

To: Haley Cochran, Attorney, Office of General Counsel, Railroad Commission of Texas

From: Virginia Palacios, Executive Director, Commission Shift

Date: Friday, October 7, 2022

Subject: Proposed Amendments to §3.65, relating to Critical Designation of Natural Gas Infrastructure

The power outages Texans endured during Winter Storm Uri led to hundreds of deaths,¹ the largest carbon monoxide poisoning event in state history,² and hundreds of billions of dollars in damages and extraordinary energy costs.³ A federal investigation published after widespread Texas power outages in 2011 recommended that the Railroad Commission consider minimum uniform standards for weatherization for natural gas production and processing facilities,⁴ which the commission declined to develop. Many of the power outages caused by Winter Storm Uri likely could have been prevented if relevant gas supply chain facilities had been weatherized. Getting the critical infrastructure rule right is incredibly important, because it defines which facilities will be required to weatherize under the commission's new weatherization rule 16 TAC § 3.66 ("3.66").

Commission Shift is a statewide nonpartisan nonprofit focused on reforming oil and gas oversight in Texas. We have concerns about how the commission will ensure enough facilities are weatherized to meet gas demand in a weather emergency, how operators of transferred assets

¹ Texas Health and Human Services. (2021). *February 2021 Winter Storm-Related Deaths-Texas*. https://www.dshs.texas.gov/news/updates/SMOC_FebWinterStorm_MortalitySurvReport_12-30-21.pdf

² Perla Trevizo, Ren Larson, Lexi Churchill, Mike Hixenbaugh, & Suzy Khimm. (2021, August 17). Texas power outages led to carbon monoxide poisoning catastrophe. *The Texas Tribune, Propublica, and NBC News*. <https://www.texastribune.org/2021/04/29/texas-carbon-monoxide-poisoning/>

³ Garrett Golding, Anil Kumar, & Karel Mertens. (2021, April 15). *Cost of Texas' 2021 Deep Freeze Justifies Weatherization*. Federal Reserve Bank of Dallas. <https://www.dallasfed.org/research/economics/2021/0415.aspx>

⁴ Federal Energy Regulatory Commission and North American Electric Reliability Corporation. (2011). *Report on Outages and Curtailments During the Southwest Cold Weather Event of February 1 - 5, 2011*. p. 214. <https://www.ferc.gov/sites/default/files/2020-04/08-16-11-report.pdf>



will efficiently communicate during an emergency, and which facilities will be required to weatherize this winter considering the sequence of deadlines.

We have followed the Railroad Commission’s progress in implementing the requirements of Senate Bill 3 closely and have commented on each rulemaking. In May 2022, we published a report with Texans for Public Justice analyzing the commission’s progress in implementing the November 2021 critical infrastructure rule for the natural gas supply chain.⁵ Commission Shift made a series of recommendations on the proposed new rule for 3.65, which we submitted on November 1, 2021. Over 900 individuals commented on the draft critical infrastructure rule in 2021. After the rule’s final publication on November 30, 2021, we prepared a rubric to score the final version of 3.65 against our recommendations. In addition to our broad concerns, attached is an evaluation of the current proposed amendments for the critical infrastructure rule 16 TAC § 3.65 (“3.65”) published on Sep. 16, 2022 against our rubric.

The current version of the rule with proposed amendments is an improvement from the initial proposed draft of the critical infrastructure rule (3.65) published in September 2021, which would have allowed operators to voluntarily opt out of the rule and expressed no criteria that the commission would use to determine eligibility for an exception from critical designation. However, it is worth noting that the latest proposed amendments add ambiguity to the final critical infrastructure rule (3.65) that was approved in November 2021, and will reduce the population of facilities that are required to comply with the weatherization rule (3.66), so much that Texas may not have enough gas production available to meet demand if we experience another winter weather emergency of the same magnitude as Winter Storm Uri.

⁵ Andrew Wheat, & Virginia Palacios. (2022). *Preliminary Texas Railroad Commission Data Show Progress Designating “Critical” Gas Facilities that Fuel the Electrical Grid.* <https://commissionshift.org/extreme-weather/>

Volume of gas produced

Data that is currently available indicates that the facilities that will be designated as critical do not produce enough gas to meet peak demand Texas experienced during Winter Storm Uri. The commission must consider whether alterations to the volume thresholds that designate facilities as critical will require enough facilities to weatherize across the natural gas supply chain so that there will be extra natural gas fuel supply available in a weather emergency to allow for a margin of error in the volume of gas we expect to need in the future.

The commission stated in the proposed amendments preamble that critical producing wells that produce gas at the new thresholds produced an average of 24.5 billion cubic feet per day (Bcfd) in March 2022, and that this amount is equal to 78.4% of the total natural gas produced per day.⁶ Data from S&P Global Platts that was cited in the 2021 FERC/NERC report on Winter Storm Uri showed that natural gas demand reached a record high of 27.6 Bcfd during Winter Storm Uri (see figure).⁷ Considering that gas deliveries were restricted while gas generating units were down, this gas demand figure could underestimate actual gas demand if all generating units are working. The commission should be transparent in its calculations and data sources for natural gas demand in an extreme weather event, and clearly explain how both gas production and storage can meet demand needs for the next event. We also need the commission to plan for extra supplies to be available in the event that the supply chain is not functioning perfectly in all geographies.

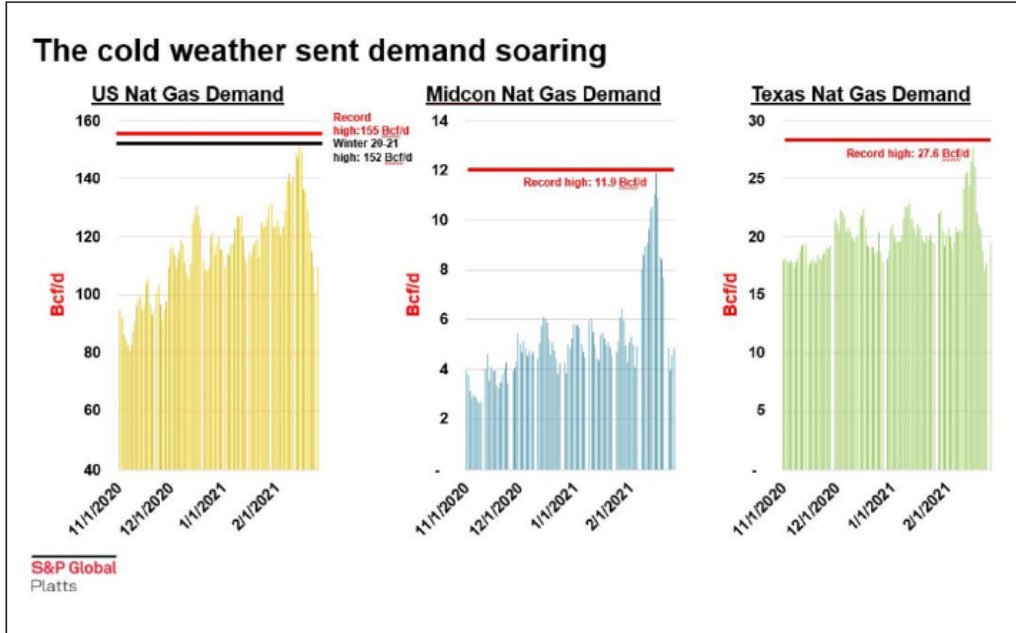
Natural gas demand is constantly changing because Texas' energy needs are constantly changing. The critical infrastructure rule must not only address that variability, but the RRC's

⁶ Railroad Commission of Texas. August 30, 2022. Memorandum Re: "Proposed Amendments to §3.65, relating to Critical Designation of Natural Gas Infrastructure." p. 2 of 11, lines 25 - 26.

⁷ Federal Energy Regulatory Commission, & North American Electric Reliability Corporation. (2021). The February 2021 Cold Weather Outages in Texas and the South Central United States. p. 111. <https://www.ferc.gov/media/february-2021-cold-weather-outages-texas-and-south-central-united-states-ferc-nerc-and>

Critical Infrastructure Division must also develop systems and processes to regularly compare projected gas demand against the supply that can be produced from facilities designated as critical that are also subject to the weatherization rule.

Figure 53: Natural Gas Demand November 2020 – February 2021



Source: Federal Energy Regulatory Commission, & North American Electric Reliability Corporation. (2021). The February 2021 Cold Weather Outages in Texas and the South Central United States. p. 111.

Emergency communications

Another key vulnerability is that when operators transfer critical assets, their contact information will still show on the electricity supply chain map until the next critical infrastructure filing deadline. That means old operators will be responsible for transferring emergency calls to new operators in the event of a weather emergency, possibly for up to six months. The commission has not resolved this problem in its proposed amendments to the critical infrastructure rule. Having an old operators' information on the energy supply chain map during a weather emergency could create significant complications and delays. These delays are preventable. In February 2021, the grid was only minutes from a failure that would have caused a

complete blackout. Efficient communication during an emergency can mean the difference between life and death.

Compliance deadlines

Please clarify the deadlines for compliance. The last critical infrastructure filing deadline was on September 1st. Operators are expected to comply with the weatherization rule (16 TAC 3.66) by December 1st. Only facilities that are both listed as critical and are on the electricity supply chain map will be required to comply with the weatherization rule. The commission's proposed amendments to the critical infrastructure rule will greatly reduce the population of facilities that will be required to weatherize. But it is unclear how the commission will enforce the weatherization rule for the 2022 – 2023 winter, considering that the September 1st critical infrastructure filing deadline has already passed, and the next filing deadline isn't until March 1st. Will the proposed amendments to the critical infrastructure rule apply before or after the March 1, 2022 filing deadline?

Rubric summary

Commission Shift made a series of recommendations on the proposed new rule for 16 TAC 3.65, which we submitted on November 1, 2021. After the rule's final publication on November 30, 2021, we prepared a rubric to score the final version of 3.65 against our recommendations. We have added an analysis of the proposed amendments for 16 TAC 3.65, published in the Texas Register on September 16, 2022 to our rubric. We recommend the commission consider changes that address the following ambiguities and potential pitfalls of the proposed amendments to 3.65:

1. The proposed amendments to 3.65 are ambiguous to whether they apply to facilities that do not need power from the grid. In other words, gas producing facilities that are not connected to the grid could fall through the cracks and not be required to weatherize.
2. The secrecy of the electricity supply chain map means the public is disabled in its ability to ensure the weatherization rules are enforced.
3. Potential reasons why an operator may request an exception to critical designation are broadly described as “examples” in the proposed amendments, meaning the RRC could routinely grant exceptions for other reasons not listed in the rule, just as generously as it does inactive well plugging extension requests and flaring rule exception requests.
4. The penalties (16 TAC 3.107) that apply to violations of the critical infrastructure rule (3.65) are too low to incentivize compliance.
5. ERCOT is still using a redundant form and process to obtain information from operators on whether or not they represent a critical load, and it appears RRC has not coordinated with ERCOT to simplify this process for operators and reduce unnecessary redundancies.

Conclusion

We are in a vulnerable period. It is important for the commission to remain vigilant for potential weaknesses in rules, implementation, internal processes, and enforcement. This is just the beginning of weatherizing the gas supply chain, and the public is counting on the commission to manage preventable risks. It is not enough for the Railroad Commission to continue to operate through trial-and-error. The commission must graduate from being a reactive bureaucracy, to taking a proactive approach to public safety. This means the commission will need to take on a system of actively evaluating its past performance, examining trends and future probability, and managing its internal processes and rules to meet future expected needs.

Rubric

1. **Will oil and gas facilities that don't use power from the grid be required to file for critical infrastructure designation (and eventually be required to weatherize)?**

Nov. 30, 2021 final rule:

- Yes. The proposed draft of the rule was directed primarily at facilities that are connected to power from the electric grid and need to maintain power during an energy emergency. In the final rule, the RRC clarified that facilities like gas wells that aren't connected to the grid should still be designated as critical if they meet certain criteria.

Sep. 16, 2022 proposed amendments draft:

- No. In the 2022 proposed amendments to 16 TAC 3.65, RRC states “if a critical facility is denied as a critical load, the proposed amendments allow the facility to request an exception such that it is not required to comply with §3.65.” The commission makes no mention of facilities that are not connected to the grid. This could cause problems if enough gas-producing wells are not required to weatherize because of this exception. **We recommend eliminating (e)(2)(D) as a reason for operators to qualify for an exception, because designating facilities as critical loads in not the sole purpose of 16 TAC 3.65.** Senate Bill 3 (87th Regular Session) made it clear that only facilities that are both designated as critical and are on the electricity supply chain map would be required to comply with the commission's weather preparedness rules. Connection to electricity is not the only means of weatherizing a gas supply chain facility, and facilities that are not connected to the grid should still be required to implement weather preparedness measures.

2. **Will oil and gas facilities that supply gas to electric generation facilities be allowed to opt out simply because they are not already prepared to operate in a weather emergency (even though they should be required to weatherize)?**

Nov. 30, 2021 final rule:

No. The commission improved the description of which facilities will qualify for an exception.

Sep. 16, 2022 proposed amendments draft:

- No. Exception criteria are still described in the rule, to some extent.

3. **What criteria have been included to identify which exception applications the RRC can reject?**

Nov. 30, 2021 final rule:

- Facilities that supply the highest gas volumes (>250 thousand cubic feet per day) in the supply chain will not be eligible for an exception to critical infrastructure designation.
- Facilities that produce very low quantities of gas (<15 thousand cubic feet per day for gas wells and less than 50 thousand cubic feet per day for oil wells) will be eligible for an exception as long as they are not on the future electricity supply chain map produced by the Texas Electricity Supply Chain Security and Mapping Committee. Applicants will have to demonstrate with objective evidence a reasonable basis and justification in support of the application.
- Facilities that are on the electricity supply chain map are not eligible for an exception from critical infrastructure designation.

Sep. 16, 2022 proposed amendments draft:

- The commission changed the criteria that designate facilities as critical or allow exceptions from critical designation. Applicants will still have to demonstrate with objective evidence a reasonable basis and justification in support of the application for an exception.
- Facilities that are on the electricity supply chain map are not eligible for an exception from critical designation **if they meet the definition of a critical gas customer or a critical gas supplier.**
- The volume of production that defines a critical gas supplier was increased from 50 thousand cubic feet per day (Mcf) to 500 Mcf for oil leases, and from 15 Mcf to 250 Mcf for gas wells. This change will reduce the overall population of wells that is required to weatherize.
- Only facilities that are both designated as critical and listed on the electricity supply chain map will be required to weatherize. This means that the overall population of wells required to weatherize will be even smaller. It is unclear if the commission has conducted an analysis to determine average gas production for facilities that will be required to weatherize because they are also on the map, or if it only looked at facilities that meet the proposed definition of critical gas suppliers.
- In the preamble, RRC noted that “Operators of low producing facilities, if required to comply with §3.66's preparation standard, may voluntarily shut-in low producing facilities before a weather emergency-or decommission the facilities in their entirety-because the risks associated with complying with §3.66 may exceed the facility's production value. This is particularly true given that Senate Bill 3's penalty ceiling is up to \$1,000,000 per violation of §3.66.” (p. 4 of 11, lines 1 -5). The prospect of the RRC assessing a \$1,000,000 penalty on a low-producing operator seems extremely unlikely. The RRC has repeatedly emphasized that the penalty amounts in the final violation classification structure in the weatherization rule (3.66) is only a set of guidelines. Per the violation classification structure, operators producing low volumes of gas are not likely to end up in the highest

class of violations, and the floor for penalties in the highest class of violations is \$5,000. Considering that the violation classification system is a mere set of guidelines and knowing the commission's track record, we have difficulty believing that the RRC will even penalize operators producing the highest volumes of gas at the \$1,000,000 penalty ceiling.

- The commission removed paragraph (c)(2), which had required facilities that are on the electricity supply chain map to apply to be designated as critical.
 - The commission added a new list of examples for which an exception might be granted. One of those reasons is “all of the natural gas produced at the facility is consumed outside of this state.” This is concerning, because overall lack of natural gas supply in an energy emergency would cause gas prices to increase. Texas' gas market is not limited to state boundaries. In order to preserve affordability, gas producers that supply gas consumed outside of the state should still be required to weatherize. Ensuring the potential for gas production at these facilities during an energy emergency will help to prevent extraordinary gas prices, and the need for additional securitization of those costs during the next winter storm.
 - Another example of a reasonable basis for an exception, according to the proposed amendments, would be if an electric entity denied a facility's request to be designated as a critical customer. **This neglects to consider that facilities that are not connected to the grid should still be required to weatherize.**
4. **Will this process replace ERCOT's critical load application process? If not, will facilities be able to avoid RRC's weatherization requirements and still receive power if they sign up under ERCOT's process?**

Nov. 30, 2021 final rule:

- Facilities may still be able to sign up as critical loads even if they have an exception from the RRC's process. However, the commission remarked “based on ERCOT's comments, the Commission expects that ERCOT will use information provided on Form CI-D moving forward, but the Commission cannot speak for ERCOT on that matter.”

Sep. 16, 2022 proposed amendments:

- RRC did not mention this process in the rule preamble.

5. **Does the penalty structure encourage operators to designate themselves as critical (and eventually become subject to weatherization rules)?**

Nov. 30, 2021 final rule:

- The penalty structure was not changed, but the criteria for designating critical facilities is more rigorous, allowing RRC to better enforce penalties on facilities that decline designation, but that should have applied for designation.

Sep. 16, 2022 proposed amendments:

- Penalties remain unchanged. Operators who fail to file Form CI-D or Form CI-X may be eligible for a \$1,000 fine. Operators who fail to provide critical customer information could be fined \$2,500.

6. Do the forms capture information about whether these gas facilities connect to electric generation facilities?

Nov. 30, 2021 final rule:

- No. The commission remarked that “whether a facility obtains an exception is public information that will be available unless claimed confidential under the Public Information Act.” The Texas Electricity Supply Chain Security and Mapping Committee will be producing a map of critical infrastructure in the gas supply chain that serves the electricity supply chain. It is possible that the committee will collect information some other way.

Sep. 16, 2022 proposed amendments:

- No changes were made. The electricity supply chain map is confidential, and it will be nearly impossible for legislators and the public to oversee the commission’s process, ensuring that the proper facilities are required to weatherize.