

The Public Utility Commission of Texas (commission) proposes new §25.275 relating to Code of Conduct for Municipally Owned Electric Utilities and Electric Cooperatives and Their Competitive Affiliates. The proposed new rule will implement the Public Utility Regulatory Act, Texas Utilities Code Annotated §39.157(e) (Vernon 1998, Supplement 2000) (PURA) as it relates to adopting a code of conduct for municipally owned electric utilities (MOUs) and electric cooperatives (COOPs) once they decide to implement retail choice and begin providing service outside their certificated areas. Project Number 22361 has been assigned to this proceeding.

PURA §39.157(e) directs the commission to establish a code of conduct that must be observed by COOPs and MOUs and their affiliates to protect against anticompetitive practices, and requires that the code of conduct be consistent with PURA Chapters 40 and 41 and not be more restrictive than the rules adopted for transmission and distribution utilities under PURA §39.157(d). Accordingly, the proposed section establishes broad safeguards to govern the interaction between the transmission and distribution business unit (TDBU) of a MOU or COOP and its affiliates. The proposed section sets rules and enforcement procedures to govern transactions between the TDBU and its affiliates to avoid potential anticompetitive practices such as cross-subsidization between regulated and competitive activities. The rule also establishes certain reporting requirements for MOUs and COOPs.

Although certain aspects of the proposed code of conduct are similar to §25.272 of this title (relating to Code of Conduct for Electric Utilities and Their Affiliates) which was previously adopted under PURA §39.157(d), a number of aspects necessarily differ due to the distinct nature of MOUs and COOPs. The energy services provided by MOUs are an integrated part of municipal operations, a portion of municipal utility revenues support general government, and municipal utility facilities are financed with public debt. COOPs are operated as nonprofit corporations and some debt of a COOP may be financed through arrangements with the federal government. Specifically, PURA §40.054(d) and §41.054(d) mandate that the commission make accommodations in the code of conduct for specific legal requirements imposed by state or federal law applicable to MOUs or COOPs. The governing bodies of MOUs and COOPs have sole discretion to decide if, and when, the MOU or COOP will adopt retail electric customer choice.

As part of the drafting process, commission staff conducted workshops in Austin to receive input from potentially affected persons on August 16, 2000 and October 17, 2000. Written comments from a number of interested parties were submitted in connection with both of these workshops.

The commission seeks comments on the proposed rule from interested persons. Comments should be organized in a manner consistent with the organization of the proposed rule. When commenting on specific subsections of the proposed rule, parties are encouraged to describe "best practice" examples of regulatory policies, and their rationale, that have been proposed or implemented successfully in other states already undergoing electric industry restructuring, if the parties believe that Texas would benefit

from application of the same policies. The commission is only interested in receiving "leading edge" examples that are specifically related and directly applicable to the Texas statute, rather than broad citations to other state restructuring efforts.

In addition to comments on specific subsections of the proposed rule, the commission requests that parties specifically address the following three issues which are explained in greater detail below: (1) compliance variation depending on size of the TDBU; (2) when the code of conduct becomes applicable; and (3) mandatory provision of products and services by the TDBU.

One challenge in developing a uniform code of conduct for MOUs and COOPs is the fact that public electric systems vary greatly in size. For example, in 1999 the electric system for the City of San Antonio had an annual system peak demand of 3,684 megawatts (MWs) with total annual system energy sales of 16,356,874 megawatt hours (MWh), while the City of Mason had an annual system peak demand of five MWs with total annual system energy sales of 1,450 MWh. Using alternative methods for size comparison, the largest COOP, Pedernales Electric Cooperative, served 134,943 meters with 555 employees, while Gate City Electric Cooperative served only 1,864 meters with 11 employees. Given this variation, it is critical to recognize that there is a delicate balance between the amount of regulation necessary to ensure that MOUs or COOPs do not engage in anticompetitive practices and an amount of regulation that becomes so burdensome that the MOU or COOP decides not to participate in customer choice. The decision of a MOU or COOP to not participate in customer choice is the ultimate barrier to entry for other competitors in the State. In addition, smaller MOUs or

COOPs may have limited ability to exercise potential market power. Considering these factors, the proposed rule has three levels of regulation based on the amount of metered electric energy (MWh) delivered through the TDBU's system for sale at retail and wholesale. The commission seeks specific comment on the appropriateness of this standard. Some examples of alternative methods for measuring size include number of employees, number of meters served, or the relative amount of market share as compared to other energy service providers within ERCOT or throughout the State. In addition, should the threshold at which a TDBU passes from the small to the mid-sized category be modified if there is not an adjustment for normal growth within the service area of the MOU or COOP?

The draft rule provides that the code of conduct should not apply until the MOU or COOP begins providing service outside its certificated area. However, proposed subsection (n)(1) requires the MOU or COOP to file with the commission a plan for implementing the code of conduct provisions 120 days prior to providing service outside its certificated service territory. The commission seeks comments on whether it would be appropriate to require MOUs or COOPs to adhere to an internal code of conduct during this 120-day transition period.

Finally, the commission proposes subsection (k)(2), regarding products and services available on a non-discriminatory basis. This section requires a TDBU to make available to all similarly situated entities any product or service, other than corporate support services, that it makes available to its competitive affiliate. Proposed subsection (k)(2) requires the TDBU to make the product or service available to third parties at the same price and on the same basis and manner that it was made available to the

competitive affiliate. MOUs have private use restrictions arising from the funding of facilities by tax-exempt debt, including such facilities as computer systems, vehicle and equipment fleets, warehouse facilities and other structures, and other assets that prevent the use of these facilities for the benefit of private parties. COOPs have tax restrictions on the amount of income they may earn from activities other than service to their own customers. The commission notes that both MOUs and COOPs will file tariffs concerning the terms and conditions for distribution access in accordance with proposed §25.215 of this title (relating to Terms and Conditions of Access by a Competitive Retailer to the Delivery System of a Municipally Owned Utility or Electric Cooperative that has Implemented Customer Choice). Therefore, access to the transmission and distribution systems of MOUs and COOPs will be provided on a non-discriminatory basis and in accordance with the tariffs developed pursuant to that section. The commission seeks comment on what specific products or services the TDBU might provide to its competitive affiliate, other than corporate support services, that would not be provided pursuant to a tariff. Is it appropriate to require the TDBU to provide any such non-tariffed products or services to similarly situated third parties? If non-discriminatory provision of non-tariffed services is required, should there be consideration of the size of the TDBU?

Bridget R. Headrick, Senior Policy Analyst, Policy Development Division, has determined that for each year of the first five-year period the proposed section is in effect for COOPs there will be no fiscal implications for state or local government as a result of enforcing or administering the section. For each year of the first five-year period the proposed section is in effect for MOUs, there may be fiscal implications for local government as a result of enforcing or administering the section; however, the

costs will differ from MOU to MOU and are difficult to ascertain. It is believed that the benefits accruing from implementation of the proposed section will outweigh these costs. The governing body of the MOU has the authority to determine whether or not to adopt customer choice, and at that time, can assess any negative fiscal implications for local government.

Ms. Headrick has also determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be improved regulatory oversight of MOUs and COOPs and enhanced competition in the provision of energy related services. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section.

It is anticipated that there will be economic costs to the entities required to comply with the new section as proposed. These costs may vary from entity to entity, and are difficult to ascertain. However, it is believed that the benefits accruing from implementation of the proposed section will outweigh these costs.

Ms. Headrick has also determined that for each year of the first five years the proposed section is in effect there should be no effect on a local economy, and, therefore, no local employment impact statement is required under Administrative Procedure Act §2001.022.

Comments on the proposed new rule (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Reply comments may be submitted within 45 days after publication. All comments should refer to Project Number 22361.

The commission staff will conduct a public hearing on this rulemaking pursuant to Texas Government Code §2001.029 on Monday, January 22, 2001, beginning at 9:30 a.m., in the Commissioners' Hearing Room located on the seventh floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701.

This new section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §§14.002, 39.157(e), 40.001, 40.004, 40.054, 40.056, 41.001, 41.004, 41.054, and 41.056 (Vernon 1998, Supplement 2000) (PURA). Section 14.002 provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. Section 39.157(e) requires the commission to establish a code of conduct that must be observed by COOPs and MOUs and their affiliates to protect against anticompetitive practices. Chapter 40 addresses competition for MOUs and river authorities and Chapter 41 addresses competition for COOPs. Specifically, §40.001 addresses the law applicable to MOUs. Section 40.004 gives the commission jurisdiction over MOUs for certain purposes. Section 40.054 subjects the MOU to the commission's authority in certain instances. Section 40.056 grants the commission authority over complaints for anticompetitive actions. Section 41.001 addresses the law applicable to COOPs.

Section 41.004 gives the commission jurisdiction over COOPs for certain purposes. Section 41.054 subjects the COOP to the commission's authority in certain instances. Section 41.056 grants the commission authority over complaints for anticompetitive actions.

Cross Reference to Statutes: PURA §§14.002, 39.157(e), 40.001, 40.004, 40.054, 40.056, 41.001, 41.004, 41.054, and 41.056.

§25.275. Code of Conduct for Municipally Owned Utilities and Electric Cooperatives and Their Competitive Affiliates.

(a) **Purpose.** The provisions of this section establish safeguards to govern the interaction between the transmission and distribution business unit (TDBU), as defined in subsection (c)(14) of this section, of a municipally owned utility (MOU) or electric cooperative (COOP) and its competitive affiliates to protect against anticompetitive practices, consistent with the provisions of the Public Utility Regulatory Act (PURA) §39.157(e) and Chapters 40 and 41.

(b) **Application.**

(1) **General application.** This section applies to the TDBU of a municipally owned utility or an electric cooperative (collectively referred to as MOU/COOP) operating in the State of Texas, and the transactions or activities between the TDBU and its competitive affiliates provided that each of the following conditions is met:

(A) The MOU/COOP has chosen to participate in customer choice pursuant to PURA §40.051(b) or PURA §41.051(b).

(B) The competitive affiliate of a MOU/COOP is providing electric energy at retail to consumers in Texas outside its TDBU's certificated retail service area. For the purposes of this section, a MOU/COOP shall not be considered to be

providing electric energy to retail consumers outside its certificated retail service area if:

- (i) the MOU/COOP was serving the area prior to September 1, 1999;
- (ii) after receiving notice that the MOU/COOP is selling electric energy at retail outside its retail service area, which identifies the service location, the MOU/COOP promptly investigates and thereafter takes reasonable steps to cease the provision of service outside its service area as soon as reasonably practicable; or
- (iii) there is a dispute concerning the service area boundary and no commission order resolving the dispute has become final or the commission's order is subject to appeal.

- (2) **Small TDBU.** A small TDBU is subject to the following provisions of this section only:
- (A) paragraphs (1) and (4)-(8) of this subsection, application;
 - (B) subsection (i)(4) of this section, separate books and records;
 - (C) subsection (j)(1) of this section, transactions with competitive affiliates; however, transactions provided for under subsection (j)(1) of this section shall be conducted at pricing levels that are fair and reasonable to the customers of the small TDBU and that reflect not less than the book value of the assets and the cost of employee time determined on the basis of aggregate percentage of time devoted by the employee to the competitive function or transmission and

distribution function and do not include any discounts, rebates, fee waivers or alternative tariff terms and conditions;

(D) subsection (k)(1) of this section, tying arrangements prohibited;

(E) subsection (k)(2) of this section, products and services available on a non-discriminatory basis; and

(F) subsection (n) of this section, remedies and enforcement.

(3) **Mid-size TDBU.** A mid-size TDBU is subject to the following provisions of this section only:

(A) paragraphs (1) and (4)-(8) of this subsection, application;

(B) subsection (d) of this section, annual report of code-related activities; however, a mid-size TDBU shall report only with respect to the activities for which it is subject to regulation under this section, including copies of policies implementing subsection (m)(3) of this section, requests for specific competitive affiliate information;

(C) subsection (e) of this section, copies of contracts or agreements;

(D) subsection (g) of this section, reporting deviations from the code of conduct; however, a mid-sized TDBU shall only report deviations with respect to the activities for which it is subject to regulation under this section;

(E) subsection (i) of this section, separation of a TDBU from its competitive affiliates; however, sharing of employees, facilities, or other resources with competitive affiliates shall be allowed, and the safeguards shall be deemed

achieved through compliance with the transactional, information transfer, and marketing and advertising standards applicable to a mid-size TDBU under subsections (j), (k), and (l) of this section;

- (F) subsection (j)(1) of this section, transactions with competitive affiliates; however, transactions provided for under subsection (j)(1) of this section shall be conducted at pricing levels that are fair and reasonable to the customers of the mid-size TDBU and that reflect not less than the book value of the assets and the cost of employee time determined on the basis of aggregate percentage of time devoted by the employee to the competitive function or transmission and distribution function and do not include any discounts, rebates, fee waivers or alternative tariff terms and conditions;
- (G) subsection (j)(2) of this section, records of transactions;
- (H) subsection (k)(1) of this section, tying arrangements prohibited;
- (I) subsection (k)(2) of this section, products and services available on a non-discriminatory basis;
- (J) subsection (l)(1) of this section, proprietary customer information; however, with respect to subsection (l)(2) of this section, nondiscriminatory availability of aggregate customer information, a mid-size TDBU shall make aggregate customer information available to all non-affiliates under the same terms and conditions and at the same price or fully allocated cost that it is made available to any of its competitive affiliates, but is not otherwise subject to subsection

(l)(2) of this section. With respect to subsection (l)(3) of this section, no preferential access to transmission and distribution information, a mid-size TDBU shall comply with this paragraph except to the extent preferential access may not practicably be avoided due to cross-functional responsibilities of employees or other operating constraints as reasonably determined by the mid-size TDBU;

(K) instead of the restrictions in subsection (m)(2) of this section, a mid-sized TDBU may participate in joint marketing, advertising, and promotional activities with a competitive affiliate, provided that the mid-size TDBU informs the customer that the competitive energy services to which the promotional activities are directed are available from other providers as well as the mid-size TDBU and makes available to the customer upon request a copy of the most recent list of competitive energy service providers as developed and maintained by the commission;

(L) instead of the restrictions in subsections (m)(3) and (m)(4) of this section, if a customer or potential customer of a mid-size TDBU makes an unsolicited request for distribution service, competitive service, or information relating to such services, the mid-size TDBU shall inform the customer that competitive energy services are available not only from the mid-size TDBU but also from other providers. The mid-size TDBU shall make available to a customer upon request a copy of the most recent list of competitive energy service providers as

developed and maintained by the commission and may make available telephone numbers and other commonly available information; and

(M) subsection (n) of this section, remedies and enforcement.

(4) **Duration of code application.** This section applies to a TDBU, regardless of whether it is classified as large, mid-size or small, only so long as each of the conditions of paragraph (1) of this subsection continue to be met.

(5) **Report of energy system sales and declaration of code applicability.** A report of total metered electric energy (MWh) delivered through the TDBU's system for sale at retail and wholesale, for the average of the three most recent calendar years shall be filed annually with the commission by each MOU/COOP subject to the provisions of this section. The initial report shall be filed in conjunction with subsection (n)(1) of this section. After the initial report filing, the report of energy system sales shall be filed annually by June 1, and shall encompass the period from January 1 through December 31 of the preceding year. The annual report of energy system sales shall be filed under a control number designated by the commission for each calendar year. Both the initial and annual reports of energy sales shall include a statement from the MOU/COOP affirming that it is classified as either a small, mid-size, or large TDBU.

(A) In the event that the MWhs delivered through the TDBU's system increase so that a TDBU is reclassified to a larger size, the TDBU shall notify the commission through the annual report of energy system sales. The TDBU shall

have six months from the date of the reclassification to implement the applicable provisions of this section.

(B) Petition for exception to reclassification. Any TDBU may petition the commission for exception to the size determination. Upon request, if a small TDBU is reclassified as a mid-sized TDBU, the commission may consider an adjustment for growth based upon total Texas retail sales.

- (6) **No circumvention of the code of conduct.** A MOU/COOP shall not circumvent the provisions of PURA §39.157(e) or this section by using any affiliate to provide information, services, products, or subsidies that would be prohibited by this section between a competitive affiliate and a TDBU.
- (7) **Good cause exception.** A MOU/COOP that is or may become subject to this section may petition the commission at any time for an exception or waiver of any provision of this section on a showing of good cause. Good cause may be demonstrated by showing that the cost or difficulty of achieving compliance outweighs the benefit to be achieved or that there are other alternative actions that are likely to produce reasonable results under the circumstances.
- (8) **Notice of conflict with other regulation and petition for waiver.** Nothing in this section shall affect or modify the obligation or duties relating to any rules or standards of conduct that may apply to a MOU/COOP or its affiliates, whether competitive or noncompetitive, under orders or regulations of the Federal Energy Regulatory Commission (FERC), Securities and Exchange Commission (SEC), or shall violate

PURA, Chapters 40 and 41, subchapter C. A MOU/COOP shall file with the commission a notice of any provision in this section that conflicts with FERC or SEC orders or regulations. A MOU/COOP that is subject to statutes or regulations in any state that conflict with a provision of this section may petition the commission for a waiver of the conflicting provision on a showing of good cause.

(c) **Definitions.** The following words and terms when used in this section shall have the following meanings unless the context clearly indicates otherwise:

(1) **Affiliate** — An entity, including a business unit or division, that controls, is controlled by, or is under common control with, a MOU/COOP. Control means the power and authority to direct the management or policies of an entity through directly or indirectly owning or holding at least a 5.0% voting or ownership interest. Affiliate includes an entity determined to be an affiliate by the commission after notice and hearing based on criteria parallel to those prescribed in PURA §11.006.

(2) **Competitive affiliate** — An affiliate of a MOU/COOP that provides services or sells products at retail in a competitive energy-related market in this state, including telecommunications services to the extent those services are energy-related. An affiliate of a MOU/COOP that is selling energy only in the capacity of a provider of last resort within the scope of PURA §40.053(c) and (d) or PURA §41.053 (c) and (d) is not a competitive affiliate under this definition. The term competitive affiliate shall include both competitive divisions and competitive subsidiaries.

- (3) **Competitive division (CD)** — A competitive affiliate that is organized as a division or other part of a MOU/COOP.
- (4) **Competitive subsidiary (CS)** — A competitive affiliate that is organized as a corporation or other legally distinct entity.
- (5) **Confidential information** — Any information not intended for public disclosure and considered to be confidential or proprietary by persons privy to such information. Confidential information includes, but is not limited to, information relating to the interconnection of customers to a MOU/COOP's transmission or distribution systems, proprietary customer information, trade secrets, competitive information relating to internal manufacturing processes, and information about a MOU/COOP's transmission or distribution system, operations, or plans for expansion.
- (6) **Corporate support services** — Services shared by a MOU/COOP, a MOU/COOP TDBU, or by an affiliate created to perform corporate support services, with the MOU/COOP's affiliates of joint corporate oversight, governance, support systems, and personnel.
 - (A) Examples of services that may be shared, to the extent the services comply with this section, include human resources, procurement, information technology, regulatory services, administrative services, real estate services, legal services, accounting, environmental services, research and development unrelated to marketing activity and/or business development for the competitive affiliate regarding its services and products, internal audit, community relations,

corporate communications, financial services, financial planning and management support, corporate services, corporate secretary, lobbying, corporate planning, and community economic development if the economic development activities are within the MOU/COOP's certificated retail service area.

- (B) Examples of services that may not be shared, except as otherwise allowed under the terms of this section, include engineering, purchasing of electric transmission facilities and service, transmission and distribution system operations, and marketing.
- (7) **Fully allocated cost** — The cost of a product, service, or asset based on book values for the component elements established through regularly accepted accounting principles; or alternatively, an internal transfer price based upon the actual or expected (budgeted) operating and maintenance expenses and a capital component, as appropriate, divided by the expected or actual units for the service or product produced. Such transfer prices may be set as needed, but shall not be used beyond a three year period without review. The operating and maintenance expenses shall be fully loaded with applicable overheads. The capital component shall consider the original cost of the associated assets, and a reasonable return. Such internal prices may include an allowance for transfers to a municipal general fund at the discretion of the municipality.
- (8) **Large transmission and distribution business unit (TDBU)** — A TDBU that:

- (A) delivers total metered electric energy through its system for sale at retail and wholesale for the average of the three most recent calendar years greater than 6,000,000 MWh; and
 - (B) is otherwise subject to the provisions of this section as provided in subsection (b)(1) of this section.
- (9) **Mid-size transmission and distribution business unit (TDBU)** — A TDBU that:
 - (A) delivers total metered electric energy through its system for sale at retail and wholesale for the average of the three most recent calendar years that is less than or equal to 6,000,000 MWh and is greater than 500,000 MWh; and
 - (B) is otherwise subject to the provisions of this section as provided in subsection (b)(1) and (b)(3) of this section.
- (10) **Municipally owned utility/electric cooperative (MOU/COOP)** — A municipally owned utility (MOU) as defined in PURA §11.003(11) and an electric cooperative (COOP) as defined in PURA §11.003(9). As used in this section, MOU/COOP does not include a competitive affiliate but does include a MOU, COOP, or river authority that controls a TDBU that is a division or part of the MOU/COOP.
- (11) **Proprietary customer information** — Any information compiled by a TDBU on a customer in the normal course of providing electric service that makes possible the identification of any individual customer by matching such information with the customer's name, address, account number, type or classification of service, historical electricity usage, expected patterns of use, types of facilities used in providing service,

individual contract terms and conditions, price, current charges, billing records, or any other information that the customer has expressly requested not be disclosed. Information that is redacted or organized in such a way as to make it impossible to identify the customer to whom the information relates does not constitute proprietary customer information.

- (12) **Small transmission and distribution business unit (TDBU)** — A TDBU that:
- (A) delivers total metered electric energy through its system for sale at retail and wholesale for the average of the three most recent calendar years that is less than 500,000 MWh; and
 - (B) is otherwise subject to the provisions of this section as provided in subsection (b)(1) and (b)(2) of this section.
- (13) **Transaction** — Any interaction between a TDBU and its competitive affiliates in which a service, good, asset, product, property, right, or other item is transferred or received by either the TDBU or its competitive affiliates.
- (14) **Transmission and distribution business unit (TDBU)** — The business unit of a MOU/COOP, whether structurally unbundled as a separate legal entity or functionally unbundled as a division, that owns or operates for compensation in this state equipment or facilities to transmit or distribute electricity, except for facilities necessary to interconnect a generation facility with the transmission or distribution network, a facility not dedicated to public use, or a facility otherwise excluded from the definition of electric utility in a qualifying power region certified under PURA §39.152. TDBU does

not include a MOU/COOP that owns, controls, or is an affiliate of the TDBU, if the TDBU is organized as a separate corporation or other legally distinct entity. A TDBU shall not provide competitive energy services.

- (d) **Annual report of code-related activities.** A report of activities related to this section shall be filed annually with the commission. Using forms approved by the commission, a TDBU shall report activities among itself and its competitive affiliates in accordance with the requirements of this section. The report shall be filed by June 1, and shall encompass the period from January 1 through December 31 of the preceding year during which the MOU/COOP was subject to this section.
- (e) **Copies of contracts or agreements.** A TDBU shall reduce to writing and file with the commission copies of any contracts or agreements it has with its competitive affiliates. The filing of an earnings report does not satisfy the requirements of this section. All contracts or agreements shall be filed by June 1 of each year as attachments to the annual report of code-related activities required in subsection (d) of this section. In subsequent years, if no significant changes have been made to the contract or agreement, an amendment sheet may be filed in lieu of refileing the entire contract or agreement.
- (f) **Tracking migration of employees.** A MOU/COOP shall track and document the movement between the TDBU and its competitive affiliates of all employees engaged in transmission or

distribution system operations, including persons employed by the MOU/COOP who are engaged in transmission or distribution system operations on a day-to-day basis or have knowledge of transmission or distribution system operations. Employee migration information shall be included in the MOU/COOP's annual report of code-related activities. The tracking information shall include an identification code for the migrating employee, the respective titles held while employed at the TDBU and the competitive affiliate, and the effective dates of the migration.

- (g) **Reporting deviations from the code of conduct.** A TDBU shall report information regarding the instances in which deviations from this section were necessary to ensure public safety or system reliability pursuant to this section. The information reported shall include the nature of the circumstances involved, and the date of the deviation. Within 30 days of each deviation relating to a competitive affiliate, the MOU/COOP shall report this information to the commission and shall conspicuously post the information on its Internet site or a public electronic bulletin board for 30 consecutive calendar days. Information regarding a deviation shall be summarized in the MOU/COOP's annual report of code-related activities.
- (h) **Ensuring compliance for new competitive affiliates.** A MOU/COOP and a new competitive affiliate are bound by this code of conduct, to the extent applicable, immediately upon creation of the new competitive affiliate. The MOU/COOP shall post a conspicuous notice of any newly created competitive affiliates on its Internet site or a public electronic bulletin

board for 30 consecutive calendar days. Additionally, the MOU/COOP shall ensure that its annual report of code-related activities reflects all changes that result from the creation of new competitive affiliates.

(i) **Separation of a TDBU from its competitive affiliates.**

(1) **Sharing of employees, officers and directors, property, equipment, computer and information systems, other resources, and corporate support services.** A MOU/COOP and its competitive affiliate may share common employees, officers and trustees/directors, property, equipment, computer and information systems, other resources, and corporate support services, if the TDBU implements safeguards that the commission determines are adequate to preclude employees of a competitive affiliate from gaining access to confidential information in a manner that would allow or provide a means to transfer confidential information from the TDBU to the competitive affiliate, create an opportunity for preferential treatment or unfair competitive advantage, lead to customer confusion, or create significant opportunities for cross-subsidization of a competitive affiliate.

(2) **Employee transfers and temporary assignments.**

(A) A MOU/COOP shall not assign for less than one year employees engaged in transmission or distribution system operations to a competitive affiliate unless safeguards are in place to prevent transfer of confidential information. TDBU employees engaged in transmission or distribution system operations, including

persons employed by a structurally unbundled service company affiliate of the TDBU who are engaged on a day-to-day basis in or have knowledge of transmission or distribution system operations, and are transferred to a competitive affiliate shall not remove or otherwise provide or use confidential information or information gained from the TDBU or affiliated service company in a discriminatory or exclusive fashion, to the benefit of the competitive affiliate or to the detriment of non-affiliated electric suppliers.

- (B) Movement of employees to a competitive affiliate may be accomplished through either the employee's termination of employment with the TDBU and acceptance of employment with the CS, or a transfer to the CD as long as the transfer results in the TDBU bearing no ongoing costs associated with that employee.
- (C) Transferring employees shall sign a statement indicating that they are aware of and understand the restrictions set forth in this section. The TDBU also shall post a conspicuous notice of such a transfer on its Internet site or other public electronic bulletin board within 24 hours and for at least 30 consecutive calendar days.
- (D) Employees may be temporarily assigned to an affiliate or non-affiliated TDBU to assist in restoring power in the event of a major service interruption or assist in resolving emergency situations affecting system reliability. Any such deviation shall be reported and posted on the TDBU's Internet site or other public

electronic bulletin board within 24 hours and for at least 30 consecutive calendar days.

- (3) **Sharing of office space.** A TDBU's office space shall be physically separate from the office space of competitive affiliates. Physical separation is accomplished by having office space in separate buildings or, if within the same building, by a method such as having offices on separate floors or with separate access.
- (4) **Separate books and records.** A TDBU shall maintain separate books of accounts and records from those of any CS. In a proceeding under subsection (n)(3) of this section, filing a complaint, the commission may review records relating to a transaction between a TDBU and a CS. Costs of CDs, other than those costs related to corporate support services, shall be segregated by account.
 - (A) In accordance with generally accepted accounting principles, a TDBU shall record all transactions with its CS whether they involve direct or indirect expenses, and all transactions with CDs that relate to the transmission and distribution function.
 - (B) A TDBU shall prepare financial statements that are not consolidated with those of a CS.
- (5) **Limitations on credit support by a TDBU for a competitive affiliate.** A TDBU and its affiliates may share credit, investment, or financing arrangements with a competitive affiliate if the TDBU implements adequate safeguards precluding employees of a competitive affiliate from gaining access to information in a manner that would allow

or provide a means to transfer confidential information from the TDBU to the competitive affiliate or lead to customer confusion. Nothing in this section shall impair the existing contracts, covenants, or obligations between a MOU/COOP and its lenders and holders of bonds issued on behalf of or by a MOU/COOP.

- (A) **MOU.** In issuing debt related to competitive affiliates, a MOU shall be governed by and maintained, operated, and managed in accordance with the laws of the State of Texas, including the ordinances and resolutions authorizing the issuance of any form of indebtedness and the provisions thereof, which require that funds reasonably necessary for operation and maintenance expenses (including TDBU operation and maintenance expenses) have priority in any pledge of gross revenues of the municipally owned utility system.
- (B) **COOP.** A COOP TDBU shall not allow a competitive affiliate to obtain credit under any arrangement that would include a specific pledge of assets reasonably necessary for TDBU operations or a pledge of gross revenues of the TDBU.

(j) **Transactions between a TDBU and its competitive affiliates.**

- (1) **Transactions with competitive affiliates.** Except for transfers implementing unbundling, transfers of property pursuant to a rate order having the effect of a financing order, credit support, and corporate support services provided by a TDBU to its competitive affiliate, any transaction between a TDBU and its competitive affiliate shall be accomplished at pricing levels that are fair and reasonable to the customers of the

TDBU and that reflect the approximate market value of the assets or the fully allocated cost of the assets, service or product, and that do not include any preferential discounts, rebates, fee waivers or alternative tariff terms and conditions. Such transfers include, but are not limited to, the following:

- (A) sale or provision of products or services by a TDBU to its competitive affiliate;
- (B) purchase or acquisition of products, services, or assets by a TDBU from a competitive affiliate; or
- (C) assets transferred from a TDBU to a competitive affiliate.

(2) **Records of transactions.** Each transaction between a TDBU and its competitive affiliates, other than those involving corporate support services or transactions governed by tariffs of general applicability filed at the commission or approved by the TDBU's governing body, shall be reflected in a contemporaneous written record of the transaction including the date of the transaction, name of the competitive affiliate, name of a TDBU employee knowledgeable about the transaction, and description of the transaction. Such records shall be maintained for three years.

(3) **Provision of corporate support services.** Provisions of corporate support services by a TDBU to its competitive affiliate shall be carried out in such a way as to not allow or provide the means for the transfer of confidential information from the TDBU to the competitive affiliate, the opportunity for preferential treatment or unfair competitive advantage, customer confusion, or significant opportunities for cross-subsidization of the competitive affiliate.

(k) **Safeguards relating to provision of products and services.**

(1) **Tying arrangements prohibited.** A TDBU shall not condition the provision of any product, service, pricing benefit, or alternative terms or conditions upon the purchase of any other good or service from the TDBU or its competitive affiliate.

(2) **Products and services available on a non-discriminatory basis.** Any product or service, other than corporate support services, made available by a TDBU to its competitive affiliate shall be made available to all similarly situated entities at the same price and on the same basis and manner that the product or service was made available to the competitive affiliate. Any service required to be provided in compliance with §25.215 of this title (relating to Terms and Conditions of Access by a Competitive Retailer to the Delivery System of a Municipally Owned Utility or Electric Cooperative that has Implemented Customer Choice) shall be provided in a non-discriminatory manner and in accordance with the tariffs developed pursuant to that section.

(l) **Information safeguards.**

(1) **Proprietary customer information.** A TDBU shall provide a customer with the customer's proprietary customer information, upon request by the customer. Unless a TDBU obtains prior affirmative written consent or other verifiable authorization from the customer as determined by the commission, or unless otherwise permitted under this subsection, it shall not release any proprietary customer information to a competitive

affiliate or to any other entity, other than the customer, an independent organization as defined by PURA §39.151, or a provider of corporate support services for the sole purpose of providing corporate support services in accordance with subsection (j)(3) of this section. The TDBU shall maintain records that include the date, time, and nature of information released when it releases customer proprietary information to another entity in accordance with this paragraph. The TDBU shall maintain records of such information for a minimum of three years, and shall make the records available for third party review within three business days of a written request, or at a time mutually agreeable to the TDBU and the third party. When the third party requesting review of the records is not the customer, commission, or Office of Public Utility Counsel, the records may be redacted in such a way as to protect the customer's identity. If proprietary customer information is released to an independent organization or a provider of corporate support services, the independent organization or entity providing corporate support services is subject to the rules in this subsection with respect to releasing the information to other persons.

- (A) **Exception for law, regulation, or legal process.** A TDBU may release proprietary customer information to another entity without customer authorization where authorized or requested to do so by the commission or by law, regulation, or legal process. Nothing in this rule requires disclosure of information that may be withheld from disclosure under Texas Government Code, Chapter 552.

- (B) **Exception for release to governmental entity.** A TDBU may release proprietary customer information without customer authorization to a federal, state, or local governmental entity or in connection with a court or administrative proceeding involving the customer or the TDBU; provided, however, that the TDBU shall take all reasonable actions to protect the confidentiality of such information, including, but not limited to, providing such information under a confidentiality agreement or protective order, and shall also promptly notify the affected customer in writing that such information has been requested.
- (C) **Exception to facilitate transition to customer choice.** In order to facilitate the transition to customer choice, a MOU/COOP may release proprietary customer information to its competitive affiliate, where either entity will be exercising the function of retail electric provider or provider of last resort, without authorization of those customers, provided that such information may be released only during the six-month period prior to implementation of customer choice, during the six-month period prior to implementation or expansion of a pilot project, or such additional periods as may be prescribed by the commission.
- (D) **Exception for release to providers of last resort.** On or after January 1, 2002, a TDBU may provide proprietary customer information to a provider of last resort without customer authorization for the purpose of serving customers who have been switched to the provider of last resort.

(E) **Exception for release to customer's selected competitive retailer.** A TDBU shall release proprietary customer information for a particular customer to the competitive retailer chosen by that customer, subject to demonstration by the competitive retailer that the customer has selected that competitive retailer, in connection with provision of metering data or otherwise in compliance with the Access Tariff applicable to the TDBU under §25.215 of this title.

(2) **Nondiscriminatory availability of aggregate customer information.** A TDBU may aggregate non-proprietary customer information, including, but not limited to, information about a TDBU's energy-related goods or services. However, except in circumstances solely involving the provision of corporate support services in accordance with subsection (j)(3) of this section, a TDBU shall aggregate non-proprietary customer information for a competitive affiliate only if the TDBU makes such aggregation service available to all non-affiliates under the same terms and conditions and at the same price or fully allocated cost as it is made available to any of its competitive affiliates. In addition, no later than 24 hours prior to a TDBU's provision to its competitive affiliate of aggregate customer information, the TDBU shall post a conspicuous notice on its Internet site or other public electronic bulletin board for at least 30 consecutive calendar days, providing the following information: the name of the competitive affiliate to which the information will be provided, the rate charged or cost allocated for the information, a meaningful description of the information provided, and the procedures by which non-affiliates may obtain the same information under the terms and conditions. The TDBU

shall maintain records of such disclosure information for a minimum of three years, and shall make such records available for third party review within three business days of a written request, or at a time mutually agreeable to the TDBU and the third party.

- (3) **No preferential access to transmission and distribution information.** A TDBU shall not allow preferential access by its competitive affiliates to information about its transmission and distribution systems.
 - (4) **Other limitations on information disclosure.** Nothing in this rule is intended to alter the specific limitations on disclosure of confidential information in the Texas Utilities Code, the Texas Government Code, Chapter 552, or the commission's substantive and procedural rules.
 - (5) **Other information.** Except as otherwise allowed in this subsection, a utility shall not share information, except for information required to perform allowed corporate support services, with competitive affiliates unless the utility can prove to the commission that the sharing will not compromise the public interest prior to any such sharing. Information that is publicly available, or that is unrelated in any way to utility activities, may be shared.
- (m) **Safeguards relating to joint marketing and advertising.**
- (1) **Name and logo.** A TDBU may not, prior to September 1, 2005, allow the use of its corporate trademark, name, brand, or logo by a CS on employee business cards or in any written or auditory advertisements of specific services to existing or potential

residential or small commercial customers located within the TDBU's certificated service area, whether through radio or television, Internet-based, or other electronic format accessible to the public, unless the CS includes a disclaimer with its use of the TDBU's corporate trademark, name, brand, or logo. Such disclaimer of the corporate trademark, name, brand, or logo in the material distributed must be written in a bold and conspicuous manner or clearly audible, as appropriate for the communication medium, and shall state the following: "{Name of CS} is not the same entity as {name of TDBU} and you do not have to buy {name of CS}'s products to continue to receive quality services from {name of TDBU}." A TDBU may allow the use of its corporate name, brand, or logo by a CD in any context.

(2) **Joint marketing, advertising, and promotional activities.**

(A) A TDBU shall not:

- (i) provide or acquire leads on behalf of its competitive affiliates;
- (ii) solicit business or acquire information on behalf of its competitive affiliates;
- (iii) give the appearance of speaking or acting on behalf of any of its competitive affiliates in connection with any marketing, advertising or promotional activities, other than community economic development activities;
- (iv) share market analysis reports or other types of proprietary or non-publicly available reports relating to retail energy sales, including, but not

- limited to, market forecast, planning, or strategic reports with its competitive affiliates; or
- (v) request authorization from its customers to pass on information exclusively to its competitive affiliate.
- (B) A TDBU shall not engage in joint marketing, advertising, or promotional activities of its products or services with those of a competitive affiliate in a manner that favors the competitive affiliate. Such joint marketing, advertising, or promotional activities include, but are not limited to, the following activities:
- (i) acting or appearing to act on behalf of a competitive affiliate in any communications and contacts with any existing or potential customers;
 - (ii) joint sales calls;
 - (iii) joint proposals, either as requests for proposals or responses to requests for proposals;
 - (iv) joint promotional communications or correspondence, except that a TDBU may allow a competitive affiliate access to customer bill advertising inserts so long as access to such inserts is made available on the same terms and conditions to non-affiliates offering similar services as the competitive affiliate that uses bill inserts;
 - (v) joint presentations at trade shows, conferences, or other marketing events within the state of Texas; and

- (vi) providing links from a TDBU's Internet web site to a competitive affiliate's Internet web site.
 - (C) At a customer's unsolicited request, a TDBU may participate in meetings with a competitive affiliate to discuss technical or operational subjects regarding the TDBU's provision of transmission or distribution services to the customer, but only in the same manner and to the same extent the TDBU participates in such meetings with unaffiliated electric or energy services suppliers and their customers. Representatives of a TDBU may be present during a sales discussion between a customer and the TDBU's competitive affiliate, but shall not participate in the discussion or purport to act on behalf of the competitive affiliate.
- (3) **Requests for specific competitive affiliate information.** If a customer or potential customer makes an unsolicited request to a TDBU for information specifically about any of its competitive affiliates, the TDBU may refer the customer or potential customer to the competitive affiliate for more information. Under this paragraph, the only information that a TDBU may provide to the customer or potential customer is the competitive affiliate's address and telephone number. The TDBU shall not transfer the customer directly to the competitive affiliate's customer service office via telephone or provide any other electronic link whereby the customer could contact the competitive affiliate through the TDBU. When providing the customer or potential customer information about the competitive affiliate, the TDBU shall not promote its competitive

affiliate or its competitive affiliate's products or services, nor shall it offer the customer or potential customer any opinion regarding the service of the competitive affiliate or any other service provider.

- (4) **Requests for general information about products or services offered by competitive affiliates and their competitors.** If a customer or potential customer requests general information from a TDBU about products or services provided by its competitive affiliate or the competitors of its CS or CD, the TDBU shall not promote its competitive affiliate or its competitive affiliate's products or services, nor shall the TDBU offer the customer or potential customer any opinion regarding the service of the competitive affiliate or any other service provider. The TDBU may direct the customer or potential customer to a telephone directory or to the commission, or provide the customer with a recent list of suppliers developed and maintained by the commission, but the TDBU may not refer the customer or potential customer to the competitive affiliate except as provided for in paragraph (3) of this subsection.

(n) **Remedies and enforcement.**

(1) **Code implementation filing.**

- (A) Not later than 120 days prior to the implementation of customer choice by a MOU/COOP, a TDBU shall file with the commission its plan for implementing the provisions of this section, addressing all applicable requirements of this section in the context of its operations as they will be conducted in the

competitive retail market. The TDBU shall post notice of its filing on its Internet site or a public electronic bulletin board for 30 consecutive days and shall provide copies of the filing to requesting parties. Interested parties may file comments on the filing with the commission within 30 days following the filing and shall provide copies of such comments to the TDBU. Commission staff shall review the code implementation filing, and provide to the TDBU its comments and recommendations as to any suggested changes in the filing within 60 days following the date of the filing. The TDBU may amend its initial filing based on the comments and recommendations and shall file any such amendments not later than 75 days following the date of the initial filing. The filing provided for in this paragraph is not subject to the contested hearings process, except upon complaint by an interested party or the commission staff.

- (B) In lieu of the implementation filing provided for in subparagraph (A) of this paragraph, a MOU/COOP may file with the commission a statement that it does not at this time intend to provide electric energy at retail to consumers in Texas outside its certificated retail service area as provided for in subsection (b)(1)(B) of this section. Subsequently, if a MOU/COOP intends to provide electric energy at retail to consumers in Texas outside its certificated retail service area as provided for in subsection (b)(1)(B) of this section, it shall file the implementation filing provided for in subparagraph (A) of this paragraph

with the commission not later than 120 days prior to the time it provides retail electric energy in Texas outside its certificated retail service area.

- (2) **Informal complaint procedure.** A TDBU shall establish and file with the commission a complaint procedure for addressing alleged violations of this section. This procedure shall contain a mechanism whereby all complaints shall be placed in writing and shall be referred to a designated officer or other person employed by the TDBU.
- (A) All complaints shall contain:
- (i) the name of the complainant;
 - (ii) a detailed factual report of the complaint, including all relevant dates, entities or divisions involved, employees involved, and the specific claim.
- (B) A complaint must be filed with the TDBU within 90 days of the date the complaining party was on notice, knew, or with diligent investigation should have known, that the violation occurred.
- (C) The designated officer shall acknowledge receipt of the complaint in writing within five working days of receipt. The designated officer shall provide a written report communicating the results of the preliminary investigation to the complainant within 30 days after receipt of the complaint, including a description of any course of action that will be taken.
- (D) In the event the TDBU and the complainant are unable to resolve the complaint, the complainant may file a formal complaint with the commission. In the event

the complainant advises the TDBU that the complainant does not consider the complaint fully resolved by the course of action proposed by the TDBU then the TDBU shall notify the complainant of his or her right to file a formal complaint with the commission, and shall provide the complainant with the commission's address and telephone number. The informal complaint process shall be a prerequisite for filing a formal complaint with the commission.

- (E) A large TDBU shall report to the commission regarding the nature and status of informal complaints handled in accordance with this paragraph in its annual report of code-related activities filed pursuant to subsection (d) of this section. The information reported to the commission shall include the name of the complainant and a summary report of the complaint, including all relevant dates, companies involved, employees involved, the specific claim, and any actions taken to address the complaint. Such information on all informal complaints that were initiated or remained unresolved during the reporting period shall be included in the large TDBU's annual report of code-related activities.

- (3) **Filing a complaint.** Following the informal process, a formal complaint may be filed with the commission alleging a violation of this section. No complaint shall be valid unless filed with the commission within 30 days after the designated officer or employee of the TDBU mails its written report communicating the results of the preliminary investigation to the complainant. Each complaint shall contain the name of the complainant and a detailed factual report of the complaint, including all relevant dates,

entities or divisions involved, employees involved, and the specific claim. Additionally, each complaint shall identify the specific provisions of this section that are alleged to have been violated, contain a sworn affidavit that the facts alleged are true and correct to the best of the affiant's knowledge and belief, and if the complainant is a corporation, a statement from a corporate officer that he or she is authorized to file the complaint.

- (4) **Notification of complaint and opportunity to respond.** The commission shall provide a copy of the complaint to the TDBU. The TDBU shall respond to the complaint in writing within 15 days. The TDBU and the complainant shall make a good faith effort to resolve the complaint on an informal basis as promptly as practicable.
- (5) **Settlement conference.** Upon request by the MOU/COOP subject to the complaint, commission staff shall conduct a settlement conference. At such settlement conference, each party including the commission staff shall recommend what steps are necessary to cure any violation that it believes has occurred. Discussions at the settlement conference including the recommendations to cure the violation shall not be admissible at a hearing on the complaint.
- (6) **Opportunity to cure.** The MOU/COOP shall have three months to cure the violation in accordance with an agreement arising from the settlement conference or following a hearing. A MOU/COOP may cure the violation in any reasonable manner as set forth in the settlement agreement or hearing, including taking action designed to prevent recurrence of the violation or amending the rule or order.

(7) **Enforcement by the commission.** In the event the commission finds there has been a violation which has not been reasonably cured, the commission may enforce the provisions of this section.

(A) The commission may recommend actions to be taken by the MOU/COOP within a prescribed time and if such actions are not taken, the commission may:

(i) seek an injunction to eliminate or remedy the violation or series or set of violations; or

(ii) limit or prohibit retail service outside the TDBU's certificated retail service area until the violation or violations are adequately remedied.

This remedy shall not be applied in a manner that would interfere with or abrogate the rights or obligations of parties to a lawful contract.

(B) In assessing enforcement remedies, the commission shall consider the following factors:

(i) the TDBU's prior history of violations; if any, found by the commission after hearing;

(ii) the TDBU's efforts to comply with the commission's rules;

(iii) the nature and extent of economic benefit gained by the TDBU's competitive affiliate;

(iv) the damages or potential damages resulting from the violation or series or set of violations;

(v) the size of the business of the competitive affiliate involved; and

- (vi) such other factors deemed appropriate and material to the particular circumstances of the violation or series or set of violations.
 - (C) The commission may conduct a compliance audit of affiliate activities to ensure compliance with the code of conduct.
- (8) **No immunity from antitrust enforcement.** Nothing in these affiliate rules shall confer immunity from state or federal antitrust laws. Enforcement actions by the commission for violations of this section do not affect or preempt antitrust liability, but rather are in addition to any antitrust liability that may apply to the anti-competitive activity. Therefore, antitrust remedies also may be sought in federal or state court to cure anti-competitive activities.
- (9) **No immunity from civil relief.** Nothing in these affiliate rules shall preclude any form of civil relief that may be available under federal or state law, including, but not limited to, filing a complaint with the commission consistent with this subsection.
- (10) **Preemption.** This section supersedes any procedures or protocols adopted by an independent organization as defined by PURA §39.151, or similar entity, that conflict with the provisions of this section.

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

**ISSUED IN AUSTIN, TEXAS ON THE 17th DAY OF NOVEMBER 2000 BY THE
PUBLIC UTILITY COMMISSION OF TEXAS
RHONDA G. DEMPSEY**