The Public Utility Commission of Texas (commission) adopts new §25.214, relating to Terms and Conditions of Retail Delivery Service Provided by Investor Owned Transmission and Distribution Utilities, with changes to the text as published in the August 4, 2000, *Texas Register* (25 TexReg 7286). The commission also makes changes to the text of the standard Tariff (pro-forma tariff), adopted by reference in §25.214. This rule is necessary to implement the Public Utility Regulatory Act, Texas Utilities Code Annotated §39.203 (Vernon 1998, Supplement 2001) (PURA), as it relates to the establishment of non-discriminatory terms and conditions of retail distribution service provided by a transmission and distribution utility. PURA Chapter 39, Restructuring of Electric Utility Industry, became effective September 1, 1999, as part of Senate Bill 7, 76th Legislative Session, (SB7) to effectuate a competitive retail electric market that allows each Retail Customer to choose its provider of electricity and encourages full and fair competition among all providers of electricity. This new rule is adopted under Project Number 22187.

This section incorporates a standard, pro-forma tariff which contains the terms and conditions of retail distribution service. This pro-forma tariff is adopted by reference and can only be changed through the rulemaking process. Each transmission and distribution utility (TDU) operating in Texas shall file with the commission a Tariff to govern its retail distribution service, using pro-forma tariff chapters 1, 3, 4, and 5 as written, but with the ability to modify chapters 2 and 6 to reflect individual utility characteristics. The pro-forma tariff is divided into six chapters as follows: Chapter 1 defines various terms used throughout the pro-forma tariff; Chapter 2

involves descriptions of the TDU's certified service area; Chapter 3 sets forth rules and regulations applicable to both the relationship between the TDU and Retail Electric Provider (REP) and the relationship between the TDU and Retail Customer; Chapter 4 sets forth the rules and regulations governing the REPs' access to the TDU's Delivery System; Chapter 5 sets forth the rules and regulations governing the TDU's provision of Delivery Service and conditions of service to the Retail Customer; and Chapter 6 involves TDU specific Rate Schedules.

As part of the drafting process, commission staff conducted workshops in Austin to receive input from potentially affected persons. Following the first workshop, commission staff received proposed pro-forma tariffs from both the investor owned utilities, representing the TDUs, and the REPs. After consideration of these proposals, commission staff issued a first draft pro-forma tariff upon which it received informal comments. Commission staff then held a second workshop at which it received further input from the parties and attempted to work towards a consensus document. Commission staff later issued a second draft pro-forma tariff and a draft rule upon which further informal comments were received.

After the proposed new section was published in the *Texas Register*, the commission received written comments and/or reply comments on the proposed rule and pro-forma tariff from the following entities: Alcoa, Inc. (Alcoa); Automated Energy, Inc. (Automated Energy); Consumers Union, Texas Ratepayers' Organization to Save Energy and Texas Legal Services Center (Consumers); Entergy Gulf States, Inc. on behalf of its Affiliated Retail Electric Provider, Entergy Retail Texas Limited Partnership (Entergy Texas REP); Enron Energy Services, Exelon Corporation, Green Mountain Energy Company, New Energy Texas, and Shell Energy Services

Company, L.L.C. (Independent Retailers); Investor Owned Utilities (IOUs); Entergy Gulf States, Inc. and Southwestern Public Service Company (Non-ERCOT Utilities); Nucor Steel (Nucor); Occidental Chemical Corporation (OxyChem); Texas Association of Builders (TAB); Texas Electric Cooperatives, Inc. (TEC); Texas Industrial Energy Consumers (TIEC); Texas Industries, Inc. (TXI); and TXU Electric Company on behalf of its future retail electric provider (TXU REP).

After receiving written comments, the commission held a public hearing regarding the proposed new rule and pro-forma tariff at the commission offices on September 29, 2000. Representatives from the following entities attended the public hearing and made oral comments: Automated Energy, IOUs and TAB. Such oral comments are summarized herein to the extent that they differ from the submitted written comments.

Almost all of the comments received were in response to the pro-forma tariff adopted by reference in subsection (d) of the proposed rule. As a result of changes to the Tariff, the commission modifies subsection (d) to reflect the new effective date of the revised pro-forma tariff.

Non-ERCOT Utilities commented that the commission should clarify in subsection (b) that the terms and conditions contained in the pro-forma tariff do not apply to the provision of transmission service by non-ERCOT utilities to Retail Customers since the transmission service provided by the non-ERCOT utilities falls under the jurisdiction of the Federal Energy Regulatory Commission (FERC) rather than by the commission. They also pointed out that in

the future the non-ERCOT distribution utilities will neither have control over operation nor control of the access to the transmission facilities. The revenues derived from transmission service will be charged and collected by an independent operator under the terms and conditions of the Independent Operator's FERC tariffs.

For the non-ERCOT utilities, the commission agrees that the pro-forma tariff should govern distribution service only. A similar issue arose in connection with the unbundling cost of service cases, and the commission expressed its view that transmission service from non-ERCOT utilities would be available under FERC-approved tariffs. The commission modifies subsection (b) accordingly.

In the preamble to the proposed rule the commission posed the following questions:

1. Are the provisions of this rule consistent with the protocols of the relevant independent organizations (as defined in PURA §39.151) in Texas? If not, please identify which provisions are inconsistent and explain why. Also explain how these provisions need to be modified, if at all, to make them consistent with those protocols.

No party identified any major discrepancy between the pro-forma tariff and the protocols of the Independent Organization, except that TXU REP and IOUs identified one provision in Section 4.8.4 regarding procedures for the assignment of an ESI ID that is not consistent with the protocols of the Independent Organization. Both TXU REP and IOUs recommended that this section simply refer to the protocols of the Independent Organization.

The commission agrees with TXU REP and IOUs and makes the suggested modification. This modification is consistent with the rest of the Tariff. As IOUs pointed out the proposed Tariff avoids the possibility of any conflict by simply stating that certain actions need to be carried out in accordance with the protocols or Applicable Legal Authorities.

Nucor pointed out that the Electric Reliability Council of Texas (ERCOT) protocols are not final yet, so it is difficult to comment. IOUs pointed out that non-ERCOT Protocols are not finalized yet either.

The commission concludes, as it notes above, that any possibility of a conflict with the final version of the protocols is avoided in the rule by simply referring to the protocols or Applicable Legal Authorities, rather than to any details of the protocols.

Nucor also suggested that the commission adopt the appropriate terms and conditions and that any inconsistent protocols adopted by an Independent Organization should be amended to conform to the commission rules. The parties, however, have not pointed out other specific conflicts between this rule and the protocols.

2. Are the provisions of this rule consistent with the commission's customer protection rules as proposed in Project Number 22255? If not, please identify which provisions are inconsistent and explain why. Also explain how these provisions need to be modified, if at all, to make them consistent with the proposed customer protection rules. (Note: The

commission plans to consider the Project Number 22255 customer protection rules for publication at the August 10, 2000 Open Meeting. The rules as approved for publication should be available in Central Records and on the commission's web site no later than August 17, 2000. If for some reason there is a delay in Project Number 22255, staff will attempt to make a draft available for your review no later than August 17, 2000.)

Entergy Texas REP identified a few technical differences (*e.g.*, regarding definitions of terms used) between the two rules and recommended changes in the two rules to make them consistent. For example, it pointed out that some situations discussed in the present rule regarding suspension of service with or without notice are not covered in the customer protection rules. Entergy Texas REP then identified one substantive difference in the two rules regarding the ability of the Competitive Retailers to disconnect Retail Customers for non-payment. Entergy Texas REP favored the treatment in the present rule, which permits a Competitive Retailer to disconnect a Retail Customer for non-payment. IOUs discussed the differences in their detailed comments on different sections of the Tariff.

The commission addresses the differences identified by Entergy Texas REP and IOUs in the discussion of various sections of the Tariff below.

3. The proposed rule incorporates certain provisions (*e.g.*, provisions relating to line extension, service connection) of the existing customer protection rules §§25.21 – 25.31. What other provisions, if any, of the existing customer protection rules, should be incorporated in this rule assuming that the existing §§25.21 – 25.31 will be replaced with

new rules (viz., new customer protection rules to be adopted in Project Number 22255 and the present rule dealing with the terms and conditions of retail delivery service provided by a TDU) in the restructured market in Texas?

IOUs pointed out that §25.26 of this title (relating to Spanish Language Requirements) and the non-English language provisions in the customer protection rules should be incorporated in this rule. This requirement is relevant for outage notification (repair requests.) IOUs also recommended keeping §25.27 of this title (relating to Retail Electric Service Switchovers) as a separate rule because of the level of detail contained in that rule.

The commission agrees and adds the Spanish language provision in Section 5.12.1. The switchover rule is a separate rule that is not affected by the adoption of this rule.

IOUs claimed that the appropriateness of repealing §§25.21-25.31 should be examined on a rule by rule basis in the customer protection rulemaking proceeding. TXU REP pointed out that replacing existing customer protection rules with the new rules would create a gap in customer protections during the pilot programs for customers of utilities that choose to remain with their utility providers.

The commission in proposing new customer protection rules recognized the need to leave the existing rules in place until the beginning of full retail competition, at the earliest.

4. Are the standard electronic transaction (SET) protocols and testing procedures referenced in Section 4.3.1, Eligibility, sufficient to ensure accurate data transfer between Competitive Retailers and TDUs, or does there need to be an Electronic Trading Agreement to supplement those protocols? If so, what are the elements and provisions needed for that agreement?

IOUs claimed that the policy decisions regarding system architecture and related issues surrounding the implementation of the Tariff are beyond the scope of Texas SET and should be dealt with at the commission. They requested that a work group be established to address these implementation issues including development of the Electronic Trading Partner Agreement and testing of all data transfer protocols. TXU REP also pointed out that while Texas SET protocols define transaction data elements and codes, they do not specify parameters of transport mechanisms, timing, and other technical information. TXU REP, however, recommended an Electronic Trading Partner Agreement similar to the one in the document developed by the Coalition for Uniform Business Rules (CUBR).

The commission finds that a requirement of successful system testing based on a test plan developed by the SET team, in coordination with the commission, as adopted in this Tariff in Section 4.3.1, alleviates the need for an Electronic Trading Partner Agreement and ensures a transparent and impartial process that will facilitate smooth transactions between TDUs and Competitive Retailers.

Comments on the Pro-forma Tariff

Comments on Chapter 1: Definitions

Applicable Legal Authorities: Nucor suggested that the definition should exclude ERCOT or its authorized entities since these entities are not legal authorities and should not be granted such unfettered authority. IOUs disagreed and cited PURA §38.005 and §39.151 to support ERCOT's important role in the restructured electric market. TEC recommended deletion of the term "Applicable" from "Applicable Legal Authorities" since not all entities, rules, or statutes cited in the definition are applicable to all situations. IOUs disagreed claiming that the use of the word "Applicable" in the definition makes it clear that only some rules or laws will be applicable, not all. They also argued that the concept "Applicable Legal Authorities" has been used in other jurisdictions (*e.g.*, New Jersey) and hence should be used here.

The commission agrees with IOUs.

Central Prevailing Time: TXU REP recommended adding a definition of Central Prevailing Time, which is used in Section 4.8.1, and specifying that all references to a time certain are to be interpreted to refer to Central Prevailing Time.

The commission agrees and adds the definition used in the ERCOT protocols.

Company: TEC recommended clarification of the definition by adding that it is a TDU and hence not a municipally owned utility or a cooperative.

The commission agrees and has made such clarification.

Competitive Retailer: TEC recommended clarification of the definition by adding Provider of Last Resort (POLR) explicitly in the definition and also by replacing the phrase "conducts business" with "sells Electric Power and Energy." Entergy Texas REP pointed out that the proposed customer protection rule uses the term "Energy Service Provider" (ESP) rather than "Competitive Retailer" and suggested that the use of terms and their definitions in the two rules should be made consistent.

The commission concludes that TEC's inclusion of POLR in the definition is redundant since a POLR is by definition a REP and hence already included. However, the commission agrees with TEC's second suggestion. The commission also agrees that consistency should be achieved in the rules on the use of terms and their definitions. The commission decides to use the term "Competitive Retailer" in the present rule since the terminology is already being used in the protocols proposed by ERCOT and is also used in the commission's Substantive Rule §25.173 of this title (relating to Goal for Renewable Energy). The commission will decide on the use of the term ESP in the customer protection rule when it finalizes that rule.

Construction Service: IOUs recommended that the definition be expanded to reflect services normally provided under a facilities extension policy.

The commission agrees and makes the proposed changes.

Delivery Service Agreement: Independent Retailers recommended deleting the definition and modifying the definition of "Service Agreement" by emphasizing that this is the agreement attached to the Tariff and cannot be modified by parties to the agreement. They argued that allowing a TDU to offer different terms to selected Competitive Retailers introduces a potential means to discriminate and to delay new service. IOUs discussed the issue when commenting on Section 4.3.1. They pointed out that Service Agreement encompasses all commission-approved agreements that the Company may enter into with any entity pursuant to this Tariff including Delivery Service Agreement, and Facility Extension Agreement.

The commission agrees with IOUs' explanation that Delivery Service Agreement is one of the commission-approved Service Agreements that a TDU will have with Competitive Retailers. The commission, however, modifies the definition of Delivery Service Agreement to address the concerns of the Independent Retailers under Section 4.3.1, ELIGIBILITY. (See discussion under Section 4.3.1.)

Discretionary Services: IOUs proposed replacing the term "tariff" with "Rate Schedule" and changing the reference from Section 6.1.3 to Section 6.1.

The commission agrees to change the term "tariff" with "Rate Schedules" but declines to change the reference. The commission believes that referring specifically to the section in Rate Schedules for Discretionary Services enhances the definition of Discretionary Services.

Distribution Cooperative: TEC recommends deleting this definition and replacing the term "distribution cooperative" with "electric cooperative" since that approach is consistent with PURA.

The commission agrees and makes the recommended changes.

Good Utility Practice: IOUs suggested that the definition should be modified to refer to the most current Substantive Rule definition of the term, which is Substantive Rule §25.5(31) of this title (relating to Definitions).

The commission acknowledges the discrepancy and addresses the problem by making the reference to §25.5, rather than to the definition number.

Point of Delivery and Point of Supply: Independent Retailers added the concept of "designated point" to the definitions. IOUs argued that such a modification is not necessary. IOUs argued that electric power enters the Company's Delivery System at numerous Points of Supply and there is no way in the Tariff to designate a Point of Supply. IOUs argued that there is no need for the designation since "Point of Supply" and "Point of Delivery" are only used in defining "Delivery". In the case of "Point of Delivery" IOUs argued that a particular point is "designated" by the physical act of interconnecting to the TDU's Delivery System with the Retail Customer's Electrical Installation unless otherwise agreed to by the TDU and Retail Customer.

The commission agrees and retains the proposed definitions without modification.

Premises: Independent Retailers modified the definition of "Premises" by including "related or commonly used tracts" in the definition. IOUs disagreed and pointed out that the definition in the published draft is the same as the definition in Substantive Rule §25.5(37) (currently §25.5(51)). They argued that the definition is intended to provide a limitation on the unwarranted expansion of electric facilities by a Retail Customer without utility approval. (Related issues are discussed in the context of Section 5.6.3.)

Consistent with its decision on Section 5.6.3, the commission modifies the definition as suggested by Independent Retailers.

Retail Customer: Entergy Texas REP suggested a modification to make this definition consistent in both the present rule and the customer protection rules.

The commission believes that the definition used in the proposed pro-forma Tariff is the most appropriate for the present rule. The commission will decide on the definition used in the proposed customer protection rule during the adoption of that rule.

Retail Customer's Electrical Load: Independent Retailers suggested modifications to the definition of "Retail Customer's Electrical Load" without providing any explanation. IOUs disagreed with that definition and recommended replacing the expression "may be" in the definition with "are." The purpose is to define "connected load" and not "maximum demand" as the proposed definition implies.

The commission agrees with IOUs' and makes the suggested change.

Retail Electric Provider: Entergy Texas REP suggested a modification to make this definition consistent in both the present rule and the customer protection rule. Consumers preferred the definition of REP that includes the idea that any officer or employee, etc., representing the REP will also be considered a REP. IOUs disagreed by pointing out that the current definition is consistent with the definition in PURA §31.002(17).

The commission agrees with IOUs and maintains the definition in the proposed pro-forma tariff. The commission will decide on the definition used in the proposed customer protection rule during adoption of that rule.

Service Agreement: Independent Retailers asked the commission to clarify that neither the utility nor the Competitive Retailer may negotiate terms other than the commission-approved standard agreement. Otherwise, there is potential for discrimination

The commission agrees and has added such clarifying language.

Tamper or Tampering: Both Independent Retailers and IOUs proposed changes to the definition of "Tamper or Tampering." IOUs claimed that their definition reflects the commission's current definition of meter tampering in Substantive Rule §25.126 of this title (relating to Meter Tampering).

The commission agrees with IOUs and modifies the proposed definition.

Comments on Chapter 3: General Service Rules and Regulations

Comments on Section *3.1, Applicability;* Section *3.12, Good Faith Obligation;* Section *3.14, Cooperation in Emergencies;* and Section *3.16, Exercise of Right to Consent*

Independent Retailers argued that the Tariff cannot "apply to" Competitive Retailers, and cannot require them to negotiate in good faith, to cooperate in emergencies, or not unreasonably withhold their consent since the commission possesses jurisdiction over only the utility. Rather the Tariff sets forth the terms and conditions under which the utility offers service. Independent Retailers would move these obligations to the agreement to be signed between a TDU and a Competitive Retailer. IOUs replied that the commission has jurisdiction to promulgate substantive rules that apply to Competitive Retailers. Furthermore, the IOUs contended that, the provisions of the Tariff "apply" to anyone who seeks to use the utilities' services.

The commission agrees with IOUs. The Tariff applies to Delivery Service offered by TDUs to REPs and prescribes the terms and conditions for such service. The Tariff applies to REPs in the sense that it prescribes the conditions that REPs must meet to qualify for Delivery Service under the Tariff. The commission concludes that this section of the Tariff is accurate and need not be changed.

Consistent with their comments on subsection (b) of the proposed rule, Non-ERCOT Utilities claimed that the pro-forma Tariff should explicitly state that the Tariff does not apply to the provision of transmission service by non-ERCOT utilities to Retail Customers

As in subsection (b), the commission agrees.

Comments on Section *3.2, General*

Entergy Texas REP raised various questions including liability issues stemming from the statement that: "Company has no ownership interest in any Electric Power and Energy it delivers." It posed the hypothetical of a passer-by who contacts a low-hanging power line and is injured by the electric current flowing through the line, and then asked the question whether the "owner" of the electric power is liable for the damages. IOUs explained that the language in the Tariff merely reflects PURA §39.105(a). IOUs, on the other hand, recommended that the preamble clarify that access to the Delivery System does not give Competitive Retailer a vested property interest in Company's Delivery System facilities. In response, Independent Retailers agreed that access to the Delivery System does not create a vested property interest but wanted the Tariff clarified to acknowledge that eligible Competitive Retailers do possess a right to access that system according to the Tariff terms and conditions.

Regarding ownership of Electric Power and Energy, the commission agrees with IOUs that a TDU does not have an ownership interest in any Electric Power and Energy it delivers. On the associated liability issues raised by Entergy Texas REP, the commission believes that any

liability for injury caused by contact with a low-hanging/drooping power line resides not with the owner of the electrons flowing through that line, if that could even be determined, but with the entity responsible for operation and maintenance of that line, *i.e.*, the TDU. The commission also clarifies that eligible Competitive Retailers possess a right to access a TDU's Delivery System facilities in accordance with the Tariff although that access does not give Competitive Retailer a vested property interest in those facilities.

Comments on Section *3.7, Non-Discrimination*

Independent Retailers demanded that the non-discrimination provision expressly apply to "affiliated REPs" in addition to all affiliates because there is a possibility, as in the case of Reliant HL&P, that an "affiliated REP" may not be an actual affiliate of the Company if the affiliate divests its affiliated REP.

The commission agrees with Independent Retailers that the particulars of the Reliant Business Separation Plan may lead to an "affiliated REP" that is not an actual affiliate of the Company. As such, the commission has added language to clarify that neither "affiliates" nor an "affiliated retail electric provider" may receive preferential treatment under this Tariff. For completeness, the commission has also added the definition of "affiliated retail electric provider" found in PURA §31.002(2).

So that the general provisions of Section 3.7 would trump other, more specific provisions of the Tariff, TXI recommended adding the following language prefacing the first sentence of this

section: "Notwithstanding any other provision of this Tariff." It also recommended adding language to ensure that the requirement of a Company's non-discriminatory treatment regarding the discharge of its responsibilities under the Tariff also applies to a Company's exercise of its authority and discretion under the Tariff, and to further emphasize the requirement of equality of treatment. IOUs replied that a TDUs' compliance with the very specific requirements of the Tariff should mean that the TDU has complied with the general non-discrimination provision in Section 3.7 and that a Retail Customer or Competitive Retailer should not be able to argue that a TDU has somehow violated the general non-discrimination provision in Section 3.7 even though the TDU has complied with the specific requirements of the Tariff. Further, the IOUs stated that TXI's suggested language, "and in a manner that is reasonable and comparable to the manner in which Company treats itself and its affiliates," is unnecessary because PURA §39.203, on which TXI relies, makes it clear that the commission is to adopt "reasonable terms and conditions" for Delivery Service and that the reasonable and comparable terms and conditions referenced by these sections are the Tariff terms and conditions, *i.e.*, these code sections are fully effectuated by the commission's adoption of the Tariff.

The commission agrees with the reasoning of the IOUs on both accounts and, therefore, declines to adopt TXI's proposed additional language.

Consumers recommended additional language to explicitly rule out discrimination against Retail Customers based on race, nationality, color, religion, sex, marital status, income level, source of income, or geographic location. In Reply, IOUs pointed out that such discrimination is already prohibited under Substantive Rule §25.4 of this title (relating to Statement of Nondiscrimination)

as proposed by staff in Project Number 21232, *Rule Changes to Conform Rules to Electric Restructuring Act (Senate Bill 7)*, and, hence, it is not necessary, or even appropriate, to repeat those same prohibitions in this section of the Tariff. However the IOUs proposed including a reference to Applicable Legal Authorities which would include Substantive Rule §25.4.

The commission agrees with IOUs and modifies the Tariff language accordingly.

Comments on Section *3.8, Required Notice*

IOUs claimed that a more appropriate heading for this section is "Form of Notice."

TEC recommended application of the "mail box rule" (Texas Rules of Civil Procedure, Rule 21), under which it is presumed that a document is received three days after it has been mailed. The presumption no longer stands if a party offers proof that the document was not received within the three days or not received at all. Consumers, however, prefer the proposed language where the burden of proof is on the sending party to establish that the notice was sent when a party claims that the notice was not received.

The commission agrees with IOUs and changes the title of the section. The commission also agrees with Consumers and retains the proposed language since it is easier for the sending party to prove that a document is sent and received by the sender than for the receiving party to establish that it has not received the document.

Comments on Section 3.9, Designation of Company Contact Persons for Matters Relating to Delivery Service

IOUs requested clarification that a website listing of Company contact persons by title only is also allowed as the section allows for identification of Company contact person by either name or by title. Consumers would like to have a direct notice to Retail Customers of a change in designation of a customer contact.

The commission agrees with IOUs and has provided the requested clarification. Regarding Consumers' request, the commission would like to note that the proposed Tariff does call for direct notice to Retail Customer of a change in designation of customer contact where Retail Customer directly contacts Company for Construction Services.

Comments on Chapter 4: Service Rules and Regulations to Access to Delivery System of Company by Competitive Retailer

Comments on Section 4.2, Limits on Liability, and Section 5.2, Limits on Liability

Comments on Sections 4.2.1, Liability Between Company and Competitive Retailers, and 5.2.1, Liability Between Company and Retail Customers

IOUs argued that in light of the commission's decision to limit the TDUs' liability for outages or fluctuations of Delivery Service caused by a TDU's ordinary negligence, these sections should be

modified to promote certainty and avoid the potential for unnecessary litigation. Specifically, in order to prevent the possible misunderstanding that violation of the terms of the pro-forma Tariff is itself a tort, the IOUs requested that the first sentence of Sections 4.2.1 and 5.2.1 be replaced with the following language: "This Tariff is not intended to limit the liability of Company or Competitive Retailer for damages except as expressly provided herein."

As for the remainder of Sections 4.2.1 and 5.2.1, the IOUs provided two alternatives for consideration to, in their words, accomplish the commission's goal of avoiding a flood of litigation, while simultaneously protecting the rights of Competitive Retailers and Retail Customers to recover damages for events other than interruptions or fluctuations in service. Alternative A is composed of the suggested replacement first sentence above and, in the second paragraph, the language approved by the Texas Supreme Court in *Houston Lighting & Power Co. v. Auchan USA*, 995 S.W.2d 668 (Tex. 1999). The IOUs argued that although the language at issue in the *Auchan* case appears more complicated than the published language, it will actually be easier to administer because the Texas Supreme Court has already upheld its validity, whereas, the published language has not been tested and may encourage litigation over its meaning. The final sentence makes clear, they argued, that a TDU is liable for damages arising from its ordinary negligence that are not attributable to interruptions or fluctuations in service.

Alternative A:

This Tariff is not intended to limit the liability of Company or Competitive Retailer for damages except as expressly provided herein.

Company will make reasonable provisions to supply steady and continuous Delivery Service, but does not guarantee the Delivery Service against fluctuations or interruptions. Company will not be liable to any person or entity for any damages, whether direct or consequential, including, without limitation, loss of profits, loss of revenue, or loss of production capacity, occasioned by fluctuations or interruptions of Delivery Service; provided, however, in the event of Company's failure to make reasonable provisions (whether as a result of negligence or otherwise) to supply steady and continuous Delivery Service, Company's liability shall be limited to the cost of necessary repairs of physical damage proximately caused by the Delivery Service failure to those electrical facilities of Retail Customer which were then equipped with the protective safeguards recommended or required by the then current edition of the National Electrical Code.

However, if damages result from fluctuations or interruptions in Delivery Service that are caused by Company's or Competitive Retailer's gross negligence or intentional misconduct, this Tariff shall not preclude the recovery of appropriate damages when legally due.

In the event the commission decides not to adopt Alternative A, the IOUs also proposed Alternative B which, they argued, avoids the concerns over the proposed language but achieves the same purposes. Alternative B is composed of the suggested replacement first sentence above, the proposed language of Section 3.13 as the second sentence, the proposed language as the third sentence (with one minor correction: the replacement of the defined term "Delivery Service" for the undefined term "delivery of electric power"), and the same final sentence as in Alternative A.

Alternative B:

This Tariff is not intended to limit the liability of Company or Competitive Retailer for damages except as expressly provided herein.

Company will use reasonable diligence to provide continuous and adequate Delivery of Electric Power and Energy in conformance with Applicable Legal Authorities, but Company does not guarantee against fluctuations or interruptions.

With regard to damages arising from fluctuations or interruptions in Company's Delivery Service that are due to Company's ordinary negligence, Company shall have no liability for such damages.

However, if damages result from fluctuations or interruptions in Delivery Service that are caused by Company's or Competitive Retailer's gross negligence or intentional misconduct, this Tariff shall not preclude the recovery of appropriate damages when legally due.

Finally, with regard to the whole of Sections 4.2 and 5.2, the IOUs argued that the language in these sections should be emphasized so as to meet the conspicuousness tests outlined in Texas Law. Specifically, the IOUs cited to *Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 511 (Tex. 1993) for the propositions that language that relieves a party of its own

negligence or otherwise shifts risk must be conspicuous and that language in capital headings or in contrasting type or color is considered conspicuous.

In response to the IOUs' comments, TIEC noted that much evidence exists that calls into question the utilities' position on negligence liability. They argued that insurance is available for utilities, and that utilities, not customers, are in the best position to guard against their own negligence. Furthermore, they argued that holding utilities liable for their own negligence will give them incentive to avoid unnecessary interruptions. They argued that if the commission decides to limit the liability of TDUs, the commission should not go any farther than the provisions that were at issue in the *Auchan* case. They argued that the Tariff as currently written, as well as IOU Alternative B, would completely exempt utilities from their own negligence, whereas the *Auchan* case allows for negligence liability but limits damages to electrical facilities. They also argued that the IOUs are now attempting to narrow the definition of electrical facilities by adding the phrase "which were then equipped with the protective safeguards recommended or required by the then current edition of the National Electrical Code." This definition, they argued, limits the scope to physical damage to electrical equipment used in the provision or delivery of electricity, such as meters and transformers, and is not the same as the definition given by the late Dean Page Keeton on cross-examination in PUC Docket Number 3198, *Application of Central Power & Light Co. for Approval of Tariff Amendment*, to the effect that electrical equipment is any kind of equipment receiving electricity. Therefore, TIEC suggested that the phrase "if applicable" should be added after the words "National Electrical Code" and that "Electrical Facilities of Retail Customer" be defined to mean any and all equipment and facilities that use electricity.

In its reply comments, Entergy Texas REP stated that its own position was most closely approximated by the IOUs proposed alternative language.

In their comments regarding Sections 4.2.1 and 5.2.1, the Independent Retailers argued that indemnity from the TDU to the REPs (an indemnity clause) is necessary because Retail Customers, finding that they cannot recover against the TDU because of the Tariff limitations, will almost certainly bring suits against their electric providers seeking to recover damages caused by the TDU's negligence. They argued that without such an indemnity clause, REPs will be forced to procure liability insurance against potential damage awards and potential settlements. The Independent Retailers recommended adoption of the transmission rule's indemnity provision, §25.202(b)(2) of this title (relating to Billing and Payment for Transmission Service and Ancillary Services). However, they argued, that as long as the liability of utilities is limited, REPs can not file third party claims against a utility for indemnity or attempt to use a TDU's negligence to reduce the REP's percentage of negligence. Any efforts to obtain indemnity will not work if the proposed limitation of liability for TDUs is present. The Independent Retailers also noted that they cannot easily contract around potential liability to customers in this instance because obtaining a binding contractual limitation of liability often proves extremely difficult, the proposed customer protection rules do not expressly sanction a limitation of liability and marketplace economics may not permit it. Also, they argued that Section 4.2.2 of the published language, which declares that a REP bears no liability to a third party or customer for a TDU's negligence, might prompt a court to declare that the commission lacks jurisdiction to

enact a civil liability rule for entities outside its jurisdiction. The Independent Retailers would rewrite Section 4.2.1 to read as follows:

"Company is responsible for the design, installation, replacement, operation, and maintenance of distribution facilities up to and including the Point of Delivery except as specifically provided otherwise in this Tariff.

"Company shall assume all liability for and shall indemnify Competitive Retailer for any claims, losses, costs, and expenses of any kind or character to the extent that they result from Company's negligence in connection with the design, construction, or operation of its Distribution System or provision of Distribution Service; provided, however, that Company shall have no obligation to indemnify Competitive Retailer for claims brought by claimants who cannot recover directly from Company. Such indemnity shall include, but is not limited to, financial responsibility for: (a) Competitive Retailer's monetary losses; (b) reasonable costs and expenses of defending an action or claim made by a third person; (c) damages related to the death or injury of a third person; (d) damages to the property of Competitive Retailer; (e) damages to the property of a third person for which liability is imposed on Competitive Retailer; (f) damages for the disruption of the business of a third person for which liability is imposed on Competitive Retailer. In no event shall Company be liable for consequential, special, incidental or punitive damages, including, without limitation, loss of profits, loss of revenue, or loss of production. The Company does not assume liability for any costs for damages arising from the disruption of the business of the Competitive Retailer or for the Competitive Retailer's costs and expenses of prosecuting or defending an action or claim against the Company. This paragraph does not

create a liability on the part of the Company to the Competitive Retailer or a third person, but requires indemnification where such liability exists. The limitations of liability in Company's favor provided in this section do not apply in cases of gross negligence or intentional wrongdoing.

"If Company or Competitive Retailer is found to be grossly negligent or to have committed intentional misconduct, nothing herein shall preclude the recovery of all appropriate damages, including, but not limited to, indirect, consequential, and exemplary damages."

In reply to Independent Retailers, the IOUs argued that the commission has made its decision to limit TDUs' liability for damages resulting from interruptions/fluctuations in Delivery Service caused by a TDU's ordinary negligence and that the Independent Retailers have not given any legitimate reason to revisit that decision. The IOUs also argued that, in light of the Texas Supreme Court's reliance on the commission's reasoning in the *Auchan* case, Section 4.2.2 provides adequate protection for the Competitive Retailers against lawsuits arising from the TDU's operation of the Delivery System. The IOUs noted that Texas law authorizes sanctions against litigants who bring suit against obviously non-negligent defendants, *i.e.*, Texas Revised Civil Procedures 13, Texas Civil Practice and Remedies Code Annotated §§10.001-.006 (Vernon Supplement 2000). Furthermore, they argued that unlike TDUs, Competitive Retailers can contract for limitations on liability, and if such is refused by a Retail Customer, the Competitive Retailer can raise the customer's prices to account for the increased risks or simply refuse to serve that customer if the risks outweigh potential profits. Moreover, they argued that although

the proposed customer protection rules do not expressly approve such a limitation of liability, they do not prohibit it either.

In commenting on Sections 4.2.1 and 5.2.1, TIEC argued that the limitation on liability contained in these sections should be eliminated because no utility should enjoy special exemption from Texas common law merely because it is a regulated utility and because making utilities liable for their own negligence will give them proper incentive to avoid unnecessary interruptions that are caused by their unreasonable conduct. Moreover, they argued that the policy reason advanced for such a limitation of liability, *i.e.*, the potential impact on rates, has never been demonstrated with any evidence and is speculative at best.

In their reply comments, the Independent Retailers generally agreed with the comments of TIEC.

In reply to TIEC's comments, the IOUs argued that being a regulated utility with universal service obligations does justify a limitation of liability because TDUs must serve high risk customers and cannot raise rates to account for these risks. The IOUs also argued that TDUs do not need to be subject to liability to provide them with the proper incentive to avoid interruptions in service because TDUs already have adequate incentives to avoid outages, including lost revenues, increased service costs, performance based rates and commission penalties for poor service. As to TIEC's argument that the connection between utility liability and higher rates is speculative at best, the IOUs argued that this statement displays a misunderstanding of the rate making process. Finally, the IOUs noted that allowing such lawsuits could possibly force the TDUs to defend against hundreds and possibly thousands of lawsuits resulting from a single

power outage and that this is unnecessary because most Retail Customers have the capability to protect against such damages.

In reply to TIEC's comments, Entergy Texas REP maintained that a widespread power outage would lead to multiple lawsuits and ultimately to higher rates for electricity consumers.

With regard to Sections 4.2.1 and 5.2.1, TXI argued that the changes indicated below should be added to the published language in order to satisfy PURA's new express requirements that the TDU provide service at retail to a REP or Retail Customer at rates, terms of access, and conditions that are reasonable and comparable to those that apply to the TDU and its affiliates. Otherwise, it argued, asymmetrical Tariff provisions may not be comparable to those the TDU applies to itself. TXI also argued that these changes are necessary to prevent certain requirements of PURA, commission rules/orders, or the Tariff from being rendered toothless, *e.g.*, the prohibitions on discrimination, the requirement to maintain the Delivery System in accordance with Good Utility Practice and to provide continuous and adequate delivery of Electric Power and Energy:

"A Company or Competitive Retailer that, as a result of its actions under this Tariff, is found to be negligent, grossly negligent, or to have committed intentional misconduct, *or to have acted in a manner that is discriminatory or anti-competitive* is liable in damages toward the other for such behavior.

"However, *except as otherwise provided in this Tariff*, with regard to damages resulting from fluctuations or interruptions in Company's delivery of electric power due to Company's ordinary negligence, Company shall have no liability.

"If Company or Competitive Retailer is found to be *negligent* or grossly negligent or to have committed intentional misconduct, *or to have acted in a manner that is discriminatory or anti-competitive*, nothing herein shall preclude the recovery of all appropriate damages, including, but not limited to, indirect, consequential, and exemplary damages."

In their reply comments, the Independent Retailers generally agreed with TXI's comments and particularly agreed on the need to clarify that the limitation of liability does not affect the commission's enforcement of PURA, antitrust actions, or preclude filing a complaint against a utility with the commission.

In reply to TXI's comments, the IOUs argued that with regard to the so-called asymmetrical provisions which would supposedly allow a TDU to discriminate in favor of its affiliated REP, it is simply not the case that a TDU can apply one Tariff to its affiliated REP and force non-affiliated REPs to accept a different, less favorable Tariff. Furthermore, they argued that Section 4.2.1 does not shift risk from the TDU to the REPs but simply limits the TDUs' liability, and because REPs are not harmed by the limitation of liability, there is no merit to TXI's argument that the limitation favors an affiliated REP over a non-affiliated REP. Finally, the IOUs argued that two phrases suggested by TXI should not be adopted. First, the phrase "or to have acted in a manner that is discriminatory or anti-competitive" is unnecessary and clutters the Tariff language

because at least four other provisions prohibit a TDU from acting in a manner that is discriminatory or anti-competitive, *i.e.*, PURA §39.157(d), Substantive Rule §25.272(f), Code of Conduct for Electric Utilities and Their Affiliates, and Tariff Sections 3.2 and 3.7. Moreover, they argued, this language would open the floodgates to litigation seeking consequential damages over even spurious charges of discrimination. Second, the phrase "except as otherwise provided in this Tariff" should be rejected because the Tariff does not contain exceptions to the limitation of liability for damages resulting from interruptions or fluctuations of Delivery Service.

In reply to TXI's comments, Entergy Texas REP argued that TXI may be reading more into the Tariff than was intended and that the Tariff does not exempt the utility from liability for discriminatory or anti-competitive activities.

Entergy Texas REP argued that Sections 4.2.1 and 5.2.1 should be framed in terms of contract principles and not tort principles because they set forth the relationship between the TDU and the REP or Retail Customer "in the performance of obligations under this Tariff," with the Tariff taking the place of a contract for purposes of breach by either party. Entergy Texas REP noted that expectancy damages are available for breach of contract and that the tort concepts of negligence, gross negligence and intentional misconduct do not apply in a contract dispute. It also argued that because Tariffs have the force of law, the unintended effect of the published language may be to increase liability for TDUs because it does not contain all of the potential defenses and off-sets that are contained in tort law. Entergy Texas REP proposed that the first sentence of Section 4.2.1 be revised to read as follows: "A Company or Competitive Retailer

that, as a result of its actions towards the other in the performance of its obligations under this Tariff, is found to have breached the Tariff, shall be liable to the other for the expected performance under this Tariff." Entergy Texas REP further argued that with regard to liability to third parties, TDUs should continue to be governed by existing Tariffs until the Legislature or courts change the allocation of liability contained in utility Tariffs, *i.e.*, the existing Tariff limitation of liability should remain in effect for at least the time period that the price to beat is in effect. It recommended placing limitation of liability provisions in Chapter 6 of the Tariff.

In the interest of preserving the status quo as closely as possible as it relates to exposure to potential liability by TDUs in relation to Competitive Retailers and Retail Customers, the commission adopts IOU Alternative A but substitutes the exact tariff language at issue in the *Auchan* case (*Houston Lighting & Power Co. v. Auchan USA*, 995 S.W.2d 668 (Tex. 1999)) for the second paragraph of Alternative A. The provisions of Alternative A make clear that 4.2.1 and 5.2.1 are not intended to limit the liability of the parties for damages except as expressly provided therein. That is to say, under Alternative A, the parties remain subject to liability for damages to the full extent allowed by the law except as expressly limited in the Tariff. The express limitation of liability contained in the second paragraph of 4.2.1 and 5.2.1 limits a TDU's liability only for damages resulting from fluctuations or interruptions in Delivery Service predicated only upon the TDU's ordinary negligence, or other types of causes of action that are not tort based (this being the meaning of the parenthetical phrase "(whether as a result of negligence or otherwise)" - the purpose of this being to prevent creative lawyers from pleading around the ordinary negligence language to reach liability). In such a case, a liable TDU is responsible only for the cost of necessary repairs of physical damage (proximately caused by the

service failure) to a Retail Customer's electrical delivery facilities that were equipped with the protective safeguards recommended or required by the current edition of the National Electrical Code. The term "electrical delivery facilities" is intended to mean those electrical delivery type facilities that deal with the delivery of electricity and not with the ultimate consumption of it. Furthermore, the National Electrical Code is intended to be the statewide standard to be met by a customer for purposes of being eligible to receive restitution for the damage to that customer's electrical delivery facilities, whether or not the National Electrical Code has been adopted as the standard by the jurisdiction in which that customer lives. But for this narrow limitation, a TDU, as previously discussed, remains liable for damages to the full extent allowed by the law, which includes possible liability for damages resulting from fluctuations or interruptions in Delivery Service caused by a TDU's gross negligence or intentional misconduct.

In response to TXI's argument that additional language is needed to satisfy PURA's requirement of non-discrimination in a TDU's provision of service, the commission notes that this requirement is set out in Section 3.7, NON-DISCRIMINATION, the remedy for which is also found in the processes set forth in the Tariff. The commission believes that the additional language suggested by TXI is superfluous. In response to Entergy Texas REP's comment that Sections 4.2.1 and 5.2.1 should be framed in terms of contract principles and not tort principles, it is correct that the Tariff is contractual in nature; however, as stated in *Houston Lighting & Power Co. v. Auchan USA*, 995 S.W.2d at 673-675, the commission has the authority to limit in a utility tariff a utility's liability for damages. The purpose of these sections is to limit such liability. Therefore, with two exceptions, the commission declines to adopt proposed changes to the language of Sections 4.2.1 and 5.2.1. The first exception is that in the second paragraph of

Sections 4.2.1 and 5.2.1 the commission changes the phrase "electric service" from the *Auchan* case to the defined term "Delivery Service." The second exception is that, out of an abundance of caution, the commission adopts the IOUs' suggestion that language relieving a party of its own negligence or otherwise shifting risk must meet the conspicuousness test outlined in Texas law. Therefore, such language within the Tariff is bolded and italicized so as to draw the reader's attention to such language.

Comments on Section 4.2.2, Limitation of Duty and Liability of Competitive Retailer*, and Section *5.2.2, Limitation of Duty and Liability of Competitive Retailer

IOUs supported the proposed language as a way to limit the responsibility of REPs for fluctuations or interruptions of Delivery Service. IOUs argued that, in light of the Texas Supreme Court's reliance on the commission's reasoning in the *Auchan* case, Section 4.2.2 provides adequate protection for Competitive Retailers against lawsuits arising from the TDU's operation of the Delivery System.

Independent Retailers commented that Sections 4.2.2 and 5.2.2 may provide no real protection for the REPs against lawsuits by their customers arising from a TDU's negligence in operating the Delivery System.

Sections 4.2.2 and 5.2.2 make it very clear that a REP is in no way involved with the design, construction or operation of a TDU's facilities, and, therefore, should have no legal duty with regards to the design, construction or operation of such facilities. The commission believes that

this provision will provide guidance to trial judges in assessing the existence of a legal duty on the part of a REP and, where appropriate, prevent suits against REP where the real responsibility resides with the TDU.

Comments on Section 4.2.3, Duty to Avoid or Mitigate Damages,* and *Section 5.2.3, Duty to Avoid or Mitigate Damages

IOUs commented that these sections follow well settled Texas law in imposing on a person who suffers damages a duty to mitigate those damages.

Comments on Section 4.2.4 Force Majeure,* and Section *5.2.4, Force Majeure

IOUs commented that these force majeure clauses appropriately limit parties' liability for events beyond their control. They suggested, however, that the word "act" in the phrase "in damages for any act that is beyond such party's control" could be argued to mean only a human act. Therefore, to avoid the potential for misinterpretation, they suggested that the underlined language be added so that the phrase reads "in damages for any act *or event* that is beyond such party's control…."

The commission adopts the IOUs' suggestion and amends the language of Sections 4.2.4 and 5.2.4 to refer to "any act or event."

Comments on Sections 4.2.5, Emergencies and Necessary Interruptions,* and Section *5.2.5, Emergencies and Necessary Interruptions

IOUs argued that because of safety and reliability concerns, a TDU must have the ability to curtail or interrupt service in the event of an emergency on the Delivery System. They suggested, however, that the word "service" be replaced with the defined term "Delivery Service" to make clear what service is being referred to.

Independent Retailers commented that the commission should define the term "emergency" because otherwise, incentives exist for a TDU to declare emergencies where the facts may not justify doing so, *e.g.*, where it would allow the utility to curtail power to particular customers and areas in a manner benefiting its affiliated REP or power generation company. They argued that the public interest suffers if a monopoly obtains "sole discretion" over a critical public resource under any circumstance, particularly where the conditions necessary to exercise that discretion remain undefined. As the last sentence of Sections 4.2.5 and 5.2.5, they proposed adding the following language: "Company shall exercise such judgment consistent with all notice requirements of Section 4.3.7 of this Tariff."

In its comments, TXI urged that the following language be added as the last sentence of Sections 4.2.5 and 5.2.5: "Nothing herein shall prevent the Company from being liable if found to be grossly negligent or to have committed intentional misconduct, or to have acted in a manner that is discriminatory or anti-competitive, with respect to its exercise of its authority herein."

In their reply comments, Independent Retailers argued that utilities should not have unbridled discretion to simply declare an emergency without justification and that there should be a commission standard on what constitutes an emergency. They argued that too often the IOUs relate everything to reliability to preserve their unchallenged control over matters.

In reply, IOUs argued that the proposed revisions of Independent Retailers and TXI should be rejected because these sections are needed to prevent or alleviate emergency conditions and to maintain the integrity of the transmission and distribution systems. They argued that TXI's proposal would hamper the ability of utilities to respond to emergency conditions and inevitably lead to unnecessary litigation over whether a particular interruption resulted from gross negligence or intentional misconduct. Also, they argued that under Independent Retailers' proposed additional language, it is unclear how a TDU could exercise judgment consistent with the notice requirements in Section 4.3.7, *i.e.*, that judgment and notice are different concepts. They further argued that allowing parties to second-guess their decisions and to seek remedies for allegedly improper decisions would frustrate their abilities to respond quickly and decisively in emergency circumstances.

The commission finds that the language of Sections 4.2.5 and 5.2.5 sufficiently sets forth the nature of an "emergency" during which the TDU may interrupt service. The relevant portion reads as follows: "which emergency poses a threat to the integrity of its system or the systems to which it is directly or indirectly connected…." No party presented language to define the term "emergency." The commission adds TXI's proposed language as the last sentence of these sections, but it deletes from this added language the words "or to have acted in a manner that is

discriminatory or anti-competitive" because this issue is already addressed in Section 3.7 of the Tariff. Moreover, in keeping with the intent of TXI's proposed additional language to make known that a TDU is subject to liability for its behavior even in emergency situations, the commission deletes the phrase "without liability therefor" in two places. These modifications ensure that the TDU has the authority in emergency situations to curtail/interrupt Delivery Service but is subject to the full range of liability for damages in such situations in keeping with Sections 4.2.1 and 5.2.1 as limited therein. Moreover, the commission adopts the IOUs' suggestion to change the word "service" to the defined term "Delivery Service." The commission declines to adopt the Retailers' proposed additional language for the reasons stated by IOUs. Finally, the commission agrees that the Company should provide advance notice of curtailments or interruptions to a Competitive Retailer if reasonably possible. Language has been added noting this requirement and specifying that such notice may be provided in electronic form to all certificated REPs. The commission finds that this solution best addresses the need to inform REPs of outages while still ensuring that restoration of service is done as quickly as possible. As discussed below, this provision now makes some of the more detailed language in Sections 4.3.8.1, 5.3.7.1, 4.3.8.2, and 5.3.7.2 unnecessary.

Comments on Section 4.2.6, Limitation of Warranties by Company,* and Section *5.2.6, Limitation of Warranties by Company

IOUs argued that the Texas Business and Commerce Code permits a disclaimer of warranties for goods and that the Texas Supreme Court has held that the law of warranty with respect to goods applies as well to warranties in service contracts. They argued that such a limitation of

warranties is appropriate because it helps avoid any potential argument that the provision of Delivery Service includes an express or implied warranty, that warranties are unnecessary anyway because the Tariff contains specific remedies for failure of the TDU to satisfy its obligations under the Tariff, and allowing customers to claim such warranties would create uncertainty over TDUs' duties and liabilities. For clarification, however, they urged the replacement of the word "service" with the defined term "Delivery Service."

Independent Retailers commented that although the apparent purpose of these sections is to preclude utilities from incurring strict or warranty liability, these sections could have the unintended effect of enabling utility employees to misrepresent utility service terms or make other deceptive statements to obtain business. As the last sentence of Sections 4.2.6 and 5.2.6, they proposed adding the following language: "Company may assume such warranties by subsequent agreement, which shall be offered on a non-discriminatory basis consistent with Section 3.7 of this Tariff."

In its comments, TXI recommended adding the phrase "Except as otherwise provided in this Tariff," at the beginning of the language of Sections 4.2.6 and 5.2.6.

In their reply comments, IOUs urged the rejection of the proposed additions of Independent Retailers and responded that the Tariff does not in fact contain any warranties for Delivery Service, nor should it. Aggrieved parties should look to the commission for resolution of purported breaches of Tariff terms, not to civil courts, which are inexpert in construing the terms of the Tariff and would likely make inconsistent interpretations of the Tariff. They also argued

that Independent Retailers' proposed language is inappropriate because even if a TDU is willing to provide a warranty, it should have to do so in the Tariff itself so that all REPs can take advantage of it pursuant to the non-discrimination provision.

Except for changing the word "service" to the defined term "Delivery Service," the commission declines to adopt the changes proposed by the parties. The commission finds that warranties for Delivery Service should not be created because it would provide an opportunity for TDUs to discriminate in their treatment of REP. Independent Retailers' proposed additional language appears unworkable as it would be possible to police any subsequent warranties made by a TDU. TXI's proposed additional language is without meaning because there is not another provision in this Tariff that is contrary to this subsection.

Additional comments on Sections 4.2 and 5.2:

In addition to the proposed Sections 4.2.1 through 4.2.6 and 5.2.1 through 5.2.6, TXI proposed new Sections 4.2.7 and 4.2.8, with identical Sections 5.2.7 and 5.2.8 for chapter 5, which read as follows:

4.2.7 Effect on Enforcement of PURA

"Nothing in this section shall restrict the authority of the commission to institute a proceeding, or the right of Company or Competitive Retailer to file a complaint with the commission, under the relevant portions of the PURA or the commission's rules or orders, where that right is available,

or the authority of the commission or a court with jurisdiction to award such remedies as are available under the PURA or the commission's rules or orders."

4.2.8 Effect on Antitrust Laws

"Nothing in this section shall affect the right of any person to pursue remedies otherwise available under the antitrust laws or other laws intended to protect or encourage competition."

In reply, IOUs argued that proposed new Sections 4.2.7 and 5.2.7 are unnecessary because Tariff Section 3.11 states that Delivery Service is governed by all Applicable Legal Authorities, which is defined to include Texas statutes and regulations, Texas Utilities Code Chapter 15 expressly authorizes persons to bring complaints to the commission, and nothing in Sections 4.2 or 5.2 suggests that those sections override the commission's grant of authority by the Legislature to investigate and act on complaints. Additionally, they argued that TXI's reference to the authority of "a court with jurisdiction to award such remedies" erroneously suggests that courts have authority to adjudicate claims alleging violation of the terms of the Tariff.

IOUs also argued that proposed new Sections 4.2.8 and 5.2.8 should be rejected as superfluous because Texas Utilities Code §39.158 expressly states that nothing in Chapter 39 of the Utilities Code shall be construed to confer immunity from state or federal antitrust laws. Further, they argued that §25.272(i)(6) of this title provides that the affiliate rules do not shield any party from enforcement of the antitrust laws. Finally, they argued that adding such unnecessary language

might lead to the belief that in adopting this rule the commission meant to create new antitrust causes of action.

For the reasons stated by IOUs, the commission declines to adopt proposed new Sections 4.2.7 and 4.2.8.

Comments on Section 4.3, Service

Comments on Section 4.3.1, Eligibility

IOUs proposed adding two prerequisites for eligibility: Execution of an Electronic Trading Partner Agreement and, for a TDU subject to a financing order, payment of the security deposit by Competitive Retailer prior to serving Retail Customers in the TDU's service area. They also proposed eliminating the requirement that the system testing procedures should be limited to the protocols developed by an Independent Organization for SET transactions. Independent Retailers disagreed. They proposed that the Texas SET protocols define and delimit the appropriate testing parameters, which would be developed by the Texas SET team. They argued that requiring the Competitive Retailers to post the deposit before it recovers any money from its Retail Customers simply adds to the significant up-front costs. They maintained that nothing in the REP certification rule requires a REP to post this deposit before beginning service. They argued that waiting for a few days after the first invoice is received by the Competitive Retailer for the deposit would not increase a TDU's risk of REP default since at that time the REP would have just established to the commission that it possesses the requisite creditworthiness to obtain

certification. They also pointed out that the utilities obtained a triple-A rating on their securitization bonds without the confirmation that they would receive up-front deposits.

The commission agrees with the Independent Retailers that it is inappropriate to require Competitive Retailers to provide security for Transition Charges as a condition of being eligible for initiating service under the Tariff. The commission notes that the financing orders issued by the commission to date, as well as §25.108 of this title (relating to Financial Standards for Retail Electric Providers Regarding the Billing and Collection of Transition Charges), provide specific requirements for the establishment of any required deposit. However, the financing orders and §25.108 are silent as to the timing of the establishment of the initial deposit. As such, language has been added to Section 4.5, Security Deposits and Creditworthiness, to clarify that a Competitive Retailer is required to establish the deposit within ten calendar days of receipt of the first valid invoice from a utility for which a financing order has been granted.

Independent Retailers then argued that eligibility should not be conditioned on Company executing the Delivery Service Agreement either. They argued that the TDU might improperly delay execution of the agreement. Independent Retailers claimed that by offering service under the terms and conditions of the Tariff, Company has already assented to the agreement and that the Company needs only notice that a Competitive Retailer has executed the Agreement. IOUs disagreed. They argued that TDUs should have an opportunity to assess whether the Competitive Retailer is in compliance with Tariff requirements (*e.g.*, whether it is competent to send and receive electronic communications, and whether it has posted a deposit if the TDU is subject to Financing Order) before signing the agreement and beginning service. IOUs

continued to argue that TDUs would never intentionally delay signing the agreement for anti-competitive purposes since that would lead to commission sanction. Finally, IOUs argued that the Independent Retailers' position regarding the formation of a binding contract is contrary to Texas law which requires that a contract must be signed by both parties to be binding unless the parties have otherwise indicated assent to be bound by the writing. The IOUs stated that the legal case cited by the Independent Retailers as authority for their position that both sides do not have to sign a contract to form a binding contract is not on point because the court in that case held that the non-signing party still had to accept the contract through his acts, conduct or acquiescence. Independent Retailers also recommended developing a plan to conduct system testing and to appoint an independent third party to oversee all testing procedures and intervene in the event that disputes arise. IOUs concurred.

The commission concludes that eligibility should be conditioned on the following: (1) successful completion of system testing for electronic and other communication requirements for data exchange, outage reporting, and service requests where system testing, and certification of successful system testing will be based on a test plan developed by Texas SET in coordination with the commission; (2) either a Delivery Service Agreement fully executed by both parties, or, during an interim period of investigation only, a partially executed Delivery Service Agreement filed with the commission if Competitive Retailer has signed such Delivery Service Agreement and presented it to Company for signature to no avail. The commission believes this is the best approach because once a Competitive Retailer successfully completes system testing, Company should have no grounds at that time for refusing to execute the Delivery Service Agreement, and

any delay in being deemed eligible to receive Delivery Service could result in a significant loss of income to the Competitive Retailer.

Comments on Section 4.3.2.1, Initiation of Delivery System Service where Construction Services are not Required

IOUs suggested changing the language of condition (1) to prevent an interpretation that the Company has a duty to inspect the Retail Customer's Electrical Facilities for hazardous conditions. Independent Retailers responded by stating that a TDU cannot blind itself to substandard Retail Customer's facility if it adversely affects system security. They claimed that if the TDU declines to ascertain that it can safely connect a facility, thereby damaging the Delivery System, the associated costs should either be born by the TDU or be recovered from the Retail Customer.

The commission agrees with IOUs that a TDU has no affirmative duty to inspect a Retail Customer's electrical facilities. The TDU may withhold initiation of Delivery System Service if Retail Customer's Electrical Installation is known to be hazardous under applicable safety codes, is of such character that adequate service cannot be provided by Company, or interferes with the service of other Retail Customers. In response to the Independent Retailers' concern over possible damages resulting from the TDUs' declining to accept the duty to inspect Retail Customers' Electrical Installation prior to initiating Delivery System Service, the commission notes that the liability provisions of 4.2.1 and 5.2.1 apply at all times, and, although the TDU has

no duty to inspect, it may be subject to negligence liability for damages resulting from matters of which it reasonably should have had knowledge, *e.g.*, an open and obvious hazard.

Independent Retailers and Consumers objected to the phrase "material obligation" in condition (3). They claimed that since the term grants an unreasonable degree of discretion to the TDUs to refuse service to a Retail Customer, and because it is not defined, it will generate controversy over its meaning. Consumers wondered how a Retail Customer would know what their material obligation is. IOUs responded by pointing out that the term "material" is frequently used in contracts and business contexts and also is used in the commission's proposed customer protection rule. They claimed that it is an expression of such common use that it is not even defined for a jury in a trial, and that the use of the term here clarifies that trivial breaches of the Tariff will not lead to default. IOUs then responded to Consumers' comment by stating that Retail Customer should know of its obligation from the Tariff. In addition, IOUs proposed inclusion of a provision in which IOUs will notify the Retail Customer of a breach of a material obligation and provide an opportunity to cure it.

The commission concurs with the reasoning of IOUs and declines to define the term "material obligation."

Independent Retailers suggested deleting the word "satisfaction" as used in condition (3). IOUs expressed that they do not have objection. IOUs recommended a modification to reflect the fact that all requests for service initiation should come from the Registration Agent. TXU REP recommended that the notification by the Registration Agent that a Retail Customer has

designated an eligible Competitive Retailer, as required in condition (2), should be made electronically since that would be the most efficient means. Similar changes were recommended for Section 5.3.1.1(2). IOUs suggested that the seven day deadline for service initiation should start, where applicable, after Company's receipt of both the request and the notification of approval of Retail Customer's Electrical Installation by the proper authority.

The commission agrees with these comments with one exception and has made appropriate changes. In response to TXU REP's comments, the commission revises condition (2) to spell out that notification by the Registration Agent should be in accordance with the protocols of the Independent Organization rather than to require any specific mode of communication as recommended by TXU REP. This treatment is consistent with the treatment of other aspects of the Tariff that are affected by the protocols of the Independent Organization.

Comments on 4.3.2.2, Initiation of Delivery System Service Where Construction Services are Required

IOUs provided a more detailed process that should be followed in this section. They claimed that a Competitive Retailer needs to use the EDI transaction being developed by Texas SET Protocols working group to electronically request a Discretionary Service (including Construction Service) from a TDU. IOUs also pointed that the Competitive Retailer needs to request an ESI ID from the TDU if the premise in question has not been served before. Independent Retailers opposed the use of EDI transaction for all customer service requests. They claimed that this requirement increases a Competitive Retailer's costs without any

corresponding benefit, and preclude them from utilizing call forwarding or web portal. They also argued that the request for ESI ID does not have to precede the request for Construction Service but that the two requests can be handled simultaneously.

The commission agrees with IOUs that the service initiation process is better explained when spelled out the way the IOUs suggested, and, therefore, follows those suggestions. However the commission disagrees that all service requests should be processed via EDI transactions. The nature of some service requests may be difficult to be made electronically. Rather, the requirement to use EDI transactions should be limited to service requests for which EDI transactions are set up by Texas SET. While the commission's preference is that Competitive Retailers act as the first point of contact for all Retail Customer needs, the commission also believes that it is appropriate to allow smaller Competitive Retailers to be able to forward Retail Customer's calls regarding specific issues about Delivery Service to the Company (or put the Company's number on their bill to the Retail Customer). As such, this section has been revised to state that Competitive Retailers are responsible for informing customers about obtaining Discretionary Services, using the same options that Competitive Retailers are allowed for purposes of outage reporting (see discussion on Section 4.11.1). The commission also disagrees with IOUs that the request for a new ESI ID needs to precede the Construction Service request.

IOUs argued that since request for Delivery Service always comes through the Registration Agent, IOUs do not need the information listed in Section 4.3.2.2. On the other hand, requests for Discretionary Services would come directly from Competitive Retailer, and hence would

need to include some customer and service information. So IOUs proposed a new section regarding request for Discretionary Service.

The commission agrees with the IOUs and has made changes to the section reflecting IOUs suggestions. A new section 4.3.3, REQUESTS FOR DISCRETIONARY SERVICES INCLUDING CONSTRUCTION SERVICES, has been added to clarify the differences.

Comments on Section 4.3.3 (proposed), Changing of Designated Competitive Retailer

IOUs argued that, consistent with the provision in Section 4.3.2.1(3), TDUs should not be required to switch service to another Competitive Retailer if that Competitive Retailer is in default. Independent Retailers found that adding this provision in this section is unnecessary since the Tariff does not allow a Competitive Retailer to obtain Delivery Service if it is in default. IOUs also proposed to clarify that Competitive Retailers may be charged for customer data that they request if such charges are approved by the commission.

The commission agrees with IOUs that TDUs should not be required to switch service to another Competitive Retailer if that Competitive Retailer is in default, and, therefore, has added the clarifications. However the commission rejects the IOUs' proposal to charge for customer information. See the commission discussion for Section 4.8.

TIEC suggested that customer information would be released to a Retail Customer's Competitive Retailer only to the extent authorized by the Retail Customer. IOUs disagreed by pointing out

that the commission's code of conduct rules contain several examples of situations in which proprietary customer information may be released to entities -- some of which can be Competitive Retailers -- without customer authorization. IOUs recommended that the release of proprietary customer information should be consistent with Applicable Legal Authorities. TXU REP also suggested replacing "Commission" with "Applicable Legal Authorities" to make it consistent with Section 4.8. Consumers asserted that the limitation on the release of customer information should be expressed negatively (*i.e.*, shall not be released, except as permitted under the commission's customer protection rule), whereas the proposed Tariff expresses it positively (*i.e.*, shall release proprietary customer information to Competitive Retailer in a manner prescribed by the commission.). IOUs disagreed and claimed that what is important is that the customer information is governed by Applicable Legal Authorities.

The commission agrees with IOUs and retains the published language on the release of customer information but replaces "Commission" with "Applicable Legal Authorities."

TXU REP recommended that the notification of a change in a Retail Customer's designated Competitive Retailer be sent electronically by the Registration Agent.

The commission maintains that the current language addresses this concern. A response to the notification by the Registration Agent must be done in accordance with the protocols developed by the Independent Organization.

Comments on 4.3.4 (proposed), Switching Fee

IOUs argued that prohibition against Switching Fees should not preclude Company from charging Competitive Retailer any other commission approved charge (*e.g.*, out of cycle meter reading), if applicable, associated with a switching event. In response, Independent Retailers recommended including an explicit definition of Switching Fee (along with retention of the prohibition against Switching Fee).

The commission agrees with the Independent Retailers and has added a definition of Switching Fee.

Comments on Section 4.3.5 (proposed), Selection of Rate Schedules

IOUs argued that a Competitive Retailer may select only a rate for which a Retail Customer is eligible. They also recommended extending the number of Business Days before a Rate Schedule becomes effective from two to five since, according to them, the switch requires: receiving and routing the request, verifying that the requested Rate Schedule is applicable, and modifying the Retail Customer's billing parameters in the Company's database. Independent Retailers recommended rejection of IOUs request for additional days.

The commission agrees with IOUs that a Competitive Retailer can only select a rate for which the Retail Customer is eligible. However, the commission is not persuaded by IOUs' argument that a TDU will need five days to make the rate effective.

Comments on Section 4.3.6 (proposed), Provision of Data

IOUs argued that Competitive Retailers should timely supply to Company current customer names, telephone numbers, and mailing addresses. These data are needed by Company for communications concerning noticed suspensions, outage, facilities extension, and maintenance efforts that require access to the Retail Customer's Premises. Independent Retailers pointed out the affiliate abuse potential when a TDU is a repository of all current customer information.

The commission agrees with IOUs, since the data is essential for a TDU to efficiently and effectively provide Delivery Service to Retail Customers in the newly structured market. Any abuse by an affiliate REP can be dealt with using the complaint process of the commission.

Independent Retailers proposed replacing the section with a provision that will require all TDUs to maintain a website which a demand metered Retail Customer and its Competitive Retailer can access to obtain its usage information including interval data. IOUs disagreed and argued that TDU should not serve as the central depository for all metering information that the Competitive Retailers want to use in evaluating potential customers. Also, the cost considerations of maintaining the website for the purposes above need to be taken into account.

The commission notes that this section is intended to encompass data going from the Competitive Retailer to the Company and has renamed the section title accordingly. As will be discussed in further detail in the discussion of Section 4.8, Data Exchange, the commission agrees with Competitive Retailers that it is important that the REPs have immediate access to

load information and agrees that, to the extent such data cannot or will not be provided by the Independent Organization, the TDU should be required to set up systems to provide such data on a real-time basis. Language has been added to Section 4.8.1, Data from Meter Reading, to clarify the responsibility of the TDU to provide Retail Customers' meter data to Competitive Retailers that have obtained that customers permission through the use of a web portal or other equivalent means.

Comments on Section 4.3.7.1 (proposed), Suspensions Without Prior Notice, and Section 5.3.6.1 (proposed), Suspensions Without Prior Notice

Both Independent Retailers and Consumers argued that suspensions without prior notice should be allowed only under very limited circumstances, namely where imminent danger exists, where an emergency threatens the system, or where a court, the commission, or the ISO so orders. This is because Delivery Service suspension without prior notice:

(1) can result in property damage and endanger lives;

(2) will generate system imbalances for Competitive Retailers for which Competitive Retailers will be liable; and

(3) is not permitted in the existing commission rules (including §25.29) for at least one situation allowed in the proposed Tariff, routine service restoration or repairs, changes, and tests.

Independent Retailers recommended that even for these suspensions "where a known and dangerous condition exists" a suspension would be undertaken "unless such suspension will

result in a dangerous or life threatening condition elsewhere." IOUs argued that Independent Retailer's recommendation would impair a TDU's ability to respond in emergency situations.

The commission agrees with Independent Retailers that, to the extent a suspension of service due to a dangerous condition leads to another dangerous condition, the TDU should provide notice to the affected Retail Customers. The commission notes, as stated in this section, that the notice requirements in this section are not intended to prevent the timely restoration of service.

Independent Retailers also recommended deletion of the TDU's right to suspend Delivery Service without notice for routine maintenance, even when these suspensions are for short duration and do not affect load bigger than one MW. They suggested that if these suspensions are allowed, TDUs should take the responsibility of the resulting scheduling imbalances. IOUs replied that the imbalances resulting from service suspensions of less than one hour will be insignificant, especially compared to imbalances associated with forecast errors. And that under no circumstances should TDUs assume the imbalance risk. Independent Retailers also argued that even with one hour or one MW restrictions, suspensions without notice can cause significant property damage and personal injury (for small industrial or commercial customers). Independent Retailers argued that the convenience of foregoing notice does not justify such harm. They then argued that the TDU should bear the liability of any such damage. IOUs replied that to impose liability on the TDU in these instances contradicts the commission decision with regard to limitations on liability for the TDU, would raise costs, increase litigation, and impair the ability of the TDU to operate the Delivery System safely for the benefit of all. According to IOUs, the Retail Customer is in the best position to know about the dangerous

condition or significant exposure on its side of the Point of Delivery and do something about it. IOUs also pointed out that P.U.C. Substantive Rule §25.29 deals only with disconnections that are permanent in nature and, therefore, are very different from the ones discussed here.

The commission recognizes that REPs are at risk for imbalance energy when a Retail Customer's service is suspended for any reason. However, TDU's must also be able to perform routine maintenance and repair in an efficient fashion. The commission's adopted changes in Section 4.2.5, Emergencies and Necessary Interruptions and Section 5.2.5, Emergencies and Necessary Interruptions, state that the Company is required to give notice of interruptions due to system emergencies, maintenance, repair, or when performed to lessen possible danger when reasonably possible and prescribes the form of that notice. Language has also been added noting the requirement for the Company, if it is not able to provide advance notice, to provide notice as soon as possible after the suspension. All other language referring to these circumstances has been removed from this section, which now allows suspension without notice only due to dangerous conditions, or if authorized by the commission.

TIEC suggested additional language to clarify that in case of suspension of Delivery Service where such suspension may result in a dangerous or life-threatening condition on the Retail Customer's facility, notice of suspension should be given directly to Retail Customer. ALCOA and OxyChem concurred with TIEC and urged that this requirement be added to all other provisions in the Tariff that allow interruption without notice. IOUs proposed to omit the restriction on suspension resulting in a dangerous or life-threatening condition on the retail customer's facility as stated in proposed Section 5.3.6.1. IOUs pointed out that the Customer

Protection rules do not have this restriction. IOUs also suggested that lawsuits could result even if the TDU were following an order to relieve a grid problem or suspending service in an emergency. Furthermore the IOUs argued that a TDU may not know who the Retail Customer is and might not know whether it could disconnect that customer. In response to industrial customers' concerns, IOUs stated that IOUs' current practice of closely coordinating service suspensions and restorations with industrial customers will continue. But they also pointed out that that the obligation on the part of the Retail Customers to proactively protect against any unexpected electrical failures should continue as well. They also pointed out that a TDU has no knowledge of these special risks that may exist for the Retail Customer and cannot protect against circumstances of which it is not aware. The Retail Customer is in the best position to protect against such failures. TIEC disagreed with IOUs' deletion of the notice provision in a life threatening situation and cited provisions in the existing utility tariffs whereby such notices are provided (Entergy Gulf States, Terms and Conditions Applicable to Electric Service, paragraph 13; Reliant Energy tariff; TXU Tariff 4.5.2.2.). TIEC also pointed towards the current utility practice of giving notice to industrial facilities like chemical plants and refineries prior to an intentional interruption so that the industrial customer can safely shut down facilities and not endanger life and limb. They argued that the logic of adding a notice requirement to these customers is no different than the requirement for critical care customers. In fact, TIEC supported a procedure by which the Retail Customer would give notice to the TDU in order to implement this protection.

The commission agrees with TIEC, Alcoa, and OxyChem that it is critical that facilities or customers not be disconnected when such disconnection may result in life-threatening conditions

on a Retail Customer's premise, especially for critical care customers or certain industrial facilities. Thus, appropriate language has been added to this section and the corresponding section in Chapter 5 requiring the Company to provide notice to those customers who have such special needs. In response to the IOUs concern about the obligation of Retail Customers to inform the TDU of such circumstance, the commission has added language in these two sections requiring Retail Customers to notify their Competitive Retailer of such circumstances and has added language in Section 5.3.7.4, Prohibited Suspension of Disconnection, detailing the responsibility of the Company to not disconnect such customers without providing notice and a reasonable time to ameliorate the effects of suspension or disconnection.

IOUs proposed addition of the provision by which Company should be able to suspend service without prior notice in the event of unauthorized use, unauthorized reconnection, diversion of service, tampering or bypassing of Company equipment. Current and proposed customer protection rules (§25.29(c)(1) and §25.48(c)(1) respectively) provide for that. Any delay in disconnection due to unauthorized use would increase unaccounted for energy, and, therefore, cause inappropriate shifting of costs among Competitive Retailers and potentially unrecoverable costs for the TDU. Independent Retailers opposed IOUs proposal and argued that continuing to provide service until the utility provides notice in this situation would not adversely affect the TDU since it can always estimate the unmetered usage and charge the Competitive Retailer for it. On the other hand, any discontinuance disrupts the Competitive Retailer's relationship with its Retail Customer.

The commission recognizes that the right to disconnect Delivery Service for unauthorized use exists in the currently existing customer protection rule for utilities and has been unopposed in the proposed customer protection rule for the Energy Service Providers. The commission agrees with Independent Retailers that a Customer's REP, if one exists, should be informed of such a suspension. The commission also agrees that a TDU has the right to charge the customer's REP for such unmetered usage. No change to the Tariff has been made.

Consumers argued for prompt updating of Competitive Retailers regarding suspensions since Competitive Retailers would get inquiries from the Retail Customers. Independent Retailers recommended that within 30 minutes of a suspension without notice, notice should be provided to Competitive Retailers. IOUs argued that this kind of specific time limit will not fit the variety of situations faced by TDUs and is not in the public interest.

The commission agrees with Consumers and Independent Retailers that it is critical that Competitive Retailers be kept apprised of suspensions and their expected durations in order to ensure the same level of quality of service as exists today. The commission notes that customers taking service from those Competitive Retailers that elect to forward calls to the TDU will receive answers to their inquiries in that manner. The commission also notes that its changes to Section 4.11.1 require that Competitive Retailers who rely on outage information to the Company be kept informed of restoration efforts. The commission further believes that the limited circumstances in which a TDU can suspend service without notice minimize any imbalance risk to Competitive Retailers.

IOUs suggested deleting the phrase "on Retail Customer's Electrical Installation" from the first paragraph since it is not in the parallel section of the existing and proposed customer protection rule and may restrict Company's ability to act in the event the dangerous situation occurs outside the Retail Customer' Electrical Installation.

The commission agrees and has deleted the phrase.

Comments on Section 4.3.7.2 (proposed), Noticed Suspension, and Section 5.3.6.2 (proposed), Noticed Suspension

Independent Retailers argued that clause (3) is unreasonably broad in that it authorizes the TDU to suspend Delivery Service if a Retail Customer fails to comply with the terms of "any written agreement made between Company and the Retail Customer" since that would allow the TDU to suspend service for breach of an agreement unrelated to Delivery Service. IOUs rejected this argument saying that under the unbundling requirement of SB 7 and the commission's Substantive Rules, IOUs cannot provide any service other than Delivery Service and hence cannot have any agreement other than one related to Delivery Service. Consumers also pointed out that there should not be any other agreement between a Retail Customer and a TDU other than Facilities Extension Agreement.

The commission agrees with IOUs and maintains the proposed language. The commission agrees with Consumers and notes that the only other agreement that may exist between Retail Customers and the TDU other than this Tariff is a Facilities Extension Agreement.

IOUs suggested adding another provision for suspension of Retail Customer upon notice and due to non-payment of charges directly billed to Retail Customer.

The commission agrees but adds language noting that the only such charges are those authorized under Section 5.8.2, BILLING TO RETAIL CUSTOMER BY COMPANY and only includes construction services, damage caused by Retail Customer, or costs incurred to cure adverse effects of the Retail Customer's Electrical Installation.

TIEC suggested additional language to clarify that in case of suspension of Delivery Service where such suspension may result in a dangerous or life-threatening condition on the Retail Customer's facility, notice of suspension should be given directly to Retail Customers. Consumers also expressed concern that Retail Customers would not get the notice of suspension. IOUs argued that under proposed Section 5.3.6.1, notice will be given to Retail Customers when large numbers of Retail Customers are affected for a significant amount of time. In other cases, electronically notifying Competitive Retailers would be more efficient.

The commission agrees with TIEC and adds language in Section 5.3.7.4, Prohibited Suspension or Disconnection, to prohibit suspension or disconnection without notice in those cases where a life-threatening condition may result. The commission also clarifies that it is the Retail Customer's responsibility to inform their REP of such conditions, who is then obligated to inform the TDU. Under the revised Tariff, TDUs are thus not permitted to suspend service if such suspension creates a dangerous or life-threatening condition without notice. The commission

agrees with IOUs that when large numbers of Retail Customers are affected for more than a significant amount of time, notice is already required to Retail Customers.

TXU REP suggested that information regarding the location of customers whose service is suspended needs to be supplied to the Competitive Retailers in order for them to provide useful information to their Retail Customers. Independent Retailers agree with TXU REP.

The commission agrees and notes that the electronic notice required to be given to REPs should specify the location of suspensions, interruptions, etc.

Comments on Section 4.3.8 (proposed), Restoration of Delivery Service, and Section 5.3.6.3, Restoration of Service

TIEC recommends that the Tariff should require reasonable notice when power is restored so that the Retail Customer can implement restart procedures at the earliest possible moment.

The commission agrees with TIEC and has added language to require notice of the restoration of service.

Comments on Section 4.3.9 (proposed), Disconnection of Service to Retail Customer's Facilities, and Section 5.3.7, Disconnection of Service to Retail Customers Facilities

IOUs suggested making it explicit that when Competitive Retailer directly requests disconnection (the situations discussed in this section), Company should not be responsible for ascertaining the appropriateness of the request, except as provided in proposed Section 5.3.6.4, Prohibited Suspension or Disconnection.

The commission generally agrees but would emphasize that in situations where a TDU has knowledge that a customer should not be disconnected (for example, the customer is critically ill), the TDU has an obligation to convey that information to the Competitive Retailer before actually disconnecting the Retail Customer.

IOUs also pointed out that with regard to requests for disconnection relating to move-outs, there will be no delay based on extreme weather conditions or special situations. Therefore, the provision that Competitive Retailer be responsible for charges accrued during such a delay is not necessary. However, requests for disconnection for non-payment may be delayed for these factors and hence charges may be due from the Competitive Retailer.

TXU REP pointed out that the first paragraph of this section should not list emergencies as an event when a Competitive Retailer must provide three Business Days notice to a utility in order to obtain a disconnection.

The commission agrees with all the suggested changes and has made the appropriate modifications.

TXU REP also pointed out that the second paragraph fails to specify by when the utility will be required to disconnect. TXU REP recommended no later than five days. In response IOUs argued in favor of seven Business Days if TXU REP's language is adopted to accommodate time for processing, scheduling, and implementing the request.

The commission agrees with IOUs' compromise.

Comments on Section 4.4, Billing and Remittance

Comments on Section 4.4.1, Calculation and Transmittal of Delivery Service Invoices

IOUs recommended use of *Functional Acknowledgement* – a widely used SET protocol - whereby the recipient of a SET transaction acknowledges receipt of SET transaction - in place of the *validate/reject* provision. (IOUs also included a definition of Functional Acknowledgement). Independent Retailers disagreed. They argued for *validation* which is different from acknowledgement of just the receipt of a transaction; rather validation, as used in CUBR tariff, ensures that the Competitive Retailers get a proper *readable* invoice with *the appropriate information* including the dollar amount, the billing determinants, ESI IDs, the due dates, etc.

The commission agrees with the Independent Retailers and maintains the requirement of validation/rejection of an invoice rather than Functional Acknowledgement since the latter does not imply receipt of a readable invoice with appropriate information in the proper field. The commission also notes that the concept of validation/rejection is adopted by CUBR.

IOUs added a provision by which a TDU will use other temporary means to transmit an invoice if and when it is unable to transmit the invoice electronically. Independent Retailers disagreed and argued that they should not be required to add additional resources to process invoices manually.

The commission agrees with Independent Retailers and declines to change the rule. The commission notes that the Tariff cannot be written to encompass every eventuality that may occur and that it expects that parties will work together to address unforeseen events.

Comments on Section 4.4.3, Invoice Corrections

IOUs argued that since metering error affects both settlement processes for Electric Power and Energy, and billing by Company for Delivery Services, the procedures for adjustment for any error should be consistent. In particular, IOUs advised that, the time period for billing adjustment by a TDU should be the same as what is decided in the ERCOT settlement group for settlement purposes. They also argued that the adjustment period for over and under recovery should be symmetrical. Independent Retailers pointed out that this period is not symmetrical under the existing commission rules. They also argued that if Competitive Retailers are back billed for the past twelve months, they may no longer serve the Retail Customers who underpaid.

The commission concludes that the issue should be decided here at the commission, and, if needed, the ERCOT settlement group should recognize the rule requirement. The proposed language is reasonable since it is consistent with existing commission rules.

TIEC argued that the provisions of Sections 4.4.3 and 4.4.4 should be added to Chapter 5 of the Tariff, with the rationale that Retail Customers should be able to directly raise Meter Reading and billing cycle issues with the TDU. IOUs disagreed. According to them, Delivery Service invoices are a matter between TDU and Competitive Retailer. If a Retail Customer has a Meter Reading or billing related issue it should take it to its Competitive Retailer who may then, if appropriate, take it to the TDU.

The commission agrees with IOUs. TDUs will not bill Retail Customers, except for Construction Services, and will not be in a position to respond to Retail Customers billing inquiries.

Comments on Section 4.4.4, Billing Cycle

IOUs argued that it may not be possible to make all potentially requested changes to Meter Read/billing cycles even where Company has remote Meter Reading capability. Large volumes of Retail Customers on the same cycle will exceed the processing capacity of Company's billing system. Hence, requests for only *available* cycles will be accommodated. Independent Retailers argued that IOUs' proposal is contrary to CUBR requirements, and is based on a very unlikely

situation. Even if IOUs' argument had merit, the TDUs alone should not determine the appropriate meter read date, as that may become an avenue for discriminatory treatment.

The commission agrees with Independent Retailers and retains the proposed language.

TXU REP recommends that a Competitive Retailer be notified, in accordance with appropriate SET protocol, when any changes are made to the billing cycle of a Competitive Retailer's Retail Customer. IOUs agree, but only for permanent billing cycle changes.

The commission agrees with the compromise offered by IOUs.

Comments on Section 4.4.5, Remittance of Invoice Charges

IOUs suggested changing the term "validated" to "functionally acknowledge." (See summary of Comments on Section 4.4.1 above). They also suggested that electronic invoices transmitted after 3:00 p.m. should be considered transmitted on the following *calendar day*, not *business day*, to correspond to current practice. The IOUs also clarified that a Facility Extension Agreement may vary not only the payment timeline but also the billing procedure for Construction Services.

The commission agrees with IOUs suggested modifications with the exception of the first suggestion. See the commission discussion under Section 4.4.1.

Comments on Section 4.4.6, Delinquent Payments

IOUs suggested certain changes to clarify the delinquency and default issues. Independent Retailers disagreed. They claimed that the 3:00 p.m. deadline suggested by IOUs is not necessary since all transactions will occur electronically and will post automatically. They object to IOUs striking the concept of validation since that would require Competitive Retailers to pay even an invalid invoice (for example, with a wrong due date). Independent Retailers wanted the counting of 35 days to begin with the date specified on a *validated* invoice. They also wanted the grace period to extend to Monday in cases where the grace period ends on a Saturday since Saturday is not a Business Day.

The commission agrees that there is an inconsistency between when an invoice is considered received and when payment is considered received. The Tariff has been revised to state that both a validated invoice and payment shall be considered received if transmitted by 5:00 p.m. The commission declines to extend the grace period.

Comments on Section 4.4.8, Invoice Disputes

Independent Retailers argued that they should not be required to pay the disputed portion of an invoice. However, they agreed to provide written notice to the Company when they withhold a disputed amount, and to pay interest on the disputed amount if the Competitive Retailer is found withholding amounts properly invoiced. They argued that CUBR allows withholding of the disputed amount. IOUs pointed out that not all CUBR provisions are accepted in the published

rule, in particular, cash deposit requirement for creditworthiness. Independent Retailers also argued that electric and telephone retail customers currently have the right to withhold disputed amounts. IOUs also pointed out that Retail Customers are currently required to establish and maintain satisfactory credit with the utility, whereas Competitive Retailers are not. IOUs also argued that the potential exposure to a utility for a Competitive Retailer's disputed amount is significantly greater than the exposure resulting from nonpayment of a disputed amount by one Retail Customer. Finally, IOUs argued that Retail Customers currently have 16 days to remit payment compared to the 35-day payment provision afforded to Competitive Retailers. Independent Retailers also argued that withholding payment will provide an incentive to a TDU to address a billing problem. IOUs argued that the requirement to pay interest on any over billed account would provide them with the same incentive. Additionally, IOUs pointed out that the Tariff requires the TDU to investigate the disputed matter and report back to the Competitive Retailer within ten days.

In the interest of encouraging retail competition in Texas, the commission modifies the Tariff to allow Competitive Retailers to pay only the undisputed portion of a bill. This arrangement is recommended in CUBR. However, the commission clarifies that a commission-approved methodology to estimate meter reads may not be disputes. The commission also requires that if the Competitive Retailer is later found to have withheld amounts properly invoiced, the Competitive Retailer will pay interest along with the principal amount withheld.

IOUs suggested that if the amount due was invoiced incorrectly, the Company shall pay interest on the amount from the date the payment was *received by the Company*, not the date the payment was *due*.

The commission agrees.

Comments on Section 4.5, Security Deposits and Creditworthiness

Comments on Section 4.5.1, Security Related to Other Delivery Charges

IOUs believed that the commission has not done enough to protect the TDUs from the risk of a defaulting REP in Substantive Rule §25.107. They claimed that the commission established financial requirements for the REPs but has not effectively provided TDUs access to the funds in case of REP default. IOUs claimed that the commission's goal to provide financial security for the TDUs can only be effectuated if the money or financial instruments required in §25.107 are pledged, secured, or held in escrow in such a way that they cannot be converted or used for any purpose other than payment of penalties to the commission or amounts owed to the TDU. They requested that the commission put escrow provisions in the rules so that the commission and TDU have access to REP financial resources in the event of REP default. Independent Retailers argued that the commission has already decided on the deposit issue in §25.107 and should not change its decision in this rule.

The commission agrees with the Independent Retailers that this issue was exhaustively discussed and debated in the rules relating to the certification of retail electric providers. The commission, in that rule, established its policy with respect to the balancing of credit risk of TDUs and the promotion of a robust retail market and sees no compelling reason to change that policy at this time.

Comments on Section 4.5.1.1, Deposit Requirements

IOUs stated that they should be able to collect a security payment (deposit) from a REP if they have defaulted in *any* TDU territory in Texas (not just their TDU territory) in the past 24 months. Independent Retailers argued that IOUs proposal will create a barrier to entry for Competitive Retailers. According to them a Competitive Retailer who has never defaulted with a TDU is of no greater or less credit risk due to its other business relationships.

The commission agrees with Independent Retailers. Default by a Competitive Retailer with respect to one TDU may not be indicative of a potential for default for all TDUs as the default could, at times, be the result of extraordinary circumstances.

Comments on Section 4.5.1.2, Size of Deposit

The IOUs proposed to clarify that TDU will be responsible for estimating annual billings and determining deposit amounts. Independent Retailers disagreed and argued that under this proposal, TDUs will have ability to create barriers to entry. Also, a TDU will not have the

information to estimate a Competitive Retailer's annual billing since it would not know the Competitive Retailer's business plan. Independent Retailers also pointed out that CUBR requires Competitive Retailers to estimate annual billing. Finally, they cited commission financing orders (that allowed for issuing triple-A rated securitization bonds) that did not allow the utilities to estimate annual billing.

The commission finds that the same procedures included in the financing orders for the establishment of deposits required for Transition Charges should be incorporated here. As such, language has been added to this section to clarify that the Competitive Retailer and TDU shall mutually agree upon the size of a required deposit. The commission fully expects that Competitive Retailers and TDUs will negotiate the size of the deposit in good faith and that the parties will utilize the dispute resolution procedures provided in the Tariff to resolve any disputes.

The Competitive Retailers requested adjustment of the size of the deposit required in the present rule to reflect cash resources that a REP maintains pursuant to commission Substantive Rule §25.107(f)(1)(A)(iii). IOUs disagreed and argued that the certification process does not require an actual deposit but merely a demonstration of financial ability in a yearly report. The funds are not pledged to a TDU.

The commission agrees with IOUs. In the REP rule it was decided that the financial resources would be available to the REP and not payable to the commission (except bonds) or TDUs. After a REP default, it would seem reasonable that any deposit would be payable to the TDU for

services rendered, and not netted against any REP financial resources that might have once existed in the past. However, because the cash resources requirement in commission Substantive Rule §107(f)(1)(A)(iii) is intended to in part address the obligations due to a TDU, the commission believes that it would be appropriate for a REP to include an unused deposit held by a TDU in its demonstration of unused cash resources for purposes of the annual demonstration of financial ability. No change to the rule is required.

Comments on Section 4.5.1.3, Form of Deposit

Independent Retailers requested expansion of the list of forms the deposits can take by adding certificates of deposit, lines of credit or other loans, shareholder or principal guaranties, or any other financial instrument approved by the commission. IOUs disagreed by pointing out that the forms of deposits included in the published proposal are consistent with the deposit requirements in the Financing Orders. The forms of deposits proposed by the Independent Retailers here would not be pledged or secured to a TDU. IOUs, however, asked for more flexibility by stating that other forms of security may be mutually agreed to by Company and Competitive Retailer.

The commission agrees with IOUs, and agrees that TDUs and Competitive Retailers may mutually agree to other forms of security, provided that such other arrangements are made available to all Competitive Retailers.

Comments on Section 4.5.1.4, Interest

Competitive Retailers demanded that TDUs pay interest on a certificate of deposit, if allowed, when it is refunded. TDUs disagreed by arguing that Competitive Retailers could be entitled to the interest paid by the bank on a certificate of deposit but a TDU should not be required to also pay interest.

The commission finds that if, consistent with the above discussion, TDUs and Competitive Retailers mutually agree to this form of security, part of that agreement should include the appropriate levels of interest, if any, to be paid by the TDU.

Comments on Section 4.6, Default and Remedies of Default

Comments on Section 4.6.1, Competitive Retailer Default

As they argued under Section 4.3.2.1, Independent Retailers pointed out that the phrase "material obligation" is unreasonably broad, allowing TDUs to hold a Competitive Retailer in default for violating trivial terms or conditions. IOUs responded by claiming that a trivial condition would not be a "material obligation" and it is this type of result that the term "material obligation" would avoid.

See the commission response to comments on Section 4.3.2.1.

Competitive Retailers claimed that a suspension by the commission should not lead to default where all rights are lost and re-qualification is required for resumption of service. Rather, a

commission suspension should merely make a Competitive Retailer ineligible for service and eligibility should resume once the suspension ends. IOUs disagreed. They argued that suspension should lead to default since that is the only avenue by which the affected Retail Customers are transferred to either another Competitive Retailer or a POLR without a "gap" in responsibility for Delivery Charges associated with these customers. They also argued that a deposit should be required of the Competitive Retailers who have been suspended before a TDU continues Delivery Service since the associated risk is higher. IOUs argued that a Competitive Retailer who is suspended should re-qualify for Delivery Service since suspension can be for a long period of time and that by that time the Competitive Retailer may not still be able to perform under the Tariff.

The commission agrees with Independent Retailers. Some of the violations for which a certificate may be suspended are not related to the performance of a REP under this Tariff. Also, the commission may suspend a REP's certificate but still require the REP to continue to serve its existing customers. In such cases, the REP will still need Delivery Service for those customers. However, to the extent a TDU brings a complaint to the commission regarding a REP's failure to abide by the Tariff, that TDU may request that the REP's customers be transferred to the POLR as part of the relief that the TDU seeks. The Tariff has been revised accordingly.

Comments on Section 4.6.2.1, Default Related to Failure to Remit Charges or Maintain Required Security

Parties expressed concern over non-specificity or shear lack of procedure for the transfer of a defaulted Competitive Retailer's Retail Customer or billing and collection to the POLR. IOUs questioned how promptly the hand over of customers from the defaulted Competitive Retailer to the POLR would happen; when the POLR would receive the names and addresses of the REPs retail customers; how soon the TDU would send invoices to the POLR; whether the Registration Agent would be involved; and how the Competitive Retailer would be responsible for the costs of the POLR billing and collection.

Independent Retailers explained that TDUs can provide the relevant customer information to the POLR. According to Entergy Texas REP, it should be recognized that it would take time to transfer the customers of a defaulting REP to a POLR or another REP. IOUs argued that transferring customers or the billing and collection responsibility was adopted by the commission in lieu of allowing TDUs to take an initial deposit and so the purpose was to shield the IOUs from financial exposure. In their view, the transfer should occur within one day so that the IOUs have minimum exposure. Otherwise, the IOUs argued, the commission should require a deposit from the Competitive Retailers.

Consumers recommended that the procedure of transferring customers to the POLR be established either in the POLR rulemaking or customer protection rules. Consumers also demanded that Retail Customers be given a choice regarding which Competitive Retailer to transfer to and be provided notice when transferred to the POLR.

Because of the potential difficulties with implementing option (5)(a), IOUs proposed to be allowed a choice between option (5)(a) and option (5)(b) in the event that Competitive Retailer does not select option (5)(c).

The commission agrees that certain customer information would need to be transferred to the POLR in order for the POLR to be able to bill Retail Customers either for the charges of a defaulting REP or to take over service of the Customers. The commission also agrees with Consumers that the Customer should be notified of the transfer to the POLR of either billing or service. The Tariff has been revised to require REPs choosing either of these options to promptly convey that information to the POLR and to provide notice to their customers. The commission further finds that having the POLR bill only for Delivery Charges while a defaulting REP bills for energy-related charges may create unneeded customer confusion. As such, the commission finds it is appropriate for the POLR to assume billing for all charges, not just Delivery Charges and make corresponding changes to the Tariff. The commission declines to adopt the IOUs proposal to give the IOU the choice of options (5)(a) and (5)(b).

Entergy Texas REP recommended either TDU compensation of the POLR for billing and collection of payments from customers of a defaulted Competitive Retailer or deletion of the requirement. IOUs disagreed that the cost of billing and collection by POLR should be collected from the TDU. Rather, they and Independent Retailers recommended that these costs be recovered in POLR rates.

The commission concludes that the POLR will be compensated for this service in accordance with the commission contract with the POLR.

Comments on 4.6.2.2, Default Related to Failure to Satisfy Obligations Under Tariff

IOUs proposed adding a remedy to apply to MOU/Coops that are in violation of a material obligation under the Tariff since de-certification will not apply to the MOU/Coops. IOUs suggested that in the situation of MOU/Coop default, TDUs will notify the commission and immediately arrange for MOU/Coop customers to be served by another Retail Electric Provider or the POLR. Entergy Texas REP recommended substituting the term "immediately" with "within a commercially reasonable time."

The commission agrees with IOUs and makes the suggested changes, with a modification to allow the TDU to request that the MOU's/Coop's customers be transferred to another retailer. This will allow the commission to determine how customers should be orderly transferred to another retailer or the POLR. The commission believes this modification addresses Entergy Texas REP's concern.

Comments on Section 4.6.2.3, Default Related to De-certification

TIEC requested that the affected Retail Customer be given at least seven days notice before arranging to transfer service to another Retailer or POLR.

The commission will consider the proper procedures for transferring customers to other REPs or the POLR on a case-by-case basis in any proceeding in which the commission decertifies a REP. No change to the Tariff is required.

Comments on Section 4.7, Measurement and Metering of Service

Independent Retailers suggested that the commission initiate a project to determine the metering requirements in a competitive retail market. IOUs agreed. But IOUs disagreed with the Independent Retailers' suggestion that the metering standards for Texas should conform to CUBR. IOUs argued that CUBR's metering section is applicable to competitive metering services, whereas in Texas, metering is still provided by a regulated monopoly.

Comments on Section 4.7.3, Reporting Measurement Data

Independent Retailers demanded that all TDUs electronically report all measurement data via a web portal since otherwise, data would be delayed and the Competitive Retailers' ability to remit charges and provide competitive services would be impaired. IOUs argued that this particular electronic data transfer mechanism (namely, web portal) has not been discussed before; it may not be feasible to have such a mechanism up and running before the market opens; web portal mechanism may not be as reliable or secure as EDI that is being developed for the Independent Organization in ERCOT; it will be a costly but redundant system; and finally, it is not as standardized as EDI. Accordingly, IOUs recommended keeping the existing language and forming an implementation task force to explore the issue.

As discussed in more detail in the discussion of Section 4.8, the commission agrees with the Competitive Retailers that it is critical that REPs timely get load and meter data. The commission notes that once a REP has a customer, it will receive monthly meter reads through the ERCOT settlements system. Language has been added to Section 4.7.1 requiring the Company to provide monthly meter reads in accordance with the protocols developed by the Independent Organization.

Comments on 4.7.5, Invoice Adjustment Due to Meter Inaccuracy

Competitive Retailers proposed that the methodology or standards for invoice correction should be specified now in the Tariff (*e.g.*, measured during the same period in the three preceding years normalized for weather). IOUs preferred the existing language. (Same issues as under Section 5.4.7)

The commission agrees with IOUs.

Comments on Section 4.8, Data Exchange

Consumers objected to the provision that allows for charges for provision of customer data since that may deter shopping by customers. IOUs pointed out that they will incur costs associated with the release of such information. They also argued that this is a rate issue and hence should be decided in the rate cases. Independent Retailers sided with Consumers and argued that TDUs

should recover their costs associated with the provision of customer data to Retail Customers through their system charges, not by assessing a separate fee, as the relevant costs are mainly system costs.

The commission agrees with Competitive Retailers and Consumers. Assessing a fee is likely to deter customers from obtaining information that would help them evaluate competitive offers. Language has been added to this section expressly prohibiting the assessment of charges for load or meter data.

Comments on Section 4.8.1, Data from Meter Reading

IOUs claimed that the only data that they should be required to make available to Competitive Retailers is the data used for their billing purposes.

The commission concludes that all data *recorded* should be made available.

The Independent Retailers asked for clarification that "make available" information, in fact, means to electronically forward it to a web portal at the same time it sends the electronic invoice. IOUs argued against a "web portal" mechanism. See IOU comments under Section 4.7.3.

The commission agrees with Independent Retailers that it is critical to the development of the competitive market that REPs receive historical load and meter data for current and prospective customers as soon as possible. If such information is available from the Independent

Organization in a timely manner, then obligation on the TDU is not needed. However, to the extent an Independent Organization is unable or unwilling to provide such data in a near real-time manner, the commission believes it is appropriate to require the TDU to do so for certain customers. As such, language has been added requiring the Company to provide 12 months of historic load and meter data to a Competitive Retailer if requested in the switch request sent to the Independent Organization. Language has also been added requiring the TDUs to set up a web portal in order for Retail Customers and their current and/or prospective REPs (with the customer's permission) to obtain historical data in a real time manner for IDR-metered customers and to provide for the confidentiality of such data through the use of customer-specific passwords, if not available from the relevant ISO. The commission believes that this function is likely to be most efficiently provided for by the Independent Organizations, and encourages market participants to encourage the development of the appropriate systems.

Comments on Section 4.8.1.1, Data Related to Interval Meters

IOUs clarified that KW or KVA information need not be calculated – as the present language implies. Rather, IOUs will obtain these data directly from interval meters. TIEC recommended including the concept of calculation of KVA demand explicitly. TIEC also suggested inclusion of definition of "KVAR" and "Reactive Power" in order to properly explain KVA billing. IOUs questioned the need for such definitions. IOUs also objected to TIEC's proposal of defining a 60 minute interval demand using 15 minute interval data since data from smaller intervals should provide more accurate information.

The commission agrees with IOUs.

Comments on Section 4.8.1.2, Data Reported by Volumetric (kWh) Meters

IOUs proposed substituting the word "available" with "applicable" since they claimed that the demand readings will be supplied for all Retail Customers taking service under Rate Schedules that are based on demand billing determinants.

Consistent with its decision for Section 4.8.1, the commission rejects IOUs' claim.

Comments on Section 4.8.1.3, Out of Cycle Meter Reads

IOUs proposed to do an out of cycle meter read within three business days, rather than the next business day, since that is consistent with the provision in Section 4.8.1.2.

The commission notes that Section 4.8.1.2 relates to a final meter read for a premise that has been disconnected. This section relates to a switch in REPs. In order to provide accurate meter reads to both the old and new REP, out-of-cycle meter reads must be done the day the switch is requested to occur. For out-of-cycle meter reads not associated with a change in REPs, the commission agrees with IOUs. Appropriate changes to the Tariff have been made.

TXU REP requested that a Competitive Retailer be charged for only those out of cycle meter reads that the Competitive Retailer requests. IOUs responded that the commission has already

decided that Retail Customers will directly contact a TDU only for Construction Services and outages, and that Competitive Retailer should be billed for all Discretionary Services except for Constructions Services, and hence should be charged for all out of cycle meter reads for its Retail Customers.

The commission agrees with IOUs.

Comments on Section 4.8.1.4, Estimated Usage

The IOUs stated that there is no field in SET transactions for a description of the reason for estimation. Therefore they proposed deleting that requirement from the rule. Independent Retailers argued that the commission should require the SET team to develop a field for this purpose. They argued that a retailer needs this information to protect its own business interests.

While the commission recognizes that Competitive Retailers may need to know the reason for estimation of usage, it also notes that the CUBR document states that the reason for estimation does not need to be provided as part of SET. Accordingly, the commission adopts the language recommended by CUBR which requires a TDU to provide the reason for estimation and the method of estimation when requested.

Comments on Section 4.8.3, Adjustments to Previously Transmitted Data

TXU REP recommended that the TDUs provide an explanation for adjustment to previously transmitted data in accordance with SET protocol. TXU REP argued that Competitive Retailers need the explanation so that they may correct other records and attempt to prevent transmission of misinformation in the future. Independent Retailers agreed.

The commission agrees with TXU REP and adds the suggested provision.

Comments on Section 4.8.4, Data Exchange Protocols

Both IOUs and TXU REP proposed deleting specific procedures to establish ESI IDs from the rule and altering the rule to reflect that procedures will be established in accordance with the ISO protocols. They were concerned that the procedures in the current rule will conflict with procedures established by the Independent Organization.

The commission agrees and makes the suggested change.

Comments on Section 4.9, Dispute Resolution Procedures

Comments on Section 4.9.1, Complaint Procedures

In order to clarify confusion regarding the deadline for the filing of complaints at the commission, IOUs recommended maintaining only the provision that will allow a complaint to

be filed with the commission 30 calendar days after the date of the initial complaint if arbitration is not chosen.

The commission agrees with the suggestion and modifies the section accordingly.

Comments on Section 4.9.2, Complaint with Regulatory Authority

TXI recommended language to ensure that this provision does not limit the authority of the commission to institute a proceeding; the right of a Retail Customer to file a complaint with the commission; the authority of the commission or a court with jurisdiction to award such remedies as are available under PURA, the commissions rules or orders; or the rights of a Retail Customer to exercise all other legal rights and remedies.

The commission declines to adopt the language proposed by TXI but, with the intent of achieving the same objective as that requested by TXI, deletes the phrase "the relevant portions of the PURA, where that right is available," and replaces it with the phrase "any applicable rules or law."

Comments on Section 4.11, Outage Reporting

IOUs made the following general observations:

(1) The introduction of Competitive Retailers as a middleman in the process of outage management will require significant modifications to an IOU's telecommunications, information technology, and outage management system.

(2) Adding a third party in the outage management process may result in increased duration of outages.

(3) IOUs would need to maintain a majority of their current call center staffing and equipment, hence the associated costs, in order to accommodate those Competitive Retailers who forward the outage calls to the TDU or have the Retail Customers call the TDU directly.

(4) IOUs recommended forming a task force to implement the outage reporting process proposed in the Tariff.

Independent Retailers pointed out that: (1) TDUs would need a call center to receive outage calls even if Competitive Retailers do not forward Retail Customers' calls, and (2) while IOUs' current call centers also field calls other than outage calls, for example, billing inquiries and customer complaints, in 2002 these calls would be redirected to the Competitive Retailers.

Comments on Section 4.11.1, Notification of Interruptions, Irregularities, and Service Repair Requests

Independent Retailers suggested that Competitive Retailers be able to select the option among the three listed on a case by case basis. IOUs disagreed by saying that this will increase TDUs' costs of operation significantly since IOUs would then need to be ready to handle any possible

choice on the part of a Competitive Retailer in a particular case. Independent Retailers also suggested changes to reflect that this section is also for service requests, not just for outages. IOUs disagreed and pointed out that for service requests not involving construction services, Retail Customers should contact its Competitive Retailer, not the TDU, since the Competitive Retailer should be the primary point of contact with the Retail Customer except for Construction Services and outage matters. Independent Retailers proposed to add that electronic communications should be through a web portal. IOUs objected. See discussion on Section 4.7.3 above. IOUs proposed that the commission form an implementation task force to resolve the outage issues. Independent Retailers recommended that the commission delete the requirement for Competitive Retailers to provide the social security number of the affected Retail Customer since it will not apply to non-residential customers.

Consumers argued that outage reporting should be part of the customer protection rule since customers need to know the roles and responsibility of various parties for outage reporting. Consumers also are concerned that a Competitive Retailer with a call center may not be able to provide enough information regarding outage and restoration to its customers unless TDUs feed them the information on a timely basis. Independent Retailers agreed that TDUs should keep the Competitive Retailers informed of the nature and duration of outages.

The commission agrees with Consumers and Independent Retailers and requires that outage reporting done under option (1) be done in a manner that does not compromise the timely restoration of service and ensures that Competitive Retailers are kept informed of restoration efforts. The commission agrees with Independent Retailers that a social security number should

not be required to be provided and has deleted this requirement. As discussed earlier, while the commission prefers that Competitive Retailers serve as the primary point of contact for Retail Customer needs, the commission agrees with Independent Retailers that having service requests from Retail Customers be call forwarded to the TDU, or having a Competitive Retailer direct the Retail Customer to call the Company (*i.e.*, through inclusion of the Company's number on a bill) is consistent with that preference and recognizes that smaller REPs may not be able to support the personnel and infrastructure to electronically convey such information. To the extent Competitive Retailers forward customer calls to the TDU, or direct Retail Customers to call the TDU directly, the commission finds that it is appropriate for these Competitive Retailers to make sufficient arrangements with the TDU regarding the Competitive Retailer's approval of any service requests for which the Competitive Retailer will be billed, in order to prevent disputes about invoices. Competitive Retailers who do not make such arrangements should be deemed to have pre-approved all service requests from Retail Customers. Modifications to this section have been made to reflect this clarification.

Comments on Section 4.11.2, Response to Reports of Interruptions and Repair Requests

The Competitive Retailers and Consumers suggested eliminating the possibility of Company charging them for an investigation if it turns out the problem is on the Customer's side of the meter. IOUs responded that this is a rate issue and should be decided in the UCOS cases. TXU REP recommended that the Company include an explanation of the condition when it notifies the Competitive Retailer that a reported problem is caused by a condition on Retail Customer's side

of the Point of Delivery. IOUs explained that TXU REP's recommendation is impossible to undertake since TDUs cannot investigate Customer's side of the meter.

The commission agrees with IOUs and believes that the appropriate level of the charge should be determined in the UCOS cases.

Comments on Chapter 5: Service Rules and Regulations Relating to the Provision of Delivery Service to Retail Customers

Comments on Section 5.1, General

Automated Energy requested that language be included in Chapter 5 to standardize Tariff structure statewide for pulse outputs, and also for installation of pulse meters. They claimed that the individual proposed utility tariffs either reflect high prices or tariff language so vague as to permit the utility to set its own price. Since pulse output from a Customer's meter can provide valuable information to a Customer to enable the Customer to really benefit from competition, Automated Energy asked for commission review of the associated TDU rates and charges for this service. IOUs responded by claiming that the rates, terms and conditions of pulse output services should be dealt with in individual rate cases since the issues involved are rate issues.

The commission agrees with Automated Energy about the importance of reasonable provision of pulse output to customers. However, the commission also agrees with IOUs that the issues of concern are rate issues and should be dealt with in UCOS cases.

Comments on Section 5.1.1, Applicability of Chapter

TIEC cited PURA §39.203(a) in support of language that would allow Retail Customers to purchase Delivery Service and, at the Retail Customer's option, be billed directly by TDUs. IOUs argued that maintaining dual billing -- namely requiring TDUs to bill either REPs or Retail Customers -- will increase TDUs' overall cost of operation and hence rates. IOUs pointed out that industrial customers have bargaining power and, therefore, will always have other options to address their concerns.

The commission has already decided this issue in Project Number 21083, *Cost Unbundling and Separation of Utility Business Activities, Including Separation of Competitive Energy Services and Distributed Generation*, where it concluded that "as a general rule, the primary point of contact for customers should be the REP, which should be the primary procurer of T&D service…. While it may be true that in some emergency situations, the customer may need to directly contact the T&D company, this is not sufficient justification for requiring a customer to contact multiple entities to resolve a problem, nor is it justification for T&D utilities to continue to maintain large and costly customer call centers and billing systems. Larger customers with unique distribution facility needs may choose to deal directly with the T&D utility on certain T&D utility service issues. Nothing in this rule should be read as precluding that contact to meet these unique distribution needs, so long as the utility observes the code of conduct and the REP is notified." (25 TexReg 720, 736). The commission believes that the proposed Tariff has accommodated the above referenced unique service needs in the second sentence of Section 5.3,

SERVICE, by using the phrase "Except as required for… other unique Delivery Service needs,…." Accordingly, no change of language in the Tariff is necessary.

Comments on Section 5.3, Service

Comments on Section 5.3.1, Initiation of Delivery Service (Service Connection)

IOUs suggested that this section should parallel sections 4.3.2.1 and 4.3.2.2. IOUs pointed out that a Retail Customer does not make the request for service initiation when existing Company facilities are used, the Competitive Retailer (via the Registration Agent) does. The IOUs also clarified that a Retail Customer can request Construction Services directly from the Company.

The commission agrees with IOUs and clarifies the Tariff accordingly. The following sections are added to this chapter: Section 5.3.1.1, Initiation of Delivery System Service Where Construction Services are not Required; Section 5.3.1.2, Initiation of Delivery System Service Where Construction Services are Required; and 5.3.2, Requests for Construction Services.

Comments on Section 5.3.2 (proposed), Changing of Designated Competitive Retailer

IOUs suggested that consistent with changes they have suggested to Section 4.3.3 (proposed) and the proposed language in Section 4.3.2.1(3), it should be made clear that the Competitive Retailer chosen by a Retail Customer must not be in default to make the customer choice

effective, and that, if authorized by the commission, Company may charge the Competitive Retailer for provision of customer information.

The commission agrees with IOUs suggestions except for the last one. The commission believes that the issue of any charge to a Competitive Retailer is more appropriately dealt with in Chapter 4 of the Tariff, where the terms and conditions of Company's Delivery Service to Competitive Retailers are discussed.

Comments on Section 5.3.3 (proposed), Switching Fees and Switchovers

IOU proposed additional language, as in Section 4.3.4 (proposed), that Company can charge any other commission-approved fee if applicable. The Competitive Retailers recommended clarification that the Company can charge a Customer to switch to a different TDU *only* when such a switchover charge is applicable.

As stated in the commission response to the comments on Section 4.3.4 (proposed), the Tariff should include a definition of Switching Fee and a prohibition on charging such fees. The commission also finds that the modification suggested by Independent Retailers is not necessary. The commission's switchover rules, together with Company's Rate Schedules, will address their concern.

Comments on Section 5.3.5 (proposed), Changes in Rate Schedules

IOUs requested allowing a change in a rate schedule to become applicable for the entire billing cycle if the request is made at least five business days before the meter reading date. The rule currently reads two business days.

The commission refuses IOUs' request for the same reasons as discussed in connection with Section 4.3.5 (proposed).

Comments on Section 5.3.6.4 (proposed), Prohibited Suspension or Disconnection

IOUs pointed out that the deferral of disconnection based on a medical emergency has no applicability to the TDU, except when the Retail Customer fails to pay charges for Discretionary Services that are billed directly to the Retail Customer by the TDU. They maintain that only the POLR has this responsibility to defer disconnection for nonpayment of all other Delivery Charges on medical grounds. The IOUs also suggested that the language in this section should exactly track the specifics of the current and the proposed customer protection rules, rather than paraphrase the language there since important terms and criteria got omitted in the process.

The commission agrees with IOUs and modifies the Tariff accordingly.

Consumers recommend changing Section 5.3.6.4(2) (proposed) to refer to the customer protection rules for the definition of "extreme weather conditions".

The commission agrees and modifies the Tariff accordingly.

Comments on Section 5.4, Electrical Installation and Responsibilities

Comments on Section 5.4.1, Retail Customer's Electrical Installation and Access

IOUs recommended clarifying that protection of a Retail Customer's own electric facilities is also the customer's responsibility. IOUs also noted that since under the commission's energy services rule a TDU cannot provide any service on a Retail Customer's side of the meter, IOU has no responsibility regarding design, installation, operation, protection, and maintenance of Retail Customer's electrical facilities.

The commission agrees and has added clarifications.

Comments on Section 5.4.2, Inspection and Approval of Retail Customer's Electrical Installation

IOUs proposed modifying the section to say that the Company can decline to interconnect with a Retail Customer's electrical installation that is known to be hazardous.

The commission concurs and modifies the section accordingly.

Comments on Section 5.4.6, Protection of Company's Facilities on Retail Customer's Premises

Independent Retailers argued that no reasonable justification exists for the current wording that requires a Retail Customer to safeguard the TDU's property, *i.e.*, no affirmative obligations should be placed on the customer, other than to not intentionally or negligently injure that property. IOUs pointed out that this is standard Tariff language that has been approved for years by the commission. They argued that the equipment is used for the Retail Customer and that the Retail Customer is in the best position to prevent unauthorized persons from damaging it.

The commission agrees with the Independent Retailers and changes the language of the Tariff to reflect that a Retail Customer does not have a duty to protect Company facilities but has a duty not to damage them. In keeping with Sections 4.2.1 and 5.2.1, however, the commission notes that a Retail Customer is subject to liability with regard to this duty not to damage if the Retail Customer is negligent himself, or is negligent with respect to controlling another person over whom the Retail Customer should reasonably have control from so damaging the Companies property located on the Retail Customer's Premises. To reflect the change with regard to Retail Customer's duty, the commission changes the title of this section.

IOUs argued that the Rate Schedules in Section 6.1 should be used to assign cost responsibility for loss or damage to Company facilities caused by Retail Customers and that the reference to Section 5.2 should be deleted.

The commission agrees with IOUs that charges for such loss or damage shall be consistent with Section 6.1, but believes that the reference to Section 5.2 is also appropriate.

Comments on Section 5.4.7, Unauthorized Use of Delivery System

IOUs proposed adding the costs associated with the investigation and correction of the unauthorized use to the list of costs to be recovered from the party responsible for the unauthorized use.

The commission concurs and adds that provision to the Tariff.

The Independent Retailers recommended a definitive estimation method for estimating unauthorized use and suggested that such estimate must be based on previous usage over the last three years normalized for weather conditions. IOUs argued that the method of determining unmeasured consumption is adequately addressed in the proposed language that reflects the existing practice and should remain flexible to account for changes in Retail Customer operation.

Independent Retailers also clarified that a Retail Customer is not responsible for tampering if it occurred before the Retail Customer owned or began using the facility. They also desired to clarify that Competitive Retailers should not be charged in this situation. IOUs claimed that the proposed Tariff language addresses Independent Retailers concerns.

The commission agrees with IOUs and maintains the proposed language.

Comments on Section 5.4.8, Admittance to Retail Customer's Premises

TIEC proposed amendments to ensure that utility personnel follow essential safety protocols when working on industrial sites. IOUs agreed so long as the safety requirements are communicated to the utility.

The commission agrees with TIEC and IOUs and makes appropriate changes to the Tariff language.

Comments on Section 5.5, Retail Customer's Electrical Load

Comments on Section 5.5.1, Load Balance

TIEC proposed deletion of the requirement that a Retail Customer's load should be in reasonable balance because the concept of reasonable balance is undefined. IOUs argued that it is impossible to have a standard definition of reasonable balance since load situations may vary. However, IOUs claimed that it is critical that Retail Customers with multi-phase loads balance them so that TDU's Delivery System is not harmed. Hence, they argued, the requirement, which is in IOUs' tariff today (*e.g.*, TXU Electric Tariff Section 4.7.2.1), should not be deleted. Good Utility Practice will be used, as is used today, to determine whether the customer load is in reasonable balance.

The commission agrees with the IOUs and keeps the proposed language unchanged.

Comments on Section 5.5.2, Intermittent Electrical Loads and Limitation on Adverse Effects

Nucor recommended additional language so that a TDU cannot unreasonably refuse service to equipment of the types described in the section. Nucor argued that the equipment is needed for commercial and industrial purposes and that Company's system and other Retail Customers are protected by the Tariff provision which requires that Retail Customers installing such equipment make specific prior arrangements. TXI also recommended changing the language and cited PURA §37.151, regarding the obligation to serve. IOUs stated that the intention is not to refuse service but to make Retail Customers aware of their obligation. They point out that Section 3.16 already provides that consent may not be unreasonably withheld.

The commission agrees with the IOUs and does not change the published language.

Nucor and TXI both recommended deletion of language in the proposed Tariff that would allow a TDU to establish Billing Demand intervals for certain customers that are different from all other customers since that would be arbitrary, discriminatory, and anticompetitive. IOUs pointed out that if the TDU does not measure the spiking load of the Retail Customer whose power consumption creates large spikes in the system and charge the Retail Customer appropriately, the rest of the customers will need to subsidize that customer. Nucor also argues that TDUs will use this provision to correct an improperly selected demand interval.

IOUs, on the other hand, proposed a language change to reflect the fact that the determination of Billing Demand for intermittent load depends on the type of equipment and usage pattern and hence does not lend itself to a standard methodology that could be approved by the commission

for generic application. Nor would it be practical for the commission to conduct separate cases for each such individual customer. A more appropriate solution, according to IOUs, is for the Company to determine the billing determinant in accordance with the Good Utility Practice which will be subject to commission review if the Retail Customer disagrees.

The commission concludes that the proposed language is adequate and addresses both TXI's and Nucor's concerns, as well as IOUs' concerns.

Independent Retailers argued that TDU should bill Retail Customer, rather than its Competitive Retailer, for correction Devices. IOUs point out that issue is already addressed in Section 5.8.2.

The commission agrees with IOUs and does not change the proposed language.

Comments on Section 5.5.3, Equipment Sensitive to Voltage and Wave Forms

The IOUs suggested adding motors to examples of electrical equipment that may be affected by fluctuations and explicitly including provision and installation of protective equipment as Retail Customer's responsibility.

The commission agrees with IOUs and makes the suggested modifications.

Comments on Section 5.5.4, Change in Retail Customer's Electrical Load

The IOUs proposed a change in language to make it explicit that the Retail Customer would pay for damage to a Company's facility resulting from the use of Delivery Service in excess of the Delivery System's maximum capacity if the Retail Customer does not give adequate notice of the load change.

The commission concludes that the appropriate standard for liability is set forth in Section 5.2, namely, but for the express limitation on liability stated therein, a party is subject to liability for its negligence or intentional misconduct to the full extent allowed by the law, and that no change to this section is necessary.

Comments on Section 5.5.5, Power Factor

IOUs proposed inclusion of a formula that needs to be used to adjust Billing Demand when a Residential Customers' Power Factor lags by more than 95% and a corrective device has not been installed.

The commission agrees with IOUs and included the formula.

Nucor recommended changing the Power Factor requirement from 95% to 90%. IOUs pointed out that commission Substantive Rules (§25.192(b)(1)(D) and §25.198(b)(5)) and proposed ERCOT ISO requirement for distribution load serving entities both require 95% Power Factor for utility's system. Therefore, IOUs argued, Retail Customers who use a utility's Delivery System should have the same requirement. In fact, IOUs proposed language would change the

requirement for Retail Customers when an Independent Organization or a governing Regional Transmission Organization (RTO) changes the Power Factor requirement for the TDU Delivery System.

The commission agrees with IOUs that 95% Power Factor standards should be maintained to support the reliable operation of the transmission and distribution network. However, it declines to incorporate IOUs' proposed language that would automatically change the Power Factor requirement for Retail Customers when the requirements of RTO or Independent Organization change. Given the fact that most Retail Customers do not directly deal with either RTOs or Independent Organizations, a more comprehensive notice like a notice for rulemaking is appropriate to institute such a change.

Comments on Section 5.6, Limitation on Use of Distribution Service

Comments on Section 5.6.3, Extension of Retail Customer's Wiring

TIEC and OxyChem argued that the requirement in this section is unreasonable. Today, plants that span public streets routinely put in their own distribution systems spanning these streets by obtaining permission and easements from the affected city or county. Utilities should not be given the power to veto this option and thereby raise the plants' cost of operation. IOUs pointed out that similar provisions already exist in IOUs current Tariffs (*e.g.*, Reliant Energy Tariff Section V, Sheet Number E1, page 3; EGSI Terms and Conditions, Sheet No. 9, No. 9; and TXU Tariff Section 4.7.1.4). The purpose is to limit a Retail Customer's ability to combine points of

delivery to avoid charges which may ultimately increase costs to others, or to bypass the utility's facilities by transporting power on its own. According to IOUs, under SB7 the TDU retains its traditional role as a regulated entity certified to serve a specific area and maintenance of the prohibition on crossing public streets is fundamental to safeguarding the public interest in this set up.

A utility does not have the ability to prevent a customer from consolidating loads on the customer property. A customer should have the same latitude to join loads on adjacent properties that are separated by public streets. Accordingly, the commission deletes the section.

Comments on Section 5.7, Facilities Extension Policy

Comments on Section 5.7.1, General

Independent Retailers suggested deletion of "Installation of standard facilities" from the list of extensions, implying that installation of standard facilities will always be without additional costs to the entity requesting such extension. IOUs disagreed since IOUs' Facilities Extension Policies -- both existing and proposed -- explicitly cover standard facilities; in other words, utilities may charge for line extension even when it involves installation of standard facilities only, if, for example, the cost of the standard facilities in a particular situation exceeds the standard allowance for the extension.

The commission agrees with the IOUs and notes that any rate issues on line extension will be dealt with in the pending UCOS cases.

Comments on Section 5.7.2, Contractual Arrangement

Consumers suggested that the Facilities Extension Agreement setting out all payment, billing and credit items for residential customers should be standardized and approved by the commission in a public process with comments from all parties. IOUs responded that standardization of Facilities Extension Agreement among all utilities involves rate issues and should be dealt with in the context of UCOS cases which will be a public process.

The commission agrees with the IOUs and defers the issue of standardization of Facilities Extension Agreement to the UCOS cases since it involves rate issues.

Comments on Section 5.7.3, Processing of Requests for Construction of Distribution Facilities

IOUs claimed that the ten-day time period allowed for preparation of an estimate of the cost of a construction project should begin upon receipt of a request containing all required detailed information regarding the project.

The commission agrees and modifies the section accordingly.

TXI requested a language change to impose limits on the Company's discretion regarding Company estimates of the time needed to meet the requests by non-residential entities by requiring that the time limit be reasonable. It also requested that commission enforcement be available when a TDU does not meet the time limit, and that such enforcement could be sought by filing a complaint. IOUs opposed TXI's proposal and pointed out that an explicit time limitation for construction for non-residential customers does not currently exist in the commission's customer protection rules because of varying and non-standard equipment requirement of non-residential customers, on the delivery of which the utility has limited control. IOUs pointed out that a Retail Customer always has the right to file a complaint with the commission if, in its opinion, the TDU has acted unreasonably.

The commission agrees with IOUs and concludes that TXI's proposed modification need not be included in the Tariff.

Comments on Section 5.7.4, Allowance for Facilities

TAB asserted that the proposed provisions of the Tariff negatively impact housing affordability by not defining the term "standard facilities" and, therefore, possibly charge the builders and developers for the costs of line extension. It advocated that the cost of line extensions be recouped over a long period of time in a TDU's rates and proposed a definition of standard residential service that would include bringing service all the way to the meter on each house according to the norm (underground or overhead facilities) in the area. IOUs argued that the definition does not reflect how standard service is defined today in the IOUs' existing tariffs and

pointed out that even under current tariffs, there may be a customer contribution associated even with standard facilities in situations where costs of standard facilities exceed the standard allowance. IOUs recommended that since definitions of "standard facilities" and "standard allowance" have significant cost impact on utilities and hence their rates, these issues should be dealt with in UCOS cases. TAB in their oral presentation in the Public Hearing also stated that the TDU should have the cost responsibility for everything on the TDU side of the customer meter and either should be prohibited from requiring the contribution of easements or should pay developers a fee for an easement. In response, IOUs maintained that all these issues should be more appropriately handled in the UCOS cases.

The commission concludes that the standard allowance currently allowed for in the integrated utilities' tariffs should be continued for the time being, unless the current tariffs calculate the standard allowance through an evaluation of the expected revenues from the customer. After the commencement of retail competition, this calculation would no longer be done on the expected bundled revenues from the customer, but instead on the expected revenues received by the TDU from the transmission and distribution rates. If such a calculation is currently prescribed by a utility's tariff, the utility, in its UCOS case, should convert this methodology to either a foot-allowance or a dollar allowance. If a utility's tariff currently prescribes a foot-allowance, dollar allowance, or other comparable method, the utility should, in its UCOS case, utilize the same method for its future transmission and distribution utility.

Comments on Section 5.7.5, Non-Standard Facilities

TXI recommended additional language to reduce Company's discretion to refuse service to non-standard facilities. IOUs argued that because of the special and unanticipated conditions inherent in the non-standard facilities, those cannot be dealt with on a standard basis but need to be handled on a case by case basis.

The commission agrees with TXI and has added the suggested language that the commission believes is broad enough to address IOUs' concern.

Comments on Section 5.7.6, Customer Requested Facility Upgrades

IOUs proposed modifying the section to reflect the fact that a Retail Customer is not always assessed a charge for facilities upgrade. They also suggested deleting the second sentence since it would require payments even when payments are not required by Company Rate Schedules.

The commission agrees and makes the suggested change.

Comments on Section 5.7.9, Dismantling of Company's Facilities

The IOUs suggested deleting the language "Company shall indemnify the Retail Customer for any such abandonment" because it is redundant and simply restates the prior clause, which makes the Company subject to liability pursuant to Section 5.2, Limits of Liability. Additionally, with regard to the issue of terminating applicable easements upon abandonment of Delivery Service facilities, they urged that "shall" terminate be changed to "may" terminate to

reflect that the terms of the easement document itself governs the termination of the easement. The Independent Retailers urged that the commission clarify that the utility bears all financial responsibility, including liability for all third party damages claims, in connection with the utility's abandoned facilities, including the duty to indemnify the customer and Premises owner for any damages and defense costs that they may incur. In reply, the IOUs reiterated the reasoning from their initial comments. The Independent Retailers, in their reply comments, argued that although the IOUs are correct that the limitation on liability for ordinary negligence does not apply in this case because such damages do not result from an outage, the commission should impose an indemnity requirement to ensure that the utility properly bears the responsibility for its abandoned facilities.

In response to the Independent Retailers' concern, the commission again notes that Sections 4.2.2 and 5.2.2 shield them from liability for any damages resulting from the TDUs' operation/maintenance of the TDUs' Delivery Facilities and, therefore, no indemnity provision is necessary. The commission also notes that in assessing a TDU's potential liability under Section 5.2.1, a Retail Customer's negligence or contributory negligence with regard to Company's abandoned facilities may be considered. Finally, for the reason stated by the IOUs, the commission adopts the IOUs' proposed change of language from "shall" to "may."

Comments on Section 5.8, Billing and Remittance

Comments on Section 5.8.2, Billing to Retail Customer by Company

IOUs pointed out that although the proposed rule refers to the customer protection rule for the relevant credit standard for Construction Services, the customer protection rule deals only with credit standards for monthly electric service and only for residential customers. Accordingly, IOUs suggested deleting the reference. IOUs also added reference to two more sections to include in the list of situations that provide for direct billing of Retail Customer by Company.

Independent Retailers suggest deleting the section defining Retail Customer to include property owners, builders, developers, contractors, or any other entity or individual making a request to the Company since the definition of Retail Customer already includes these entities.

The commission agrees with the modifications suggested by both parties and has appropriately changed the Tariff. The commission again notes that the only charge to be billed directly by the Company to Retail Customers are those authorized by this section.

Comments on Section 5.9, Default and Remedies on Default

Comments on Section 5.9.1, Company Remedies on Default by Competitive Retailer

TIEC asserted that the Retail Customer must be given adequate notice (seven days) prior to a Competitive Retailer default or the date on which the responsibilities are transferred. Consumers had a similar argument in their comments on Section 4.6.2. As they have argued under Section 4.6.2.1, IOUs responded that implementation of a remedy upon a default must be immediate. Otherwise, the total bad debt accruing to the TDU will increase dramatically.

See the commission's response to the comments on Section 4.6.

Comments on Section 5.10, Meter

Comments on Section 5.10.2, Retail Customer Responsibility and Rights

Consistent with their suggestion for Section 4.8.1, IOUs requested a change to clarify that only data used by Company for billing purposes will be made available.

Consistent with its response to IOUs comments on Section 4.8.1, the commission is not adopting this suggestion. However, the commission does modify the section to make it consistent with the duty set forth in Section 5.4.6 as discussed in that section.

In order to protect privacy of customer information in situations where a Retail Customer is served by multiple Competitive Retailers, TIEC suggested additional language to clarify that only the data approved by the Retail Customer for a particular Competitive Retailer will be released by the TDU to that Competitive Retailer. As they have commented on Section 4.3.3, IOUs point out that according to the commission's code of conduct rules, proprietary customer information may be released in certain situations without customer consent (*e.g.*, §25.272(g)(1)(C) and (D): to facilitate customer choice and to provider of last resort).

The commission agrees with TIEC that, in general, the TDU should release customer information to its designated Competitive Retailer only to the extent authorized by the Retail Customer. However, the commission also agrees with IOUs that this requirement should be subject to the limitation imposed by Applicable Legal Authorities.

Comments on Section 5.10.3, Metering of Retail Customer's Installation in Multi-Metered Buildings

IOUs recommended a language change to make it consistent with Section 5.10.2.1 and to clarify that the Meter Socket is provided by the Retail Customer.

The commission agrees with IOUs' suggestion.

Comments on Section 5.11, Retail Customer Inquiries

Comments on Section 5.11.1, Service Inquiries

IOUs suggested limiting the service inquiries to only the items explicitly listed in the section and proposed deleting the phrase "including, but not limited to." Their recommendation was based on the general principle under retail competition of minimal contact by a TDU with Retail Customers.

The commission agrees with IOUs and has made the proposed modification.

Comments on Section 5.11.3, Billing Inquiries

TIEC asserted that Retail Customers should be given the right to contact the TDU directly with regard to obtaining interval data to ensure Retail Customers' flexibility and control of its own proprietary consumption data.

The commission notes that Section 5.10.2 of the Tariff already gives a Retail Customer access to its metered data. Accordingly, no modification of the present section is necessary.

Comments on Section 5.12, Outage Reporting

Comments on Section 5.12.1, Notification of Interruptions, Irregularities, and Service Repair Requests

IOUs recommended that a Spanish language provision be included for outage reporting. They also added Retail Customer's phone number in the list of information necessary for outage management, arguing that Company needs to match Premise phone number in the Company's automated outage management system.

The commission agrees with IOUs on both issues. So far as the second issue is concerned, the commission notes that Retail Customer's phone number is included in the parallel section in Chapter 4 (viz, Section 4.11.1).

Comments on Chapter 6: Company Specific Item

IOUs suggested that this chapter should be free format since the contents will vary among companies.

The commission rejects IOUs' suggestion. One of the main purposes of having a pro-forma Tariff is to have the different IOUs Tariffs in a standardized format so that it is easy to locate a TDU's rate, terms and conditions of one particular service in a definite pre-specified section. Otherwise, it would be difficult to track different TDUs' rates, especially for a REP operating in multiple TDUs' service area

This new rule is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2001) (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. The commission also adopts this rule pursuant to PURA §39.203, which grants the commission authority to establish reasonable and comparable terms and conditions for open access on distribution facilities for all retail electric utilities offering customer choice, and comparable rates for open access for all retail electric utilities offering customer choice.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 39.104, and 39.203.

§25.214. Terms and Conditions of Retail Delivery Service Provided by Investor Owned Transmission and Distribution Utilities.

(a) **Purpose.** The purpose of this section is to implement Public Utility Regulatory Act (PURA) §39.203 as it relates to the establishment of non-discriminatory terms and conditions of retail delivery service, including delivery service to a retail customer at transmission voltage, provided by a transmission and distribution utility (TDU). A TDU shall provide retail delivery service in accordance with the terms and conditions set forth in this section to those retail customers participating in the pilot project pursuant to PURA §39.104 on and after June 1, 2001, and to all retail customers on and after January 1, 2002. By clearly stating these terms and conditions, this section seeks to facilitate competition in the sale of electricity to retail customers and to ensure reliability of the delivery systems, customer safeguards, and services.

(b) **Application**. This section, which includes the pro-forma tariff set forth in subsection (d) of this section, governs the terms and conditions of retail delivery service by all transmission and distribution utilities in Texas. The terms and conditions contained herein do not apply to the provision of transmission service by non-ERCOT utilities to retail customers.

(c) **Tariff.** Each TDU in Texas shall file with the Public Utility Commission of Texas (commission) a tariff to govern its retail delivery service using the pro-forma tariff in subsection (d) of this section. TDUs may add to or modify only Chapters 2 and 6 of the

tariff, reflecting individual utility characteristics and rates, in accordance with commission rules and procedures to change a tariff. Chapters 1, 3, 4, and 5 of the pro-forma tariff shall be used exactly as written; these chapters can be changed only through the rulemaking process. If any provision in Chapter 2 or 6 conflicts with another provision of Chapters 1, 3, 4 and5, the provision found in Chapters 1, 3, 4 and 5 shall apply, unless otherwise specified in Chapters 1, 3, 4 and 5.

(d) **Pro-forma Retail Delivery Tariff.** The commission adopts by reference the form "Tariff for Retail Delivery Service," effective date of December 13, 2000. This form is available in the commission's Central Records division and on the commission's website at www.puc.state.tx.us.

This agency hereby certifies that the rule, as adopted, 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 §25.214, relating to Terms and Conditions of Retail Delivery Service Provided by Investor Owned Transmission and Distribution Utilities, is hereby adopted with changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE 22nd DAY OF JANUARY 2001.

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