

PROJECT NO. 34039

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

PROPOSAL FOR PUBLICATION OF AMENDMENT TO §25.107
AS APPROVED AT THE MARCH 29, 2007 OPEN MEETING

The Public Utility Commission of Texas (commission) proposes an amendment to §25.107, relating to certification of retail electric providers. The proposed amendment will permit the commission to establish additional or different financial requirements for retail electric providers (REPs) that, together with any affiliates, serve a million customers or more and will clarify some of the circumstances in which transfers of a REP certificates occur. The amendment would also repeal certain obsolete provisions of the rule. This rule is a competition rule subject to judicial review as specified in PURA §39.001(e). Project Number 34039 is assigned to this proceeding.

When commenting on specific subsections of the proposed rules, parties are encouraged to describe "best practice" examples of regulatory policies, and their rationale, that have been proposed or implemented successfully in other states already undergoing electric industry restructuring, if the parties believe that Texas would benefit from application of the same policies. The commission is interested in receiving only "leading edge" examples that are specifically related and directly applicable to the Texas electric market, rather than broad citations to other state restructuring efforts.

Jess Totten, Director of the Electric Oversight Division, has determined that for each year of the first five-year period the proposed amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Totten has determined that for each year of the first five years the proposed amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be better assurance that large REPs have the financial resources to provide continuous and reliable retail electric service, which will protect customers, electric utilities providing delivery service, and other companies participating in the electric market from the adverse impacts of the business failure of a large REP. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section. There may be economic costs to persons who are required to comply with the proposed section. These costs may include the cost of meeting more stringent financial requirements and demonstrating to the commission that their financial resources are adequate. The impacts are likely to vary from business to business, and are difficult to ascertain, but it is believed that the benefits accruing from implementation of the proposed section will outweigh these costs.

Mr. Totten has also determined that for each year of the first five years the proposed amendment is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rulemaking, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 at a time to be determined. The request for a public hearing must be received within 24 days after publication.

Comments on the proposed amendment may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 24 days after publication. Sixteen copies of comments on the proposed amendment are required to be filed pursuant to §22.71(c) of this title. Reply comments may be submitted within 35 days after publication. Comments should be organized in a manner consistent with the organization of the proposed amendment. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 34039.

This amendment is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2006) (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 authorizes the commission to certify a person as a REP who, among other things, has the financial resources to provide continuous and reliable electric service; and PURA §39.356(a), which authorizes the commission

to suspend or revoke a REP's certificate if it no longer has the financial capability to provide continuous and reliable electric service.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 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~~subject to PURA §39.102(e) 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) and (2) (No change.)

(b) (No change.)

(c) **Application for REP certification.**

(1) (No change.)

(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, directly or indirectly, without prior approval by the commission. For the purposes of this

section, a transfer includes the direct or indirect transfer of a controlling interest in the certificate holder or the certificate holder's direct or indirect owner, including the sale of 50% or more of the stock of the certificate holder or the certificate holder's owner; or the sale, acquisition, or merger or other combination of the certificate holder or the certificate holder's owner. For purposes of this section, a direct or indirect owner of a certificate holder is limited to an entity that directly or indirectly controls the certificate holder, and therefore does not include an entity that has a non-controlling interest in the certificate holder or the certificate holder's parent.

(3)-(6) (No 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. Good cause for extending the time for review includes an application to transfer a REP certificate by a REP that, together with any affiliates, serves one million or more residential customers.

(8)-(9) (No change.)

(d) (No change.)

- (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)-(2) (No change.)

~~(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. The commission may review the financial condition of, and establish additional or different financial requirements for, a REP that, together with any affiliates, serves one million or more residential customers and does not have a credit rating that meets the requirements of paragraph (1)(F) of this subsection or has the lowest credit rating sufficient to meet the requirements of paragraph (1)(F) of this subsection but has been placed on credit watch or review for a possible downgrade. If the credit ratings for a REP from different rating agencies referred to in paragraph (1)(F) of this subsection are different, the commission will rely on the highest rating for the purposes of determining whether to review the financial condition of, and establish additional or different financial requirements for, the REP. The commission may review the financial condition of, and establish additional or different financial requirements for, such a REP regardless of whether an affiliate or

another company provided a bond, guaranty, or corporate commitment in order for the REP to meet the requirements of paragraph (1)(F) of this subsection.

(1)-(5) (No change.)

(g)-(h) (No change.)

(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)-(3) (No change.)

(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)-(B) (No change.)

~~(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.~~

~~(C)(D)~~ A list of aggregators with whom the REPs have conducted business in the reporting period, including commission registration verification for each.

~~(D)(E)~~ A sworn affidavit that the certificate holder is not in material violation of any of the requirements of its certificate.

(5)-(9) (No change.)

- (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)-(5) (No change.)

- (6) Failure to maintain ~~the minimum level of~~ financial resources ~~set out~~ in accordance with subsection (f) of this section;

(7)-(15) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

**ISSUED IN AUSTIN, TEXAS ON THE 30th DAY OF MARCH 2007 BY THE
PUBLIC UTILITY COMMISSION OF TEXAS
ADRIANA A. GONZALES**