

**PROPOSED NEW 16 TAC § 3.65 AND § RAILROAD COMMISSION  
PROPOSED AMENDMENTS TO § 3.107 §  
TO IMPLEMENT HB 3648 AND SB 3 § OF TEXAS**

**OFFICE OF PUBLIC UTILITY COUNSEL’S INITIAL COMMENTS  
ON THE TEXAS RAILROAD COMMISSION’S PROPOSED NEW 16 TAC § 3.65 AND  
PROPOSED AMENDMENTS TO § 3.107**

The Office of Public Utility Counsel (“OPUC”) respectfully submits these comments on the Proposal for Publication approved by the Railroad Commission of Texas (“Commission” or “RRC”) on September 14, 2021. The Commission proposes new 16 Texas Administrative Code (“TAC”) § 3.65, relating to Critical Designation of Natural Gas Infrastructure, and amendments to §3.107, relating to Penalty Guidelines for Oil and Gas Violations, to implement Texas Natural Resources Code, Chapter 81, § 81.073.

Specifically, new § 3.65 designates certain natural gas facilities and entities associated with providing natural gas as critical gas suppliers during an energy emergency.<sup>1</sup> Those designated as critical natural gas facilities must provide critical customer information under proposed § 3.65(e), as defined by the Commission, to certain entities described by § 38.074(b)(1) of the Texas Utilities Code.<sup>2</sup> Natural gas facilities and entities designated as critical by new § 3.65 must also acknowledge their critical designation status by filing Form CI-D with the Commission.<sup>3</sup> Notably, § 3.65(d) also includes a critical designation exception for any entity whose operator asserts the facility is not prepared to operate during a weather emergency.<sup>4</sup> There are no standards in proposed new § 3.65 as to what qualifies a facility as inoperable during a weather emergency, only an assertion from the operator that the facility cannot operate during a weather emergency by filing Form CI-X bi-annually along with a \$150 application exception fee.<sup>5</sup> An operator that fails to comply with the proposed filing requirements will be subject to a minimum penalty of \$1000.<sup>6</sup> An

---

<sup>1</sup> Proposal for Publication at 9 – 11 (Sept. 14, 2021) (“PFP”).

<sup>2</sup> PFP at 10.

<sup>3</sup> *Id.*, proposed § 3.65 (c).

<sup>4</sup> *Id.*, proposed § 3.65 (d).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 15.

operator that fails to provide the critical customer information will be subject to a minimum penalty of \$2500.<sup>7</sup>

## **I. COMMENTS ON PROPOSED NEW 16 TAC § 3.65**

### **a. NEED FOR WEATHERIZATION STANDARDS REQUIRED BY RULE**

OPUC recommends that the RRC develop interim rules incorporating standards for weatherization of critical natural gas facilities as part of this rulemaking, for example by codifying some or all of the RRC’s best practices for weatherization jointly published by the Commission’s Oil and Gas Division and Oversight and Safety Division.<sup>8</sup> As proposed, Rule 3.65 designates almost all entities up and down the entire natural gas supply chain as critical.<sup>9</sup> The Commission’s proposed rule follows the critical designation criteria with § 3.65(c), which only requires a facility designated as critical by § 3.65(b) to acknowledge their critical status by filing Form CI-D and providing certain Critical Customer Information (CCI) to the electric entities identified by the Public Utility Commission of Texas (PUC) in proposed 16 TAC § 25.52(h)(1)(A).<sup>10</sup> Moreover, a natural gas facility listed as a critical facility in § 3.65(b) may simply opt out of their critical status under the proposed rule if the facility’s operator decides they are not prepared to operate during a weather emergency and files Form CI-X with a \$150 exception application fee.<sup>11</sup>

Without any standards for weatherization included in the Commission’s Rules, the proposed opt out in § 3.65(d) leaves a facility with complete discretion to decide if they want to operate as a critical entity during a weather emergency. Even if the entity is equipped and able to operate during a weather emergency, as currently proposed, nothing in the rule would stop the entity from opting out. To fully carry out the statutory requirements of the Texas Legislature in SB 3 and HB 3648, OPUC believes that the Commission should:

---

<sup>7</sup> *Id.*

<sup>8</sup> NOTICE TO GAS FACILITY OPERATORS AND GAS PIPELINE FACILITY OPERATORS, *Preparation by Operators for Winter 2021-2022*, [https://rrc.texas.gov/media/r5dbn5b2/2021-nto\\_preparation-by-operators-for-winter\\_2021-2022\\_mlb\\_10-6-2021.pdf](https://rrc.texas.gov/media/r5dbn5b2/2021-nto_preparation-by-operators-for-winter_2021-2022_mlb_10-6-2021.pdf) (Oct. 2021).

<sup>9</sup> See 16 TAC §3.65(b).

<sup>10</sup> PFP at 10.

<sup>11</sup> See § 3.65(d). (a “weather emergency” is defined by § 3.65(a)(2) as “any weather condition that results in or has the potential to result in an anergy emergency as defined by this section.”).

- (1) Promulgate rules with weatherization standards for a designated critical facility. To be able to promulgate an enforceable rule between now and the 2021/2022 winter season, as suggested above, OPUC recommends the inclusion of the RRC's best practices for weatherization jointly published by the Commission's Oil and Gas Division and Oversight and Safety Division in proposed new section 3.65;<sup>12</sup>
- (2) Require a designated critical facility to weatherize its facilities in compliance with the adopted weatherization standards. If the RRC's best practices for weatherization are incorporated in the final rules, require designated entities to comply with the version of the best practices for weatherization incorporated in proposed new section 3.65;
- (3) A designated critical facility that is unable to meet the weatherization standards should notify the Commission, and apply for a good cause exception;
- (4) The Commission should include a process in the rule for a designated critical facility that is unable to comply with the weatherization standards to apply for a good cause exception;
- (5) An applicant for a good cause exception must demonstrate why it is not able to comply with any or all of the weatherization standards; and
- (6) Meaningful penalties for failure to comply with the weatherization standards should be included in the rule to carry out the statutory requirements in SB 3 and HB 3648.<sup>13</sup>

OPUC believes the weatherization designation procedure and exception outlined in proposed new § 3.65 is inadequate to address the pressing needs of weatherization that would ensure a semblance of electric and natural gas supply to Texas residential electric and natural gas utility customers during a weather emergency.

The Commission recently published a *Notice to Gas Facility Operators and Gas Pipeline Operators* that provides best practices for weatherization.<sup>14</sup> This guidance from the Commission's Oil and Gas Division and Oversight and Safety Division is helpful; however, Commission guidance documents lack the necessary enforcement mechanisms that exist in rules duly

---

<sup>12</sup> NOTICE TO GAS FACILITY OPERATORS AND GAS PIPELINE FACILITY OPERATORS, *Preparation by Operators for Winter 2021-2022*, [https://rrc.texas.gov/media/r5dbn5b2/2021-nto\\_preparation-by-operators-for-winter\\_2021-2022\\_mlb\\_10-6-2021.pdf](https://rrc.texas.gov/media/r5dbn5b2/2021-nto_preparation-by-operators-for-winter_2021-2022_mlb_10-6-2021.pdf) (Oct. 2021).

<sup>13</sup> S.B. 3, 87<sup>th</sup> Leg., R.S. (2021); H.B. 3648, 87<sup>th</sup> Leg., R.S. (2021).

<sup>14</sup> NOTICE TO GAS FACILITY OPERATORS AND GAS PIPELINE FACILITY OPERATORS, *Preparation by Operators for Winter 2021-2022*, [https://rrc.texas.gov/media/r5dbn5b2/2021-nto\\_preparation-by-operators-for-winter\\_2021-2022\\_mlb\\_10-6-2021.pdf](https://rrc.texas.gov/media/r5dbn5b2/2021-nto_preparation-by-operators-for-winter_2021-2022_mlb_10-6-2021.pdf) (Oct. 2021).

promulgated and adopted by the Commission under the Texas Administrative Procedures Act.<sup>15</sup> Moreover, this guidance does nothing to address the previously discussed issue of a facility operator's complete discretion to opt out of a critical facility designation by simply filing a form and paying a nominal fee.<sup>16</sup> OPUC recommends that the Commission incorporate baseline weatherization standards or at a minimum includes its published best practices for weatherization into proposed new 16 TAC § 3.65 and base the opt out provision in § 3.65(d) on whether a critical facility meets these minimum standards to operate during a weather emergency. Tying a designated critical facility's ability to opt out to specific weatherization standards incorporated in proposed new § 3.65 will ensure designated critical facilities are not opting out simply because they do not wish to undertake the costs required to weatherize their facilities. Sarah Olmstead, economist and professor at the Lyndon B. Johnson School of Public Affairs, said most companies are unlikely to voluntarily declare themselves as critical infrastructure because weatherizing equipment is costly, and the energy market does not reward them for reliability.<sup>17</sup> In this same spirit, OPUC also recommends that the \$150 opt-out fee be increased to a level that the Commission believes could induce some non-weatherized, non-compliant operators to weatherize their facilities. Also, OPUC believes the Commission should consider, following an updated narrower designation of what constitutes critical infrastructure, altering the nature of the fee so that it is no longer an opt-out but instead a penalty fee for those truly critical facilities that fail to properly weatherize.

#### **b. THE RRC SHOULD CONSIDER A TWO-STEP RULEMAKING APPROACH**

While the adoption of weatherization rules is intertwined with the map to be published by the Texas Electricity Supply Chain Security and Mapping Committee, which has not yet been completed, there is nothing preventing the Commission from publishing an interim rule incorporating baseline weatherization standards then updating this rule in a subsequent rulemaking when the mapping efforts are completed. OPUC recommends that the RRC consider a two-step

---

<sup>15</sup> Administrative Procedure Act, Tex. Gov'n't Code Ann. §§ 2001.00-.902 (APA).

<sup>16</sup> Proposed § 3.65 (d), PFP at 10.

<sup>17</sup> Huerta, Marisa, UT Professors say Texas Legislature should do more to improve power grid structure reliability, <https://thedailytexan.com/2021/10/22/ut-professors-say-texas-legislature-should-do-more-to-improve-power-grid-structure-reliability/> (Oct. 22, 2021).

rulemaking. In this initial phase, the RRC and PUC are working together to set a baseline for weatherization during a weather emergency especially in Winter 2021/2022. Then, when the mapping is complete and the PUC and RRC have had the opportunity to consider more weatherization practices, the rules should be re-opened at both agencies in order to update with more firm weatherization practices and a more precise definition of what constitutes critical infrastructure.

**c. NEED FOR RESTRICTIVE DESIGNATION OF CRITICAL INFRASTRUCTURE**

OPUC notes that the Commission’s broad designation of critical infrastructure will likely not provide the level of reliability intended by the Legislature in passing SB 3 and HB 3648. OPUC is concerned that an over-inclusive standard for designating critical infrastructure will result in an unworkable final product that will fail to protect those facilities that truly should be designated as critical. OPUC recommends that, following the conclusion of the Texas Electric Supply Chain Security and Mapping Committee’s mapping of the natural gas chain, that the RRC re-visit this rule and further define what should truly constitute facilities that are critical during an energy emergency.

The designation of “critical natural gas” as proposed by the PUC in § 25.52(c)(2) includes “a facility designated as a critical gas supplier by the [RRC] under § 3.65(b) of this title...”<sup>18</sup> Proposed § 3.65(b) lists all types of facilities at every stage of the entire natural gas supply chain as critical gas suppliers and critical customers.<sup>19</sup> The Commission estimates that approximately 6,200 operators are subject to the proposed § 3.65.<sup>20</sup> OPUC encourages the Commission to consider the practical implication of designating every type of natural gas facility as critical. While failure of natural gas facilities and their supply chain was a major contributor to the severe impact on the public during Winter Storm Uri, OPUC is concerned that identifying all gas supply chain facilities as critical without any attention to relevant importance of each facility may introduce a risk that electric utilities are unable to properly manage prioritization of critical facilities during an emergency. During a severe weather emergency such as Winter Storm Uri, it may be impossible

---

<sup>18</sup> Public Utility Commission of Texas, Docket No. 52345, Proposal for Publication at 7 (Sept. 16, 2021).

<sup>19</sup> PFP at 9 – 10.

<sup>20</sup> *Id.* at 6.

to shed load in a manner that prevents truly critical gas facilities from losing power when each distribution feeder includes a facility that is considered “critical” under the expansive designation proposed by the Commission in § 3.65(b). This concern was specifically highlighted by CenterPoint Houston in their comments to the PUC’s proposed questions in Project No. 52345, regarding critical infrastructure:

“The [Public Utility] Commission and RRC should develop stringent criteria that would limit the number of natural gas facilities designated as critical. Otherwise, electric utilities may be in a situation where there is no more prioritization between feeders because every feeder has become critical [because these feeders each serve a critical natural gas facility]”<sup>21</sup>

Depending on the severity of the weather emergency, there may already be insufficient electric supply to power the loads designated as critical and adding thousands of gas facilities to an already expansive list could exacerbate the problem.

OPUC recommends the Commission identify significant natural gas facilities that are truly critical to the steady supply of natural gas for prioritization during severe weather emergency and load shed event. This would provide enhanced reliability by avoiding an approach that is overinclusive and affects the electric utility’s ability to efficiently shed load during an energy emergency. OPUC appreciates that drafting rules that prioritize the system in a more thoughtful manner is difficult without the information from the mapping efforts to be published by the Texas Electricity Supply Chain Security and Mapping Committee in 2022. However, even a simple two-tier system that identifies the more critical infrastructure could make all the difference in maintaining power to the most critical facilities in a severe weather emergency. OPUC urges the Commission to collaborate with the PUC to identify the most important critical natural gas facilities and incorporate a more concise designation of critical infrastructure or a tiered system in proposed § 3.65. Consistent with the discussion regarding a two-step rulemaking process, OPUC would request that the Commission amend and update the critical facility designation in a more meaningful way in a subsequent rulemaking as the information from the Texas Electric Supply Chain Security and Mapping Committee is made available.

---

<sup>21</sup> Public Utility Commission of Texas, Docket No. 52345, Centerpoint Energy Houston Electric, LLC’s Responses to Commission Staff’s Questions in Project No. 52345 (August 16, 2021).

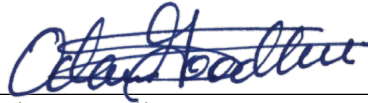
## II. CONCLUSION

OPUC appreciates the opportunity to provide these initial comments on the Proposal for Publication and looks forward to working with the Commission and other stakeholders in this rulemaking project.

Date: November 1, 2021

Respectfully submitted,

Chris Ekoh  
Interim Public Counsel  
State Bar No. 06507015



---

Adam Goodlett  
Assistant Public Counsel  
State Bar No. 24087605  
Shawnee Claiborn-Pinto  
Director of Market & Regulatory Policy

OFFICE OF PUBLIC UTILITY COUNSEL  
1701 N. Congress Avenue, Suite 9-180  
P.O. Box 12397  
Austin, Texas 78711-2397  
(512) 936-7500 (Telephone)  
(512) 936-7525 (Facsimile)  
adam.goodlett@opuc.texas.gov  
shawnee.claiborn-pinto@opuc.texas.gov  
opuc\_eservice@opuc.texas.gov (Service)