

The Public Utility Commission of Texas (commission) adopts new §25.107, relating to Certification of Retail Electric Providers (REPs), and new §25.108, relating to Financial Standards for Retail Electric Providers Regarding the Billing and Collection of Transition Charges with changes to the proposed text as published in the April 28, 2000 *Texas Register* (25 TexReg 3670). Proposed new §25.107 establishes requirements for certification of retail electric providers (REPs), application procedures, requirements for maintaining certificates, and provisions for suspension and revocation of certificates, as well as related administrative penalties. Proposed new §25.108 imposes additional financial requirements on REPs who will be billing and collecting transition charges resulting from securitization by utilities. These new sections were adopted under Project Number 21082.

In new §25.107, the commission establishes application procedures and threshold standards for REPs to obtain certification and to maintain certification on an ongoing basis. The commission finds that the largest task of the rule is to establish, as a matter of policy, the fundamental balance between the credit risk of REPs imposed on the financial integrity of transmission and distribution utilities (TDUs) and the potential competitiveness of REPs in the restructured environment. The commission concludes that the public interest is best served by the protection and encouragement of competition, especially by measures designed to maximize the number of competing REPs at the commencement of customer choice. Therefore, the commission sets credit standards for REPs at minimum levels and prohibits

TDUs from setting more restrictive requirements on REPS unless the REPs default in making payments to TDUs.

In new §25.108, the commission establishes the standards for REPs in the billing and collection of transition charges, which are patterned after the financing orders adopted in the dockets concerning the securitization of funds. (See Docket Number 21527, *Application of TXU Electric Company for a Financing Order to Securitize Regulatory Assets and Other Qualified Costs*; Docket Number 21528, *Application of Central Power and Light Company for a Financing Order to Securitize Regulatory Assets and other Qualified Costs*; and Docket Number 21665, *Application of Reliant Energy, Incorporated for a Financing Order to Securitize Regulatory Assets and other Qualified Costs*.) The changes to the proposed rule are points of clarification that were agreed to by all parties in those dockets.

A public hearing on the proposed sections was held at commission offices on June 15, 2000, at 9:30 a.m. Representatives from Shell Energy Services (Shell), and Texas Electric Company Transmission and Distribution Utilities (TXU-TDU) attended the hearing and provided comments. To the extent that these comments differ from their submitted written comments, such comments are summarized herein.

The commission received comments on proposed new §25.107 from Brazos Electric Power Cooperative, Inc. (Brazos), the City Public Service of San Antonio (San Antonio), Central and South West Retail Electric Provider (CSW-REP), El Paso Electric Company (EPE), Entergy Gulf States, Inc.

(EGS), retailers comprised of Enron Energy Services, Fowler Energy, Green Mountain.com, NewEnergy Texas, and Shell Energy Services (jointly "Retailers"), the Office of Public Utility Counsel (OPUC), Reliant Energy, Inc. (Reliant), Southwestern Public Service Company (SPS-REP), Texas Electric Company Retail Electric Provider (TXU-REP), TXU-TDU, Texas Industrial Energy Consumers (TIEC), Texas New Mexico Power Company Distribution Utility (TNMP-TDU), and Texas New Mexico Power Company Retail Electric Provider (TNMP-REP). Reply comments were received from the City of Austin (Austin), Consumers Union (Consumers), EGS, Retailers, Reliant, San Antonio, Shell, Texas Electric Cooperatives (TEC), TIEC, and Utility.com.

Comments on proposed new §25.108 were received from CSW-REP, Retailers, San Antonio, and TXU-TDU. In addition, Reliant, OPUC, TIEC, Shell Energy Services Co., L.L.C., Enron Energy Services (Enron), Inc., NewEnergy Texas, L.L.C. (NewEnergy), the State of Texas, Texas Retailers Association (TRA), Occidental Chemical Corporation (Occidental), and EGS (jointly "Securitization Parties") filed joint comments on proposed §25.108. Reply comments were received from Shell and Retailers.

On several occasions in its open meetings, the commission has discussed the potential diversity of entities that may want to participate in the REP market. The commission notes that the market may offer many niche opportunities for service providers who do not wish to assume the full responsibilities and operational scope of being a REP. Further, a development that has occurred in the course of this rulemaking proceeding is the articulation amidst the Electric Reliability Counsel of Texas (ERCOT)

proceedings of the role of the Qualifying Scheduling Entity (QSE). With that development, it has become apparent that many REPs may wish to contract with a QSE rather than become a QSE themselves. Once the notion of outsourcing settlement and other technical requirements to a QSE arise, it quickly becomes evident that the notion of subcontracting other requirements is also of interest.

The commission believes healthy competition can be achieved most readily if the opportunities for participation are many and diverse. These rules are designed to encompass all aspects of providing continuous and reliable electricity to retail customers for which a REP is responsible, regardless of how many of the service components it directly provides to the customer. The commission believes a customer has a right to expect all service components necessary for continuous and reliable electric service from any REP so that, in that respect, there are no gradations of REPs as far as the customer is concerned. On the subject of whether there should be different distinctions among REPs corresponding to the proportion of services they provide directly, as opposed to outsourcing, the commission received the following comments:

Consumers characterized the comments made by commissioners in open meeting, while discussing adoption of the aggregator registration rule, as agreement with Consumers and other consumer commenters that aggregators should represent only buyers and never sellers. Consumers said that the commissioners expressed a preference for letting the market determine how REPs might conduct business, for example through use of an agent, and observed the commissioners using the terms "REP-lite" and "REP-heavy" in its discussion.

Consumers stated that they do not oppose REPs using agents or any other creative marketing strategy, so long as the certificated REP is ultimately responsible for the agent's behavior. Consumers explained that, in such a scenario, a REP could hire another firm as an agent and that firm would not be required to obtain its own certification, but the REP should be responsible for that firm's actions, and suffer the consequences if its agent violates commission rules. Consumers reminded the commission that much of the problem faced by customers with "slamming" in long distance telecommunications service had to do with third-party telemarketers, acting on behalf of the long distance carrier, who slammed customers in order to increase sales. Consumers noted that the long distance carriers typically did not endorse or encourage this behavior, but neither did they provide sufficient oversight to prevent it.

Consumers suggested that the commission include a reference to the use of agents or other third parties who act on behalf of the REP without obtaining a certificate, and require that the REP have full responsibility for their actions. Consumers suggested that such provisions could be made in either §25.107 (a) or (b).

The commission agrees with Consumers that REPs are responsible for the activities conducted by any agents on its behalf and, given that condition, such agents do not need to be certified as REPs, or to otherwise register with the commission. Given its decision in §25.111, *Registration of Aggregators*, that aggregators are necessarily buyer's agents when customer choice begins, the commission agrees that, when customer choice begins and for as long as aggregators are limited to being buyer's agents,

REPs and their agents are sellers and seller's agents, respectively, and should not represent themselves to the market as buyer's agents. As an example, a firm that wishes to specialize in marketing electric power but does not want to engage in the business of purchasing power and making other arrangements necessary for customers to receive retail electric service, could contract with one or more REPs to conduct their marketing. It could represent itself as a seller's agent for the REPs with which it contracts marketing services. The REP would be wise to include liability measures in its contract with the marketing firm because, if the firm does not treat customers, including applicants for electricity service, in accordance with commission rules, the REP will be liable to applicable legal and commission sanctions. The accountability rests with the REP regardless of whether the niche provider offers marketing, billing and collection, call center, or other niche services. The commission adds language to §25.107(a) to clarify its view that market participants include both certificated REPs and niche service providers for whom the REPs are held accountable.

The commission requested comments on four preamble questions, as follows:

1. *Concerning §25.107(f)(1), relating to financial resources required for credit quality: (A) To what extent does the approach of this provision, and the three credit quality alternatives in particular, achieve the goals of sufficient financial creditworthiness to promote fair competition and minimal financial barriers to entry to the market place?*

*The Financial Basis for Credit standards:*

The question asks whether the commission balanced the conflicting goals of encouraging competition among REPs and TDU credit risk. The TDUs and Retailers provided comments on aspects of the commission's proposed rule's standards of financial creditworthiness: 1) the financial standards necessary for certification, and 2) the ongoing creditworthiness standards necessary for the financial health of the utilities. In general, the TDUs criticized the proposed rule as being unfair because it did not adequately address the REP's creditworthiness with respect to payments to TDUs. In contrast, Retailers, for potential REPs, supported the rule as being fair because it did not create unreasonable barriers to entry, at least partly because the TDUs were not permitted to impose credit risk restrictions on the REPs.

Reliant in its Reply Comments referred to the "Licensing" versus "Creditworthiness" dichotomy in the Coalition for Uniform Business Rules ("CUBR") publication, *Standards for Uniform Business Rules* (Version 1.1, Sept. 1999). According to the CUBR, the purpose of the financial requirements for licensing, certification in the case of Texas, is to ensure the payment of fines and penalties levied by the regulatory authority. In contrast, the purpose of the CUBR requirements for creditworthiness is to protect the credit interests of the TDU.

Reliant emphasized that the proposed REP rule was designed for only four purposes: 1) to encourage and permit the entry of small REPs into the retail electric market; 2) to provide credit protection between the REP and the commission; 3) to provide financial protection for customer deposits; and 4)

to provide for the collection of transition charges. Reliant then complained that the rule lacked the standard credit provisions that address the business interaction between the REP and the TDU.

The commission agrees with Reliant that CUBR's proposed separation of financial and credit standards for REPs should be considered. In addition, the commission generally agrees with Reliant that the underlying purpose of its proposed standards was to encourage the entry of REPs of all sizes into the market, and to protect the relationship between the commission and the REP, the financial deposits of customers, and the securitization of transition charges. However, the commission does not accept the TDU position that the commission's proposed credit standards do not address or mitigate the TDU's credit risks arising from doing business with the REPs. Further, the commission views the rule as applying to both certification and the ongoing maintenance of credit quality. As is discussed below, the commission is modifying the financial requirements of the proposed rule to provide additional assurance that REPs will be able to pay their bills to TDUs.

*The Goal of Fairness in Balancing Competition Against Credit Risks:*

TXU-TDU did not believe that subsection (f)(1) of the proposed rule achieved the goal of fostering the financial creditworthiness for REPs necessary to promote "fair competition." TXU-TDU said that paragraph (1)(A) appeared to be directed at establishing the minimal creditworthiness threshold for certification alone, while at the same time providing the commission itself with some security should an insolvent REP fail to pay any administrative penalties imposed by the commission.

TXU-TDU asserted that in no other commercial endeavor was a supplier of services required to absorb 100% of the risk of non-payment by those businesses taking services from it. TXU-TDU complained that there was no justification for leaving the utility alone without such security while other parties were secured by the proposed rule. TXU-TDU said that such an approach was not consistent with a competitive market where the relative credit-worthiness of competitors should be one of the factors that influences the price each competitor charges for its product. TXU-TDU argued that there was no reason to remove this basic element from the market and replace it with a regulatory alternative.

EGS stated that financial and creditworthiness criteria should promote fair competition while at the same time not creating unnecessary barriers to entry. EGS stressed the need for proper safeguards, and the need to mitigate risk of REP failure by creating rules that ensure that REPs meet minimum standards for certification.

Reliant said that the standards in subsection (f)(1) must be enhanced through one of its three alternative proposals in order to provide adequate credit protection for TDUs, as well as to provide a framework that is equally viable for both large and small REPs. Reliant also said that customer choice would require different credit protection arrangements between the various entities, including those between REPs and TDUs that were transacting business in accordance with the unique goods and services that were being exchanged.

Retailers criticized the three credit proposals presented by Reliant, arguing that the two alternative approaches raised by Reliant did not differ materially from the investment grade or 60 day deposit proposal preferred by the utility. In fact, Retailers noted that Reliant's two alternative proposals might actually be deemed more onerous to customers, pointing out that a REP serving 1,000 residential customers would need the same deposit as a REP serving a single industrial customer, and that the securitization standard would represent over-protection of TDU credit risk.

Reliant admitted that any future credit problems would likely cause the commission to intervene to revisit the rules and restrict participation by these high-risk REPs. However, Reliant urged the commission to proactively address these concerns in this rule.

In contrast to the TDUs, CSW-REP and SPS-REP believed that the balance achieved in the proposed rule was appropriate. In particular, CSW-REP noted that by providing different options for REPs with varying scopes of operations, the rule provided an opportunity for a variety of REPs to enter the marketplace by meeting financial credit standards specifically directed to their scope of business. SPS-REP believed that the proposed rule provided sufficient flexibility for a REP of any size to demonstrate its financial ability to perform in the retail marketplace without posting significant cash deposits.

Retailers stated that the proposed creditworthiness provisions of the rule promoted fair competition and imposed acceptable financial requirements that should not deter viable potential entrants. Retailers stated that the proposed terms fairly balance competitive considerations with customer protection

interests. In addition, Retailers stated that the financial subsection of the rule reasonably implemented the pro-competitive goals that both Senate Bill 7, 76th Legislature, (SB7) and the commission had established for the restructured retail market, which they characterized as follows: affording each customer a choice of electric providers; encouraging full and fair competition among all electric providers; avoiding regulation of competitive services, prices, and competitors; utilizing competitive, not regulatory, methods to achieve SB7's goals; implementing rules and orders having the least impact on competition; avoiding actions that could stifle competitors' creativity; avoiding barriers to entry; and not basing the REP's financial requirement on an assumption that everyone has bad credit.

Retailers argued that the proposed rule fairly balanced these concerns with the desire to exclude REPs with an insolvency risk. Retailers felt that the proposed rule struck this good balance between various interests by favoring relatively benign financial certification requirements, which permitted small companies lacking extensive financial backing to bring dynamic and creative offerings to the market, and by minimizing the regulatory and resource burdens on financially established companies. Retailers said that the commission correctly decided not to require all applicants to possess extensive cash holdings to obtain a certificate.

Retailers observed that requirements to amass tremendous cash resources before serving a single customer would only compound the significant business difficulties faced by REPs when competition begins. Retailers stressed that one of the key difficulties for REPs at the onset of customer choice was competing against a significant incumbency advantage, which SB7 heightened by awarding all retail

customers to the TDU's affiliated REP. Retailers noted that several Texas service areas would offer very little headroom for profitable pricing as another competitive difficulty.

Retailers argued that an intensely competitive market provides the best possible customer protection. Conversely, a market with only a few firms tends to experience less innovation, higher prices, and fewer customer choices than a market where numerous firms are competing. Even if some firms ultimately become insolvent, Retailers argued that rigorous competition ultimately provides customers more innovative products and services, greater supply and responsiveness, and superior prices.

In brief, Retailers asserted that the insolvency risk of a particular customer's REP pales in comparison to the need to promote the dynamic and vigorous competition that permitting more companies to enter the market will foster.

The commission agrees with the TDUs that they are exposed to the credit risk that some REPs might default in their payment for electric service. However, the commission also agrees with Retailers that there must be a balancing of this credit risk against the conflicting need to foster a competitive environment as envisioned by Senate Bill 7 and the commission. The commission believes that a large, dynamic REP market accessible to many competitors is important public policy at the start of customer choice. The commission also agrees with Retailers' rationale for implementing a pro-competitive market structure. In particular, the commission believes that its rules should avoid unreasonable barriers to

entry for REPs to the extent possible, and that the underlying premise for such rules should not assume that all REPs will be bad credit risks.

At the same time, the commission agrees with Reliant that if severe credit problems arise in the future, the commission would likely intervene to revisit the rules and rewrite them to restrict participation by high risk REPs.

The commission is convinced that the advantages of incumbency of the affiliated REP through the assignment of all of its TDU's "price-to-beat" customers at the start of competition are formidable and must be counterbalanced. Unlike their affiliated counterparts, unaffiliated REPs will not have an automatic revenue stream on the first day of customer choice, and will necessarily need to compete aggressively to acquire customers. In this regard, the commission notes the inherent reluctance and basic inertia of customers to change suppliers in a new and uncertain market environment. The commission has explicitly designed its rule to function as a counterbalance to the incumbency advantages.

The commission modifies the proposed rules in several ways, as discussed below, to strike an improved balance between fostering competition at the start of customer choice and addressing the credit risk burden on the TDUs. In establishing this balance, the commission believes that minimizing the barriers to REP entry is relatively more important at the start of customer choice than achieving the complete amelioration of the TDU's credit risk. The commission believes that to the extent that the cost

associated with the risk that a REP will not pay its bills is spread among all TDU customers and REPs as a group, such spreading of credit risks and its associated costs is a reasonable price that must be paid to create a competitive electric market. Further, as articulated below, the commission believes that this credit risk is substantially mitigated by certain aspects of the rule itself, as well as by specific actions that the TDUs can take to protect themselves from this risk.

*Reasonable Minimum Credit Standards (Subsection (f)(1)(A)):*

TXU-TDU acknowledged that the \$100,000 cash resource threshold was intended to ensure that a small REP could compete, but felt that such a minimal requirement overlooked the fact that a business could be insolvent and still have \$100,000 cash in the bank. TXU-TDU stated that the proposed rule does not require a REP to maintain the financial standards that qualified it for certification, which could mean that a REP with cash resources of \$100,000 when certified could lose all of its cash resources the next day, without jeopardizing its certification. The Retailers countered that if a REP does become insolvent, its customers will not lose service because they could switch to the provider of last resort (POLR), or to another REP.

TXU-TDU stated that, whatever the amounts ultimately chosen by the commission for the minimum credit standards in this subsection, these financial requirements should be considered minimum standards that must be maintained. TXU-TDU recommended that paragraph (1)(A) of this subsection should be revised to read: "must demonstrate that it has and it must maintain".

TIEC opposed TXU-TDU's proposal that REPs be required to continuously demonstrate a level of creditworthiness beyond that contemplated for certification. According to TIEC, REP certification should be a one-time event, not a continual process. TIEC noted that the proposed rule contains provisions, such as annual update requirements, that permit the commission to exercise adequate authority over REPs without the need for perpetual supervision, and that TXU-TDU's proposal would raise the barriers of entry to the competitive market.

Reliant also argued that the security provided by the minimum cash resources would be illusory if REPs are allowed to withdraw those resources after the certification process is complete. To avoid this result, Reliant argued that the cash resources described in paragraph (1)(C)(i) and (ii) should be placed in an escrow account for as long as the REP does business in Texas, and change if the REP pursued business activity levels that exceeded existing levels of credit coverage. Reliant also felt that the TDU needed to be named beneficiary to the financial resources.

Retailers disagreed with Reliant's proposal to escrow cash requirements because the purpose of cash was to fund operations, not create a source of cash, and the escrow account would simply create a cost without any corresponding benefit. Retailers noted that the deposits could increase rates if the REP passed them on to its customers, but even if not passed on to its customers, the deposits would decrease the profits of REPS, thereby reducing their numbers, and depriving customers of choices.

TNMP-TDU, TXU-TDU, and EGS stated that minimal cash resources of at least \$100,000 did not provide enough protection for the TDU. Further, TNMP-TDU stressed that neither the customer nor the TDU should be exposed to any additional risk connected with the passage of SB 7. TNMP-TDU did not provide details but stated that it would support the highest financial requirements consistent with the purposes of SB 7. EGS's suggested alternative figure was \$250,000, which it did not believe would be an unreasonable barrier to certification and entry.

Retailers said that the statute required only that the applicant possess financial resources enabling it to provide continuous and adequate service only when certified. In addition, Retailers said that "financial resources" include more than simply cash holdings because an entity with significant financial strength could acquire greater financial resources than a firm that obtains the bare minimum cash infusion before certification.

Retailers went on to state that the \$100,000 minimum figure was equivalent to the bonding requirements set forth in the CUBR standards, and moreover was consistent with the component of the previous strawman proposal of staff requiring a minimum of \$250,000 for both certification and creditworthiness. Because this \$100,000 standard addressed smaller companies without an established credit rating or extensive net assets, Retailers asserted that the ability to satisfy the requirement with cash equivalents enabled smaller companies to enter the market without incurring burdensome financial obligations.

Reliant disagreed with the assertion of Retailers that the minimum proposed standards were consistent with the credit standards proposed by the CUBR because of Retailer's incorrect assertion that the \$100,000 amount "represented the same bond requirement set forth in the CUBR's Proposed Creditworthiness Standards." Rather, the \$100,000 figure that Retailers referenced was located in the "Licensing" section of the CUBR document related to REP certification, and not the "Creditworthiness" section related to TDU credit risk.

OPUC and TIEC argued that the minimum \$100,000 cash resource requirement was too high. OPUC argued that this requirement might be a significant hurdle for newer, smaller REP entities, and suggested that the minimum initial deposit should be set at \$25,000, and gradually increased to \$100,000 as the number of a REP's customers grew. OPUC argued that the \$25,000 guarantee would not be so onerous as to discourage REPs from entering the market, and the cash requirement could be increased readily as the REP signed up more customers, and revenues from business operations increased over time. OPUC did not provide details about how to implement the sliding-scale proposal for increasing the REP's cash requirements.

In its reply to OPUC, Reliant argued that the alternate financial resource requirements contained in the proposed rule, such as letters of credit, would enable REPs to meet minimum cash resource requirements for only a fraction of the coverage that was actually being provided. Reliant suggested that, for example, the \$100,000 of coverage referenced by OPUC could be obtained reasonably for around \$1,000.

While Reliant agreed with the worthy goal of promoting market entry via setting minimum credit standards as proposed by a few commenters, it nevertheless emphasized that credit standards are still required between REPs and TDUs. Reliant stressed that any one of its three credit standard alternatives with various forms of REP cash deposits could balance these two goals through scalable, or sliding, credit standards that would be based on the level of business conducted between the REP and TDU.

In their Reply Comments, Retailers charged that the TDUs place an inappropriate reliance on regulation and said that the commission correctly employs more market-friendly methods in order to address REP standards. Retailers argued that the TDU's complaints about the \$100,000 credit minimum ignore the rule's safeguards against insolvency. Retailers cited as safeguards the rule's provisions that permit the commission to suspend or revoke a certificate if the REP becomes bankrupt or unable to pay its bills, and that require a REP to report material changes to the commission within ten days. Hence, the commission, as well as the TDUs, would quickly become aware of a REP with developing financial difficulties. In conclusion, Retailers stressed that a higher cash balance would permit fewer REPs to enter the market, thereby reducing competition.

More broadly, Reliant stressed that the importance of appropriate and complete credit standards for REPs should not be overemphasized. Reliant argued that low credit standards for REPs would effectively give them a "free option" because those REPs with nothing to lose could operate with

inadequate finances and the remaining market participants would bear the cost. Specifically, Reliant argued that REPs with nothing to lose would take a completely different approach to serving the market than REPs with equity at stake, and that the market would not be served well by defaulting REPs.

Reliant complained that TDUs that absorb the cost of defaulting REPs would be forced to recover these costs directly via self- or purchased-insurance or indirectly via the equity risk premium requirements of the capital markets. Reliant concluded that if the TDU did not directly address the risk of REP default, the capital markets would do it for them. TXU-TDU made the added point that if the risk of non-payment was placed on the TDU, then each utility's cash working capital and insurance costs would be negatively impacted, ultimately increasing the cost of transmission and delivery service for everyone. Hence, the default cost of one REP would be borne by all the customers of every REP.

Reliant went on to complain that either of these scenarios increased the TDU non-bypassable delivery charges passed on to competing REPs and that this cost reduced the profits of non-offending competing REPs, effectively "socializing" the cost of default because it was borne by the industry and not the defaulting REP and its customers. Reliant noted that market participants would be served best when the cost of doing business were commensurate with the credit quality of each REP, and directly proportional to the level of business activity pursued by that REP.

The commission agrees with Retailers that the \$100,000 minimum credit standard for certification is in the public interest. The commission further agrees that the higher figures recommended by TXU-TDU

and EGS, and the deposits recommended by Reliant, would create barriers to entry. While it understands OPUC's concern about an excessively high entry hurdle, the commission believes that the proposed \$100,000 credit standard for REPs is the minimal figure that is consistent with the need to balance the conflicting goals of TDU credit protection and the REPs' ease of entry into the retail market.

Overall, the commission agrees with Reliant that, once a REP begins operating, its credit requirement should increase as its monthly obligations to TDUs increase. Otherwise, a REP could obtain certification under the credit provisions for small REPs but build up a large volume of business and a large monthly obligation to TDUs. In order to address this concern, the commission finds it appropriate to require REPs to maintain greater cash resources after they achieve a threshold level of business. However, the commission also believes that any sliding scale should not unduly limit the entry of all smaller firms and their growth opportunities.

The commission concludes that the \$100,000 minimum cash balance should allow a REP to conduct up to \$250,000 of monthly business with TDUs and that, after surpassing this monthly threshold, the REP should be required to increase and maintain cash resources at the same ratio to its monthly business with TDUs. For example, for every \$25,000 of monthly business above the initial \$250,000 figure, the REP needs to maintain incremental cash resources of \$10,000 above the initial \$100,000 required for initial certification. For purposes of this calculation, the monthly level of a REP's business with a TDU is the amount billed by the TDU except for transition charges on securitized funds, since they are supported in a separate manner. To inform the commission of the change in applicable requirements, a REP shall file

with the commission a sworn affidavit demonstrating compliance with subsection (f)(1)(A) within 90 days of surpassing the \$250,000 threshold level of business permitted with initial certification. Demonstration of continued compliance with this and other financial requirements is included in the REP's annual report thereafter.

The commission believes that this modification addresses the concern of TXU-TDU and Reliant that the cash certification of REPs could be fleeting, and that the funds could disappear the next day. The commission also believes that TXU-TDU's concern is addressed in subsection (i)(3)(B) dealing with reporting requirements for material changes in the financial basis for a REP's certification, in subsection (f)(1)(E) dealing with verifying financial resources "at any time after certification," and also in modified subsection (j)(6) and (j)(7) and new subsection (j)(8) relating to various financial grounds for suspension or revocation of certificates. Subsection (j)(8) is added for the express purpose of indicating that the commission regards failing to pay the TDU on time a significant violation of commission rules. These provisions permit the commission, as well as the TDUs, ready access to information on any developing financial difficulties for existing REPs. As such, these provisions will reduce the financial repercussions of the TDU credit risk.

However, to help address the concerns of TXU-TDU and Reliant, and the other TDUs, the commission modifies paragraph (1)(A)(iii) to make it clear that the evidence of financial resources is an ongoing obligation. (The commission notes the concept of an ongoing requirement was already implied in the

proposed subsection (f)(1)(E) referencing unencumbered resources at certification and "at any time after certification").

The commission intends that the \$100,000 minimum threshold and the increasing cash requirements associated with increased obligations to TDUs is a resource that is available to cover both commission penalties and TDU credit losses. The commission believes that this modification to the financial requirements will ensure that as a REP becomes larger it will have adequate cash resources to make timely payments to TDUs. Further clarification is added to subsection (f)(1)(A)(iii) that first the commission and then the TDUs are entitled to these resources in the event of default. The reduction of the grace period of subsection (i)(3)(B) from 30 days to ten days is added as further mitigation to the risk borne by TDUs.

The commission does not believe that this credit standard for REPs will unreasonably restrict their entry into the market, and it should reduce credit risk for the TDUs. On June 29, 2000, the commission adopted 16 T.A.C. §26.109, Standards for Granting of Certificates of Operating Authority (COAs), and §26.111, Standards for Granting of Service Provider Certificates of Operating Authority (SPCOAs), which permit financial verification and review of competitive providers of local telephone service for a period 12 months beyond certification. As also adopted by the commission on June 29, 2000, 16 T.A.C. §26.114, Suspension or Revocation of Certificates of Operating Authority (COAs) and Service Provider Certificates of Operating Authority (SPCOAs) specifically delineate grounds for suspension or revocation to include the following: "bankruptcy, insolvency, failure to meet financial

obligations on a timely basis, except if reasonably disputed, or the inability to obtain the financial resources needed to provide adequate service." The commission adopts an analogous strategy in this rule.

Reliant stated that a \$50 million standard is inappropriate and should be deleted because shareholder equity in a company, or its guarantor, is not a credit standard used alone by any recognized rating agency, thus making equity a particularly poor standard to apply as a basis for REP certification. Reliant stated that a large amount of equity does not ensure that a REP would have the cash to satisfy its financial obligations, and proposed that a REP who could not demonstrate an investment grade rating or \$100,000 of cash resources should not be certified as a REP.

In opposing the deletion of the \$50 million equity alternative, TIEC asserted that REPs should be able to establish creditworthiness in a variety of ways because a competitive retail market depends in part on REPs of different sizes and degrees of establishment being able to compete.

Retailers emphasized that the first two proposed alternatives to establish creditworthiness under the proposed subsection (f)(1) reasonably implement the pro-competition goals of SB 7 and the commission because both provided access to working capital and capital markets. Retailers said the \$50 million net assets standard would qualify relatively large companies with adequate financial resources and little financial impairment risk, but without an independent credit rating. Retailers also

stressed that the investment grade credit rating approach permitted small- to medium-sized companies to obtain certification without posting cash or cash equivalents as security.

The commission agrees with Retailers and TIEC that the minimum equity figure of \$50 million is in the public interest because this standard minimizes the certification scrutiny and costs for relatively substantial REPs that have yet to issue public debt, or are not publicly-traded in the financial markets.

*Reasonable Utility Credit Standards (Subsection (f)(1)(B)):*

TXU-TDU argued that the goal of reducing barriers to entry should not overshadow the fundamental need of ensuring that REPs are truly creditworthy. TXU-TDU argued that paragraph (1)(B) failed to provide sufficient credit protection to the TDUs; failed to be truly customer friendly by requiring all REP customers pay for the credit difficulties of a single REP; or failed to properly reflect fundamental elements of a competitive market.

EGS argued that creditworthiness, security for payment, and remedies for non-compliance are important issues in the business relationship between a TDU and the REP doing business in a TDU's service area, yet are separate from the certification threshold. EGS said that these separate issues should be addressed in the TDU's tariff and related service agreements governing its business relationship, and that the REP certification rules should not specify circumstances in which a TDU is precluded from imposing additional credit requirements on a REP because such limitations could be

addressed in Project Number 22187, *Terms and Conditions of Transmission and Distribution Utilities' Retail Distribution Service*. EGS proposed that paragraph (1)(B) should distinguish the certification of REPs from their creditworthiness in dealing with TDUs, by stating "TDUs may impose credit standards on a REP to the extent specified in its tariff, and allowed by commission rules."

Reliant and TXU-TDU complained that the proposed paragraph (1)(B) did not allow additional TDU credit standards unless the REP defaulted, which left the TDU exposed for the collection of delivery charges other than transition charges and left the utility with no mechanism to recover amounts due for services already provided by the TDU. According to TXU-TDU, the TDU was exposed to losing a minimum of two months of revenue in the event of REP payment default. Reliant stated that not affording TDUs adequate credit protection would be contrary to standards contained in the CUBR, which were adequate and appropriate to protect TDUs. As a result, Reliant suggested revising paragraph (1)(B) to use significant portions of the CUBR standards.

TIEC noted that while TXU-TDU, Reliant, and EGS proposed modifications to allow TDU utilities to impose additional credit standards on REPs, especially through the requirement for deposits, it opposed these changes because they would adversely affect the ability of small REPs to become certified, thus reducing competition. TIEC also observed that while the TDUs argued that failing to impose their standards might result in higher costs of credit risk being passed on to customers, none of the consumer groups appeared to share that concern. TIEC urged the commission not to change the proposed language of paragraph (1)(B).

As noted, Reliant argued that the commission should replace the proposed rule with one of its three suggested alternatives, all of which required specific levels of cash deposits for REPs. Reliant summarized these credit alternatives as follows: 1) investment grade credit rating, or secure cash resources based on two months of estimated annual TDU tariff-based billings to the REP, or; 2) investment grade credit rating or secured cash resources equal to \$100,000 for every 1,000 customers; or 3) use of the transition charge language in §25.108 to cover all charges payable to TDUs by a REP.

Reliant stated that any of its proposals would provide adequate credit protection to the TDUs, while simultaneously providing a framework that was equally viable for both large and small REPs. Reliant explained that this balance would be achieved because the cash resource credit standard alternatives were scalable; moved in proportion to the level of business occurring between the REP and the TDU; and permitted REPs to use the same financial security filed with its application for certification to meet its ongoing credit standards.

In addition to paying transition charges for securitized funds, TXU-TDU argued that REPs are required to pay TDUs for transmission service charges, distribution service charges, non-securitized competition transition charges, system benefit fund fees, nuclear decommissioning fund fees, and potentially discretionary service charges. TXU-TDU complained that these amounts at risk were not trivial to TDUs; for example, a REP responsible for 1.0% of the TXU-TDU's revenue requirements would be paying approximately \$2 million every month in distribution charges.

Reliant claimed that additional TDU credit requirements did not create insurmountable financial hurdles for smaller REPs. In fact, Reliant asserted that using a conservatively estimated cost of 1.0% yearly, a financially viable REP should be able to obtain surety bond credit coverage of \$1,000,000 for only \$10,000.

Retailers argued that the credit cost impact of Reliant and TXU-TDU depended on false premises. Retailers asserted that the TDUs wrongly assumed that REPs will default on a minimum of two months of delivery charges, and that default would actually be less onerous than claimed by TDUs because the TDU-TXU scenario was unlikely to occur due to the fact bills are commonly paid on a daily basis and not sent to customers on just a few days. If the REP defaults on one day of bills, Retailers said that the TDU would demand that the REP then post a deposit, and take other steps to reduce risk. During the public hearing, TXU-TDU responded that Retailers were incorrect in minimizing the amount of obligations subject to default because default depended not just on the first unpaid obligation, but rather on a growing level of outstanding obligations, so that once default started, it would cascade as each day of nonpayment was added to the total obligations under default.

TXU-TDU proposed that the commission does not need to decide all the issues associated with the subject of REP security payments in this proceeding, noting that this subject is also being addressed in Project Number 22187. TXU-TDU stated that the tariff rulemaking is the most appropriate forum to resolve this issue, and recommends that paragraph (1)(B) should be revised to defer these credit

standards to that rule making. TIEC argued that the commission is the proper regulatory body authorized to establish credit quality standards for REPs, and that it is entirely appropriate for the commission to set these standards in this rulemaking. While TIEC felt that the ERCOT draft rule embodies some principles in common with the proposed rule, it was still in a developmental stage, therefore requiring the commission to establish REP credit requirements in this rulemaking.

While the commission believes that TXU-TDU made a strong case for the potentially longer time period for default, the commission still believes that the argument over the length of the default and the amount of default is more a factual issue subject to accounting experience than a logical issue subject to an *a priori* resolution. Hence, the commission concludes that the amount of default and the actual credit loss to the TDUs are best resolved through the accumulation of REP credit loss experience, and therefore defers the recovery of such costs to a future rate proceeding brought by the TDUs. In addition, the modification to the \$100,000 cash standard discussed previously will lessen the possibility for default because it will ensure that as a REP becomes larger it will have adequate cash resources to make timely payments to TDUs.

The commission disagrees with TXU-TDU and agrees with TIEC that this proceeding is the appropriate rulemaking for establishing credit standards for REPs. The commission believes that Project Number 22187 is the appropriate proceeding for establishing non-credit standards, such as the equally important conditions and mechanisms imposed in the event a REP default in making payments to TDUs.

The commission does not believe that TDUs should be able to require additional security beyond that adopted in financing orders or in proposed §25.108 until, and unless, a REP defaults on payment to the TDU. While the commission recognizes the concern the TDUs have expressed related to the payment of TDU charges, the commission notes that the TDU, as a regulated entity, retains the ability to request an increase in rates if REP defaults cause the TDU to not fully recover their regulated cost of service.

In addition, the commission will establish payment timelines and standards for the remittance of TDU charges in Project Number 22187, as well as establish the remedies that the TDU may pursue upon default in payment by a REP. It is the commission's intention to make those remedies substantive and severe in order to encourage REPs to remit their payments to the TDU on a prudent and timely basis.

Furthermore, the commission has stated in §25.107(j) that REP certificates are subject to suspension or revocation for significant violations of PURA or commission rules. The commission believes it is important to state in this rule that it will consider a failure to abide by the rules adopted in Project Number 22187, and the standardized tariff adopted as a result of that proceeding, a significant violation of commission rules and that such failure will result in suspension of a certificate. As such, the commission has explicitly added a provision in §25.107(j) to state that a failure to timely remit payment to the TDU and to abide by the standardized tariff will be treated as a significant violation of its rules.

As a result of its conclusions against requiring REP deposits to address TDU credit risk, the commission declines to further modify subsection (f)(1)(B).

*Mitigating Factors Offsetting Credit Risk:*

In conclusion, the commission believes that there should be no TDU deposit requirements for REPs before default because the barriers to market entry should be kept low, at least at the start of customer choice. The commission agrees with Retailers that the barriers to entry in a new market should be minimized to the extent possible in order to facilitate entry into the newly competitive market. The commission believes that the financial standards and creditworthiness criteria established in this rule in conjunction with the requirements relating to the security needed for transition charges are the only financial requirements that the commission should require REPs to meet, in the absence of a default by a REP.

Moreover, the commission believes that the following aspects of the rule and the competitive environment will serve as mitigating factors to minimize the TDU exposure to the REP credit risk of nonpayment: minimum certification standards, including the sliding-scale cash standard, discourage non-viable entrants; on-going standards maintain credit quality over time; required notice reveals developing financial difficulties; failure to remit TDU charges violates commission rules; power contracts with power generating companies and Qualified Scheduling Entities (QSE) will require a showing of financial soundness; payment defaults permit the recovery of credit losses; and the severe remedies for default encourage on-time payments. In addition, the provisions relating to the REPs that bill for the recovery of securitized assets have stringent credit and payment requirements that are intended to ensure that

REPs are timely in their payments of transition charges, so as to preserve a high credit rating for the securitization bonds.

After consideration of these aspects of the coming competitive environment, the commission believes that the nature of the retail electric service business is that the market will require that REPs have a significant amount of financial resources and be creditworthy entities. Therefore, the commission does not find it necessary at this time to impose additional burdens on REPs beyond those adopted in this rule.

*1.(B). How do the credit quality standards that are set in this rule integrate with the expected credit quality standards to be established by an independent organization, as defined in PURA §39.151(b), and how should any differences be addressed?*

CSW-REP, EGS, SPS-REP, Retailers, and TIEC observed that the credit standards of the independent organizations (IO) have not been established yet. Nevertheless, CSW-REP and SPS-REP stressed that the standards must be consistent with commission rules. CSW-REP went on to note that consistency between the rule and the IO should be achieved easily within ERCOT because the commission has jurisdiction over setting both standards, and that the commission staff should coordinate with IOs outside of ERCOT to achieve the same consistency. CSW-REP and SPS-REP stressed the credit standards established by the IO must be a requirement for maintaining the REP's certification.

CSW-REP also stated that the credit standards must not be additive, which could create a barrier to entry.

EGS, Reliant, and TXU-TDU stated that the credit quality standards established by the REP certification rule would not preclude an independent organization, as defined in PURA §39.151(b), from establishing separate credit criteria between the IO and the REP. Reliant noted that these two entities have their own separate and unique credit considerations. EGS noted that the IO may well require additional credit quality standards and obligations with REPs to mitigate potential imbalances in energy purchases and sales, ancillary service obligations, and other costs. TXU-REP stated that the commission does not need to address the credit quality standards of ERCOT because its requirements address considerations for market settlement between market participants, while the commission's rule is designed to address consumer protection goals.

Retailers stated further that ERCOT credit quality standards would apply only to QSEs, which would schedule power transactions, and not to REPs, which generally were separate entities. As such, Retailers believed that no need existed to require REPs to provide security for such payments because ERCOT would impose requirements on QSEs, using a private, bilateral relationship outside the commission's jurisdiction. However, Retailers noted that if a REP became a QSE, the commission's rule should avoid any potential pancaking of credit requirements that might occur if separate security requirements were applied both at the ERCOT level and at the commission. This pancaking would simply result in over-security of the REP if it conducts its own scheduling.

In its Initial Comments, TIEC noted that the commission is the proper regulatory body authorized to set credit quality standards for REPs, and it is appropriate for the commission to do so in this proceeding.

In its Reply Comments, TIEC referenced CSW-REP's comments that there should be consistency between the IO and this rule because the commission has jurisdiction over both. However, if the CSW-REP advocated allowing credit quality standards to be developed at ERCOT instead of in this rulemaking, TIEC disagreed because the parties in this rulemaking devoted significant analysis to determining a REP's credit quality standards. TIEC argued that deferring determination of these standards would mean wasted effort in this project, and ultimately delay of the REP certification process.

The commission believes that its credit standards for REPs are entirely separate from those established by an IO, including ERCOT, for QSEs or the entities responsible for scheduling and interacting with the IO. That is, the IO's credit standards are distinct from the minimal credit standards, the financial requirements to protect customer deposits, and the securitization of transition charges set out in this rule. The QSE standards of IOs are separate from any REP credit concerns of the TDUs, or for that matter, generating companies. As such, the \$100,000 minimum cash requirement for REP certification should be in addition to any other requirements that the REP must meet when dealing with other parties. The commission observes that the nature of the retail electricity business will require REPs to contract with entities such as QSEs in order to operate, and that the QSEs are likely to require financial security in excess of what the commission has adopted in these rule.

2. *Concerning §25.107(f)(2), Financial resources required for customer protection, do the financial standards set in paragraph (2) adequately protect the customers of small REPs against potential harmful effects of financial derivatives that may arise from buyer speculation in or seller default of these securities? If not, how should they be addressed?*

CSW-REP, TXU-REP, EGS, SPS-REP, Reliant, and Retailers all stated that the standards set forth in subsection (f)(2) were adequate to protect customer deposits against the potential harmful effects of financial derivatives that might arise from buyer speculation or seller default.

TXU-REP and CSW-REP noted, however, that even without the use of financial derivatives, a REP might engage in speculation or otherwise engage in risky strategies that could put customer deposits at risk. Nevertheless, TXU-REP and CSW-REP stated that regardless of the reason that a REP might go out of business, *i.e.*, regardless of whether the harmful effects of financial derivatives caused the business failure or by any other cause, the requirements of subsection (f)(2) would protect customers. Consequently, no further provisions addressing any specific business risk would be necessary to protect customers. While TNMP-TDU supported the language that was contained in subsection (f)(2), the utility held that it should be made clear that the financial obligations are independent of operations and should not be used to support operations.

Retailers stated that it is impossible to write a rule that anticipates every potential event in a competitive market, including the impact of hedging and derivatives. However, the commission could protect the consumer from unfair market practices through this rule because it provides the financial assurances that a certified REP has the creditworthiness necessary to protect customers. However, Retailers felt that the question goes deeper than the REP's financial health, including determining the appropriate business practices of that REP. Retailers argued that regulating hedging crosses the threshold and constitutes an impermissible regulatory solution. The commission should not dictate the business strategy that a REP might use to protect itself from market price volatility.

In its Reply Comments, Consumers emphasized that while they supported subsection (f)(2) because it protects customer deposits and prepayments, the question goes further. Consumers noted that the question specifically asks whether the paragraph is sufficient to protect customers against any potential harmful effects resulting from the use of financial derivatives or default on securities. Consumers noted that there are other potential harmful effects of these instruments, including REP default and the transference of customers to the POLR. Therefore, the commission should still inquire of REPs whether they are planning to use such financial instruments and about their experience with these investments.

The commission agrees with the various parties that proposed subsection (f)(2) adequately protects customer deposits and other advance payments against the risks inherent in hedging and other financial derivatives, or for that matter, other business factors that could put the REP at risk. Furthermore, the commission agrees with Retailers that in the restructured environment of SB7, it is not appropriate for

the commission to over-regulate the ongoing business operations and risk-taking decisions of REPs. While the commission recognizes Consumers' concern about the transfer of customers of a defaulted REP to the POLR, perhaps at higher cost, the commission believes that this "fallback" function of the POLR is one of the basic reasons for its very existence. The paragraph is adopted as proposed except for a correction to ensure consistent terminology throughout the rule.

3. *Concerning §25.107(g), should the commission further distinguish between the continuing requirements for certified REPs and the application requirements, especially before retail choice begins?*

CSW-REP, TXU-REP, TNMP-TDU, EGS, Reliant, SPS-REP, and Retailers indicated that the rules need not further distinguish between initial application and continuing certification requirements. No party offered comments to the contrary.

As support for this position, TXU-REP suggested that the application requirements appear to be sufficiently flexible to allow, for example, an applicant to show only what is reasonably feasible under subsection (g)(1) if an ERCOT independent system organization (ISO) procedure has not been finalized by the time the application is submitted. TXU-REP, EGS and Retailers noted that the annual reporting requirements in §25.107(i) provide sufficient demonstration of ongoing compliance with the certification requirements of §25.107(g).

Reliant stated that, after retail choice begins, it might be necessary to conduct a proceeding to review the requirements based on actual experiences in the market. Reliant maintained that such a proceeding should be the forum for parties to suggest modifications or revisions of various rules, including the REP certification rule.

The commission concurs with all the parties that further distinction between the initial application and continuing certification requirements is not necessary. The commission also agrees with TXU-REP, EGS, and Retailers that the requirements of subsections (g) and (i) combine to ensure that the commission receives adequate ongoing information about REPs. With respect to Reliant's comment, future activity in the marketplace will determine whether a comprehensive review of rules concerning the restructured marketplace is warranted.

4. *Finally, concerning the annual report required by §25.107(i), Requirements for updating or changing the terms of a REP certificate: What circumstances should the commission consider in establishing a reporting period and due date for the report?*

CSW-REP, TNMP-TDU, and SPS-REP supported the commission's proposed reporting period and due date of June 1. CSW-REP conditioned its support on the fact that subsection (i) requires more contemporaneous reporting for some events. SPS-REP concluded that the proposed rule's requirements for reporting and for changing the terms of a REP certificate were adequate.

CSW-REP and TNMP-TDU requested language in the rule to clarify the due date of the first report. CSW-REP noted the first annual report should be due on June 1 of the year following the year in which the certification is granted, even if the calendar year reported includes only a partial year of operation. TNMP-TDU said that, without a year specified, REPs participating in the pilot program that commences on June 1, 2001 may be unclear whether they are required to file an annual update in 2002.

EGS, TXU-REP, Reliant, and Retailers did not object to the June 1 due date but expressed concern that reporting periods and report dates in each of the commission rules applicable to REPs be coordinated. Reliant suggested the REP Annual Report be similar in form and due date to the utility Annual Report filed by each electric utility in Texas. EGS offered that the reporting requirements in §25.107(g) should be determined after considering the schedules for all reporting requirements imposed by PURA and the commission's rules.

TXU-REP asserted that the commission should strive to achieve consistency and to eliminate redundant reporting obligations under all of its rules and the ERCOT ISO requirements. To the greatest extent possible the commission should rely on publicly available information compiled by other sources, such as the ERCOT ISO, before imposing reporting obligations on REPs. Retailers replied in agreement, noting that the redundant reporting obligations should be avoided under all commission rules and the ERCOT ISO requirements because they impose unnecessary regulatory burdens on REPs and increase costs. Retailers proposed the commission consider extending the deadline for good cause

circumstances. TXU-REP further suggested that the first annual report should cover no less than a 12-month period, and proposed language to that effect.

The commission adopts the calendar year reporting period and June 1 annual report date of the proposed rule. The commission notes the congruence of this provision with the reporting period and date for reports required by utilities pursuant to §25.84, relating to *Reporting of Affiliate Transactions for Electric Utilities*. The commission further notes that it strives to coordinate such reporting dates across rules when possible and appropriate. The commission adds language to subsection (i)(4) to clarify that the first annual report of a REP is due in the year following its certification as a REP, regardless of whether the first report contains only a partial year of company activity. The commission believes it can grant extensions on the basis of good cause without changes to the rule language as proposed.

*§25.107(a), Application*

Brazos supported the proposed rules as written and expressed concern that a statement in the published preamble did not accurately reflect the meaning of the proposed rule text. Brazos noted that the last two sentences of the proposed subsection (a) were consistent with PURA §11.003(14) and §31.002(17) with regard to the terms "cooperative" and "REP." However, Brazos asserted that the sentence in the first full paragraph on page 4 of 46 of the preamble should be modified to read as

follows: "These credit standards apply to a REP's business with TDUs serving Texas, as well as a REP's business to any electric cooperatives or municipal utilities electing customer choice."

In reply comments, CPS, Austin, and TEC supported Brazos. TEC understood the intent of the preamble statement to require that credit standards apply to a REP's business with (1) TDUs serving Texas, (2) electric cooperatives electing customer choice, and (3) municipal utilities electing customer choice. TEC added that Brazos' suggested wording would eliminate confusion.

The commission agrees with Brazos and replying parties and reaffirms, with Brazos' correction, its statement in the publication preamble concerning the components of the financial strategy of the rule.

The scheme of financial standards in these rules has three additive components that are found in the first three paragraphs of §25.107(f): (1) three alternative credit quality standards for certification as a REP; (2) a financial standard for protecting customer deposits and other advance payments made to the REP; and (3) a financial standard and procedure for REPs to bill and collect any transition charges resulting from securitization. These credit standards apply to a REP's business with TDUs serving Texas, as well as to a REP's business with any electric cooperatives or municipal utilities electing customer choice.

EPE, in its initial comments, noted that, by virtue of PURA §39.102(c), it is not subject to PURA Chapter 39 until the expiration of its freeze period in 2005. Therefore, the rules proposed in this project do not apply to EPE until the end of EPE's freeze period. EPE requested that proposed subsection (a)

be amended to include specific acknowledgement of the fact that the rule does not apply to companies subject to PURA §39.102(c).

The commission agrees that the rule does not apply to a company that is subject to PURA §39.102(c) until its freeze period ends and therefore amends §25.107(a) to include the clarification.

*§25.107(b), Definitions*

EGS stated that, to the extent defined terms already exist, current definitions should be used in the commission's proposed rule and, along with TXU-REP, supplied alternatives to the definition for "customer" to correlate it to PURA §31.002(16). EGS believed that the term should be changed to "end use customer" and clarified to mean a customer who does not buy electricity for resale but who purchases and ultimately consumes electricity. TXU-REP stated that the definition of "customer" should only include those to whom the REP is actually selling electricity or to whom the REP has committed to sell electricity, and requested deletion of the someone who merely "has applied for" service from a REP from the rule's definition. TXU-REP argued that including such applicants, who may never actually receive or commit to service would expand the rule's definition of "customer" beyond the definition of "retail customer" contained in the governing statute.

Consumers replied in opposition to the elimination of "has applied for" from the definition of customer on the grounds that such would be inconsistent with the customer protection rules, which currently apply to

applicants as well as customers. Consumers noted that, while certain provisions of the rules will not apply to persons who were applicants but not customers of a REP, the anti-discrimination provisions of PURA clearly apply to applicants, and in fact are intended to prevent REPs from discriminating in the provision of service to potential customers.

The commission agrees with Consumers and therefore declines to change the definition of "customer."

EGS and Retailers argued that the commission should change the definition of "Residential Customer" and strike the clause "as defined in statewide transmission and distribution utility tariffs." Retailers asserted that the statement does not add to the definition and the tariff definition referenced may differ among utilities. EGS also suggested speaking to the consumption of "electricity" rather than "power."

Consumers replied in opposition to the proposal to strike the reference to "statewide transmission and distribution utility tariffs" from the definition of residential customer and said it is crucial that "residential customer" be defined consistently for all purposes. Consumers argued that a customer who pays non-bypassable charges, as allocated to the residential class, must be considered a residential customer for purposes of calculating the 300-megawatt requirement under SB7. Consumers restated the concept as "a residential customer is a residential customer is a residential customer—there should be no opportunities to game the system by reclassifying customers into different rate classes for different purposes." Consumers said that the reference back to the tariff governing the TDU charges will ensure all REPs classify residential customers the same.

Because a common understanding of what the term "residential customer" means is essential only to the threshold residential service calculations required by subsection (e)(3), and because that provision becomes moot three years after customer choice begins, the commission deletes the proposed definition of "residential customer" in subsection (b). Instead, the commission incorporates the definition components into the requirements of subsection (e)(3). The commission agrees with Consumers that if a customer is considered to be in the residential class of the utility tariff, the customer should be counted toward the 5.0% threshold, and if the customer is not of that class, it should not be counted. To allow for the possibility, at some point in the future, that utility tariffs do not specify a residential rate class, the commission inserts language from the proposed definition, augmented by comments of parties, to identify the customers captured in existing residential rates classes.

*§25.107(c), Application for REP Certification*

Reliant and TXU-REP expressed concerns with the certification process being a contested case, and Reliant proposed that the commission add a sentence in §25.107(c) stating that the REP certification process will not be treated as a contested case. Reliant stated that PURA §39.003 does not require that a certification process be conducted as a contested case and focused on the importance of a speedy and efficient certification process in order to facilitate entry of competitors into the retail market. According to Reliant, although PURA §39.003 does not except certification from the contested case requirement, it assumes that each contested case will involve an incumbent electric utility. Because

PURA §31.002(6) defines an "electric utility" as a person that "owns or operates for compensation in this state equipment or facilities to produce, generate, transmit, distribute, sell, or furnish electricity in this state," Reliant argued that a REP is not an incumbent electric utility. TXU-REP asserted that the commission should handle REP certification requests as administrative proceedings, and maintained that the rule should clearly provide for such a process.

As an alternative, Reliant stated that, if the commission decides that the certification proceeding must be a contested case, that proceeding should be conducted quickly, with a minimum of discovery and briefing. Consumers posited that restricting the contested aspects of the application to a minimum would facilitate the legislative goal of establishing a "fully competitive electric power industry," as specified in PURA §39.001(a).

Consumers disagreed both with the statement that the rule requires a contested case and with the suggestion that a contested case should be prohibited, and asserted that the commission cannot deny a party, including its own staff, the right to challenge an application. Consumers indicated that, if an application is challenged, all parties including the applicant are entitled under law to have a contested case to offer evidence to support their position. Consumers insisted that contested cases should be allowed, but predicted that contested cases would be warranted in only a few circumstances.

Shell maintained that the commission must conduct every proceeding under PURA Chapter 39, other than a rulemaking proceeding, report, notification, or registration, as a contested case. Further, Shell

asserted that an application for certification constitutes a contested case within the meaning of the Administrative Procedure Act, Texas Government Code Annotated §2001.003(1) (Vernon 2000) (APA). The APA defines a "contested case" as "a proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing." The due process interest in granting a hearing therefore outweighs any slight delay that treating these applications as contested cases may cause.

The commission concurs with Shell and concludes that the REP certification process is a contested case according to the APA, as cited by Shell. In addition, PURA §39.003 requires that, unless specifically provided otherwise, each commission proceeding under PURA Chapter 39, other than a rulemaking proceeding, report, notification, or registration, shall be conducted as a contested case and that the burden of proof is on the incumbent electric utility. While the commission agrees that a REP is specifically excepted from the definition of "electric utility," the commission does not agree that PURA §39.003 assumes that each contested case will involve an incumbent electric utility. The commission interprets this PURA provision as intending to expand, rather than restrict, contested cases under the APA.

Although the commission concludes that the REP certification process shall be a contested case, experience with contested cases involving certification applications in the telecommunications industry demonstrates that such cases can be managed fairly and efficiently. The commission expects to utilize a conservative standard with respect to intervention in these proceedings. Assertions of justiciable interest

will be subject to strict scrutiny. For example, the mere allegation that an entity is a competitor or potential competitor with respect to the applicant is unlikely to be sufficient grounds for admission as a party to a REP certification proceeding. The commission intends these proceedings to be aggressively managed. Commission Procedural Rule §22.32, relating to Administrative Review, authorizes administrative review in instances where, among other requirements, the matter has been fully stipulated so that there are no issues of fact or law disputed by any party. Moreover, Procedural Rule §22.35, relating to Informal Disposition, allows informal disposition in contested cases under proper circumstances. Presiding Officers also have discretion to limit discovery, where appropriate. When a contested issue of fact arises in a REP certification proceeding, fairness and due process require an opportunity for hearing. The commission concludes that an expeditious process must be balanced with the obligation of the commission to protect the interests of the Texas customer and competitors in the market. Both the contested case nature of the proceeding and the timelines for reviews of applications are designed to serve these goals.

EGS and Retailers stressed the importance of a certification process that does not unnecessarily delay a REP's ability to enter the market, and proposed condensing the timelines for evaluating completeness of applications and for completing the certification process by as much as half. Both parties emphasized that the commission could extend the deadlines when necessary with a finding of good cause. According to EGS, it is imperative that the process does not hinder the transition to competition, including a REP's participation in the Customer Choice Pilot Programs.

The commission does not agree that the timelines for review of REP certification applications should be shortened from those in the proposed rule (20 days to evaluate completeness and 90 days to complete the certification process). Given that there is no statutory limit on the certification process, given the steps required to process an application, and given the commission's experience in the telecommunications industry, the commission determines that times allowed in the proposed rule are appropriate.

The commission carefully considered the timelines and finds that they reflect an efficient timeline by which the majority of sufficiency reviews can be completed. Practically speaking, a number of steps must happen in the application process. When many applications must be managed simultaneously, efficiency may well be impaired, particularly when a new process is being initiated. The volume of REP applications that will be filed at the first opportunity cannot be precisely anticipated, but the commission expects that many applications will be received in September and October of 2000. Although every effort will be made to complete the sufficiency part of the process as quickly as possible, to create a provision in the rule that could result in the need for issuance of orders for good cause extensions that could otherwise be avoided is not prudent.

Similar estimation processes were employed in determining the 90-day overall review timeline adopted in the rule. In addition to the work of customer protection and financial and technical review, a proposed order must be drafted and filed twenty days before the open meeting at which the commissioners will consider the case. This means that only 70 of the 90 days in the schedule are

actually available for the work of review. While commenters suggest reducing this time to 45 or 60 days, the commission's experience with telecommunications industry certification processes, which are subject to a 60-day statutory timeline, reflects the frequent need for good cause extensions. Sometimes these extensions were the result of a need to find a "fit" with the open meeting schedule, but more often were the result of motions for extensions of time by the parties. Rather than adopt an unreasonably short timeline that will result in good cause extensions being the rule rather than the exception, the commission chooses a timeline that it anticipates will be appropriate to the needs of the majority of REP certification cases. The commission finds that the 90-day review timeline adopted in the rule is reasonable and appropriate. In any event, prompt filings after September 1, 2000 will be processed well in advance of the pre-marketing activities for the pilot project program in Spring 2001.

*§25.107(d), REP certification requirements based on service area*

*Subsection (d)(1)(A)*

Reliant and TXU-REP stated that the geographical service areas specified in proposed §25.107(d)(1)(A)(i-iii) should be consistent with the service areas used for POLRs in Project Number 21408. According to Reliant, a REP affiliated with a TDU will almost certainly be required to serve an entire POLR service area, and therefore will have to become the POLR by default if no other REP chooses to serve that entire area. The geographical requirements in subparagraph (A) should be broad enough to ensure that REPs other than the affiliated REP are eligible to serve as the POLR for a

particular area. TXU-REP stated its concerns about allowing certain REPs, by unilaterally designating their own small service areas, to circumvent the requirements of PURA §39.106(f), which imposes upon all certified REPs the potential obligation to serve as POLR. TXU-REP stated that the commission should revise §25.107(d)(1)(A) to ensure that only the state, a power region within the state, or the service areas of a TDU, can be designated as service areas. TXU-REP pointed out that requiring larger service areas would also facilitate the commission's record keeping.

Consumers maintained that, the smaller the service territory, the greater the potential for "redlining and cream skimming." Consumers further maintained that greater potential for competitive choice in rural areas would result if the minimum size REP service area region is the TDU service territory. Contrary to Reliant and TXU-REP, Consumers stated that it is not averse to naming the affiliated REP as the POLR.

TXU-REP stressed that the commission should ensure that the geographical service areas that may be designated for REP certification match the geographical areas that will be identified in the ERCOT registration database as well as the areas that are being contemplated for delineating the bounds of service areas for POLR. TXU-REP said that, to date, market participants who have been involved in establishing the parameters for the registration database (which will identify each customer and its chosen REP) have agreed that the zip code and the service area of the TDU that serves the customer are the appropriate geographical identifiers. If the commission allows REPs to designate their service

area in any different manner, especially if the area designated is smaller, then it will be difficult for the registration database to sufficiently fulfill its purpose.

The commission finds that the financial requirements that were inserted into the proposed rule at publication, and largely maintained in the adopted rule, facilitate market entrance for new and small REPs and eliminate the need to allow for small geographical service areas in order to facilitate market entry. The commission agrees with Consumers that, the smaller the geographical service area, the opportunities for "redlining" increase. The commission believes that requiring the smallest REP service areas to equate a TDU service area will encourage REPs to broaden their customer base.

*Subsection (d)(2)*

EGS asserted that the reporting requirements related to Option 2 in §25.107(d)(2)(F) are unduly burdensome and should be deleted, since Option 2 is available only to REPs serving individual customers who contract for one megawatt (MW) or more of capacity.

The commission does not agree that the Option 2 REPs should be exempted from the reporting requirements of the rule. The sophistication of Option 2 customers is recognized by the reduced application requirements imposed upon REPs who serve them; the reporting requirements are designed to serve purposes in addition to customer protection. However, the commission does agree that

§25.107(d)(2)(F) should be modified to read: "A REP certified pursuant to this paragraph is subject to reporting requirements specified in subsection (i) of this section."

*§25.107(e), Administrative requirements.*

*Subsection (e)(1)(A)*

Reliant Energy objected to limiting a REP to two assumed names, stating that this requirement: 1) is not supported by any facts in this proceeding; 2) could restrict a REP's marketing strategies that would require using several different names; and 3) would restrict a REP with multiple distribution service areas from using a different name for each of its service areas. Reliant argued that, at the least, the rule should clarify that it allows for two assumed names in each distribution service area. CSW-REP concurred with Reliant, stating that the requirement is arbitrary. CSW-REP suggested that the commission review and approve the use of authorized names instead of limiting a REP to two names, and noted that §25.111(f)(1)(A), relating to Registration of Aggregators, permits five trade names. TXU-REP and Retailers urged the commission to consider authorizing the use of more than just two names, and suggested that the commission revise its rule to allow REPs to use up to ten names, all of which would be identified on the REP's original or amended certificate. EGS argued that, as long as a REP properly registers all assumed names with the commission, the commission would have the means to monitor a REP's activities in the marketplace.

Consumers countered by recalling the reasons offered in debate on the affiliate use of an incumbent's name in earlier rulemakings. Consumers argued specifically that customers should understand with whom they are doing business and that, therefore, the commission should not lift the proposed limit on the number of assumed names used by a REP.

The commission finds that the unlimited use of assumed names by REPs would create the potential for confusion on the part of the public. On the other hand, the commission is sympathetic to the issues raised by the commenters. Therefore, the commission revises subsection (e)(1)(A) to allow a REP to use up to five names at any one time, consistent with the practice adopted in the aggregator registration rule. If an applicant demonstrates sufficient justification for a good cause exception to this requirement, it may seek one.

*Subsection (e)(2)*

EGS suggested that the commission should provide a REP reasonable advance notice with respect to visits set forth in §25.107(e)(2), and proposed that the phrase "on the same basis available to an electric customer" be replaced with "A REP is entitled to reasonable advance notice of any visit so that the REP can have appropriate representatives available to respond to the commission's authorized representative." Utility.com objected to the requirement that its Texas office provide customer service, stated that more is available to a customer on its website than at its Texas office, and argued that

acceptance of process serving at its Texas office would create delay of a day or more for the proper company officials to receive it.

The commission finds that the prior notice requested of EGS would undermine the effectiveness of an inspection intended to reveal the conditions of a REP's office as experienced by an electric customer, and therefore would be inconsistent with the purpose of such an inspection. The commission notes that the person onsite at the REP's Texas office does not need to be responsible for anything so onerous as a full commission audit. Rather, the person on site must simply be able to show a commission representative that the office meets the requirements of PURA §39.352(b)(4). The commission interprets this statute to list functions that the office is capable of providing and not that the office be the REP's only or primary location of providing the functions. Therefore, a commission representative may reasonably expect a demonstration that customer service is available, that service of process can be accepted at the site, and that documents demonstrating that the REP is in compliance with the requirements of Chapter 39, Subchapter H of PURA are accessible. The commission includes in the rule the phrase "on the same basis available to an electric customer" to indicate that the required burden in responding to the commission's representative is no more onerous than responding to a customer (or server of process) in a manner that complies with the law. To address Utility.com's concern about customer service functions occurring at the site, the commission clarifies that the availability of a company representative in the Texas office that can provide a customer with assistance in navigating Internet or other communication with a service center located elsewhere would be sufficient to comply with the letter of the law and rule.

*Subsection (e)(3)*

OPUC recommended modification of the "4CP method" calculation of the 300 MW threshold contained in subsection (e)(3)(A), stating that it is unclear whether the REP's "4CP" is measured at the time of a utility service area's overall four monthly peaks, or at the time of the ERCOT four monthly peaks. OPUC asserted that, if the "4CP method" is intended to refer to the demands at the time of the REP's internal peak demand in each of the four summer months, the reference to "4CP" is misleading, since the measurement is non-coincident with respect to the loads of other REPs. In the event that the 4CP method refers to a REP's internal peak demand in each of the four summer months, OPUC recommended alternate language. EGS interpreted the rule to mean that statewide (ERCOT and non-ERCOT areas) peak hours will be used and supported the rule language. TIEC stated that it is unclear whether OPUC opposes a 4CP methodology that measures a REP's internal peak demand in each of the four summer months, and stated that OPUC's description of this methodology as "the average of the REP's maximum hourly demand in each of the months, June, July, August, and September" is an accurate characterization of the rule's 4CP methodology. TIEC stated that it would not oppose including the language cited by OPUC to clarify the methodology.

OPUC further stated that the rule provision does not state whether the 4CP is measured at the meter or at the generating source, and asserted that the determination of this question should depend, in part, upon the intended data source for the measurement, *i.e.*, the IO or the TDU. OPUC suggested that the

commission specify the entity to supply the measurement data and confirm that the data will be readily available. TIEC offered that the 4CP is measured at the meter, not at the generating source, and would support clarification to that effect. OPUC also noted that, given the lack of specificity in the rule as to how the "4CP" data will be collected and measured, it is unclear whether load profile information will be necessary in order to comply with the rule.

OPUC observed that the rule does not clearly define "4CP Method." OPUC disagreed with the specified measurement, if 4CP refers to REP demand at the time of utility system peak hour, statewide peak hour or ERCOT peak hour. According to OPUC, in such cases, the demands of customer loads which are completely off-peak (*e.g.*, street lighting or night lighting) would never affect the measurement of the REP's size; by limiting the peak demand measurement to summer months, the loads of winter heating customers would never affect whether the REP crosses the 300 MW threshold. OPUC maintained that the concept of coincident peak may have relevance to pricing or costing, but it has less meaning for purposes of determining the size of a particular REP. OPUC and Consumers stated that the Legislature did not intend to exempt a REP that aggregates 300 MW of off-peak load (or winter heating load) from the residential service requirement. OPUC and Consumers offered that an alternative measurement is to utilize the REP's class maximum diversified demands, summing the maximum demand of each customer class served by the REP. According to OPUC, the TDUs would be the best source of that data. If that method is not used, OPUC recommended basing the measurement upon the maximum hourly demand of the REP, regardless of month.

EGS urged that OPUC's recommendation for calculating the 300-MW threshold be rejected for two reasons. EGS asserted that OPUC's method complicates the calculation of the threshold by utilizing classes in the calculation. According to EGS, the issue underlying PURA §39.352(g) is whether the REP's aggregate load meets the 300-MW threshold, and it is not necessary to use classes to resolve this issue. EGS further stated that the maximum diversified demand method proposed by OPUC would require calculations specific to each REP using data obtained from the TDUs, while the 4CP method could utilize data and calculations from centralized entities such as ERCOT and IO in non-ERCOT areas. EGS further argued that there is no basis in PURA §39.352(g) for differentiating between on-peak and off-peak load, and that the 4CP method is a reasonable method of measuring aggregate load under this provision. Retailers observed that the commission staff has historically depended on a 4CP over the summer months as the standard methodology for determining capacity demand and setting rates.

The commission agrees that the intent of the 300-megawatt aggregate load threshold is to establish the size of a REP to which the 5.0% residential load requirement will apply. In choosing to employ the "4CP" method for calculating the 300 megawatt threshold, the goal was to determine the average of the highest hourly demand in megawatts of all of a REP's customers during each of the months of June, July, August and September. The commission recognizes that this average is non-coincident with respect to other REPs (or with respect to the system peak), and that, therefore, the use of "4CP" terminology may create confusion. Therefore, the commission removes the "4CP" terminology from the rule.

The commission finds that the maximum diversified demand measure suggested by OPUC is not consistent with the statutory requirement, which is couched in terms of aggregated demand.

While the commission agrees that looking only at summer months, or the single highest day in that month may not capture the most accurate picture to the size of each REP, the commission finds that utilizing the average of a REP's highest hourly average demand in the hottest months strikes a good balance. While the law is written in a manner that can be construed to cast the broadest net of any instance in the year of surpassing the 300-megawatt threshold, the commission finds that a single unanticipated reading at that level would be deterrence to competition. The commission's balance in the rule avoids imposing an unexpected burden on those REPs that may, on a single occasion, have a 300 MW demand, but captures those REPs whose business justifies the requirement.

This procedure is also intended to ease the calculation and reporting burdens on REPs. It is crucial, however, to capture all of a REP's demand in both ERCOT as well as other reliability councils or regions. Therefore, for those REPs serving load in multiple IO jurisdictions, the calculation must include the combined demand scheduled concurrently at all relevant IOs and that of affiliates. The commission adopts a calculation based on the amount of power scheduled by or on behalf of the REP because it believes that this will be administratively straightforward for the REP to report and for the commission to verify. While the commission recognizes that amount of load scheduled by a REP (or its QSE) will be different from that ultimately deemed to have occurred after settlement, the commission notes that there is little if any incentive for REPs to purposely under-schedule for the purposes of avoiding the

obligations of subsection (e)(3) because such REPs will be assessed balancing energy by the IO for the amount of load under-scheduled.

*§25.107(f), Financial requirements*

*Subsection (f)(1)(A)(i):*

EGS proposed that REPs should be allowed to provide audited financial statements for the last two years as a means of demonstrating the capitalization requirements in paragraph (1)(A)(i).

The commission disagrees with the unqualified use of yearly audited financial statements to demonstrate the \$50 million capitalization requirements because such data tends to become out of date and unreliable. The commission believes that the financial data for certifying REPs must be as current as possible and that quarterly financial data should also be provided when available to update and support the annual data.

Retailers noted that the word "or" appears to be missing at the end of subsection (f)(1)(A)(i) and should be added.

The commission agrees and incorporates the grammatical correction.

*Subsection (f)(1)(A)(iii):*

Because Retailers believed that the \$100,000 liability represented a burden to a smaller REP, they proposed that the commission permit an "early release" from this requirement without having to file a new certification application once the REP establishes an investment grade credit rating or when it satisfies the \$50 million in net assets test.

The commission agrees with Retailers that if a REP achieves investment grade status, or at least \$50 million of net assets, then the REP should be able to obtain an early release from its cash requirement. However, rather than specifying conditions in this rule under which such a release would be allowed, the commission leaves it to REPs to realize this credit upgrade through an amendment to their certification.

*Subsection (f)(1)(C)*

EGS proposed that REPs should have the opportunity to obtain a credit rating from nationally recognized credit rating firms in addition to Standard & Poor's ("S&P") or Moody's Investor Services ("Moody's"). Furthermore, EGS proposed that, if the current credit rating was downgraded below investment grade or the rating was otherwise suspended or withdrawn by one credit rating agency, the REP should have the opportunity to substitute the requisite rating of another rating agency for the commission's consideration prior to requiring alternative sources of financial evidence.

The commission agrees with the use of other credit rating agencies in addition to S&P and Moody's, such as Fitch for financial institutions and Best for insurance companies. However, as a practical matter, the commission does not agree to the substitution of rating agencies if one of them downgrades the REP's credit. Generally speaking, the commission believes that the credit downgrade by an agency is usually a harbinger of the REP's downgrade by other rating agencies. Nevertheless, the commission will expand subsection (f)(1)(F) to reflect the inclusion of acceptable alternative credit rating agencies with national presence as proposed by EGS.

TXU-TDU stated that the financial instruments specified in this subsection should specify that the financial institution issuing the instrument should have a required credit rating (such as A- or better) and should be an U.S. financial institution or a foreign institution with an U.S. branch. Furthermore, since the commission will presumably be the party drawing on the security under subsection (i)(9), this subsection should specify who will be entitled to negotiate the precise form of the financial instrument and who will be entitled to draw on the security.

The commission believes that it is sufficient to rely on its future ability to approve these financial instruments in advance of their use. At the same time, however, the commission modifies subsection (f)(1)(F) to state that a minimum investment grade credit rating of "BBB-" from S&P or "Baa3" from Moody's, or their equivalents, is more appropriate than pursuing the much lower risk "A" rating that is also assigned by both agencies to much stronger financial credits.

Retailers proposed that a new subparagraph be crafted to allow a performance bond to be an option for evidence of financial resources in meeting the minimum credit standard, specifically a "bond issued by a financially viable surety company authorized to transact business of this type in the state of Texas." During the public hearing, Retailers addressed the nature and pricing of bonds used to meet the credit standards of subsection (f), noting that the cost of such bonding depended on the type of bond required by the commission for certification. However, no details were provided addressing the quantification of these costs.

Since relevant details of bonding are not yet resolved, the commission conforms its rule to the wording consistent with that adopted in §25.111, Registration of Aggregators, by modifying subparagraph (C)(iv) to read "... including a bond in a form approved by the commission." However, the commission modifies subsection (f)(1)(F) to allow that a "BBB-" investment grade credit rating by S&P or a "Baa3" rating by Moody's, or their equivalents, to be a reasonable minimum requirement for a bonding entity in Texas.

*Subsection (f)(2)(A)(ii):*

Utility.com requested that clause (ii) be re-written so that there was no misunderstanding that only REPs receiving prepayments or deposits must file the 90 day sworn affidavit.

For the sake of clarity and consistency, the commission re-writes the clause to specify "deposits or other advance payments."

*Subsection (f)(3).*

CSW-REP noted that the first sentence of subsection (f)(3), referring to a TDU that is subject to a financing order, should reference PURA §39.303, which pertains to commission adoption of securitization financing orders, rather than PURA §39.310, which addresses the pledge of the state related to transition bonds.

The commission corrects the reference.

*§25.107 (g), Technical and managerial resource requirements*

Reliant stated that the technical and managerial resource requirements set forth in subsection (g) are necessary and appropriate, but incomplete from a TDU's perspective. Reliant noted the proposed rule focuses on a REP's ability to comply with IO obligations, but is silent regarding a REP's capability to comply with obligations set forth in the TDU tariffs and service agreements. Reliant submitted that a REP should satisfy terms and conditions in the tariffs and service agreements applicable to a TDU's service area in which the REP makes retail sales, prior to the REP being permitted to begin operations and enroll customers in the TDU's service area. Retailers countered that the TDU Access tariff

proceeding will be consistent with the technical requirements of this rule, and that the ability to comply with the tariff is a matter for consideration in Project Number 22187. Consumers supported subsection (g) as written.

The commission believes that these are issues that are also being addressed in Project Number 22187.

*Subsection (g)(1)-(4)*

Retailers asserted that the commission should require the applicant to submit only a sworn affidavit to establish compliance with subsection (g)(1)-(4). The applicant would file the affidavit as part of its application, and would then need to actually meet these requirements before commencing service. Retailers argued that requiring compliance before certification would be burdensome, and it would be unrealistic to expect a prospective REP to execute contracts for capacity and ancillary services prior to obtaining REP certification. Retailers recommended the commission accept a sworn affidavit to establish compliance. The applicant would file the affidavit as part of its application, and would then need to actually meet these requirements before commencing service. Especially with respect to subsection (g)(1), Retailers said that applicants should be allowed to submit affidavits to demonstrate compliance with these obligations through contracting with a QSE.

The commission concurs with Retailers and amends subsections (g)(9)(G) and (i)(2) of the rule to clarify that applicants can meet the certification requirements of (g)(1)-(4) by affidavit. A REP that initially

demonstrates that it can meet these requirements by affidavit must provide evidence that the requirements in (g)(1)-(4) are met 21 days before beginning to offer service.

Retailers suggested that the commission remove the compliance requirements for the renewable portfolio standards from the REP certification requirements, since the renewable resource rule provides for penalties the REP must pay. Failing to meet the requirement constitutes a business decision on the part of the REP.

The commission concludes that specifying the renewable standard in the rule will allow REPS to make an informed business decision. Therefore, the commission retains, as an integral part of the REP compliance requirement, the renewable portfolio standard, but makes wording adjustments to acknowledge the business decision mentioned by Retailers.

*Subsection (g)(6)*

TXU-REP and Retailers suggested the deletion of paragraph (6) of the subsection (g), since competitors should be expected to know and accept the responsibility of adequate staffing or training. According to TXU-REP and Retailers, it is not the commission's role to regulate such matters in a competitive market.

While competition will weed out unfit suppliers, the commission is required by the legislature to ensure that providers of electricity meet certain minimum financial and technical requirements, and abide by the customer protection rules. Therefore, subsection (g)(6) ensures from the outset that certain minimum standards have to be in place prior to allowing a REP to provide service in Texas. The commission concludes that these standards will promote healthy competition and deter unscrupulous operators.

*Subsection (g)(7)*

CSW-REP stated that paragraph (7) should be rewritten to recognize that the REP may be the initial point of contact with a customer, and that the REP should provide adequate procedures to enable the customer to contact the distribution service provider on a 24-hour basis. CSW-REP suggested that REPs could provide a recorded message with the telephone number of the distribution utility needing to address the distribution service issue for after-hours calls. CSW-REP also suggested that distribution utilities take calls directly.

TXU-TDU stated the REP's function as the primary point of contact for retail customers for distribution system services will be defined in the standard tariff terms and conditions being developed in Project Number 22187, and, to avoid confusion, those terms and conditions should be cross-referenced in subsection (g)(7). TXU-TDU further stated that REPs would need to communicate electronically with the utilities to convey outage notices.

Retailers proposed that REP compliance to outage notices on a 24-hour basis be based on high volume automated call routers or interactive voice response (IVR) equipment on a 24-hour basis; answering calls, or obtaining interruption information and relating the information to the utility.

The commission believes that there may be situations that warrant direct contact between the retail customer and the TDU. This and related IVR issues are being addressed in Project Number 22187.

*Subsection (g)(9)(B)*

TXU-REP and Retailers said that the requirement in subsection (g)(9)(B) to submit a 12-month load projection with an application should be deleted. TXU-REP stated that it seems unlikely that, at the time of applying for certification as a REP, the potential REP will be able to reasonably estimate the total load and residential load that it expects to serve over the next year. Retailers argued that a REP's projection of 12-month load at the outset, with residential load separately identified, would be speculative and of little value.

While the commission disagrees that initial load projections would be of little value, the commission finds that the information is not essential to the application process and deletes the requirement from the rule.

*Subsection (g)(9)(C)*

CSW-REP stated that the three-year complaint history requirement of paragraph (9)(C) seemed unnecessarily burdensome for affiliated REPs. The commission has extensive regulatory experience with the predecessor of the affiliated REP, and can be expected to rely heavily on that experience in evaluating the application for a certification. Because of these circumstances, CSW-REP believes that affiliated REPs should be relieved of the obligation to provide a complaint history and compliance record for affiliates providing utility-related services. CSW-REP also requested the commission to consider easing these restrictions in a similar manner for other established REPs, for example, when they simply seek to extend their area of operation into Texas. For an established entity that has been operating as a REP for a number of years, its direct complaint history and compliance record is substantially more significant than that of affiliated telecommunications, gas, water and cable providers, argued CSW-REP, and, accordingly, requirements for additional information would burden the process unnecessarily.

Retailers offered substitute language to this provision to parallel the intent found in numerous other states' rules. In Nevada, Arizona, California, Connecticut, Maryland, and Massachusetts, state rules recognize the difference between a violation and a complaint. Retailers complained that requiring applicants to file all complaints, which are subjective at that stage, would be less meaningful than requiring the filing of only actual violations and sanctions, and only those relating to customer protection.

The commission notes that load and billing information will be kept in ERCOT for several years. Therefore, given the state and cost of technology, a three-year complaint history is not burdensome.

The commission agrees that a distinction between complaint and sanction and/or violation may be relevant. Therefore, the commission retains the requirement as proposed.

*Subsection (g)(9)(G)*

TXU-REP stated that PURA §39.151(j) requires all REPs to comply with the ERCOT ISO's scheduling, operating, planning, reliability, and settlement policies, rules, guidelines, and procedures. Consequently, there is no need to allow REPs an alternative of merely relying on the entities from which they buy power to comply with the IO's procedures. Thus, subsection (g)(9)(G) of the proposed rule should be revised accordingly.

The commission has stated all along that REPS will be required to comply with additional technical and reliability requirements imposed by the IO. Subsection (g)(9)(G) recognizes that for certain functions, such as scheduling power, a REP may delegate this function and corresponding IO technical requirements to the QSE. The commission concludes that requiring a REP to personally perform functions that will be performed by the QSE (on behalf of the REP) is unnecessary and redundant.

*§25.107(h), Customer protection requirement*

EGS commented that customer protection requirements are best addressed in Project Number 22255, *Customer Protection Rules for Electric Restructuring*, and need not be enumerated in this rule.

EGS and Retailers suggested that subsection (h) be modified to cross-reference existing customer protection requirements and that future customer protection requirements and subsection (h)(1) - (h)(8) be deleted.

Consumers supported the rule as proposed, including the retention of subsection (h)(1) - (h)(8), noting that the proposed rule referenced them by allowing that, "In the absence of further specificity in other commission rules, certificated REPS shall be held to the general standards listed below." Consumers felt the provisions are an important safety net for customers, as REPs may be certificated and begin signing up customers prior to the time the customer protection rules are adopted. Consumers expressed hopefulness for the future outcome of the customer protection rules but stated an unwillingness to rely on that result due to the deep division between consumer representatives and REPs observed in that rulemaking project. Consumers noted the minimum standards listed in this rule would provide some minimal protections for customers regardless of the outcome of the other rulemaking.

The commission agrees with Consumers that a list of minimal customer protection standards in this rule is appropriate given that new entrants to the market will apply for certification before rules are adopted under Project Number 22255. The commission reaffirms its statement in the preamble for publication that the existence of such a list in this rule serves several functions. First, it briefly indicates the scope of the customer protection requirements a prospective REP must prepare to meet at the point of making an application. The commission notes that PURA §39.352, relating to REP certification, includes mention of customer protections as a threshold to REP certification and therefore mention of customer

protection obligations of a REP is imperative in the certification rule. The commission reaffirms its concern that the subsection not limit the considerations of Project Number 22255 and therefore deletes the PURA reference in the subsection's introduction and makes several other wording adjustments in the subsection text.

*Subsection (h)(3)*

TXU-REP and Reliant noted proposed paragraph (3) can be ambiguous about what the REP is obligated to tell its customers regarding customer's rights. Reliant interpreted proposed paragraph (3) to mean that a REP must notify its customers of the practices that are forbidden under the Customers' Service Rights, and of the procedures available to remedy such infractions. Reliant did not interpret the provision to mean that when a REP is accused of or found guilty of illegal practices, it must notify all of its customers that it has engaged in such a practice. Reliant and TXU-REP proposed language to clarify the rule in this regard. TXU-REP suggested reference to the customer protections afforded by PURA.

CSW-REP supported the language requiring that customers be informed of their rights and avenues available to pursue complaints. However, CSW-REP interpreted the "illegal practices" phrase contrary to the clarification discussed above, and therefore posited arguments to delete that part of the requirement.

The commission agrees that the proposed language could be ambiguous and amends subsection (h)(3) to reference the customer protection provisions listed in PURA §39.101 rather than make reference to "illegal practices."

*Subsection (h)(7)*

TXU-TDU stated that, consistent with the notion that the REP is to be the primary point of contact with the retail customer, subsection (h)(7) should be modified to require a REP to maintain adequate customer service staff to handle customer inquiries, complaints, and report power outages. Retailers opposed TXU-TDU's proposal and recalled a workshop in Project Number 22187 where parties agreed that a REP may automatically forward all outage calls if it maintains current customer information with the TDU. Accordingly, Retailers said that the parties have already resolved this issue in that proceeding and there is no need to place such a requirement on REPs in this rulemaking.

The commission concludes that subsection (h)(7) is intended only to address customer inquiries and complaints. As Retailers noted, the commission is considering options for dealing with outage calls, the particulars of which will be addressed in Project Numbers 22187 and 22255. The commission does not limit the considerations of those projects with paragraph (7), but simply underscores the REP's obligation to address it according to applicable commission rules.

*§25.107(i), Requirements for reporting and for changing the terms of a REP certificate.*

*Subsection (i)(3)*

TXU-TDU noted that subsection (i)(3) of the proposed rule requires a REP to notify the commission within 30 days after a material change in the REP's status concerning subsection (f), financial requirements, and subsection (g), technical conditions, relied upon by the commission in certifying the REP. TXU-TDU further noted that this 30-day period is inconsistent with the requirement in subsection (f)(1)(F) that a REP provide alternative financial evidence within ten days of a credit downgrade, and therefore recommended that the 30-day period in subsection (i)(3) should be changed to the same ten-day period provided for in subsection (f)(1)(F).

The commission agrees that the time periods for notification are inconsistent between subsections (i)(3) and (f)(1)(F) and modifies the rule accordingly.

*Subsection (i)(4)*

TXU-TDU suggested that REPs should also be required to report the amount, if any, paid by the REP to the system benefit fund, as required by subsection (e)(3)(B)(iii), in order to provide a mechanism to verify compliance with that payment requirement, and proposed language to that effect.

The commission agrees and adds amounts paid to the system benefit fund to the reporting requirement list.

*Subsection (i)(8)*

In order to provide some minimal assurance that a REP will not cease operations without paying its outstanding transmission and distribution service charges, TXU-TDU suggested that REPs should also be required to file proof of the payment of any amounts owed to TDUs, and proposed language to that effect.

The commission declines to adopt TXU-TDU's proposed language. The commission finds that the financial requirements offer the appropriate commission guidance to ensure against the insolvency of REPs. The commission concludes that a REP is obligated to pay transmission and distribution costs to TDUs, and that sufficient legal procedures exist to resolve payment disputes between REPs and TDUs.

*Subsection (j), Suspension and revocation*

According to TXU-REP and Retailers, subsection (j)(10) should identify only the suspension or revocation of any other aggregation registration, certification, or license, since some state and federal licenses are insignificant or purely administrative, and proposed language to that effect. With respect to subsection (j)(3) and (j)(4), TXU-REP and Retailers maintained that a one-time accidental or

inadvertent switch of a customer's REP or the billing of an unauthorized charge should not be considered a significant violation; rather, a pattern of such behavior should be used as a significant violation justifying suspension or revocation.

The commission concurs with TXU-REP and Retailers that some certificate revocations are not associated with providing aggregation services, but clarifies that the list of violations cited in adopted subsection (j) is not intended to be automatic cause for revocation; rather the commission will address suspension or revocation on a case-by-case basis. For this reason, the commission declines to adopt TXU-REP's and Retailers' language.

TXU-TDU stated that the rule should include a requirement that the commission issue a final order within 90 days after giving notice to the REP in any case involving allegations of a violation of or a failure to maintain minimum financial resources, a failure to meet financial obligations (including bankruptcy or insolvency), or a failure to observe scheduling, operating, planning, reliability, and settlement policies, rules, guidelines, and procedures established by the IO. TXU-TDU expressed concern that, in situations involving a REP with financial difficulties, a long revocation process could expose the utility to significant financial losses, to the ultimate detriment of other customers.

While the commission recognizes TXU-TDU's concerns about the expeditious resolution of suspension and revocation proceedings, the commission declines to include a deadline. It is possible that these proceedings will occasionally involve resolution of factual issues at the State Office of Administrative

Hearings, in which case a lengthier timeline will be necessary. While retaining the flexibility to take such time as justice requires, the commission intends these proceedings to be handled as expeditiously as possible, and expects commission staff and SOAH ALJs to aggressively manage these cases to that end. Similarly, the parties to such cases are expected to work for an expeditious resolution of suspension or revocation of certificates. The commission retains flexibility to issue necessary procedural orders if such an event occurs.

Retailers stated that the commission should make any penalty provisions subject to the provisions of PURA Chapter 15, governing proceedings for suspension and revocation.

The commission understands the need for specific guidelines to guide the revocation and suspension process, but declines to subject such a process to PURA Chapter 15, which prescribes the legal parameters for assessing administrative penalties. PURA Chapter 15 does not address suspension or revocation of certification. The commission concludes that an administrative penalty may lead to or result from a revocation or suspension proceeding. The commission also concludes that there are notice requirements in connection with assessment or appeal of administrative penalties, and these might impact the timeline of a revocation or suspension proceeding. However, the commission concludes that the PURA Chapter 15 process should not be substituted for the revocation process.

The commission finds that revocation or suspension of a certificate pursuant to PURA Chapter 39 is controlled by §39.003; unless specifically provided otherwise, each commission proceeding under

PURA Chapter 39, other than a rulemaking proceeding, report, notification, or registration, shall be conducted as a contested case. Furthermore, given that the certification approval process is a contested case, the commission concludes that the same formalities should apply to suspension or revocation of that certificate. The commission declines to adopt Retailers' proposed language.

*§25.108*

Utility.com proposed that the credit requirement in §25.108 only apply to those REPs who have defaulted on payments to the bond servicer.

The commission declines to accept Utility.com's suggestion as such a change would make §25.108 in conflict with previously issued financing orders.

Reliant, OPUC, TIEC, Shell, Enron, NewEnergy, the State of Texas, TRA, Occidental, and EGS filed joint comments with proposed changes to §25.108 to reflect the agreements reached by the parties in Docket Number 21665, *Application of Reliant Energy, Inc. for a Financing Order to Securitize Regulatory Assets and Other Qualified Costs*. These parties stated that the modifications proposed do not substantively change the standards in §25.108 or the Financing Orders issued in Docket Numbers 21527 and 21528, but instead clarify some of the language and materially reduce the likelihood of future disputes arising.

The commission agrees that the proposed changes do not materially change the standards adopted in previously issued financing orders, will minimize the potential for future disputes about the standards, and are more complete than the standards in the financing orders, and therefore adopts the changes. Furthermore, because the changes suggested by these parties are not in conflict with those adopted in the financing orders, §25.108 will serve to provide additional detail and clarification to the standards adopted in the securitization proceedings. Because no bonds have been issued to date and the changes to the standards will not affect the ratability of the transition bonds, the commission finds it is unnecessary to implement the conforming procedure referenced in the financing orders. Section 25.108 is revised accordingly.

CPS notes that to the extent transmission providers bill REPs directly for transmission service, municipally-owned utilities and electric cooperatives that have not yet chosen to participate in customer choice will have a financial relationship with every REP in ERCOT, regardless of the geographic area in which the REP is providing service. CPS states that it is appropriate for the commission to articulate in its rules that payment by REPs for other non-bypassable charges is expected and required, regardless of whether or not the REP receives payment for such services from its retail customers. CPS proposes that, at a minimum, the commission include REP standards for the payment of transmission and distribution charges, remedies on default, and a process for dispute resolution. TEC supported CPS's comments in its reply comments.

TXU argued that the standards related to the billing and collection of charges other than securitized charges will be established in Project Number 22187 and that that rulemaking should not simply adopt the standards proposed in §25.108.

The commission notes that the details of how transmission providers in ERCOT will bill transmission charges has been addressed in Docket Number 22344, *Generic Issues Associated with Applications for Approval of Unbundled Cost of Service Rates Pursuant to PURA §39.201 and Public Utility Commission Substantive Rule §25.344* and that the resolution of that issue will not require the relationship noted by CPS. The commission agrees with TXU that the standards for billing and collecting non-bypassable charges other than securitized charges are properly addressed in Project Number 22187, but makes no judgment at this time as to whether or not the same standards as those proposed in §25.108 should apply to the other charges.

TXU also suggested that the terms "servicer," "transition bonds," "indenture trustee," "Servicing Agreement," and "Special Purpose Entity" should be defined to avoid later confusion.

The commission agrees with TXU that these terms should be defined in order to avoid confusion at a later date. Additionally, the commission defines "financing order" and "transition charges." A definitions subsection is therefore added to §25.108.

*Proposed §25.108(a) Application*

TXU-TDU stated that the financial standards in §25.108 should apply to all entities responsible for billing and collecting transition charges and, therefore, the rule should be applicable to electric cooperatives or municipal corporations that serve retail customers in the service areas of TDUs who hold a commission financing order. TXU cites Ordering Paragraph Number 40 from the Financing Order issued in Docket Number 21527, *Application of TXU Electric Company for a Financing Order to Securitize Regulatory Assets and Other Qualified Costs*, which states that the Financing Order is binding upon each REP or "any other entity responsible for billing and collecting transition charges on behalf of the SPE". (SPE is "special purpose entity").

The commission agrees with TXU that, the financing orders issued to date require any entity responsible for the billing and collection of transition charges to meet the security and payment obligations in those financing orders. The commission recognizes that use of the term "REP" does not necessarily encompass electric cooperatives or municipal corporations; however, this rule is not intended to do so. The commission will address the applicability of these standards to all entities providing competitive retail service in standard tariff developed in Project Number 22187.

*Proposed §25.108(c)(6)*

CSW-REP notes that the reference to the "... amount of the penalty detailed in paragraph (5)..." should be a reference to paragraph (4).

The reference has been corrected.

All comments, including any not specifically referenced herein, were fully considered by the commission.

In adopting this section, the commission makes other minor modifications for the purpose of clarifying its intent.

These sections are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2000) (PURA), which provides the Public Utility commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §39.352 which requires the commission to grant certificates to applicants who demonstrate sufficient qualification to provide retail electric service; §39.356, which grants the commission authority to establish terms under which the commission may suspend or revoke a retail electric provider's certification, and §39.357, which grants the commission authority to impose an administrative penalty for violations of §39.356.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 15.023, 39.352, 39.356, and 39.357.

**§25.107. Certification of Retail Electric Providers (REPs).**

(a) **Application.** This section applies to all persons who seek to provide electric service to retail customers in Texas on or after the date of customer choice, as established by Public Utility Regulatory Act (PURA) Chapter 39, or as a provider of retail electric service in the Customer Choice Pilot Projects, as established under PURA §39.104 and §39.405. This section does not apply to the state, political subdivisions of the state, electric cooperatives or municipal corporations, or to electric utilities subject to PURA §39.102(c) until the end of the utility's rate freeze. An electric cooperative or municipally owned utility participating in customer choice may offer electric energy and related services at unregulated prices directly to retail customers who have customer choice without obtaining certification as a REP. The statutory mandate for certification of persons who provide retail electric service in this state, provided by PURA §39.352(a), is interpreted to address business functions as follows:

- (1) Persons who purchase, take title to, and resell electricity must register as REPs. Persons who do not purchase, take title to, or resell electricity, but perform a service pursuant to a contract with the REP do not need to become certificated as REPS.
- (2) A REP may contract to outsource functional requirements specified in this section or other commission rules, however:
  - (A) the REP remains accountable to applicable laws and commission rules for all activities conducted on its behalf by any subcontractor, agent, or any other entity;

- (B) the REP and any of its agents are sellers and seller's agents and may not represent themselves as agents of the buyer's interests; and
  - (C) all REPs are responsible for providing or contracting for all of the elements necessary to provide continuous and reliable electric service to retail customers as required by commission rules.
- (b) **Definitions.** The following words and terms when used in this section shall have the following meaning unless the context indicates otherwise:
- (1) **Continuous and reliable electric service** – Electric power service provided at retail by a retail electric provider (REP), consistent with the customer's terms and conditions of service, uninterrupted by unlawful or unjustified action or inaction of the REP.
  - (2) **Customer** – Any entity who has applied for, has been accepted, or is receiving retail electric service from a REP for use on an end-use basis.
  - (3) **Person** – Includes an individual, a partnership of two or more persons having a joint or common interest, a mutual or cooperative association, and a corporation, but does not include an electric cooperative or a municipal corporation.
  - (4) **Retail electric provider** – A person that sells electric energy to retail customers in this state. As provided in PURA §31.002(17), a retail electric provider may not own or operate generation assets. As provided in PURA §39.353(b), a REP is not an aggregator.

- (5) **Revocation** – The cessation of all REP business operations in the state of Texas, pursuant to commission order.
  - (6) **Suspension** – The cessation of all REP business operations in the state of Texas associated with obtaining new customers, pursuant to commission order.
- (c) **Application for REP certification.**
- (1) After the date of customer choice, or as a participant in the Customer Choice Pilot Projects, a person, including an affiliate of an electric utility, may not provide retail electric service in the state unless the person is certified by the commission as a retail electric provider in accordance with PURA §39.352 and this section.
  - (2) A retail electric provider may apply for certification any time after September 1, 2000. A certificate granted pursuant to this section is not transferable without prior approval by the commission.
  - (3) An application for certification shall be made on a form approved by the commission, verified by oath or affirmation, and signed by an applicant's owner or partner, or an officer of the applicant. Applications may be obtained in the Central Records division of the Public Utility Commission of Texas during normal business hours, or from the commission's Internet site. Each applicant shall file its application with the commission's Filing Clerk in accordance with the commission's Procedural Rules, Chapter 22, Subchapter E, of this title (relating to Pleadings and Other Documents).

- (4) The applicant may identify certain information or documents submitted that it believes to contain proprietary or confidential information. Applicants may not designate the entire application as confidential. Information designated as proprietary or confidential will be treated in accordance with the standard protective order issued by the commission for use with applications for certification as a REP. If and when a public information request is received for information designated as confidential, the applicant or REP has the burden of establishing that information filed pursuant to this rule is proprietary or confidential.
- (5) Except where good cause exists to extend the time for review, the presiding officer shall issue an order stating whether an application is deficient or complete within 20 days of filing. Deficient applications and those without necessary supporting documentation will be rejected without prejudice to the applicant's right to reapply.
- (6) While the application is pending, an applicant shall inform the commission of any material change in the information provided in the application within ten days of any such change.
- (7) The commission will make an effort, where the facts of the case permit, to insure that applications filed simultaneously are resolved simultaneously. Except where good cause exists to extend the time for review, the commission shall enter an order approving, rejecting, or approving an application with modifications within 90 days of filing an application.

- (8) A certificate granted pursuant to this section shall continue in force until further order of the commission.
  - (9) A certificate granted pursuant to this section shall not be construed to vest exclusive service or property rights in and to the area for which the certificate is granted.
- (d) **REP certification requirements based on service area.** As a requisite for obtaining and maintaining certification, a REP must designate a service area defined by either paragraph (1) or (2) of this subsection, and meet the certification requirements designated therein.
- (1) **Option 1.** For REPs defining service areas by geography:
    - (A) A REP must designate one of the following categories as its geographical service area:
      - (i) The geographic area of the entire state of Texas; (indicating the zip codes applicable to that area); or
      - (ii) The service area of specific transmission and distribution utilities, and/or municipal utilities or electric cooperatives in which competition is offered; or
      - (iii) The geographic area of Electric Reliability Council of Texas (ERCOT) or territory of another independent organization to the extent it is within Texas.

- (B) A REP with a geographical service area is subject to all subsections of this section, including those pertaining to administration, financial, technical and managerial, customer protection, and reporting requirements, as applicable.
- (C) The commission shall decide whether to grant a certificate to an applicant proposing to provide retail electric service to a geographical service area in Texas based on:
  - (i) Provision of all of the information required of the applicant in the form, *Application for a Certificate to Provide Retail Electric Service*, approved by the commission.
  - (ii) Whether the applicant has met the business name, office, and threshold residential service level requirements specified in subsection (e) of this section.
  - (iii) Whether the applicant has demonstrated that it possesses the financial and technical resources to provide continuous and reliable electric service to its customers in the area for which certification is sought and the technical and managerial ability to supply electricity at retail in accordance with customer contracts, pursuant to subsections (f) and (g) of this section.
  - (iv) Whether the applicant has demonstrated that it possesses the resources needed to meet the customer protection requirements, disclosure

requirements, and marketing guidelines as specified in subsection (h) of this section.

(v) Whether the configuration of the proposed geographic area, if any, would discriminate in the provision of electric service to any customer because of race, creed, color, national origin, or any other basis prohibited by law or by subsection (h)(1) of this section.

(D) If the presiding officer determines that an applicant does not possess resources sufficient to serve the geographical area designated by the applicant, the presiding officer shall notify the applicant of the deficiencies and allow the applicant to designate a different geographical service area commensurate with its resources. If the applicant designates no suitable area within a reasonable time, the application shall be denied.

(2) **Option 2 – For REPs defining service areas by customers.** As an alternative to a geographical service area, a REP may define a service area by a specific list of customers, each of whom contract for one megawatt or more of capacity. The applicant shall be certified as a REP only for purposes of serving the named customers.

(A) To obtain certification under this paragraph, an applicant must file with the commission a signed, notarized affidavit from each individual retail customer with which it has contracted to provide one megawatt or more of capacity. The affidavit shall state that the customer is satisfied that the REP meets the financial, technical and managerial, and customer protection standards prescribed in

subsections (f)(2), (g), and (h) of this section. The one-megawatt threshold may not be met by aggregation of individual electricity customers.

- (B) A REP whose service area is defined by customers shall meet the administrative requirements specified in subsection (e) of this section.
- (C) A REP whose service area is defined by customers shall meet the financial requirements for billing and collection of transition charges pursuant to subsection (f)(3) of this section, if applicable.
- (D) The commission will grant a certificate to an applicant under this paragraph upon a finding that the affidavits for each designated customer have been received and that all requirements of this paragraph are met.
- (E) A REP certified pursuant to this paragraph may be authorized to serve additional customers by amending its certificate pursuant to subsection (i)(6) of this section.
- (F) A REP certified pursuant to this paragraph is subject to reporting requirements specified in subsection (i) of this section.

- (e) **Administrative requirements.** As a requisite for obtaining and maintaining certification, a REP must meet the following requirements concerning business names, office access, and percentage of electricity sold to residential customers.

- (1) **Names on certificates.** All retail electric service shall be provided in the names under which the certificate was granted. If the applicant is a corporation, the commission shall issue the certificate in the corporate name of the applicant.
  - (A) No more than five assumed names may be authorized for use by any one REP at one time.
  - (B) Business names shall not be deceptive, misleading, vague, otherwise contrary to §25.272 of this title (relating to Code of Conduct for Electric Utilities and Their Affiliates), or duplicative of a name previously approved for use by an existing REP certificate holder.
  - (C) The commission shall review any names in which the applicant proposes to do business. If the commission determines that any requested name does not meet the requirements of subparagraph (B) of this paragraph, it shall notify the applicant that the requested name may not be used by the REP. A REP will be required to amend its application to provide at least one suitable name in order to be certificated.
- (2) **Office requirements.** A REP shall continuously maintain an office located within Texas for the purpose of providing customer service, accepting service of process, and making available in that office books and records sufficient to establish the retail electric provider's compliance with the requirements of PURA Chapter 39, Subchapter H, and applicable commission rules. The office satisfying this requirement for a REP shall have a physical address that is not a post office box and shall be a location where the above

three functions can occur. To evaluate compliance with requirements in this paragraph, the commission's authorized representative may visit the office of a certificated REP at any time during normal business hours on the same basis available to an electric customer. An applicant shall submit the following information with an application:

- (A) Evidence that it has made arrangements for an office located in Texas, including the physical address of the office; or
  - (B) An affidavit stating that the applicant will obtain an office located within Texas meeting the requirements of this paragraph, and will notify the commission of its physical address, after certification but before providing retail electric service to customers in Texas.
- (3) **Threshold residential service requirement.** For 36 months after retail competition begins, if a REP serves an aggregate load in excess of 300 megawatts within Texas during a given year, not less than 5.0% of the REP's load for the year in megawatt hours must consist of residential customers, pursuant to PURA §39.352(g). For the purposes of this paragraph, "residential customers" shall include any customers classified as residential by the applicable transmission and distribution utility tariff or, in the absence of a residential rate class, those customers that are primarily end users consuming electricity for personal, family or household purposes and who are not resellers of electricity.
- (A) The 300 megawatt aggregate load threshold shall be calculated by averaging the highest average hourly demand for each of the months of June, July, August,

and September. REPs shall use the sum of the amount of generation scheduled at the relevant independent organization(s) to serve the REP's customers for determining the demand to be used in this calculation.

(B) If the calculation made under subparagraph (A) of this paragraph is in excess of 300 megawatts, the certificate holder shall:

(i) demonstrate that not less than 5.0% of the total quantity of megawatt hours it sold in the calendar year was supplied to residential customers, or

(ii) demonstrate that another REP served sufficient qualifying residential load on its behalf, or

(iii) make the necessary calculations and pay an amount into the system benefit fund equal to \$1 multiplied by a number equal to the difference between the number of megawatt hours it sold to residential customers and the number of megawatt hours it was required to sell to such customers.

(C) The calculations in subparagraph (B) of this paragraph are subject to the following limitations:

(i) An affiliated REP shall pay \$1 multiplied by a number equal to the difference between the number of megawatt hours sold to residential customers outside of the electric utility's service area and the number of

megawatt hours it was required to sell to such customers outside of the electric utility's service area.

- (ii) For purposes of subparagraph (B)(ii) of this paragraph, "qualifying residential load" may not include customers served by an affiliated retail electric provider in its affiliated electric utility's service area.
- (iii) The requirements of this paragraph apply only to the portion of an affiliated REP's load that is outside the electric utility's service area. With respect to that "outside" load, any residential customers counted to meet the 5.0% threshold of residential customers must also be outside the electric utility's service area.
- (iv) Where several REPs belong to a common owner, their loads will be combined for purposes of evaluation under this subsection. If the common owner is an electric utility, only loads served outside the electric utility's service area will be used in the calculations under this paragraph.

(f) **Financial requirements.** As a requisite for obtaining and maintaining certification, a REP must meet the financial resource standards established by this subsection. The standards established by paragraphs (1), (2), and (3) of this subsection are additive.

- (1) **Financial standards required for credit quality.** A REP shall fulfill the following financial qualifications listed below concerning its underlying credit quality:

(A) **Minimum credit standards for REP certification.** In order to be certified by the commission, a REP or its parent corporation or controlling shareholder providing a guaranty to its REP under subparagraph (D) of this paragraph must demonstrate and, as a condition of continued certification, maintain:

- (i) An investment grade credit rating as provided for under subparagraph (F) of this paragraph; or
- (ii) Assets in excess of liabilities, *i.e.*, equity, of at least \$50,000,000 on its most recent balance sheet; or
- (iii) Unused cash resources of at least \$100,000, which will allow the REP to incur in Texas up to \$250,000 in total monthly billings (excluding transition charges billings) from TDUs. In the event of surpassing the \$250,000 per month level of total billings from TDUs in Texas, the REP shall maintain this same ratio of unused cash resources to TDU billings on an ongoing basis. Within 90 days of surpassing the \$250,000 billing threshold, the REP shall file with the commission a sworn affidavit demonstrating compliance with this clause. The REP shall thereafter include demonstration of its compliance with this clause in its annual reports. The cash resources under this clause shall be used to first address all commission penalties and then credit obligations to the TDU, if any, in the event of the REP's default.

- (B) **Utility credit standards for REPs.** With the exception of the credit standards provided for in paragraph (3) of this subsection, a transmission and distribution utility shall not impose any additional or separate credit conditions on a REP, unless the REP has defaulted on one or more payments to the utility for services provided by the utility. A transmission and distribution utility may impose credit conditions on a REP that has defaulted to the extent specified in its tariff and allowed by commission rules.
- (C) **Financial evidence.** A REP shall be permitted to use any of the financial instruments listed below, as well as any other financial instruments approved in advance by the commission, in order to satisfy the cash requirements established by this rule.
- (i) Cash or cash equivalent, including cashier's check or sight draft;
  - (ii) A certificate of deposit with a bank or other financial institution;
  - (iii) A letter of credit issued by a bank or other financial institution, irrevocable for a period of at least 15 months;
  - (iv) A line of credit or other loan issued by a bank or other financial institution, including a bond in a form approved by the commission, irrevocable for a period of at least 15 months;
  - (v) A loan issued by a subsidiary or affiliate of the applicant or a corporation holding controlling interest in the applicant, irrevocable for a period of at least 15 months;

- (vi) A guaranty issued by a shareholder or principal of the applicant; a subsidiary or affiliate of the applicant or a corporation holding controlling interest in the applicant; irrevocable for a period of at least 15 months.
- (D) **Loans or guarantees.** To the extent that it relies upon a loan or guaranty described in subparagraph (C)(v) or (vi) of this paragraph, the REP shall provide financial evidence sufficient to demonstrate that the lender or guarantor possesses the cash or cash equivalents needed to fund the loan or guaranty.
- (E) **Unencumbered resources.** All cash and other instruments listed in subparagraph (C) of this paragraph as evidence of financial resources shall be unencumbered by pledges for collateral. These financial resources shall be subject to verification and review prior to certification of the REP and at any time after certification in which the REP relies on the cash or other financial instrument to meet the requirements under this subsection. The resources available to the REP must be authenticated by independent, third party documentation.
- (F) **Credit ratings.** To meet the requirements of this paragraph, a REP may rely upon either its own investment grade credit rating, or a bond, guaranty, or corporate commitment of an affiliate or another company, if the entity providing such security is also rated investment grade. The determination of such investment grade quality will be based on the credit ratings of Standard &

Poor's (S&P), Moody's Investor Services (Moody's), or any other nationally recognized rating agency, including Fitch for financial institutions and Best for insurance companies. Minimum investment credit ratings include "BBB-" for S&P or "Baa3" for Moody's, or their financial equivalent. If the investment grade credit rating of either S&P or Moody's is suspended or withdrawn, the REP must provide alternative financial evidence included under subparagraphs (C) - (E) of this paragraph within ten days of the credit downgrade.

- (2) **Financial standards required for customer protection.** A REP shall maintain records on an on-going basis for any deposits or advance payments received from customers. Financial obligations to customers shall be payable to them within 30 calendar days from the date the REP notifies the commission that it intends to withdraw its certification or is deemed by the commission not able to meet its current customer obligations. Customer obligations shall be settled before the REP withdraws its certification or ceases doing business in Texas. A REP must meet the following financial qualifications concerning its receipt of customer payments:

- (A) **Financial obligations to customers.** The REP must maintain and provide evidence of financial resources equal to the sum of its obligations to customers for any deposits or other advance payments received from customers, subject to the following conditions.

- (i) Financial resources required under this paragraph shall be maintained at levels sufficient to demonstrate that the REP can cover all deposits or other advance payments that are outstanding at any given time.
  - (ii) The REP shall file with the commission a sworn affidavit demonstrating compliance with this paragraph within 90 days of receiving the first deposit or other advance payment from customers for its services.
  - (iii) Financial resources required pursuant to this subsection shall not be reduced by the REP without the advance approval of the commission.
- (B) **Financial evidence.** A REP shall be permitted to use any of the financial instruments and conditions set out in paragraph (1)(C) – (F) of this subsection to demonstrate that its resources are adequate for customer protection.
- (C) **External notice.** Any party providing the financial resources necessary to protect customers under this provision of the rule, either directly or indirectly, shall be provided a copy of this rule by the REP.
- (3) **Financial standards required of REPs for the billing and collection of transition charges.** If a REP serves customers in the service area of a transmission and distribution utility that is subject to a financing order pursuant to PURA §39.310, the REP shall comply with any additional standards specified in §25.108 of this title (relating to Financial Standards for Retail Electric Providers Regarding the Billing and Collection of Transition Charges).

- (4) **Credit support by affiliates.** To the extent it relies on an affiliated transmission or distribution utility for credit, investment, or financing arrangements pursuant to this subsection, the REP shall demonstrate that any such arrangement complies with §25.272(d)(7) of this title.
- (5) **Reporting requirements.** A REP certified under this subsection is subject to the ongoing annual financial requirements of subsection (f) of this section and any other applicable requirements of subsection (i) of this section.
  
- (g) **Technical and managerial resource requirements.** As a requisite for providing retail electric service, a REP must have technical resources to provide continuous and reliable electric service to customers in its service area and technical and managerial ability to supply electric service at retail in accordance with its customer contracts. Technical and managerial resource requirements include:

  - (1) Capability to comply with all scheduling, operating, planning, reliability, customer registration and settlement policies, rules, guidelines, and procedures established by the ERCOT independent system operator (ISO), or other independent organization, if applicable, including any independent organization requirements for 24 hour coordination with control centers for scheduling changes, reserve implementation, curtailment orders, interruption plan implementation, and telephone number, fax number, and address where its staff can be directly reached at all times.

- (2) Capability to comply with the registration and certification requirements of the ERCOT ISO or other independent organization and its system rules, or contracts for the purchase of power from entities registered with or certified by the ERCOT ISO or independent organization and capable of complying with its system rules.
- (3) Purchase of capacity and reserves, or other ancillary services, as may be required by the ERCOT ISO or other independent organization to provide adequate electricity to all the applicant's customers in its certificated area.
- (4) Compliance with all renewable energy portfolio standards in accordance with §25.173 of this title (relating to Goal for Renewable Energy), whether by money or by deed.
- (5) At least one principal or employee experienced in the retail electric industry or a related industry.
- (6) Adequate staffing and employee training to meet all service level commitments.
- (7) The capability and effective procedures to be the primary point of contact for retail electric customers for distribution system service in accordance with applicable commission rules, including procedures for relaying outage reports to the transmission and distribution utility on a 24 hour basis.
- (8) A customer service plan that describes how the REP complies with the commission's customer protection and anti-discrimination rules.
- (9) The following information submitted in an initial application:
  - (A) Prior experience of the applicant or one or more of the applicant's principals or employees in the retail electric industry or a related industry.

- (B) Any complaint history and compliance record during the three calendar years prior to the filing of the application regarding the applicant, applicant's affiliates that provide utility related services such as telecommunications, electric, gas, water, or cable service, the applicant's predecessors in interest, and principals with public utility commissions, attorney general offices, or other applicable regulatory agencies in other states where the applicant is doing business or has conducted business in the past or with the Texas Secretary of State, Texas Comptroller's Office, or Office of the Texas Attorney General. Relevant information shall include, but is not limited to, the type of complaint, status of complaint, resolution of complaint and the number of customers in each state where complaints occurred. The Office of Customer Protection shall review any similar complaint information on file at the commission.
- (C) A summary of any history of bankruptcy, dissolution, merger or acquisition of the applicant or any predecessors in interest in the three calendar years immediately preceding the application; and
- (D) A statement indicating whether the applicant is currently under investigation, or has been penalized, by an attorney general or any state or federal regulatory agency, either in this state or in another state or jurisdiction for violation of any deceptive trade or consumer protection laws or regulations.

- (E) Disclosure of whether the applicant, a predecessor, an officer, director or principal has been convicted or found liable for fraud, theft or larceny, deceit, or violations of any customer protection or deceptive trade laws in any state;
  - (F) An affidavit stating that the applicant will register with or be certified by the ERCOT ISO or other independent organization and will comply with the technical and managerial requirements of paragraphs (1)-(4) of this subsection; or that all entities with whom the applicant has a contractual relationship to purchase power are registered with or certified by the independent organization and will comply with all system rules and standards established by the independent organization; and
  - (G) Other evidence, at the discretion of the applicant, supporting the applicant's plans for meeting requirements listed in paragraphs (1) - (5) of this subsection.
- (h) **Customer Protection requirements.** As a requisite for obtaining and maintaining certification, a REP shall comply with any customer protection requirements, disclosure requirements, marketing guidelines and anti-discrimination rules adopted by the commission. In the absence of other commission rules, certificated REPS shall be held to the general standards listed below. An applicant for certification as a REP shall provide a sworn affidavit, as specified in the application form approved by the commission, that it will comply with this section and any other applicable customer protection rules, disclosure requirements, marketing guidelines, and anti-discrimination rules approved by the commission.

- (1) A REP may not refuse to provide retail electric service or otherwise discriminate in the provision of electric service to any customer because of race, creed, color, national origin, ancestry, sex, marital status, lawful source of income, disability, or familial status; or refuse to provide retail electric service to a customer because the customer is located in an economically distressed geographic area or qualifies for low-income affordability or energy efficiency services.
- (2) A REP shall inform its customers whom to contact and what to do in the event of power outage or other electricity-related emergency.
- (3) A REP shall inform its customers of the customer's rights and avenues available to pursue a complaint against the REP as afforded by PURA §39.101.
- (4) A REP shall not switch, or cause to be switched, the retail electric provider for a customer without first obtaining proper authorization from the customer.
- (5) A REP shall not bill, or cause to be billed, an unauthorized charge to a customer's retail electric service bill.
- (6) A REP shall respond in good faith when notified by a customer of a complaint.
- (7) A REP shall maintain a customer service staff adequate to handle customer inquiries and complaints.
- (8) A REP may not release proprietary customer information to any person unless the customer authorizes the release in a manner approved by the commission.

- (i) **Requirements for reporting and for changing the terms of a REP certificate.** The ongoing maintenance of a REP certificate is dependent upon keeping the certification information up to date, pursuant to the following requirements:
- (1) The certificate holder shall notify the commission within 30 days of any change in its office address, business address, telephone number(s), or other contact information.
  - (2) A certificate holder that has met certain certification requirements of this rule by affidavit shall supply information to the commission to show compliance with the requirement as follows:
    - (A) A REP who met the Texas office requirement pursuant to subsection (e)(2)(B) of this section shall supply the commission with the physical office address on or before the date of commencing retail electric service in Texas.
    - (B) A REP that demonstrates that it can meet the technical requirements of subsection (g)(9)(G) of this section by means of an affidavit shall supply the commission with evidence that it has the capability to comply with subsection (g)(1)-(4) on or before the 21st day prior to commencing retail electric service in Texas.
  - (3) If any of the following events occur, the holder of a REP certificate must be prepared, if necessary, for re-certification by the commission and shall notify the commission :
    - (A) within 30 days of a material change in any of the technical conditions presented pursuant to subsection (g) of this section as the basis for the approval of the applicant's initial certification; or,

- (B) within ten days of a material change in any of the financial requirements presented pursuant to subsection (f) of this section as the basis for approval of the applicant's initial certification, with a material financial change defined as the loss of investment grade or a 5.0% decline in either the \$50 million equity standard or the \$100,000 cash standard;
- (4) All REP certificate holders shall file updated information set forth in this subsection on an annual basis on a report form approved by the commission. The annual report is due on June 1 each year for the preceding calendar year. A company's first annual report is due in the year following the calendar year in which it is awarded a certificate. The following information, at a minimum, shall be reported annually:
- (A) Any changes in addresses, telephone numbers, authorized contacts, and other information necessary for contacting the certificate holder.
  - (B) If certificated for a service area defined by geography, identification of areas where the REP is providing retail electric service to customers in Texas compiled by zip code.
  - (C) For 36 months after retail competition begins, the result of the calculation and proof of threshold residential service requirements and the amount paid into the system benefit fund, if applicable, pursuant to subsection (e)(3) of this section.
  - (D) A list of aggregators with whom the REPs have conducted business in the reporting period, including commission registration verification for each.

- (E) A sworn affidavit that the certificate holder is not in material violation of any of the requirements of its certificate.
- (5) The holder of a REP certificate shall file with the commission notice of changes to the organizational structure or to the material facts represented in its application, including, but not limited to any change in name, service area, facilities ownership or affiliation upon which the commission relied in approving the REP's application. The commission may require the REP to file an amendment to its certificate if it determines that the changes warrant a reevaluation of the REP's basis for certification.
- (6) The holder of a REP certificate for a service area defined by specific customers may amend its certificate to add additional specified customers by submitting to the commission the affidavit required by subsection (d)(2) of this section from the additional customers on or before the commencement of electric service to those customers.
- (7) A REP certificate shall not be transferred without prior commission approval. Approval for transfer shall be obtained by petition to the commission. The transferee must complete and file with the commission an application form for certification that demonstrates the transferee's financial and technical fitness to render service under the transferred certificate.
- (8) No REP certificate holder shall cease operations as a REP without prior notice to the commission, to each of the REP's customers to whom the REP is providing service on the proposed date of cessation of business operations, and other affected persons, including the independent operator, transmission and distribution utilities, electric

distribution cooperatives, municipally owned utilities, generation suppliers, and providers of last resort. The REP shall file with the commission proof of refund of any monies owed to customers. Upon the effective cessation date, a REP's certificate will be deemed suspended. If, within 24-months of cessation, a REP demonstrates compliance with certification requirements, the certificate will be reinstated.

- (9) If a REP files a petition in bankruptcy, is the subject of an involuntary bankruptcy proceeding, or in any other manner becomes insolvent, it shall notify the commission within ten days of this event and shall provide the commission a brief summary of the nature of the proceedings. The commission shall have the right to proceed against any financial resources that the REP relied on in obtaining its certificate, to satisfy unpaid administrative penalties or payments owed to customers.
- (j) **Suspension and revocation.** Pursuant to PURA §39.356, certificates granted pursuant to this section are subject to suspension and revocation for significant violations of PURA, commission rules, or reliability standards adopted by an independent organization. The commission may also amend the certificate or impose an administrative penalty for a significant violation. The commission or any affected person may bring a complaint seeking to suspend or revoke a REP's certificate. Significant violations include, but are not limited to, the following:
- (1) Providing false or misleading information to the commission;
  - (2) Engaging in fraudulent, unfair, misleading, deceptive, or anti-competitive business practices or unlawful discrimination;

- (3) Switching, or causing to be switched, the retail electric provider for a customer without first obtaining the customer's permission;
- (4) Billing an unauthorized charge, or causing an unauthorized charge to be billed to a customer's retail electric service bill;
- (5) Failure to maintain continuous and reliable electric service to its customers pursuant to this section;
- (6) Failure to maintain the minimum level of financial resources set out in subsection (f) of this section;
- (7) Bankruptcy, insolvency, or the inability to meet financial obligations on a reasonable and timely basis;
- (8) Failure to timely remit payment for invoiced charges to a transmission and distribution utility pursuant to the terms of the statewide standardized tariff adopted by the commission;
- (9) Failure to observe any scheduling, operating, planning, reliability, and settlement policies, rules, guidelines, and procedures established by the independent organization;
- (10) A pattern of not responding to commission inquiries or customer complaints in a timely fashion;
- (11) Suspension or revocation of a registration, certification, or license by any state or federal authority;

- (12) Conviction of a felony by the certificate holder or principal employed by the certificate holder, of any crime involving fraud, theft or deceit related to the certificate holder's service;
- (13) Not providing retail electric service to customers within 24 months of the certificate being granted by the commission;
- (14) Failure to serve as a provider of last resort if required to do so by the commission pursuant to PURA §39.106(f); and
- (15) Failure, or a pattern of failures to meet the conditions of this section or other commission rules or orders.

**§25.108. Financial Standards for Retail Electric Providers Regarding the Billing and Collection of Transition Charges.**

- (a) **Application.** This section applies to any retail electric provider (REP) or any other entity responsible for billing and collecting transition charges serving customers in a transmission and distribution utility (TDU) service area subject to a financing order issued by the commission under Public Utility Regulatory Act (PURA) §39.303.
- (b) **Definitions.**
- (1) **Financing order** – An order of the commission adopted under PURA §39.201 or §39.262 approving the issuance of transition bonds and the creation of transition charges for the recovery of qualified costs.
  - (2) **Indenture trustee** – An entity that administers the indenture related to transition bonds.
  - (3) **Servicer** – The entity responsible for carrying out obligations related to transition bonds under a servicing agreement.
  - (4) **Servicing agreement** – The agreement that details the obligations of the servicer related to the imposition, collection, and remittance of transition charges.
  - (5) **Special purpose entity (SPE)** – An entity formed by an electric utility, pursuant to a financing order, for the limited purpose of acquiring transition property, issuing transition bonds, and performing other activities relating thereto or otherwise authorized by a financing order.

- (6) **Transition bonds** – Bonds, debentures, notes, certificates, of participation or of beneficial interest, or other evidences of indebtedness or ownership that are issued by an electric utility, its successors, or an assignee under a financing order, that have a term not longer than 15 years, and that are secured or payable from transition property.
  - (7) **Transition charges** – Nonbypassable amounts to be charged for the use or availability of electric services, approved by the commission under a financing order to recover qualified costs, that shall be collected by an electric utility, its successors, an assignee, or other collection agents as provided for in a financing order.
- (c) **Applicability of REP standards.** Beginning on the date of customer choice for any retail customers, the servicer of the transition bonds will bill the transition charges for those customers to each retail customer's REP and the REP will collect transition charges from its retail customers. The standards in this section are the most stringent that can be imposed on REPs by any servicer of transition bonds . The standards relate only to the billing and collection of transition charges authorized by a financing order and do not apply to the collection of any other non-bypassable charges, or any other charges. The standards apply to all REPs other than REPs that have contracted with the transmission and distribution company to bill and collect transition charges from retail customers. REPs may contract with parties other than the transmission and distribution company to bill and collect transition charges from retail customers, but such REPs shall remain subject to the standards in this section.

(d) **REP standards.** The REP standards for transition charges are:

(1) **Rating, deposit, and related requirements.** A REP that does not have or maintain the requisite long-term, unsecured credit rating may select which alternate form of deposit, credit support, or combination thereof it will utilize, in its sole discretion. The indenture trustee shall be the beneficiary of any affiliate guarantee, surety bond or letter of credit. The provider of any affiliate guarantee, surety bond, or letter of credit must have and maintain a long-term, unsecured credit ratings of not less than "BBB-" and "Baa3" (or the equivalent) from Standard & Poor's ("S&P") and Moody's Investors Service ("Moody's"), respectively. Each REP must:

(A) have a long-term, unsecured credit rating of not less than "BBB-" and "Baa3" (or the equivalent) from S&P and Moody's , respectively; or

(B) provide:

(i) a deposit of two months' maximum expected transition charge collections in the form of cash,

(ii) an affiliate guarantee, surety bond, or letter of credit providing for payment of such amount of transition-charge collections in the event that the REP defaults in its payment obligations, or

(iii) a combination of clause (i) and (ii) of this subparagraph.

(2) **Loss of credit rating.** If the long-term, unsecured credit rating from either S&P or Moody's of a REP that did not previously provide the alternate form of deposit, credit support, or combination thereof or of any provider of an affiliate guarantee, surety bond,

or letter of credit is suspended, withdrawn, or downgraded below "BBB-" or "Baa3" (or the equivalent), the REP must provide the alternate form of deposit, credit support, or combination thereof, or new forms thereof, in each case from providers with the requisite ratings, within ten business days following such suspension, withdrawal, or downgrade. A REP failing to make such provision must comply with the provisions set forth in paragraph (5) of this subsection.

- (3) **Computation of deposit.** The computation of the size of a required deposit shall be agreed upon by the servicer and the REP, and reviewed during the first month of each calendar quarter to ensure that the deposit accurately reflects two months' maximum collections. If the REP provides a cash deposit, then within ten business days following such review, the REP shall remit to the indenture trustee the amount of any shortfall in such required deposit, or the servicer shall instruct the indenture trustee to remit to the REP any amount in excess of such required deposit. If the REP provides security in the form of a letter of credit or surety bond then within ten business days following such review, the REP shall submit replacement letters of credit or surety bonds in the amount determined pursuant to the review. A REP failing to so remit any such shortfall or failing to submit replacement letters of credit or surety bonds, as applicable, must comply with the provisions set forth in paragraph (5) of this subsection. REP cash deposits shall be held by the indenture trustee, as a collateral agent for the REP and the indenture trustee (in its capacity as indenture trustee) and shall be maintained in a segregated account which shall not be part of the trust estate, and invested in short-term high quality

investments, as permitted by the rating agencies rating the transition bonds. Investment earnings on REP cash deposits shall be considered part of such cash deposits so long as they remain on deposit with the indenture trustee. At the instruction of the servicer, cash deposits will be remitted with investment earnings to the REP at the end of the term of the transition bonds unless otherwise utilized for the payment of the REP's obligations for transition bond payments. Once the deposit is no longer required, the servicer shall promptly (but not later than 30 calendar days) instruct the indenture trustee to remit the amounts in the segregated accounts to the REP.

- (4) **Payment of transition charges.** Payments of transition charges less the charge-off allowance described in paragraph (9) of this subsection are due 35 calendar days following each billing by the servicer to the REP, without regard to whether or when the REP receives payment from its retail customers. The servicer shall accept payment by electronic funds transfer, wire transfer, and/or check. Payment will be considered received the date the electronic funds transfer or wire transfer is received by the servicer, or the date the check clears. A 5.0% penalty is to be charged on amounts received after 35 calendar days; however, a ten calendar-day grace period will be allowed before the REP is considered to be in default. A REP in default must comply with the provisions set forth in paragraph (5) of this subsection. The 5.0% penalty will be a one-time assessment measured against the current amount overdue from the REP to the servicer. The "current amount" consists of the total unpaid transition charges existing on the 36th calendar day after billing by the servicer. Any and all such penalty

payments will be made to the indenture trustee to be applied against transition charge obligations. A REP shall not be obligated to pay the overdue transition charges of another REP. If a REP agrees to assume the responsibility for the payment of overdue transition charges as a condition of receiving the customers of another REP that has decided to terminate service to those customers for any reason, the new REP shall not be assessed the 5.0% penalty upon such transition charges; however, the prior REP shall not be relieved of the previously-assessed penalties.

- (5) **Remedies upon default.** After the ten calendar-day grace period (the 45th calendar day after the billing date) referred to in paragraph (4) of this subsection, the servicer shall have the option to seek recourse against any cash deposit, affiliate guarantee, surety bond, letter of credit, or combination thereof provided by the REP, and to avail itself of such legal remedies as may be appropriate to collect any remaining unpaid transition charges and associated penalties due the servicer after the application of the REP's deposit or alternate form of credit support. In addition, a REP that is in default with respect to the requirements set forth in paragraphs (2), (3), or (4) of this subsection shall select and implement one of the options listed in subparagraphs (A), (B), or (C) of this paragraph. If a REP that is in default fails to immediately select and implement one of these options or, after so selecting one of the options, fails to adequately meet its responsibilities thereunder, then the servicer shall immediately implement the option in subparagraph (A) of this paragraph. Upon re-establishment of compliance with the requirements set forth in paragraphs (2), (3), or (4) of this subsection, and the payment

of all past-due amounts and associated penalties, the REP will no longer be required to comply with this paragraph.

- (A) Allow the Provider of Last Resort ("POLR") or a qualified REP of the customer's choosing to immediately assume the responsibility for the billing and collection of transition charges.
  - (B) Immediately implement other mutually suitable and agreeable arrangements with the servicer. It is expressly understood that the servicer's ability to agree to any other arrangements will be limited by the terms of the securitization Servicing Agreement and requirements of each of the rating agencies that have rated the transition bonds necessary to avoid a suspension, withdrawal, or downgrade of the ratings on the transition bonds.
  - (C) Arrange that all amounts owed by retail customers for services rendered by the REP be timely billed and will immediately be paid directly into a lock-box controlled by the servicer with such amounts to be applied first to pay transition charges and other non-bypassable delivery charges before the remaining amounts are released to the REP. All costs associated with this mechanism will be borne solely by the REP.
- (6) **Billing by providers of last resort.** The initial POLR appointed by the commission, or any commission-appointed successor to the POLR, must meet the minimum credit rating or deposit/credit support requirements described in paragraph (1) of this subsection in addition to any other standards that may be adopted by the commission.

If the POLR defaults or is not eligible to provide such services, responsibility for billing and collection of transition charges will immediately be transferred to and assumed by the servicer until a new POLR can be named by the commission or the customer requests the services of a certified REP. If the POLR or a qualified REP assumes responsibility for billing and collecting transition charges under paragraph (5) of this subsection or servicer assumes such responsibility under this paragraph, the POLR, replacement REP, or servicer, as applicable shall bill all transition charges which have not been billed as of the date it assumes such responsibility and shall be subject to the provisions of the financing order. (For example, if a REP which bills on a calendar month basis goes into default and is replaced by the POLR on April 20, the initial transition charge bill rendered by the POLR would cover all transition charges attributable to periods since March 31, the last date for which the original REP had rendered bills). Retail customers may never be re-billed by the successor REP, the POLR, or the servicer for any amount of transition charges they have paid their REP (although future transition charges shall reflect REP and other system-wide charge-offs). Additionally, if the amount of the penalty detailed in paragraph (4) of this subsection is the sole remaining past-due amount after the 45th calendar day, the REP shall not be required to comply with paragraph (5)(A), (B) or (C) of this subsection, unless the penalty is not paid within an additional 30 calendar days.

- (7) **Dispute resolution.** In the event that a REP disputes any amount of billed transition charges, the REP shall pay the disputed amount under protest according to the timelines

detailed in paragraph (4) of this subsection. The REP and servicer shall first attempt to informally resolve the dispute, but if they fail to do so within 30 calendar days, either party may file a complaint with the commission. If the REP is successful in the dispute process (informal or formal), the REP shall be entitled to interest on the disputed amount paid to the servicer at the commission-approved interest rate. Disputes about the date of receipt of transition charge payments (and penalties arising thereof) or the size of a required REP deposit will be handled in a like manner. It is expressly intended that any interest paid by the servicer on disputed amounts shall not be recovered through transition charges if it is determined that the servicer's claim to the funds is clearly unfounded. No interest shall be paid by the servicer if it is determined that the servicer has received inaccurate metering data from another entity providing competitive metering services pursuant to PURA §39.107.

- (8) **Metering data.** If the servicer is providing the metering, metering data will be provided to the REP at the same time as the billing. The REP will be responsible for providing the servicer accurate metering data (including meter identification information) for all REP's customers whose meters are not read by the servicer at the time the data is provided to the independent organization (as defined in PURA §39.151(b)) under the independent organization's protocols for settlement.
- (9) **Charge-off allowances.** The REP will be allowed to hold back an allowance for charge-offs in its payments to the servicer. Such charge-off rate will be recalculated each year in connection with the annual true-up procedure. In the initial year, REPs will

be allowed to remit payments based on the same system-wide charge-off percentage then being used by the servicer to remit payments to the indenture trustee for the holders of transition bonds; thereafter the charge-off percentage will be calculated based upon each REP's prior year charge-off experience. On an annual basis in connection with the true-up process, the REP and the servicer will be responsible for reconciling the amounts held back with amounts actually written off as uncollectible in accordance with the terms agreed to by the REP and the servicer, provided that:

- (A) The REP's right to reconciliation for charge-offs will be limited to customers whose service has been permanently terminated and whose entire accounts (*i.e.*, all amounts due the REP for its own account as well as the portion representing transition charges) have been written off.
- (B) If the REP's actual charge-offs are greater than the allowance for charge-offs, the REP may collect the difference, with interest, from the date the review was completed, in 12 equal monthly installments beginning in the month that the transition charges are adjusted to reflect the new charge off percentages. The REP's recourse will be limited to a credit against future transition charge payments unless the REP and the servicer agree to alternative arrangements, but in no event will the REP have recourse to the indenture trustee, the "SPE" or the SPE's funds for such payments and the indenture trustee and SPE shall not be liable for such amounts. If the REP's actual charge-offs are less than the allowance for charge-offs, the REP shall pay the difference, with interest, from

the date the review was completed, in 12 equal monthly installments beginning in the month that the transition charges are adjusted to reflect the new charge-off percentages. The interest rate on amounts due to or from the REP under this paragraph shall be the interest rate in effect pursuant to Texas Utilities Code §183.003 on the date the annual reconciliation is made. REP and servicer shall each have the unilateral right to prepay any amounts due hereunder and thus avoid continued accrual of interest.

- (C) The REP shall provide ' the servicer a list of all charge-offs qualifying for reconciliation under subparagraph (A) of this paragraph, and documentation permitting servicer to verify that service to the customer has been terminated and all amounts due the REP from such customers have been written off. The information shall be provided not later than 30 days prior to the date on which the annual true-up adjustment is to be filed and shall cover the most recent 12-month period for which data is available at the time of submission. The information to be provided by the REP shall include data demonstrating that the REP has not collected any amounts the REP claimed as charge-offs in prior periods, or, if any amount previously charged-off has been collected, quantifying the revenues. The REP's rights to credits will not take effect until adjusted transition charges reflecting the REPs charge-off experience have been implemented.

- (10) **Service termination.** In the event that the servicer is billing customers for transition charges, the servicer shall have the right to terminate transmission and distribution service to the end-use customer (or if the servicer is not the transmission and distribution utility to direct the transmission and distribution utility to terminate service to the end-use customer) for non-payment by the end-use customer pursuant to applicable commission rules. In the event that a REP or the POLR is billing customers for transition charges, the REP shall have the right to transfer the customer to the POLR (or to another certified REP) or to direct the transmission and distribution utility to terminate transmission and distribution service to the end-use customer for non-payment by the end-use customer pursuant to applicable commission rules. In the event that the POLR is billing customers for transition charges, the POLR shall have the right to direct the transmission and distribution utility to terminate transmission and distribution service to the end-use customer for non-payment by the end-use customer pursuant to applicable commission rules.
- (11) **Precedence and modifications of REP standards in a financing order.**
- (A) Compliance with financing order standards. If the REP standards in the applicable financing order are in direct conflict with the standards in this section, then the REP must comply with the REP standards stated in the financing order, instead of the standards stated in this section, unless the standards of the financing order have been modified and approved according to subparagraph (B) of this paragraph.

- (B) Commission modification of standards. The commission may impose standards on REPs that are different from those in the applicable financing order but only if the commission receives prior written confirmation from each rating agency that rated the transition bonds authorized by that financing order that the proposed modifications will not cause a suspension, withdrawal, or downgrade of ratings on the transition bonds.

This agency hereby certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority. It is therefore ordered by the Public Utility Commission of Texas that §25.107 relating to Certification of Retail Electric Providers (REPs) and §25.108 relating to Financial Standards for Retail Electric Providers Regarding the Billing and Collection of Transition Charges are hereby adopted with changes to the text as proposed.

**ISSUED IN AUSTIN, TEXAS ON THE 25th DAY OF JULY 2000.**

**PUBLIC UTILITY COMMISSION OF TEXAS**

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**Chairman Pat Wood, III**

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**Commissioner Judy Walsh**

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**Commissioner Brett A. Perlman**