (July 8, 2009), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=37075&TXT_ITEM_NO=3 (alleged violator paid a $100,000 penalty for a single LaaR deployment violation); Tex. Pub. Util. Comm'n, *Agreed Notice of Violation and Settlement Agreement Relating to Tenaska Power Services Co.'s Violation of PURA § 39.151(j) and P.U.C. Subst. R. § 25.503(f)(2), Relating to Failure to Adhere to ERCOT Protocol § 6.5.4(2) Concerning Load Acting as Resource Service Requirements*, Docket No. 36993, at 3–4 (June 19, 2009), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=36993&TXT_ITEM_NO=3 (alleged violator paid a $325,000 penalty for a single LaaR deployment violation); Tex. Pub. Util. Comm'n, *Agreed Notice of Violation of PURA § 39.151(j) and P.U.C. Subst. R. § 25.503 Relating to Failure to Adhere to ERCOT Protocol § 6.10.5.4 Concerning Load Acting as Resource Service Requirements*, Docket No. 36607, at 3–4 (Feb. 27, 2009), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=36607&TXT_ITEM_NO=3 (alleged violator paid a $151,500 penalty for two separate LaaR deployment violations); Tex. Pub. Util. Comm'n, *Agreed Notice of Violation and Settlement Agreement Relating to Occidental Power Services, Inc.'s Violation of PURA § 39.151(j) and P.U.C. Subst. R. § 25.503, Relating to Failure to Adhere to ERCOT Protocol § 6.10.5.4 Concerning Load Acting as Resource Service Requirements*, Docket No. 36442, at 3 (Jan. 22, 2009), http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/36442_5_608363.PDF (alleged violator paid a $212,000 penalty for a single LaaR deployment violation); Tex. Pub. Util. Comm'n, *Agreed Notice of Violation and Settlement Agreement Relating to Suez Energy Marketing NA, Inc.'s Violations of PURA § 39.151(j) and P.U.C. Subst. R. § 25.503(f)(2), Relating to Failure to Adhere to ERCOT Protocols § 6.5.4(2) Concerning Load Acting as Resource Service Requirements*, Docket No. 35650, at 4 (Oct. 29, 2008), http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/35650_5_601093.PDF (alleged violator paid a $116,000 penalty for two separate LaaR deployment violations); Tex. Pub. Util. Comm'n, *Agreed Notice of Violation and Settlement Agreement Relating to Tenaska Power Services Co.'s Violation of PURA § 39.159(j) and P.U.C.*

Further, as discussed above, Section 15.023(c) requires both the creation of a classification system for violations and the setting of a range of penalties for each classification based on certain specified factors.[151] Accordingly, under Section 15.023(c), a penalty's amount for the violation of PURA or a Commission rule or order is determined by the violation's classification, with the Legislature clearly intending the range between the maximum and minimum penalties to differentiate one violation within a classification from another.[152] The per-megawatt penalty theory, however, improperly makes an administrative penalty's amount dependent on the megawatts involved in the violation rather than on the violation's classification and the range of penalties for that classification.[153]

Finally, Section 15.023(d) requires that $25,000 penalties be reserved for the highest classification of violations.[154] The per-megawatt penalty

Subst. R. § 25.503(f)(2), Relating to Failure to Adhere to ERCOT Protocols §§ 6.5.4(2) and § 6.10.5.4(2) Concerning Load Acting as Resource Scheduling Requirements, Docket No. 34182, at 3 (May 31, 2007), http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/34182_5_552290.PDF (alleged violator paid a $166,695 penalty for two separate LaaR deployment violations, one of which was before PURA Section 15.023's penalty was increased to $25,000); Tex. Pub. Util. Comm'n, *Agreed Notice of Violation and Settlement Agreement Relating to Reliant Energy Power Supply, LLC's Violation of PURA § 39.151(j) and P.U.C. Subst. R. § 25.503(f)(2), Relating to Failure to Adhere to ERCOT Protocols §§ 6.5.4(2), 6.10.5.4 and 6.5.1.1(4) Concerning Load Acting as Resource Service Requirements*, Docket No. 34210, at 4–5 (May 31, 2007), http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/34210_3_552363.PDF (alleged violator paid a $111,581 penalty for three separate LaaR deployment violations).

Similarly, in Docket 34061, the Executive Director justified the enormous proposed penalty by disregarding the fact that the economic withholding occurred each time the respondents submitted an allegedly improper balancing-energy bid and instead claiming that each megawatt economically withheld constituted a separate violation. *See* Revised Notice of Violation at 2–4, *Notices of Violation by TXU Corporation, et al., of PURA § 39.157(a) and P.U.C. Subst. R. § 25.503(g)(7)* (Tex. Pub. Util. Comm'n Sept. 14, 2007) (No. 34061), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=34061&TXT_ITEM_NO=105.

[151] See *supra* Part III.A.

[152] *See, e.g.*, Standard Oil Co. v. United States, 164 F. 376, 386 (7th Cir. 1908) (noting that "the wide range between maximum and minimum [penalties in a penal statute was] doubtless thought [by Congress] to be a sufficient range within which to differentiate the punishment adapted to one transaction, from the punishment adapted to another").

[153] *See supra* Part IV.B.1.

[154] TEX. UTIL. CODE ANN. § 15.023(d) ("[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

theory not only ignores the $25,000 maximum penalty amount, but also makes the largest penalties dependent not on the violation's classification, but on the megawatts involved in the violation.[155]

3. The Case Law Makes Clear that a "Per-Megawatt" Penalty Unit Is Unsupportable

Cases from Texas and other jurisdictions in which courts have refused to allow the government to transform a single action prohibited by the relevant penalty statute into multiple artificial violations to support an assessment of multiple penalties demonstrate the impropriety of a per-megawatt penalty unit. The case law makes clear that a single wrongful action can support multiple penalties only if the penalty provision's language expressly permits the assessment of multiple penalties for the units or items involved in the wrongful action.[156] This principle is illustrated by a comparison of federal cases precluding and allowing multiple penalties for a single action.

In *Baltimore & Ohio Southwestern Railroad v. United States*, for example, the issue was how many penalties could properly be assessed against a railroad that violated a prohibition against confining animals in railcars for longer than twenty-eight consecutive hours.[157] The statute provided that a penalty between $100 and $500 could be assessed "for every such failure."[158] According to the United States Supreme Court, the number of penalties could not be measured by the number of rail cars or shippers, but rather had to be measured by each separate load of animals that was placed on the train at the same time because nothing in the statute expressly assessed a penalty by the railcar or shipper.

> Several expressions in the statute, and particularly the provision that, in estimating the period of unlawful confinement, "the time consumed in loading and unloading shall not be considered," recognize that the proper loading or unloading of a number of animals may be treated as a

system.").

[155] *Id.* § 15.023(b) ("The penalty for a violation may be in an amount not to exceed $25,000.").

[156] *See infra* note 172.

[157] 220 U.S. 94, 95 (1910).

[158] *Id.*

> single act, and there is nothing to indicate that it is to be treated as more than one act because the animals happen to belong to different persons. . . .
>
> . . . .
>
> To illustrate: It appears in this record that several hundred animals belonging to one owner and consigned to one dealer were loaded into four cars at the same time. The twenty-eight hours of their lawful confinement necessarily expired at the same time. The simultaneous failure to unload these four cars was single, and punishable as a single offense. But the duty and offense in this transaction would not have been quadrupled if the company had issued to the owner four bills of lading instead of one. Nor would there have been any increase of duty if these same cattle had been received from four consignors instead of one.[159]

A similar result was reached by the former United States Circuit Court of Appeals for the Seventh Circuit in *Standard Oil Co. v. United States*.[160] At issue in that case was a federal statute penalizing a shipper that accepted concessions or rebates from a railroad to avoid the railroad's published tariffs.[161] The trial court imposed a $29,000,000 penalty against a shipper for 1,462 instances of unlawfully accepting concessions.[162] The penalty's amount was based on each car load for which a concession was accepted because, according to the trial court, each car load constituted a separate

[159] *Id.* at 104–06.

[160] 164 F. 376 (7th Cir. 1908).

[161] *Id.* at 377. The statute at issue in the case provided in pertinent part:

> [I]t shall be unlawful for any person . . . to offer, grant or give, or to solicit, accept or receive any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce, whereby any such property shall . . . be transported at a less rate than that named in the tariffs published and filed by such carrier . . . . Every person . . . who shall offer, grant, or give, or solicit, accept or receive, any such rebates, concession or discrimination, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars or more than twenty thousand.

Act of Feb. 19, 1903, ch. 708, § 1, 32 Stat. 847.

[162] *Standard Oil*, 164 F. at 387.

offense.[163] On appeal, the court reversed the penalty because nothing in the statute expressly provided that the penalty was to be assessed by the car load rather than by the transaction.

> The offense denounced in the statute, and charged in the indictment, is the accepting by [the shipper] of a concession in respect to the transportation of property in interstate commerce . . . . The gist of the offense is the acceptance of the concession, irrespective of whether the property involved was car loads, train loads, or pounds. . . .
>
> The offense of accepting a concession is the "transaction" that the given rebate consummates—not the units of mere measurement of the physical thing transported—but the "transaction" whereby the shipper, for the thing shipped, no matter how great or little its quantity, received a rate different from the established rate—the wide range between maximum and minimum punishment being doubtless thought to be a sufficient range within which to differentiate the punishment adapted to one transaction, from the punishment adapted to another.
>
> The number of offenses in the present case should have been ascertained in accordance with these principles. The measure adopted by the trial court was wholly arbitrary—had no basis in any intention or fixed rule discoverable in the statute.[164]

[163] *Id.* at 385.

[164] *Id.* at 385–86; *accord* McCowin v. Dumont, 54 F. Supp. 749, 751 (W.D. Mo. 1944) (holding that in an action for statutory treble damages for violation of a federal price-control statute, a tenant could not recover damages for each rental payment in excess of the ceiling because "[w]hen the commodity is the right to occupy a given habitation, the selling of the commodity would seem to be the agreement whereby the right to occupancy is given" since "[t]he fact that the consideration is to be paid in installments, or weekly or monthly, logically would not transform one selling into many sellings") (internal quotation marks omitted); United States v. Solomon, 3 F.R.D. 411, 413–14 (E.D. Ill. 1944) (rejecting the government's contention that, under a statute imposing a penalty for engaging in the business of handling perishable commodities without a license, "a separate penalty . . . can lawfully be imposed for each of the twenty-two car loads . . . handled by defendant" because "[t]he statute does not clearly so state" and "[t]he offense which is penalized . . . is carrying on the designated business without a license"); United States v.

In contrast, in *China Mail S.S. Co. v. United States* (or *The Nanking*),[165] the former United States Circuit Court of Appeals for the Ninth Circuit reached a different result from that in *Baltimore & Ohio Southwestern Railroad Co.*[166] and *Standard Oil Co.*[167] because the statute at issue expressly provided for the imposition of a penalty for each unit or item involved in the prohibited activity. *The Nanking* involved a federal statute imposing a $1,000 fine against a ship that allowed an "alien immigrant" to "land" illegally.[168] In holding that the trial court correctly imposed a fine against a ship for each of four aliens who were allowed to land illegally at the same time and place, the court distinguished *Baltimore & Ohio Southwestern Railroad* and *Standard Oil* because the immigration statute at issue in those cases, unlike in *The Nanking*, expressly provided for a fine for any alien allowed to land illegally.

> We cannot assent to the proposition that there was but a single violation of the statute. The appellant cites [*Baltimore & Ohio Southwestern Railroad* and *Standard Oil*], where but one penalty was imposed for a violation of law as to numerous shipments of cattle. But in those cases there was but one act of transportation of various shipments contrary to law, or but one violation of the time limit upon the confinement of live stock in a single transportation. Nor is the case similar to *United States v. New York* [*Central & Hudson River Railroad Co.*] and *United States v. International Silver Co.*, where the illegal act was the solicitation of alien immigration prohibited under the contract labor law. There, although numerous aliens were

Int'l Silver Co., 255 F. 694, 699 (D. Conn. 1919) (concluding that, in a prosecution for the violation of a statute prohibiting the solicitation of alien contract laborers, only one penalty could be imposed for the solicitation of two such laborers because they were solicited simultaneously by the same correspondence and the statute did not expressly provide a penalty for each laborer solicited).

[165] 290 F. 769 (9th Cir. 1923).

[166] 220 U.S. 94 (1910).

[167] 164 F. 376 (7th Cir. 1908).

[168] *The Nanking*, 290 F. at 771. The statute at issue in the case provided, in pertinent part: "Any such officer or agent, who shall either knowingly or negligently land or permit to land any alien immigrant at any place or time other than that designated by the inspection officers, shall be deemed guilty of a misdemeanor [punishable by a $1,000 fine]." *Id.* at 771–72.

> solicited, the act of solicitation was the act for which punishment was inflicted, and it was dealt with as a single offense.
>
> The present case is similar to *Grant Bros. v. United States* where penalties were imposed upon conviction of providing for transportation for, and assisting, encouraging, and soliciting the transportation into the United States of alien laborers in violation of the Alien Immigration Act of February 20, 1907. The court there gave effect to the words of the statute which provided that separate suits might "be brought for each alien thus promised labor or service." So in the present case the statute provides for a fine "in each case."[169]

The rule prohibiting the division of a single prohibited action into multiple violations for penalty purposes based on the units involved unless the statute expressly provides for multiple penalties is not unique to federal jurisprudence. Courts from Texas and other states uniformly follow it.[170]

For example, *Missouri, Kansas & Texas Railway Co. v. State* involved a statute allowing a county to recover a $100 weekly penalty from a railroad that failed to provide separate male and female water-closets at its train stations in the county.[171] In reversing a judgment penalizing the railroad $100 per week for each of two stations in Rains County at which separate male and female water-closets were not provided, the former Texas Court of Civil Appeals held that only one $100 penalty could be imposed for each week the stations lacked separate water-closets because the statute did not expressly provide a penalty for each station at which separate water-closets were not provided:

> The object of the act is to require railroad and railway corporations . . . to erect and maintain separate water-closets for male and female persons at its passenger stations. . . . The statute provides for the penalty for each week the railway corporation fails and neglects to comply

[169] *Id.* at 772–73 (citations omitted). *See also* discussion *supra* Part IV.A.

[170] *See infra* note 172.

[171] 97 S.W. 724, 725 (Tex. Civ. App.—Dallas 1906), *rev'd on other grounds*, 100 Tex. 420, 100 S.W. 766 (1907).

> with its provisions. It does not expressly provide that the penalty shall be imposed for a violation at each and every station, but for each week the corporation fails and neglects to comply with the law. To enforce the penalty for each week the corporation fails to comply with the act each and every station, we would have to say that such was clearly the intention of the Legislature. The statute does not so read, and we do not feel justified in so holding. The courts will duly enforce such penalties as are clearly within the statute. We are of the opinion that for the failure and neglect of the railway corporation to comply with the provisions of the act at the stations of Point and Emory in Rains County, such violations being concurrent in point of time, but one penalty per week for twelve weeks, or $1,200, was recoverable.[172]

[172] *Id.* at 724–25; *accord In re* Long, 984 S.W.2d 623, 625 (Tex. 1999) (holding that, "in assessing a penalty, a court cannot divide one contemptuous act into separate acts and assess punishment for each allegedly separate act"); Mo., Kan. & Tex. Ry. v. Forrest, 148 S.W. 1176, 1178 (Tex. Civ. App.—Dallas 1912, no writ) (rejecting landowner's argument that, under a statute permitting a landowner to recover a penalty from a railroad for allowing certain grass to go to seed on its right-of-way adjacent to the landowner's property, landowner could recover three penalties, rather than one, because landowner's property had been divided into three farms that were leased to different tenants); *see also* Peters v. Felber, 152 P.2d 42, 45 (Cal. App. Dep't. Super. Ct. 1948) (holding that, in an action for statutory treble damages for the violation of a federal price-control statute, a tenant could not recover damages for each rental payment in excess of the ceiling because "if cumulative recoveries are to be permitted, the Legislature should state its intention in so many words"); DCX, Inc. v. D.C. Taxicab Comm'n, 705 A.2d 1096, 1100 (D.C. 1998) (holding that a taxicab company that violated a statute by failing to give terminated drivers access to its insurance sinking fund could not be penalized for each day the drivers were denied access to the fund because nothing in the statute's express language allowed cumulative daily penalties); 3B TV Inc. v. Office of the Attorney Gen., 794 So. 2d 744, 750 (Fla. Dist. Ct. App. 2001) (rejecting state's argument that a defendant that transmitted a bingo game into Florida by satellite in violation of Florida law could penalized for each day of the illegal broadcasts because nothing in the statute expressly allowed for daily penalties); Winter v. Hardester, 98 So. 2d 629, 631 (Miss. 1957) (rejecting the state's argument that, under a statute prohibiting the sale of liquor without a license, a separate penalty could be imposed for each bottle sold by the defendant because "[t]he statute does not say that any person who violates the provisions thereof shall be subject to pay . . . the sum of five hundred dollars for each bottle" and "[t]he amount of the penalty which may be recovered . . . for a violation of the statute is fixed by the statute and is not to be determined according to the number of sales which the proof may show the defendant has made"); Am. Transit Ins. Co. v. Corcoran, 565 N.E.2d 485, 487 (N.Y. 1990) (reversing a penalty

Section 15.023, like the statutes in *Baltimore & Ohio Southwestern Railroad*, *Standard Oil*, and *Missouri, Kansas & Texas Railway*, and unlike the statute in *The Nanking*, does not expressly permit the imposition of a separate penalty for each megawatt (or other unit of measurement) involved in the underlying violation. Rather, as discussed above, Section 15.023 provides for one penalty for each separate violation of PURA or a Commission rule or order.[173] Accordingly, any attempt to divide one wrongful action or one breach of a PURA provision, a Commission rule or order, or an ERCOT Protocol into multiple violations through the fiction

leveled against an insurance company for each day the company was late in filing its annual report because the "[p]yramiding of penalties, i.e., treating continuing violations as separate daily transgressions, has been upheld only where cumulative penalties are expressly authorized by statute" since "[n]o such specificity or formulation is found in the provision applicable in this case"); People v. Spencer, 94 N.E. 614, 615–16 (N.Y. 1911) (noting, in connection with a statute providing for a penalty for both the manufacture and sale of imitation cider vinegar and the marking of any package containing imitation cider vinegar as cider vinegar, that "[i]n repeated decisions, this court has refused to recognize a right to recover [multiple penalties], unless clearly authorized [by the statute's language]" and holding that with respect to two lots of imitation cider vinegar that were sold as cider vinegar only two penalties could be imposed, irrespective of the number of barrels in the lot, because nothing in the statute penalized the seller by the barrel sold, but that a separate penalty could be imposed for each barrel in the two lots wrongfully labeled cider vinegar because the statute specifically imposed a penalty for any barrel so labeled); State Bd. of Pharmacy v. Bellinger, 138 A.D. 12, 13 (N.Y. App. Div. 1910) (examining a statute imposing a penalty for the sale of medicines without a license and holding that "one transaction of sale is not to be divided into its separate elements in order to multiply penalties" because there was "but one sale of several articles, and properly but one violation of the statute, and, therefore, but one penalty recoverable"); Meyer v. Ford Indus., Inc., 538 P.2d 353, 359 (Or. 1975) (concluding that a penalty for failing to allow a shareholder to inspect corporate books could not be based on the number of different types of documents for which inspection was demanded and denied); Kramer v. Haley, 439 P.2d 573, 574 (Or. 1968) (holding that, under a statute imposing a $100 penalty for hauling logs without a permit and providing that each day's continuance of a violation is a separate violation, the maximum penalty was $100 per day even though 106 loads were hauled); Porter v. Dawson Bridge Co., 27 A. 730, 731 (Pa. 1893) (rejecting the plaintiff's argument that, in a suit to recover penalties from a toll-bridge operator who collected excessive tolls on five occasions, a separate penalty was recoverable for each passenger in the plaintiff's vehicle because "[i]t is idle to say that because there were 579 passengers over the bridge for which the money was paid, therefore there were 579 offenses for which the penalty was incurred, because the penalty was only incurred by the collection of the money, and there were but five collections in all" and "[i]f there had been but one collection of the whole amount, there would have been but one offence").

[173] *See* discussion *supra* Part IV.B.

that each megawatt involved in the action or breach is a separate violation within Section 15.023(b)'s meaning is wrong.[174]

4. Section 15.023's Objective and Legislative History Confirm that Violations Are Not Counted by the Megawatt Involved

As pointed out above, a review of a statute's objective and legislative history always is relevant to its proper interpretation.[175] Section 15.023's objective and legislative history confirms the per-megawatt penalty unit is improper.

The House Research Organization (HRO) bill analysis for Senate Bill 373, which contains the administrative-penalty provision, stated that the bill "would allow the commission to impose an administrative penalty of up to $5,000 per day for violations."[176] Significantly, nothing in the analysis mentions, much less suggests, that administrative penalties are to be imposed by the megawatt (or any other unit) involved in the violation or that violations are to be measured by the megawatts (or other unit) involved in the wrongful action. [177]

Just as significant is the analysis' description of the arguments supporting the bill's passage:

> Currently, the PUC has several tools in place for sanctioning utilities that violate statutes, rules, and orders, but those enforcement powers are intended for major infractions and are seldom used because of their severity, expense and time-consuming nature. By allowing the PUC the ability to impose a small administrative penalty to enforce rules, it could ensure compliance with those rules sooner than if the PUC had to wait for the infraction to be severe enough to impose the sanctions currently available[,

[174] *See* discussion *supra* Part IV.B.

[175] *See* discussion *supra* Part IV.B.

[176] H. Research Organization, Bill Analysis, Tex. S.B. 373, 74th Leg., R.S., at 7 (1995). Courts have long recognized the value of bill analyses. *See, e.g.*, Warner v. Glass, 135 S.W.3d 681, 685 (Tex. 2004) (considering a bill analysis as legislative history in construing a statute); Dillehey v. State, 815 S.W.2d 623, 625 (Tex. Crim. App. 1991) ("We have long honored, as binding evidence of legislative intent, bill analyses . . . ."). As noted above, Section 15.023(b) was amended in 2005 to increase the maximum penalty to $25,000. *See supra* note 130.

[177] H. Research Organization, Bill Analysis, Tex. S.B. 373, 74th Leg., R.S., at 7.

> which included injunctive relief, civil penalties, and the suspension or revocation of the wrongdoer's certificate].[178]

Thus, it is clear that Section 15.023's objective was to allow for the imposition of small monetary penalties for minor violations of PURA or the Commission's rules or orders.[179]

The adoption of a per-megawatt penalty unit would defeat this clearly expressed legislative intent. For example, in Docket 34061, the maximum penalty that could have been imposed against the respondents under a per-megawatt penalty theory was $1.26 billion.[180] Of course, such a penalty is not, by any stretch of the imagination, the small administrative penalty intended by the Legislature and created by Section 15.023(b).[181]

The result of the per-megawatt penalty theory is that, contrary to the Legislature's clear intent, virtually no administrative penalty can be small in amount (or even less than the $25,000 maximum penalty provided by Section 15.023(b)) because $25,000 times any significant number of megawatts (or other unit of measurement) will always be a large amount.

5. The Consequences of Using a "Per-Megawatt" Penalty Unit Confirm that Violations Are Not Counted by the Megawatt

As pointed out above, a particular construction's consequences also are relevant in construing Section 15.023.[182] A review of the consequences of using a per-megawatt penalty unit confirms that violations are not counted by the megawatt (or any other unit) involved in the violation because carving up a single violation into its individual sub-units, such as the megawatts involved in the violation, subjects the same conduct to

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[178] *Id.*

[179] *See id.*

[180] *See* Luminant's Response to Staff's Appeal of Order No. 26 at 25 & n.15, *Notices of Violation by TXU Corporation, et al., of PURA § 39.157(a) and P.U.C. Subst. R. § 25.503(g)(7)* (Tex. Pub. Util. Comm'n Aug. 1, 2008) (No. 34061), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=34061&TXT_ITEM_NO=224.

[181] *See* State v. Haltom Med. Investors, L.L.C., 153 S.W.3d 664, 668 (Tex. App.—Fort Worth 2004, no pet.) ("[W]e are mindful that the Code Construction Act erects a presumption that a just and reasonable result was intended; and, the act authorizes us to consider the objective sought to be obtained . . . .") (footnote omitted).

[182] *See supra* note 139.

dramatically different penalties and further allows the imposition of penalties that are grossly disproportionate to the harm caused by the violation of PURA or the Commission rule or order.

The former consequence is illustrated by perhaps the most common violation for which administrative penalties have been sought: failures to timely deploy LaaR.[183] Assume, for example, two QSEs, one of which bids one LaaR megawatt and another of which bids 100 LaaR megawatts, fail to timely deploy their LaaR in the same interval. Even though both committed the same violation, under the per-megawatt penalty theory, the first QSE would face a maximum penalty of only $25,000 because it failed to deploy timely only one LaaR megawatt, whereas the second QSE would face a maximum penalty of $2.5 million because it failed to timely deploy 100 LaaR megawatts.[184] Thus, the penalty theory creates a tremendous disparity in potential liability for identical conduct.[185]

Docket 34061 illustrates the latter consequence, that is, penalties grossly disparate to the harm caused by the violation.[186] In that proceeding, the Executive Director claimed that the respondents' alleged economic withholding caused $57 million in damages and earned them $18.8 million of excess profits.[187] Nonetheless, as discussed above, under the per-megawatt penalty theory, the maximum penalty that could have been imposed against the respondents under Section 15.023(b)'s former $5,000 maximum penalty per violation was $1.26 billion (and would have been $6.3 billion under Section 15.023(b)'s current language).[188] Of course, such a penalty is grossly disproportionate to both the respondents' alleged excess profits and the alleged damages of other balancing-energy buyers. Clearly,

[183] *See supra* note 150 and accompanying text.

[184] *See supra* Part IV.B.

[185] *See supra* Part IV.B.

[186] *See* Revised Notice of Violation at 2, *Notices of Violation by TXU Corporation, et al., of PURA § 39.157(a) and P.U.C. Subst. R. § 25.503(g)(7)* (Tex. Pub. Util. Comm'n Sept. 14, 2007) (No. 34061), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=34061&TXT_ITEM_NO=105.

[187] *See id.*

[188] *See* Luminant's Response to Staff's Appeal of Order No. 26 at 25 & n.15, *Notices of Violation by TXU Corporation, et al., of PURA § 39.157(a) and P.U.C. Subst. R. § 25.503(g)(7)* (Tex. Pub. Util. Comm'n Aug. 1, 2008) (No. 34061), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=34061&TXT_ITEM_NO=224; *supra* Part IV.

the Legislature did not intend to allow the Commission to impose such an enormous and potentially ruinous penalty.[189]

6. The Strict-Construction Rule Confirms that Section 15.023's Proper Penalty Unit Is Not the Megawatt Involved in the Violation

Any doubt regarding the propriety of a per-megawatt penalty unit is erased by the strict-construction rule. Section 15.023 clearly is a penal statute because its caption so denominates it[190] and because its sole purpose is to allow the Commission to punish violations of PURA and the Commission's rules and orders with monetary penalties.[191]

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[189] H. Research Organization, Bill Analysis, Tex. S.B. 373, 74th Leg., R.S., at 7 (1995) (stating that Section 15.023 "allows the PUC the ability to impose a small administrative penalty"); *see also* United States v. Reedy, 304 F.3d 358, 365 n.6 (5th Cir. 2002) (noting that, in a criminal prosecution for transporting child pornography in interstate commerce by means of ten web sites, the government's position "that a new count, potentially carrying an additional prison term of 15 years, can be added every time any subscriber downloads an image" was so extreme that it "undermine[d] the [government's] reliability and credibility" because if "hypothetically, one website [had] 100 child pornographic pictures" and "each of 100 subscribers were to download each of the 100 pictures just once, the defendant could be charged with 10,000 counts, for a potential sentence of 150,000 years"); DCX, Inc. v. D.C. Taxicab Comm'n, 705 A.2d 1096, 1100 & n.8 (D.C. 1998) (rejecting government's position that cumulative daily penalties could be imposed under a statute penalizing a taxicab company for failing to give three terminated drivers' access to its insurance sinking fund in part because "[s]uch an interpretation would be contrary to the legislative intent of the statute," which was that the "legislation is not intended to be unduly punitive in its impact on the industry").

[190] TEX. UTIL. CODE ANN. § 15.023 (West 2007). Section 15.023's caption is "Administrative Penalty." *Id.* The statute's penal nature is confirmed by both the captions for Chapter 15 and Subchapter B of Chapter 15, in which Section 15.023 is found, which respectively are "Judicial Review, Enforcement, and Penalties" and "Enforcement, and Penalties." *See id.* ch. 15. A statute's caption or title is relevant in determining legislative intent and the statute's nature and purpose. *See, e.g.*, Aviles v. Aguirre, 292 S.W.3d 648, 649 (Tex. 2009) (relying on statute's captions in construing statute); AT&T Commc'ns of Tex., L.P. v. Sw. Bell Tel. Co., 186 S.W.3d 517, 534 (Tex. 2006) (same).

[191] *See* TEX. UTIL. CODE ANN. § 15.023. Texas courts traditionally have defined a penal statute as any "statute imposing a penalty." *See, e.g.*, City of Baird v. W. Tex. Utils. Co., 145 S.W.2d 965, 968 (Tex. Civ. App.—Eastland 1940, writ dism'd); *accord* Branaum v. Patrick, 643 S.W.2d 745, 748 (Tex. App.—San Antonio 1982, no writ) (noting that the word "penal" includes "a pecuniary penalty enforced by the State"); Kierstead v. City of San Antonio, 636 S.W.2d 522, 525 (Tex. App.—San Antonio 1982) (noting a civil service statute was penal because it "impose[d] penalties" for violations of its provisions), *rev'd on other grounds*, 643 S.W.2d 118

A long-standing statutory construction rule in Texas is that, if there is reasonable doubt about the scope of a statute providing for a monetary penalty,[192] the statute must be strictly construed in favor of the person against whom the penalty is sought and against the penalty's imposition.[193]

(Tex. 1982); Waters-Pierce Oil Co. v. State, 48 Tex. Civ. App. 162, 181, 106 S.W. 918, 926 (Austin 1907, writ denied) (noting a penal statute is one "enacted for the purpose of suppressing and preventing certain things regarded by the Legislature as detrimental to the public interest"); s*ee also* 3 NORMAN J. SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES & STATUTORY CONSTRUCTION § 59:1 (7th ed. 2008 & Supp. 2010) (defining a penal statute as one "connot[ing] some form of punishment imposed on the individual by the authority of the state," commenting that "[w]here the primary purpose of a statute is expressly enforceable by fine . . . the statute is always construed as penal," and noting that "[t]his penal character . . . may include 'penalties and forfeitures'"); 67 Tex. Jur. 2d *Statutes* § 14 (2003) ("A penal statute is one that imposes a fine or penalty for the neglect of some duty that is commanded or the commission of some wrong that is prohibited by law.").

[192] *See, e.g.*, Williams v. Adams, 74 S.W.3d 437, 440 (Tex. App.—Corpus Christi 2002, pet. denied) ("[S]trict construction of a statute is that which refuses to expand the law by implications or equitable considerations, but confines its operation to cases which are clearly within the letter of the statute as well as within its spirit or reason, resolving all reasonable doubts against applicability of [the] statute to a particular case.") (internal quotation marks omitted); Carbide Int'l v. State, 695 S.W.2d 653, 659 (Tex. App.—Austin 1985, no pet.).

[193] *See, e.g.*, City of Houston v. Jackson, 192 S.W.3d 764, 770–73 (Tex. 2006) (strictly construing Section 143.134(h) of the Local Government Code, which imposes a $1,000 daily penalty each day a local government intentionally fails to implement a civil service commission's decision); Flores v. Millennium Interests, Ltd., 185 S.W.3d 427, 433 (Tex. 2005) (strictly construing Section 5.077 of the Property Code, which allows a buyer of real property under a contract of deed to collect daily liquidated damages of $250 from a seller who fails to provide an annual accounting statement); Brown v. De La Cruz, 156 S.W.3d 560, 564–65 (Tex. 2004) (strictly construing former Section 5.102 of the Property Code, which imposed a daily penalty of up to $500 per day on a seller under a contract of deed who failed to record the deed within ninety days of final payment); First State Bank of Bedford v. Miller, 563 S.W.2d 572, 577 (Tex. 1978) (strictly construing penalty provisions of Texas' usury statute); Schwab v. Schlumberger Well Surveying Corp., 145 Tex. 379, 382, 198 S.W.2d 79, 81 (1946) (strictly construing former Article 7091 of the Revised Civil Statutes, which made an officer or director liable for the obligations of a corporation whose corporate privileges were forfeited for failure to pay its franchise tax); Agey v. Am. Liberty Pipe Line Co., 141 Tex. 379, 382, 172 S.W.2d 972, 974 (1943) (strictly construing former Article 6049a of the Revised Civil Statutes, which imposed a daily penalty of up to $1,000 against pipelines that discriminated against oil producers); *see also* SINGER & SINGER, *supra* note 191, § 59.1–3 (concluding that statutes imposing civil penalties are penal in nature and, therefore, entitled to strict construction); R.D. Hursh, Annotation, *Recovery of Cumulative Statutory Penalties*, 71 A.L.R.2D 986, 990 (1960) ("[P]enalty provisions are strictly construed in favor of the person whom it is sought to penalize, with the result that, in the absence of clear statutory language to the contrary, penalties are held noncumulative.") (footnote omitted); 41 Tex. Jur. 3d

Under the strict-construction rule, any doubt regarding the propriety of a per-megawatt penalty unit must be resolved against its application.[194]

7. Commission Staff's Rationales for Using a "Per-Megawatt" Penalty Unit Are Unavailing

In Dockets 34061 and 37634, the only administrative-penalty proceedings in which the respondents contested the per-megawatt penalty unit's propriety, Commission Staff justified the use of a per-megawatt penalty unit principally in two ways. First, it argued that limiting Section 15.023 to one penalty of up to $25,000 for each violation of PURA or a Commission rule or order, irrespective of the megawatts involved, was neither commensurate with the serious potential consequences from the alleged violation at issue[195] nor a sufficient deterrent to future violations.[196] Second, Commission Staff argued that the penalty unit was proper because the minimum balancing-energy or LaaR bid was one megawatt.[197] As discussed below, neither justification is correct.

Forfeitures and Penalties § 31 (2007) ("Penal statutes should be strictly construed.").

[194] *See supra* note 192–193.

[195] The economic withholding allegedly led to inflated balancing-energy prices, whereas in Docket 37634, an untimely LaaR deployment conceivably could result in a brownout or, even worse, a blackout. *Compare* Commission Staff's Appeal of Order No. 26 Denying Its Cross-Motion for Summary Decision on One Issue of Law at 13, 16, *Notices of Violation by TXU Corporation, et al., of PURA § 39.157(a) and P.U.C. Subst. R. § 25.503(g)(7)* (Tex. Pub. Util. Comm'n July 23, 2008) (No. 34061), http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/34061_223_590858.PDF, *with* Commission Staff's Initial Brief on Certified Issue at 7, *Agreed Notice of Violation and Settlement Agreement Relating to Luminant Energy Company LLC's Violation of PURA § 39.151(j) and P.U.C. Subst. R. § 25.503(f)(2), Relating to Failure to Adhere to ERCOT Protocol § 6.10.5.4(1) Concerning Load Acting as Resource Service Requirements* (Tex. Pub. Util. Comm'n Dec. 8, 2008) (No. 37634), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=37634&TXT_ITEM_NO=7.

[196] *See* Commission Staff's Initial Brief on Certified Issue at 12–13, *Agreed Notice of Violation and Settlement Agreement Relating to Luminant Energy Company LLC's Violation of PURA § 39.151(j) and P.U.C. Subst. R. § 25.503(f)(2), Relating to Failure to Adhere to ERCOT Protocol § 6.10.5.4(1) Concerning Load Acting as Resource Service Requirements* (Tex. Pub. Util. Comm'n Dec. 8, 2008) (No. 37634); Commission Staff's Appeal of Order No. 26 Denying Its Cross-Motion for Summary Decision on One Issue of Law at 13, *Notices of Violation by TXU Corporation, et al., of PURA § 39.157(a) and P.U.C. Subst. R. § 25.503(g)(7)* (Tex. Pub. Util. Comm'n July 23, 2008) (No. 34061).

[197] *See* Commission Staff's Initial Brief on Certified Issue at 14, *Agreed Notice of Violation*

a. The Adequacy of a $25,000 Penalty Is One for the Legislature, and Not for the Commission

The argument that a per-megawatt penalty unit is needed because a single $25,000 penalty neither is commensurate with the serious potential consequences from a particular violation nor sufficient to deter future violations is wrong for multiple reasons. Initially, whether Section 15.023's penalty provisions are severe enough is not an issue for the Commission in an administrative-penalty proceeding, but rather is one for the Legislature. In fact, as recently recognized by the Commission, the Executive Director only has authority to recommend penalties within Section 15.023's bounds: "PURA and its rules limit[] the Executive Director to recommending a penalty in compliance with the Commission's authority to assess penalties."[198]

The argument also ignores the wide variety of remedies, besides administrative penalties, available to the Commission for violations of PURA and the Commission's rules and orders: injunctions, the revocation, suspension, or amendment of the violator's certificate, administrative penalties, civil penalties, cease and desist orders, and even criminal

and Settlement Agreement Relating to Luminant Energy Company LLC's Violation of PURA § 39.151(j) and P.U.C. Subst. R. § 25.503(f)(2), Relating to Failure to Adhere to ERCOT Protocol § 6.10.5.4(1) Concerning Load Acting as Resource Service Requirements (Tex. Pub. Util. Comm'n Dec. 8, 2008) (No. 37634); Commission Staff's Appeal of Order No. 26 Denying Its Cross-Motion for Summary Decision on One Issue of Law at 17, *Notices of Violation by TXU Corporation, et al., of PURA § 39.157(a) and P.U.C. Subst. R. § 25.503(g)(7)* (Tex. Pub. Util. Comm'n July 25, 2008) (No. 34061), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=34061&TXT_ITEM_NO=223.

[198] Tex. Pub. Util. Comm'n., *Notice of Violation by International Power America, Inc, Hays Energy Limited Partnership, Midlothian Energy Limited Partnership, and ANP Funding I, LLC of PURA § 39.151(j) and P.U.C. Subst. R. § 25.503(f) and (g), Relating to Failure to Adhere to ERCOT Protocols §§ 5.8.1.1, 5.8.1.2, and 6.5.1.1(1)(e) Concerning Governor in Service Requirements and Frequency Bias Requirements, and of P.U.C. Subst. R. § 25.503(f)(10), Relating to Failure to Comply with Requests for Information by ERCOT Within the Time Specified by ERCOT Instructions*, Docket No. 34738, at 7 (Feb. 8, 2008), http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/34738_51_575426.PDF (preliminary order); *see also* Gibbs Constr. Co. v. La. Dept. of Labor, 540 So. 2d 268, 269 (La. 1989) (holding that a regulatory agency "cannot stray from the letter of the law on grounds that it is furthering the spirit"); Me. Land Use Reg. Comm'n v. White, 521 A.2d 710, 713 (Me. 1987) (whether a $500 daily fine for timber harvesting without a permit "provides adequate deterrence to accomplish the legislature's purpose is not for [the court] to say").

penalties.[199] In fact, Section 15.023's legislative history recognizes this fact and makes clear that those other remedies "are intended for major infractions" and small administrative penalties are intended for minor infractions.[200]

Finally and perhaps most importantly, the argument wholly ignores the adverse and chilling effect on ERCOT market participants from enormous (and grossly disproportionate to the harm) administrative penalties that result from a per-megawatt penalty unit. The mere possibility of such penalties is likely to cause some market participants to refrain from offering to sell various types of services into ERCOT auctions because the potential penalty from even the most technical and minor violation of PURA, a Commission rule or order, or an ERCOT Protocol relating to such services can result in a penalty that far exceeds the potential profit from offering to provide the services.

This situation is demonstrated by Dockets 34061 and 37634. As discussed above, in Docket 34061, even though the respondents' alleged profit from their economic withholding was $18.8 million and the alleged harm to purchasers of balancing-energy was $57 million, the potential penalty was more than a billion dollars.[201] In Docket 37634, even though the respondent's revenue (not profit) from the sale of its LaaR megawatts was a mere $9,500 and no injury resulted from the delayed LaaR deployment, the potential penalty was more than a million dollars.[202]

Not only are the potential penalties in both proceedings grossly disproportionate to both the potential profit from the alleged violations and the harm caused by them, but, rather than deterring future violations, they are likely to cause some market participants to refrain from offering to sell balancing-energy, LaaR services, and other ancillary services vital to ERCOT's efficient operation. The Commission's Chairman has recognized this possibility at least twice: first, in Project Numbers 30303, *Staff's*

[199] *See supra* note 3.

[200] *See* H. Research Organization, Bill Analysis, Tex. S.B. 373, 74th Leg., R.S., at 7 (1995).

[201] *See supra* note 180.

[202] Luminant Energy Company LLC's Reply to Commission Staff's Opening Brief on Certified Issue of Law at 18, *Agreed Notice of Violation and Settlement Agreement Relating to Luminant Energy Company LLC's Violation of PURA § 39.151(j) and P.U.C. Subst. R. § 25.503(f)(2), Relating to Failure to Adhere to ERCOT Protocol § 6.10.5.4(1) Concerning Load Acting as Resource Service Requirements* (Tex. Pub. Util. Comm'n Dec. 18, 2009) (No. 37634), http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/37634_8_635571.PDF.

Investigation into the Causes for the Energy Shortages in the ERCOT Balancing Energy Market, and 30513, *Staff's Investigation into the Wholesale Market Activities of TXU*, and again in Docket 34061. On both occasions, he acknowledged that the Commission's former $300 shame cap likely caused generators not to participate in the balancing-energy segment of the ERCOT market.[203]

b. The Fact the Pertinent ERCOT Protocols Allow Bids in One-Megawatt Increments Is Irrelevant

The mere fact that the relevant ERCOT Protocol permits a QSE to bid balancing-energy or LaaR in one-megawatt increments or otherwise refers to megawatts is irrelevant because separate bids are not submitted for each balancing-energy or LaaR megawatt and, more importantly, because ERCOT does not issue a separate deployment instruction for each balancing-energy or LaaR megawatt needed.[204]

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[203] Memorandum from Barry T. Smitherman, Chairman, Tex. Pub. Util. Comm'n, to Donna L. Nelson & Kenneth W. Anderson, Jr., Comm'rs, Tex. Pub. Util. Comm'n at 3–4 (Dec. 18, 2008), http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/34061_237_605870.PDF ("I don't know why other generators didn't offer power into the BES market during the study period (perhaps it was the fear of the $300 shame cap) . . . ."); Memorandum from Barry T. Smitherman, Chairman, Tex. Pub. Util. Comm'n, to Julie Parsley & Paul Hudson, Comm'rs, Tex. Pub. Util. Comm'n at 1 (May 11, 2005), http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/34061_237_605870.PDF (noting that there were "flaws in the ERCOT market design, such as the $300 disclosure threshold that may discourage many power producers from offering power at critical times").

[204] *See* Luminant Energy Company LLC's Opening Brief on Certified Issue of Law at 10, *Agreed Notice of Violation and Settlement Agreement Relating to Luminant Energy Company LLC's Violation of PURA § 39.151(j) and P.U.C. Subst. R. § 25.503(f)(2), Relating to Failure to Adhere to ERCOT Protocol § 6.10.5.4(1) Concerning Load Acting as Resource Service Requirements*, (Tex. Pub. Util. Comm'n Dec. 8, 2009) (No. 37634), http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/37634_6_634178.PDF. In Docket 37634, Commission Staff ignored the fact that under ERCOT Protocol 6.5.4(11), a QSE has the option to request its LaaR be deployed only as a complete block and that ERCOT must honor any such request and that a QSE's compliance with ERCOT Protocol 6.10.5.4 is not measured by the megawatt. *See id.*; ERCOT Protocol §§ 6.5.4(11), 6.10.5.4, http://www.ercot.com/mktrules/protocols/current (last visited Nov. 11, 2010). Rather, the protocol measures compliance on a bandwidth basis: "[a] QSE's LaaR portfolio response is expected to be not less than ninety-five percent (95%), nor more than (150%) of the RRS requested . . . within ten (10) minutes of ERCOT's deployment Dispatch Instruction and maintained until recalled or the QSE's service Obligation expires . . . ." ERCOT Protocol § 6.10.5.4.

Moreover, the mere fact that the relevant ERCOT Protocol permits balancing-energy or LaaR to be bid in one-megawatt increments or otherwise refers to megawatts does not change the fact that the prohibited act was the economic withholding of balancing-energy in Docket 34061 and the failure to timely deploy LaaR in Docket 37634, irrespective of the number of megawatts involved.

Further, neither Section 15.023 nor the relevant PURA provisions or substantive rules allegedly violated in Docket 34061 or Docket 37634 provide that the unit for computing a penalty is the megawatt,[205] and Commission Staff has never explained how a per-megawatt penalty unit is consistent with violations of PURA provisions, Commission rules and orders, or ERCOT Protocols that do not reference megawatts. In fact, there is no logical reason why a megawatt is an appropriate penalty unit as opposed to another measurement, such as the kilowatt, watt, minute, second, or dollars involved in the violation. And, under Commission Staff's reasoning, a violation could easily be found for each kilowatt or even watt involved in the alleged violation, resulting in wholly arbitrary penalties.

Finally, at least one court has rejected a similar argument. In *Maine Land Use Regulation Commission v. White*,[206] the Whites harvested timber without the required license on a number of different days.[207] In rejecting the Land Use Regulation Commissioner's argument that the Whites were liable for a penalty for each illegally harvested tree, the Maine Supreme Judicial Court reasoned:

> We find greater merit in [the Whites'] argument that the court erred in its assessment of the civil fine on the basis of $500 per tree cut. Section 685-B(1)(C) prohibits the commencement or operation of any development without a permit from [the Commission] . . . . [The Commission's regulation] specifies that timber harvesting is an activity for which a permit is required. Finally, section 685-C(8) provides that any violation is punishable by a fine of up to

[205] One PUC Substantive Rule, Rule 25.173(p), specifically penalizes by the megawatt hour. 16 TEX. ADMIN. CODE § 25.173(p) (2010) (Tex. Pub. Util. Comm'n, Goal for Renewable Energy).

[206] 521 A.2d 710 (Me. 1987).

[207] *Id.* at 712.

> but not more than $500 for each day of the violation. By engaging in timber harvesting without a permit, the Whites are exposed to a maximum fine of $500 for each day of timber harvesting.
>
> [The Commission] contends that, because cutting a single tree could cause a violation, each tree cut must constitute a separate violation that would authorize a separate fine. [The Commission's] view is not supported by the plain language of either the statutes or the regulations. Engaging in the activity of timber harvesting without a permit is the activity punishable by the day. Whether the penalty provides adequate deterrence to accomplish the legislative purpose is not for us to say.[208]

8. The Commission Rejects the "Per-Megawatt Penalty" Unit

As noted above, the propriety of the per-megawatt penalty theory has been presented to the Commission twice: first in Docket 30641 and later in Docket 37634.[209] In Docket 30641, the respondents and Commission Staff each cross-moved for summary decision on the proper penalty unit under Section 15.023(b), with Commission Staff contending it was each megawatt economically withheld and the respondents claiming, among other things, it was each balancing-energy bid in which balancing-energy was withheld.[210] The ALJs ruled in favor of the respondents, reasoning as follows:

> Because it is the *actions* of the market participant that give rise to the violation, those actions giving rise to the alleged violations in this case are the submission of bid curves, not the division of the bid curves into units of

[208] *Id.* at 712–13 (internal quotation marks omitted).

[209] *See supra* Part IV.B.7.

[210] *See* Tex. Pub. Util. Comm'n, *Notices of Violation by TXU Corporation, et al., of PURA § 39.157(a) and P.U.C. Subst. R. § 25.503(g)(7)*, Docket No. 34061, at 1 (Mar. 28, 2007), http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/34061_222_590410.PDF (order ruling on cross motions for summary decision). The respondents also argued that (1) under Section 15.023(b), violations were counted by the day so that the maximum penalty, irrespective of the number of illegal balancing-energy bids submitted in a day, was $5,000, and (2) Commission Staff's reliance on the antitrust concept of treble damages was improper. *Id.* at 2. The ALJs rejected both arguments. *Id.* at 5, 7.

> MW. . . . Staff's proposed penalty of $171 million, and Staff's allegation that $5,000 could be assessed for each MWh, resulting in a much larger penalty, are not properly calculated given that under the applicable statute and substantive rule, it is the act or practice of the market participant that is a violation, not the number of MW or MWh involved in each improper act.
>
> In this case, the act or practice constituting a violation is the alleged submission of bid curves above marginal cost. Although the bid curves are submitted in MW, it is inappropriate to count each MW/MWh to determine the maximum penalty.[211]

On appeal, the Commission declined to decide the issue.[212] Instead, it reversed the ALJs' decision and remanded the issue for hearing "[d]ue to the novel and fact intensive nature of the [notice of violation]."[213]

In Docket 37634, the Commission decided the issue. In that proceeding, Commission Staff and the respondent entered into a high-low settlement pursuant to which the respondent admitted the violation and the parties agreed that the penalty's amount would be dependent on the Commission's answer to the following certified question:

> (1) [W]hether an administrative penalty [may] be assessed

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[211] *See id.* at 5 (footnotes omitted).

[212] *See* Tex. Pub. Util. Comm'n, *Notices of Violation by TXU Corporation, et al., of PURA § 39.157(a) and P.U.C. Subst. R. § 25.503(g)(7)*, Docket No. 34061, at 3 (Aug. 15, 2008), http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/34061_226_593109.PDF (order on appeal of prior order).

[213] *Id.* The Commission could have decided the question because the appeal presented a pure legal issue as it involved (1) a penalty's proper calculation, *see, e.g.*, United States *ex rel.* Longhi v. Lithium Power Techs., Inc., 530 F. Supp.2d 888, 901 (S.D. Tex. 2008) (deciding, in the summary judgment context, the proper method of calculating the civil penalty portion of the damages award in a qui tam action under the federal False Claims Act); Tex. Health Care Info. Council v. Seton Health Plan, Inc., 94 S.W.3d 841, 854 (Tex. App.—Austin 2002, pet. denied) (affirming district court's summary judgment determining the minimum and maximum civil penalties authorized under the Texas Health and Safety Code for a health maintenance organization's failure to timely file an annual report), and (2) the construction of a statute, *e.g.*, Argonaut Ins. Co. v. Baker, 87 S.W.3d 526, 529 (Tex. 2002) (stating that "matters of statutory construction are questions of law" that are properly decided on summary judgment); *In re* Canales, 52 S.W.3d 698, 701 (Tex. 2001) (same).

> on a per MW basis where each MW not timely deployed pursuant to a LaaR obligation following an ERCOT deployment instruction is a separate violation, [as Staff maintains,] or
>
> (2) whether an administrative penalty may only be assessed on the single wrongful act or inaction of failing to timely dispatch a LaaR obligation following an ERCOT deployment instruction[, as the respondent maintains]?[214]

After extensive briefing by the parties and the submission of an amicus brief by the Texas Power Advocates and Tenaska Power Services Company, the Commission rejected Commission Staff's penalty theory:

> PURA § 15.023(b) makes no mention of penalties based on a per-MW calculation. Further, PUC Proc. R. § 22.246(b) does define "violation," not in terms of MWs, but in terms of any "activity or conduct prohibited." Finally, ERCOT Protocol § 6.10.5.4 describes the criteria for each LaaR event or instruction as requiring at least 95% of the responsive reserve service request within ten minutes of ERCOT's deployment dispatch instruction; Protocol § 6.10.5.4 does not define those requirements in terms of MWs.
>
> In this case, ERCOT directed Luminant to deploy its LaaR portfolio. Luminant failed to deploy its portfolio within the time specified by ERCOT Protocol § 6.10.5.4. It was Luminant's conduct—its failure to deploy its LaaR

[214] Tex. Pub. Util. Comm'n, *Agreed Notice of Violation and Settlement Agreement Relating to Luminant Energy Company LLC's Violation of PURA § 39.151(j) and P.U.C. Subst. R. § 25.503(f)(2), Relating to Failure to Adhere to ERCOT Protocol § 6.10.5.4(1) Concerning Load Acting as Resource Service Requirements*, Docket No. 37634, at 3 (Nov. 13, 2009), http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/filings/pgSearch_Results.asp?TXT_CNTR_NO=37634&TXT_ITEM_NO=2 (order certifying issue to the Commission). Under the settlement, if Commission Staff's per-megawatt penalty unit was held proper, the respondent agreed to pay a $115,000 penalty. *Id.* at 2. If, however, the Commission rejected that measurement unit and held that an untimely LaaR deployment constituted but one violation, irrespective of the number of megawatts involved, Commission Staff agreed to accept a $25,000 penalty, which was the maximum penalty imposable under Section 15.023(b) for a single violation. *Id.*

> portfolio—that did not meet the stated criteria of ERCOT Protocol § 6.10.5.4. Consequently, the Commission concludes that a single violation occurred.
>
> Notwithstanding the Commission's decision, the Commission acknowledges the critical importance of LaaR in ensuring the reliability of the ERCOT grid. The Commission is sympathetic to Staff's analysis of the proper penalty to be assessed to Luminant and the need to deter such behavior. . . . However, under these circumstances, the Commission is limited by the law in its decision. The Commission therefore assesses a fine of $25,000 to Luminant.[215]

In light of the Commission's *Order on Certified Issue* in Docket 37634, it is clear that a per-megawatt penalty unit, as well as any other penalty unit based on a measurement involved in the violation (e.g., kilowatts, hours, minutes, or dollars), is no longer viable unless the relevant PURA provision or substantive rule expressly penalizes by the megawatt or other measurement unit.[216] Rather, under Section 15.023(b), the violation is the act or conduct that violates the PURA provision, Commission rule or order, or ERCOT Protocol at issue and not the number of megawatts or other units of measurement involved in the violation.[217]

V. AN ADMINISTRATIVE PENALTY'S PAYMENT

The payment of administrative penalties is governed by PURA Section 15.025.[218] If an administrative penalty is imposed by the Commission, the respondent has two options regarding its payment, one of which must be elected "[n]ot later than the 30th day after the date the commission's order

[215] Tex. Pub. Util. Comm'n, *Notice of Violation and Settlement Agreement Relating to Luminant Energy Company LLC's Violation of PURA § 39.151(j) and P.U.C. Subst. R. § 25.503(f)(2), Relating to Failure to Adhere to ERCOT Protocol § 6.10.5.4(1) Concerning Load Acting as Resource Service Requirements*, Docket No. 37634, at 3 (Feb. 25, 2010), http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/37634_13_642919.PDF (footnotes omitted) (order on certified issue).

[216] *See id.*

[217] *See id.*

[218] TEX. UTIL. CODE ANN. § 15.025 (West 2007).

imposing [the] administrative penalty is final."[219]

First, the respondent can pay the penalty's amount and not seek judicial review of the final order imposing it.[220] This ends the proceeding.[221]

Second, the respondent can file a petition for judicial review contesting the violation's occurrence, the penalty's amount, or both the violation's occurrence and the penalty's amount.[222] In such a case, the respondent can pay the penalty subject to a refund if it is reversed or reduced on appeal.[223] If the respondent does not pay the penalty, the Commission immediately may refer the matter for collection to the Attorney General unless the respondent obtains a stay of the penalty's enforcement.[224]

There are three ways for a respondent to stay enforcement: (1) pay the penalty's amount to the court for placement in an escrow account, (2) provide a supersedeas bond for the penalty's amount that is effective until all judicial review of the Commission's order is final, or (3) file an affidavit with the Court stating that the respondent is financially unable to

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[219] *Id.* § 15.025(a). Under Section 2001.144 of the Government Code, a decision in a contested case is final under the following circumstances:

> (1) [I]f a motion for rehearing is not filed on time, on the expiration of the period for filing a motion for rehearing;
>
> (2) if a motion for rehearing is filed on time, on the date:
>
> (A) the order overruling the motion for rehearing is rendered; or
>
> (B) the motion is overruled by operation of law;
>
> (3) if the state agency finds that an imminent peril to the public health, safety, or welfare requires immediate effect of a decision or order, on the date the decision is rendered; or
>
> (4) on the date specified in the order for a case in which all parties agree to the specified date in writing or on the record, if the specified date is not before the date the order is singed or later than the 20th day after the date the order was rendered.

TEX. GOV'T CODE ANN. § 2001.144(a) (West 2008).

[220] *See* TEX. UTIL. CODE ANN. § 15.025(a)(1). Administrative-penalty payments are sent to the Texas Comptroller. *See id.* § 15.027(a).

[221] *See id.* § 15.025.

[222] *See id.* § 15.025(a)(2)–(3).

[223] *See id.* §§ 15.025(a)(2), 15.026(b)–(c).

[224] *See id.* § 15.025(a)(3), (b), (d).

pay the penalty or post a supersedeas bond.[225] The affidavit, which must be served on the Executive Director, can be "contested" by the Director "not later than the fifth day after [it] is received."[226]

As intimated above, if the respondent fails to pay the penalty and enforcement is not stayed, "the executive director may refer the matter to the attorney general for collection of the amount of the penalty."[227]

VI. JUDICIAL REVIEW OF ADMINISTRATIVE PENALTIES

To obtain judicial review of a Commission penalty order, the penalized person must file a petition for review in a Travis County district court.[228] The court reviews the order under the substantial evidence rule.[229]

A Commission penalty order is not supported by substantial evidence within the meaning of Subsection 2(e) above, if the evidence as a whole is such that reasonable minds could not have reached the same conclusion.[230] In making its determination, the court can only consider the record on which the Commission's decision was based.[231] The key is whether the

[225] *See id.* § 15.025(b).

[226] *See id.* § 15.025(c). "The court shall hold a hearing on the facts alleged in the affidavit as soon as practicable and shall stay the enforcement of the penalty on finding that the alleged facts are true." *Id.* The respondent has the burden of proving that it is financially unable to pay the penalty or post the supersedeas bond. *See id.*

[227] *See id.* § 15.025(d). If the Commission improperly orders corrective action, the respondent should appeal from the portion of the final order requiring such action. *See id.* § 15.024(d). The district court hearing the appeal can stay the order's operation with respect to the corrective action pending the appeal's resolution. *See id.* § 15.004 ("While an appeal of an order, ruling, or decision of a regulatory authority is pending the district court, court of appeals, or supreme court, as appropriate, may stay or suspend all or part of the operation of the order, ruling, or decision.").

[228] *See id.* § 15.026(a); TEX. GOV'T CODE ANN. § 2001.176(b)(1) (West 2008). Section 2001.171 of the Texas Government Code permits an appeal in a contested case hearing before an administrative agency. *See* TEX. GOV'T CODE ANN. § 2001.171.

[229] *See* TEX. UTIL. CODE ANN. § 15.026(a). The substantial evidence rule is set forth in Section 2001.174 of the Texas Government Code. *See* TEX. GOV'T CODE ANN. § 2001.174.

[230] *See, e.g.*, Tex. Health Facilities Comm'n v. Charter Medical-Dall., Inc., 665 S.W.2d 446, 452–53 (Tex. 1984); Wu v. City of San Antonio, 216 S.W.3d 1, 5 (Tex. App.—San Antonio 2006, pet. denied).

[231] *See* Garza v. Tex. Alcoholic Beverage Comm'n, 138 S.W.3d 609, 613 (Tex. App.—Houston [14th Dist.] 2004, no pet.); Hammack v. Pub. Util. Comm'n, 131 S.W.3d 713, 725 (Tex. App.—Austin 2004, pet denied); Park Haven, Inc. v. Tex. Human Servs., 80 S.W.3d 211, 213 (Tex. App.—Austin 2002, no pet.).

Commission's fact findings are reasonable in light of the evidence.[232] Whether the Commission's penalty order is supported by substantial evidence is a question of law.[233]

Substantial evidence is not much evidence.[234] It is more than a mere scintilla of evidence,[235] but less than that required to sustain a jury verdict under the great weight and preponderance standard.[236] The burden of proof is on the penalized party to establish that the Commission's penalty order is not supported by substantial evidence.[237]

As with the appeal of any other administrative order in a contested case, the penalized person must move for rehearing as a prerequisite to appeal.[238] Failure to do so divests the district court of jurisdiction[239] because it constitutes a failure to exhaust administrative remedies.[240]

The rehearing motion must be filed within twenty days after the party or its attorney is notified of the final decision or order, unless the time for filing is extended by the Commission.[241] If the Commission modifies its original order on rehearing, the penalized party should file a new motion for rehearing.[242] The Commission cannot waive the requirement of a rehearing

[232] *See Hammack*, 131 S.W.3d at 725.

[233] *E.g.*, Tex. Dept. of Pub. Safety v. Alford, 209 S.W.3d 101, 103 (Tex. 2006).

[234] *See Garza*, 138 S.W.3d at 613 ("Substantial evidence is not proof beyond a reasonable doubt or even a preponderance of the evidence . . . . [A] reviewing court may uphold the decision provided there is *any* valid basis for it in the record.").

[235] *See Tex. Health Facilities Comm'n*, 665 S.W.2d at 452.

[236] *See Park Haven*, 80 S.W.3d at 213. The evidence may actually preponderate against the PUC's decision, but still amount to substantial evidence. *Garza*, 138 S.W.3d at 613.

[237] *Tex. Health Facilities Comm'n*, 665 S.W.2d at 453.

[238] *See* TEX. GOV'T CODE ANN. § 2001.145(a) (West 2008); Tex. Water Comm'n v. Dellana, 849 S.W.2d 808, 810 (Tex. 1993).

[239] *See* Lindsay v. Sterling, 690 S.W.2d 560, 563 (Tex. 1985) (stating that the rehearing motion's purpose is to ensure that the aggrieved party has exhausted all administrative remedies before seeking judicial review of the agency's decision). A motion for rehearing, however, need not be filed before seeking judicial review if (1) the Commission's order expressly "finds that an imminent peril to the public, health, safety, or welfare requires immediate effect of a decision or order, on the decision is rendered," TEX. GOV'T CODE ANN. § 2001.144(a)(3), or (2) the Commission is asserting jurisdiction over persons, activities, or things outside its statutory authority, *see* Tex. State Bd. of Exam'rs in Optometry v. Carp, 162 Tex. 1, 7–8, 343 S.W.2d 242, 246–47 (1961).

[240] *See* Morgan v. Emps. Ret. Sys., 872 S.W.2d 819, 821 (Tex. App.—Austin 1994, no writ).

[241] *See* TEX. GOV'T CODE ANN. § 2001.146(a).

[242] *See* Ector Cnty. Comm'rs. v. Cent. Educ. Agency, 786 S.W.2d 449, 450 (Tex. App.—

motion.[243] Although the contents of a rehearing motion are not jurisdictional, they do determine whether error has been preserved for judicial review.[244]

The district court's decision can be appealed to the Austin Court of Appeals and then to the Texas Supreme Court by the losing party.[245]

On appeal, the district court, if it sustains the violation's occurrence, "may uphold or reduce the amount of the penalty and order the person to pay the full or reduced amount of the penalty."[246] If, however, the court does not sustain the violation's occurrence, it "shall order that no penalty is owed."[247] Moreover, if the penalty was paid pursuant to PURA Section 15.025(a)(2) and the penalty is either reduced or not upheld on appeal, "the court shall order that the appropriate amount plus accrued interest be remitted to the person."[248] Conversely, if a supersedeas bond was posted pursuant to PURA Section 15.025(b), the court "shall order the release of the bond" if (1) the violation's occurrence is not sustained on appeal,[249] or (2) after the penalty is paid if the penalty's amount is reduced on appeal.[250]

Austin 1990, writ denied); Kristin Hay O'Neal & Andrew Weber, Comment, *Procedural Problems Under the Texas Administrative Procedure Act When Seeking Judicial Review of Contested Case Decisions or Orders*, 48 BAYLOR L. REV. 883, 894–95 (1996) ("Generally speaking, a basic precautionary rule-of-thumb should be remembered: Regardless of whether the agency grants or denies the original motion for rehearing, if the original order is changed in any way, a second motion for rehearing should be filed.").

[243] *See* Testoni v. Blue Cross & Blue Shield of Tex., Inc., 861 S.W.2d 387, 391 (Tex. App.—Austin 1992, no writ), *overruled by* Montgomery v. Blue Cross & Blue Shield of Tex., Inc., 923 S.W.2d 147 (Tex. App.—Austin 1996, writ denied).

[244] *See* Hill v. Bd. of Trs. of the Ret. Sys. of Tex., 40 S.W.3d 676, 679 (Tex. App—Austin 2001, no pet.); Wilmer-Hutchins Indep. Sch. Dist. v. Brown, 912 S.W.2d 848, 852–53 (Tex. App.—Austin 1995, writ denied).

[245] *See* TEX. GOV'T CODE ANN. § 2001.901(a); R.R. Comm'n of Tex. v. Home Transp. Co., 654 S.W.2d 432, 434 (Tex. 1983).

[246] TEX. UTIL. CODE ANN. § 15.026(b) (West 2007). If corrective action is improperly ordered by the Commission, the district court should reverse that portion of the order. *See supra* Part III.B.3.

[247] TEX. UTIL. CODE ANN. § 15.026(b).

[248] *Id.* § 15.026(c). The interest rate is "the rate charged on loans to depository institutions by the New York Federal Reserve Bank, and the interest shall be paid for the period beginning on the date the penalty was paid and ending on the date the penalty is remitted." *Id.*

[249] *See id.*

[250] *See id.*

VII. CONCLUSION

Since the adoption of full competition in the ERCOT market in 2002, administrative penalties have been the Commission's sanction of choice for violations of PURA and its rules and orders. Market participants have been reluctant to challenge the Commission's penalty unit and traditionally have settled administrative-penalty proceedings even though the penalty sought greatly exceeds the penalty amount properly imposable under PURA Section 15.023(b).[251]

In light of the Commission's decision in Docket 37634, it remains to be seen whether the Commission will continue to favor the administrative penalty, particularly if the Legislature rejects the Sunset Advisory Commission's recommendation that the penalty amount be increased from $25,000 to $100,000 for violations of ERCOT's reliability protocols or the PUC's wholesale reliability rules.[252]

[251] *See supra* proceedings cited in note 142.

[252] *See supra* note 130.