

**PROJECT NO. 34039**

<b>RULEMAKING PROCEEDING TO</b>	<b>§</b>	<b>PUBLIC UTILITY COMMISSION</b>
<b>AMEND PUC SUBSTANTIVE RULE</b>	<b>§</b>	
<b>25.107, RELATING TO</b>	<b>§</b>	<b>OF TEXAS</b>
<b>CERTIFICATION OF RETAIL</b>	<b>§</b>	
<b>ELECTRIC PROVIDERS</b>	<b>§</b>	

**ORDER ADOPTING AMENDMENT TO §25.107  
AS APPROVED AT THE OCTOBER 9, 2007 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts an amendment to §25.107, relating to Certification of Retail Electric Providers (REPs), with changes to the proposed text as published in the April 13, 2007 issue of the *Texas Register* (32 TexReg 2081). The amendment will permit the commission in certain circumstances to establish additional or different financial requirements for a REP that, together with any affiliates, serves a million or more retail customers in Texas. The amendment will also repeal certain obsolete provisions of the rule. The rule is a competition rule subject to judicial review as specified in Public Utility Regulatory Act (PURA) §39.001(e). This amendment is adopted under Project Number 34039.

The commission received comments on the proposed amendment to §25.107 from AEP Central Company and AEP Texas North Company (together AEP); the Alliance for Retail Markets (ARM) and Reliant Energy, Inc. (Reliant); CenterPoint Energy Houston Electric, LLC (CenterPoint); Texas Industrial Energy Consumers (TIEC); and TXU Energy Retail Company, LP (TXU). AEP, CenterPoint, and TIEC supported the commission's proposed amendment. Reliant and TXU objected to the amendment with respect to §25.107(c)(2) and (7), as well as §25.107(f), and ARM objected to the amendment with respect to §25.107(c)(2) and (7), but did

not take a position on proposed changes in subsection (f) because it did not believe any changes were necessary.

TXU argued that the proposed amendment does not have a reasoned justification because the commission's staff admitted at the commission's March 27 open meeting that it proposed the amendment for the sole purpose of "making it easier" for the commission to review certain aspects of the purchase of TXU Corp. and its various subsidiaries by certain private investors, including Kohlberg, Kravis, Roberts and Company and Texas Pacific Group TXU.

*Commission response*

**TXU was apparently referring to the discussion that occurred at the commission's March 20, 2007 open meeting. The commission's consideration of the transaction described by TXU resulted in the identification of commission rules that could be improved. Although the transaction was a catalyst for the amendment, the amendment addresses broader concerns than just that transaction and affects more REPs than just TXU.**

ARM and Reliant, commenting jointly, commented that the proposed amendments to §25.107(c)(2) are not within the commission's statutory authority, either expressly or by virtue of being reasonably necessary to carry out its duties. They argued that allowing the commission to pre-approve changes in REP management or transfers of REP stock—as outlined in the rule—is not within the commission's authority to safeguard customers. Furthermore, they maintained that the legislature had already contemplated, and decided against, giving the commission the authority to pre-approve in instances in which a REP merged, consolidated, or otherwise became

affiliated with another REP when PURA §39.158 was initially proposed. ARM and Reliant argued, therefore, that if the legislature declined to adopt that pre-approval authority, there is no basis to assume that the commission would be granted power to pre-approve any sale-transfer-merger transactions involving the ownership of a REP. Finally, they noted that safeguards are already in place to ensure that REPs are meeting the necessary qualifications for certification.

TXU made comments similar to ARM and Reliant's comments. However, TXU also argued that the proposed amendment is unconstitutionally retroactive to the extent that it would apply to the pending TXU transaction, which would have the effect of depriving parties of substantive and clearly vested rights.

TIEC stated its appreciation for the rationale in the proposed amendment to §25.107(c)(2), but argued that an application of more stringent transfer criteria to Option 2 REPs may not be necessary, as Option 2 customers voluntarily accept more risk.

*Commission response*

**PURA §39.352 provides that, after the date of customer choice, a person may not provide retail electric service in this state unless the person is certified by the commission as a retail electric provider in accordance with that section. The requirements for REP certification pursuant to PURA §39.352(b) include demonstration of the financial and technical resources to provide continuous and reliable electric service to customers in the area for which the certification is sought; the managerial and technical ability to supply electricity at retail in accordance with customer contracts; and the resources needed to meet the**

**customer protection requirements of PURA. The ability of a REP to meet these requirements could be materially affected by a change in control of the REP. Nevertheless, the commission concludes that it is not appropriate to adopt changes in the provisions that deal with transfers of a REP certificate. For this reason, it is not necessary to address TXU's argument concerning retroactivity and TIEC's position with respect to Option 2 REPs. The only change to subsection (c) is to remove an obsolete provision relating to when REPs may file an application for certification. The commission concludes that other changes to subsection (c) that would clarify issues relating to transfers and amendments of REP certificates should be addressed in a subsequent rulemaking proceeding.**

ARM and Reliant objected to the proposed amendment of subsection (c)(7), specifically objecting to the determination that “good cause” to extend time for commission review of REP certification exists if a REP and its affiliates together serve one million or more customers. ARM and Reliant argued that the one million customer benchmark is arbitrary and unfairly discriminates against the larger REPs and their affiliates, without reasoned justification for doing so and in violation of PURA's anti-discrimination section for participants in a competitive market.

TXU also objected to the amendments to subsection (c)(7). In addition to ARM and Reliant's arguments, TXU argued that the one million customer threshold could be interpreted to include non-Texas residents—over which the commission would have no jurisdiction—given TXU's interpretation of PURA §11.003, defining “affiliate” in a manner to include non-Texas corporations. Additionally, TXU stated that the size of a customer base bears no necessary

relationship to the time required for the commission to review a REP transfer, and that the limitless time available to the commission for such a review is constitutionally impermissible.

*Commission response*

**The commission agrees that it is not appropriate to adopt such a change.**

Reliant objected to the amendment to subsection (f). Reliant commented that imposing different standards for REPs based on size and number of customers is arbitrary and serves no justifiable purpose. Furthermore, Reliant stated that current requirements in the rule already assure that any REP meets the financial standards necessary to operate in the market and serve retail customers.

In addition to arguments similar to Reliant's, TXU argued that the proposed amendment to subsection (f) is unconstitutionally vague as written. It argued that the amendment, which could potentially subject a REP to significant penalties, fails to detail any standards or criteria by which the commission will determine additional or different financial requirements. TXU further argued that the amendment does not provide fair notice of what conduct can be punished, granting the commission what it called unbridled discretion.

CenterPoint supported the language related to "additional or different" financial requirements, noting that due to the fact that the largest REPs have the greatest financial impact, the commission should have more authority to impose additional or different financial requirements on them. CenterPoint estimated that, for a REP with a million residential customers in its service area, its bad debt exposure could be over \$100 million if the REP defaulted. In addition,

CenterPoint argued that it may be appropriate to consider whether the one million customer threshold should be lowered. CenterPoint also suggested that the one million customer threshold be interpreted to include only customers within the Electric Reliability Council of Texas (ERCOT). AEP agreed with CenterPoint.

TIEC also commented in agreement with the amendment to subsection (f), and stated that the commission has a reasonable basis for treating those REPs that serve a million or more residential customers differently than other REPs. TIEC stated that the default of such a REP on its payments to a transmission and distribution utility (TDU) could affect the TDU's ability to provide continuous and adequate service. TIEC also stated that the default of a REP with a significant customer base affects all ERCOT market participants. When REPs default on amounts owed to ERCOT, ERCOT is likely to charge all market participants the cost of the bad debt. TIEC argued that because the default of a large REP could adversely affect all ERCOT market participants, there is a reasonable basis and justification for the commission to differentiate between REPs based on size.

*Commission response*

**The commission has clarified that the one million residential customer threshold is for customers in Texas, because the commission is concerned with the magnitude of a REP default in Texas. The commission finds that it is in the public interest to provide to itself the flexibility to impose more stringent financial standards on a REP that, together with any affiliates, serves one million or more residential customers in Texas. As CenterPoint and TIEC pointed out, the impacts on the State of Texas of a failure by such a REP to**

**provide continuous and reliable electric service could be substantial. Such a failure could require the transfer of a large number of customers to providers of last resort (POLRs) over a very short time frame. This would result not only in adverse impacts on the large number of affected customers, but also on the POLRs, who may have difficulty providing service to such a large number of customers, especially on short notice. In addition, the amount of bad debt resulting from the failure could be significant, and most of it could ultimately be paid by other REPs and customers, through charges by ERCOT and through rates of the affected TDUs.**

**In response to TXU's vagueness argument, the commission has added language to subsection (f)(1)(G) to make explicit that the purpose of any different financial requirements is to meet the statutory standard that a REP have the financial resources to provide continuous and reliable electric service to customers in the area for which it is certified.**

In written comments, Reliant stated that the proposed rule distinguishes, absent a sound financial basis, between companies that rely upon their own investment-grade rating and those with commitments from entities with investment-grade ratings. Reliant argued that a corporate commitment from a company with an investment-grade rating is just as stable and reliable as a REP's own investment-grade rating. Reliant suggested modifying the language in the proposed amendment to clarify that the commission seeks to apply strict scrutiny to only those REPs serving over one million customers that either do not rely on investment-grade ratings or rely on investment-grade ratings that are subject to a downgrade below investment grade.

To further discuss “safe harbor” financial options for REPs that, together with any affiliates, serve one million or more residential customers in Texas, the commission conducted a workshop on Monday, September 24, 2007. The workshop received participation from AEP, ARM, CenterPoint, Direct Energy (Direct), ERCOT, Reliant, and TXU. The workshop included presentations by ERCOT and TXU, followed by discussion and proposed alternatives regarding the safe harbor financial options.

TXU stated at the workshop that investment-grade credit ratings provide a very good indication of the ability of a firm to access capital and its overall creditworthiness. Direct proposed a minimum investment-grade credit rating of BBB (S&P) or Baa2 (Moody’s). Direct argued that one notch above the current standard for all REPs is adequate, because the increased probability of default for BBB compared to BBB+ is negligible. TXU agreed with Direct and noted that BBB provides access to essentially all sources of market capital.

During the workshop, the participants discussed an equity safe harbor option that would require the REP or its parent corporation or controlling shareholder to provide a guaranty to the REP to demonstrate and maintain equity in excess of 120% of the total monthly billings of TDUs (excluding transition charges). Regarding this equity safe harbor option, TXU argued that equity can function as an appropriate “sign-post” indicator that a company may be having liquidity problems. TXU expressed its support for the use of equity as an option rather than the tangible net worth (stockholder’s equity less goodwill) calculation used by ERCOT.

During the workshop, the participants also discussed a cash-resource safe harbor option that would require the REP, its parent corporation, or a controlling shareholder to provide a guaranty to the REP to demonstrate and maintain unused cash resources at a level that would be based on the total monthly billings from TDUs (excluding transition charges). In connection with such a cash-resource option, the parties also discussed quarterly reporting to demonstrate compliance and notice of non-compliance. Regarding this safe harbor alternative, TXU, Reliant, and Direct expressed concern that the current standards were being expanded to include wholesale settlement risk and customer deposits. TXU, Reliant, and Direct argued that the inclusion of wholesale settlement risk and customer deposits is duplicative, because wholesale settlement risk is covered by ERCOT creditworthiness standards and customer deposits are covered by §25.107(f)(2).

CenterPoint expressed concern that the proposed cash-resource safe harbor option does not address customer deposits, and stated that amounts earmarked in the rules for TDUs have been used to refund customer deposits. CenterPoint argued that the amount of coverage provided by the cash option and access to the cash are equally important issues. CenterPoint stated that its experience with unused cash resources and REP defaults demonstrates that when a REP goes out of business, it stops paying the TDU and the unused cash resources are used to satisfy other creditors. CenterPoint and AEP argued that at least one month of security, or 100% of the total monthly billings from TDUs (excluding transition charges), should be provided given that the REP is not considered to be in default to the TDU for 45 days.

ARM expressed a general concern that any standards established for large REPs may be applied to smaller REPs in a subsequent rulemaking.

*Commission response*

The safe harbor provisions adopted in subsection (f)(1)(G) reflect the continued collaboration of commission staff and parties that participated in the workshop. The amendments to subsection (f) gives the commission the discretion to review the financial condition of, and establish different financial requirements for, a REP that, together with any affiliates, serves one million or more residential customers in Texas and does not meet the requirements of subsection (f)(1)(G). The commission concludes that, in the event that a large REP does not meet one of the safe harbor provisions, the public interest is best served by providing to the commission and the REP the flexibility to develop alternative means to balance the REP's interest in providing service and the interest of the public in avoiding excessive risk that the REP will default. In light of the relatively substantial harm that a large REP's default could have on the state, the amendments appropriately give the commission the discretion to establish additional or different financial requirements for such REPs.

The safe harbor provisions require that REPS with one million or more customers meet a significantly higher level of credit quality than that required by the current creditworthiness standards and provide the commission and market participants with a substantially greater degree of assurance regarding the large REPs' financial condition. Additionally, the revised standards require the large REPs to provide early notification of

significant changes in financial condition, thereby allowing the commission to respond more quickly and proactively to situations of a REP's declining creditworthiness and the threat of significant financial harm to market participants.

With respect to the specific safe harbor provisions contained in clauses (i), (ii), and (iii), the adopted amendments require an investment-grade credit rating of BBB or its equivalent, which is one notch above the investment-grade credit rating required by subsection (f)(1)(A)(i). The commission strongly supports the use of credit ratings as a benchmark for the financial condition of large REPs because credit rating agencies possess the information and ability to provide independent and ongoing verification of an entity's ability to satisfy financial obligations and access capital markets. Raising by one notch the required investment-grade credit rating for a REP with one million or more customers provides an additional degree of security regarding the continuing ability of such a REP to access capital and maintain a stable presence in the state's retail electricity market.

The safe harbor provision contained in clause (iv) allows a large REP to demonstrate credit quality using equity in an amount equal to 300% of the total monthly amounts billed by TDUs (excluding transition charges covered by §25.108) in Texas plus the REP's customer deposits and prepayments. The commission concludes that requiring an equity level of 300% for a large REP provides a sufficiently adequate cushion to address any concerns related to the relative liquidity of reported equity as a creditworthiness benchmark and the ability of the REP to satisfy its financial obligations. For REPs choosing to meet their

**creditworthiness requirements with this option, the rule requires the filing on a quarterly basis of the financial information necessary to demonstrate compliance.**

**The safe harbor provision contained in clause (v) requires the REP to demonstrate unused cash resources in an amount equal to 100% of the total monthly amount of TDU billings (excluding transition charges covered by §25.108) in Texas plus the REP's customer deposits and prepayments. This level of cash resources reflects a significant increase over the current credit standard in subsection (f)(1)(A)(iii), which requires cash coverage of 40% of TDU billings. The commission concludes that, for large REPs relying on the cash-resource standard, these additional requirements are appropriately commensurate with the greater role of large REPs in the state's retail electricity market and provide a substantially greater degree of financial protection for all market participants. Like the equity safe harbor option, the cash-resource option requires REPs to make compliance filings on a quarterly basis.**

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting amended §25.74, the commission makes other changes for the purpose of clarifying its intent.

The amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007) (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 §17.004(a)(1), which entitles buyers of retail electric

services to protection from fraudulent, unfair, misleading, deceptive, or anticompetitive practices; PURA §39.101(a)(1), which requires that the commission ensure that retail customer protections are established that entitle a customer to safe, reliable, and reasonably priced electricity; PURA §39.101(b)(6), which entitles a customer to be protected from unfair, misleading, or deceptive practices; PURA §39.352, which authorizes the commission to certify a person as a REP who, among other things, has the financial and technical resources to provide continuous and reliable electric service, the managerial and technical ability to supply electricity at retail in accordance with customer contracts, and the resources needed to meet the customer protection requirements of PURA; and PURA §39.356(a), which authorizes the commission to suspend or revoke a REP's certificate if it no longer has the financial or technical capability to provide continuous and reliable electric service.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 17.004(a)(1), 39.101(a)(1), 39.101(b)(6), 39.352, and 39.356(a).

**§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 providing service in an area where customer choice is not in effect. 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 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 and an office.
- (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.

(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 subparagraph (A)(ii) or (iii) of this paragraph within ten days of the credit downgrade.

(G) Financial requirements for certain REPs. The financial condition of a REP that together with any affiliates serves one million or more residential customers in Texas and does not meet the requirements of one of the alternatives specified in clauses (i) through (v) of this subparagraph is subject to review by the commission. In a review of the financial condition of a REP under this subparagraph, the commission may establish financial requirements for the REP that are different from the requirements that are otherwise applicable under this subsection, to ensure that the REP has the financial resources to provide continuous and reliable electric service to its customers.

- (i) The REP has its own credit rating of "BBB" for S&P or "Baa2" for Moody's or their financial equivalent at any other nationally recognized rating agency, including Fitch for financial institutions and Best for insurance companies;
- (ii) The REP's parent corporation or controlling shareholder providing a guaranty to the REP under this subsection has a minimum credit

rating of “BBB” for S&P or “Baa2” for Moody’s or their financial equivalent at any other nationally recognized rating agency, including Fitch for financial institutions and Best for insurance companies.

- (iii) The REP or its parent corporation or controlling shareholder providing a guaranty to the REP under this subsection is secured by a bond, guaranty, or corporate commitment of an affiliate or another entity that has a minimum credit rating of “BBB” for S&P or “Baa2” for Moody’s or their financial equivalent at any other nationally recognized rating agency, including Fitch for financial institutions and Best for insurance companies.
- (iv) The REP or its parent corporation or controlling shareholder providing a guaranty to the REP under this subsection demonstrates and maintains assets in excess of liabilities, *i.e.*, equity, in an amount equal to 300% of the total monthly amounts it is billed by TDUs in Texas (excluding transition charges billings, which are addressed by §25.108 of this title (relating to Financial Standards for Retail Electric Providers Regarding the Billing and Collection of Transition Charges) plus the amount necessary to meet the requirements of paragraph (2) of this subsection. A REP satisfying its minimum financial requirements through this alternative shall, in addition to any other reporting required under this section, file financial information with the commission on a

quarterly basis demonstrating continued compliance with this subparagraph.

- (v) The REP or its parent corporation or controlling shareholder providing a guaranty to the REP under this subsection demonstrates and maintains unused cash resources in an amount equal to 100% of the total monthly amount it is billed by TDUs in Texas (excluding amounts billed for transition charges, which are addressed by §25.108 of this title) plus the amount necessary to meet the requirements of paragraph (2) of this subsection. This requirement may also be met by a letter of credit issued by an entity that has a minimum credit rating of “BBB” for S&P or “Baa2” for Moody’s or their financial equivalent at any other nationally recognized rating agency, including Fitch for financial institutions and Best for insurance companies. The unused cash resources demonstrated and maintained pursuant to this clause shall be unencumbered by pledges for collateral. A REP satisfying its minimum financial requirements through this alternative shall, in addition to any other reporting required under this section, file financial information on a quarterly basis demonstrating continued compliance with this subparagraph. In the event of the REP’s default, the cash resources under this clause shall be used first to meet the requirements of paragraph (2) of this subsection to the extent that the REP’s cash resources are insufficient to meet both

the requirements of this clause and paragraph (2) of this subsection, then commission penalties, and then obligations to TDUs.

- (vi) Information that may be filed to meet the requirements of clause (iv) or (v) of this subparagraph includes a quarterly financial statement filed with the U.S. Securities and Exchange Commission or, for a REP that does not routinely file such quarterly financial statements, other information that is affirmed by an officer of the REP, its parent corporation, or controlling shareholder and provides sufficient evidence demonstrating compliance with the requirements of clause (iv) or (v) of this subparagraph. The information filed to meet the requirements of clause (iv) or (v) of this subparagraph shall be promptly provided to any TDU that requests the information, subject to the terms of a mutually-agreeable confidentiality agreement, if the REP asserts that the information is confidential.
  - (vii) A REP shall provide additional information within a reasonable time frame as requested by the commission staff to verify the financial resources submitted by the REP under this subparagraph.
- (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) – (G) 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.
- (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 section is subject to the ongoing annual financial requirements of this subsection and any other applicable requirements of subsection (i) of this section.
- (6) **Cure of the failure of certain REPs to meet financial requirements.** If a REP subject to paragraph (1)(G) of this subsection fails to meet the financial requirements approved by the commission or specified in that subsection, the REP shall within ten days provide evidence of compliance with one of the financial requirements set out in paragraph (1)(G)(i)-(v) of this subsection or shall be subject to commission review pursuant to this subsection.

- (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) for REPs not subject to subsection (f)(1)(G) of this section, 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; or
- (C) for REPs subject to subsection (f)(1)(G) of this section, within five 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 certification, with a material financial change defined as the loss of the minimum required credit rating, failure to meet either the equity standard prescribed by subsection (f)(1)(G)(iv) of this section or the unused cash

resources standard prescribed by subsection (f)(1)(G)(v) of this section, or a decline in either the equity standard or the unused cash resources standard such that the REP is within 5.0% of failing to comply with the minimum equity or 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 financial resources in accordance with 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.

This agency hereby certifies that the adoption has 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), is hereby adopted with changes to the text as proposed.

**ISSUED IN AUSTIN, TEXAS ON THE \_\_\_\_\_ DAY OF OCTOBER 2007.**

**PUBLIC UTILITY COMMISSION OF TEXAS**

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**PAUL HUDSON, CHAIRMAN**

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**JULIE PARSLEY, COMMISSIONER**

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**BARRY T. SMITHERMAN, COMMISSIONER**