

PROJECT NO. 35769

**RULEMAKING RELATING TO
PROVIDERS OF LAST RESORT**

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**PUBLIC UTILITY COMMISSION

OF TEXAS**

**ORDER ADOPTING AMENDMENT OF §25.43
AS APPROVED AT THE MAY 7, 2009 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts the amendment of §25.43, relating to Provider of Last Resort (POLR) with changes to the proposed text as published in the November 21, 2008 issue of the *Texas Register* (33 TexReg 9359). The amendment modifies the framework for POLR service to reflect the experience gained from recent mass transitions of customers to POLR service during the summer of 2008 and accounts for changed circumstances in the competitive market. The rule will strengthen the POLR structure in order to better protect customers in a mass transition. This rule is a competition rule subject to judicial review as specified in Public Utility Regulatory Act (PURA) §39.001(e). This rule is adopted under Project Number 35769.

The key elements associated with the rule amendment are: 1) the enhancement of the volunteer POLR category; 2) the offering of market-based, month-to-month rate plans by volunteer and non-volunteer POLRs; 3) an increase in the number of non-volunteer POLRs; 4) a revision to the market clearing price for energy (MCPE) formula applied to the residential customer class; 5) an extension for residential customers who may be required to pay deposits, and the addition of protections for low-income customers; and 6) improvements to the customer notification process. The commission received written comments from the Association of Retail Marketers (ARM); ARM and Reliant Joint Comments (Joint Commenters); Electric Reliability Council of Texas

(ERCOT); First Choice Power (First Choice); Joint Transmission and Distribution Utilities (TDUs); National Energy Marketers Association (NEM); Office of Public Utility Counsel (OPC); Reliant Energy (Reliant); Texas Electric Association of Marketers (TEAM); Steering Committee of Cities Served by Oncor (Cities); Texas Industrial Energy Consumers (TIEC); Texas Ratepayers Organization to Save Energy and Texas Legal Services Center (Texas ROSE); TXU Energy (TXU); and Whaley Consulting on behalf of Retail Electric Providers (REPs) for Competitive Markets (RCM).

General Comments

RCM commented that under the current retail market design, exiting REPs' customers are transferred to POLR service and have to pay POLR rates that are higher than most rates offered in the market. RCM and Cities stated that from a customer's perspective, this is unfair and may be perceived as a serious design flaw, causing hardship to customers who have chosen to participate in the competitive market.

Texas ROSE stated that the POLR process is bureaucratic and overly burdensome, and prices have been too high. The proposed amendment to the rule does little to moderate POLR rates or to reduce the complexity of enrolling in POLR and then switching to another POLR provider, Texas ROSE stated. Further, Texas ROSE did not agree with the proposed replacement of the term "POLR" in favor of "continuous service." OPC and ERCOT also opposed changing the POLR terminology because of confusion it may cause among customers. Cities expressed appreciation for the re-examination of the POLR process in this rule. Cities questioned the value

of a rule that the commission has attempted to bypass or mitigate since the first major REP failure (that of New Power) by urging POLR REPs to offer rates lower than the MCPE formula prescribed in the rule.

RCM stated that a simple way to address POLR service is to help REPs shed their customers prior to a default. RCM recommended that ERCOT establish a list that can be used by REPs willing to acquire customers in volume so that a failing REP can transfer its customer base to another REP prior to default. First Choice commented that the proposed rule should minimize the complexity and confusion associated with the transition of customers from a defaulting REP to a POLR. They stated that the successful implementation of the proposed rule depends in large part on the commission's ability to effectively enforce the rule in its final form. First Choice warned that the proposed rule, as written, does not include any mechanisms to enable such enforcement.

TIEC emphasized that in order to have reliable and robust POLR service, the new rule must authorize rates that are sufficient to cover the costs of serving transitioned customers, while also protecting the interests of those customers, who may be required to pay significantly increased electricity costs, often unexpectedly. The rule should strike balance between these two interests, TIEC argued, with rates based on the costs of providing POLR service. TIEC also pointed out that for a large non-residential customer, the most important function of POLR service rule is to provide sufficient notice of a REP default, and allow the customer to find a new REP before being transitioned to a POLR provider.

Commission Response

The commission worked diligently with all interested parties and ultimately drafted a consensus rule. The commission believes the revisions to the rule will address the concerns put forth by Cities, Texas Rose, and First Choice. The commission is adopting a rule that it believes will strengthen the mechanics and operations of the mass transition process. This rule seeks to balance the interests of all participants in the competitive market by putting in place protections for customers in the event of a REP default and a mass transition but doing so in a way that minimizes the cost to the competitive REP market. The commission believes this rule will strike a balance between the interests of Transmission and Distribution Utilities (TDUs), customers, and REPs.

The commission acknowledges Texas ROSE's, OPC's, and ERCOT's concerns regarding the terminology change from POLR to continuous service. The commission is not adopting the term "Continuous Service Provider" or CSP, and retains the term Provider of Last Resort (POLR or POLR provider) throughout the rule, in place of emergency service or continuous service. Nevertheless, the amended rule does incorporate the following modification to current POLR terminology: Non-volunteer POLRs are referred to as Large Service Providers (LSPs), and Volunteer POLRs are referred to as Volunteer Retail Electric Providers (VREPs).

The commission appreciates RCM's recommendation and the goal of avoiding a mass transition but the commission believes that there are numerous technical impediments to establishing a list that will enable REPs to shed load prior to a default.

The commission in responding to comments on this rule, uses those terms in place of the terms in the proposed rule.

In response to criticism that the rule did not work well in the Spring of 2008, TXU argued closer examination reveals that the POLR rule performed its most essential function, which is to keep customers' lights on. According to TXU, this was and is the fundamental purpose of the POLR rule: to ensure that even if a REP fails to honor its commitments, the REP's customers are not left without electricity. Moreover, TXU noted that the rule and its pricing formula balance the needs of transitioned customers and REPs that are compelled to provide service. TXU conceded that the POLR price was higher than anyone expected or would have liked, but the spike in price was caused by many of the same external factors that sparked REP failures, mainly unusually high temperatures during a time when a number of power plants and power lines were out of service for maintenance, along with high natural gas prices, and severe transmission congestion on two interfaces. TXU explained that the congestion problem has been essentially resolved, through changes in the way ERCOT manages it, but not in changes to the POLR rule.

TXU stated that the key failings of the current rule are entirely separate from the causes of the failures experienced during the Spring of 2008. First, the failed REPs were apparently permitted under then-applicable rules to apply customer deposits to customer balances. TXU opined that public policy considerations would seem to counsel protection of the customer and the POLR, ahead of the failed REP, but in this respect, the POLR rule (or one or more related commission rules), were not adequate in terms of protecting customer deposits. TXU proposed language to

prohibit a failing REP from applying customer deposits to customer balances that are not overdue. Second, TXU argued that the rule inadequately addresses how customer deposits to the POLR or payment for service are used. TXU pointed out that this resulted in POLR providers experiencing millions of dollars in bad debt losses. TXU stated that this problem could be eased by either returning the customer's original deposit to the customer or by transferring the deposit to the POLR. Third, TXU said the rules inadequately address customer information. Better communication with transitioned customers, TXU argued, may help their perceptions of the service they receive under this rule, and could improve their ability to make timely and informed decisions when POLR transitions occur. TXU concluded that ensuring customers are properly informed would help address the debt problem.

Commission Response

The commission in this rule is attempting to strike a balance among customer, REP, TDU, and ERCOT interests. The commission shares the concerns raised by TXU and other commenters regarding bad debt accrued by POLRs. The question of how customer deposits are handled during a REP failure has been recently addressed by the commission in the REP certification rulemaking, Project Number 35767, *Rulemaking Relating to REP Certification*. Customer deposits are also addressed elsewhere in this preamble. In past transitions to POLR, notice to the customer has been an issue, because the customer may not have received advanced notice of the REP going out of business. The first “notice” the customer may have received was a request for a deposit from an unknown provider threatening disconnection if the customer did not pay the requested deposit within 10 days. The provisions of this rule address those concerns by strengthening provisions relating to

customer information, notice, and communication to customers, which should reduce the tension between customers and POLRs.

The commission is also adopting provisions that should result in prices from the POLR providers that are either at the market rate at the time of a mass transition or are lower than the rates under the current rule. Providing a reasonable rate to customers when their REP is unable to serve them should also increase their understanding and acceptance of their transfer to a POLR provider and reduce instances of failure to pay the POLR provider's bill. The commission believes that customer education is an important component in assisting customers in a mass transition and ensuring that customer, REP, and TDU interests are protected. The commission agrees with TXU that the most essential function of the rule is to provide continuity of service for customers and believes it has preserved that feature of POLR service.

Question 1: The commission is considering a concept to provide a buffer to customers while they shop for a competitive retail electric offering following a mass transition event and to address bad debt incurred by emergency service providers. This concept would include the following elements:

- (a) For an initial "limited period" (30 or 45 days) of time, a customer would be charged a specified rate that is lower than the emergency service rate set pursuant to the existing emergency service rule. The commission would post a rate for all emergency service providers on a monthly basis that would only be for mass transition customers.*

(b) *During that same time period, the customer would not be required to pay a deposit to the emergency service provider.*

RCM supported the “buffer time period and lower rate proposal.” According to RCM, ensuring that customers do not bear an undue burden of a default will help introduce a greater confidence in the competitive market. Joint Commenters proposed an alternative solution to provide service to residential and small non-residential customers that are transferred to large service providers (LSPs); it would not apply to medium and large non-residential customers or to customers transferred to a VREP or Mandatory Retail Electric Provider (MREP).

The proposed plan would call for transitioned customers served by an LSP to pay a transitional service rate during a buffer period, which would begin on the day the LSP begins to provide POLR service and end on the last day of the first billing cycle in which the transitioned customer has at least 15 days of POLR service. Thus, the buffer period would last between 15 and 45 days. The Joint Commenter’s proposed transitional service rate would equal the price floor calculation for POLR service to residential and small non-residential customers in the current rule, except that the MCPE adder would be reduced from 130% to 120%. The energy rate under this proposal would be:

$$(one\text{-}year\ average\ of\ MCPE * 120\% / 1000) + \$0.06 + TDU\ charges$$

OPC commented it is generally opposed to Joint REPs proposal. First Choice did not support the concept proposed by the commission and expanded upon by Joint Commenters, stating that it was complicated and confusing, and that the commission should not engage in setting prices in a

competitive market, as would be required under such a rule. First Choice proposed that POLRs place customers on a variable month-to-month plan with no cancellation fee that is available to all similarly situated customers, as most REPs currently offer variable month-to-month plans to acquire customers and to serve the electric needs of customers transitioning away from expired, fixed-price term plans. First Choice pointed out that because these month-to-month plans are responsive to market conditions, REPs have processes in place to adjust these price plans as market conditions dictate.

First Choice also stated that in the absence of customer data, the proposal would encourage POLRs to request deposits from all customers during mass transitions. First Choice said that it is less than optimal for all POLR customers to be confronted with a deposit request and stated that an electric bill payment database would provide POLR providers with the ability to pre-screen customers and assess deposits only from customers presenting poor payment patterns. First Choice suggested that the creation of a payment history database would achieve a reduction in bad debt for REPs and more affordable pricing for all consumers. First Choice stated that a large portion of the final bills generated by REPs are never paid and are subsequently written off as bad debt. First Choice proposed to use this database to post both positive and negative customer payment histories, thus eliminating the deposit requirement for many customers, including those in mass transition. First Choice asserted that a database would take the guess work out of determining whether to assess a deposit to a mass transitioned customer.

TXU commented that it supports the buffers contemplated in the proposed rule through the mandatory and voluntary provider mechanisms. TXU explained that because customers pay

market month-to-month prices, this could create a buffer that would insulate customers from the POLR price, to the extent that the combined total capacity of these providers exceeds the load dropped by a failed REP. TXU did not oppose a buffer that provides a subsidized price for a limited period of time, but suggested there are several issues that would need to be addressed before it could be put in place. These issues relate to funding, costs, and allocation. TXU asserted that there is a significant policy question to address in order to socialize the costs of REP failure: if a customer chooses a REP whose price sounds too good to be true, and the price turns out not to cover the costs of providing service and the REP defaults, should customers that wisely chose a higher price help pay for the failure of the first customer's REP? TXU argued that socializing the risk of choosing a dubious REP threatens to steer customers towards dubious REPs and imposes the cost of those choices on everyone else. TXU compared this scenario to automobile insurers making customers who never get in accidents pay part of the premium for customers who do.

TXU suggested that increased customer education efforts can help customers make wise shopping decisions, avoid rates that are too good to be true, and make informed electric choices in a mass transition. TIEC agreed, and submitted that customers who select a higher-risk option should generally bear the costs associated with that choice. TIEC explained that to adopt a rule that shifts the costs of a REP failure to all customers would only encourage REPs and customers to continue making "risky" choices. TIEC commented that neither price insulation for transitioned customers nor bad debt reimbursement for the REP should be borne by other customers; rather, costs of a REP failure should be recovered from sources that are related to the cause of the costs. TIEC strongly opposed any uplift of these costs, saying it would penalize

successful REPs and customers who paid a higher rate for diminished risk while encouraging greater risk taking on the part of customers and REPs.

TXU added that an arbitrary price would deprive customers of appropriate price signals, which would chill the urgency of moving off the POLR or interim plan. TXU offered that the path to a mature retail electric market must include market-based consequences and solutions whenever possible. TXU agreed with Cities that it is undesirable and inappropriate for the maximum POLR rate to be closer to a subjective and arbitrary price than to a cost-based rate.

TXU supported the aspects of this rule that would help protect the POLR from the bad debt experienced in connection with POLR transfers such as those in the Spring of 2008, while also relieving customers of the need to post an additional deposit. TXU noted that it suffered the loss of millions of dollars in providing service to transitioned customers. TXU referred to its comments in the REP certification rulemaking, where it suggested that REPs should be required to post collateral. The funds could be used to offset bad debt without creating the new funding mechanism contemplated in this preamble question.

NEM commented that the POLR pricing structure should be reflective of the nature of the service and the costs and risks a provider incurs in standing ready to service customers in a mass transition. NEM added that the pricing structure should not incent customers to voluntarily participate in the service akin to a competitive market offering. NEM also argued that if a buffer concept is adopted, it should not be implemented until other provisions relating to customer

allocation and ceiling price are determined and the funding mechanism to reimburse LSPs for unrecovered costs is identified, approved, and available to meet emergencies.

OPC stated that it believed the buffer should be 30 to 45 days, specifying that the customer would then not need to pay a deposit. TEAM supported the buffer period concept, but suggested that it last for 30 rather than 45 days. Thirty days, TEAM argued, is the approximate length of a typical billing cycle, and provides transitioned customers with adequate time to find a new retail electric plan. TEAM argued that the 45-day proposal would undoubtedly cause confusion and increase customer complaints, because a customer could potentially receive a bill with two rates: 15 days with the specific buffer period rate, and 16 days on the standard POLR rate.

TEAM stated that deposit-free service to mass transitioned customers during a buffer period follows both the current and proposed rule's purpose of ensuring continuity of service. Because of a lack of satisfactory credit or insufficient information, certain customers are at risk of losing electric service after a mass transition, TEAM added. However, customers with unsatisfactory credit pose significant bad debt risks to REPs. TEAM concluded that it is appropriate that REPs have the opportunity to assess deposits, and urged the commission to allow for deposits after the buffer period.

Commission Response

The commission in the REP certification rule adopted a requirement that REPs qualifying under §25.107(f)(1)(B) post a \$500,000 letter of credit in order to be certified or maintain certification. Under that rule, the money will first be used to pay the deposits of low-

income customers transferred to VREPs and second to pay the deposits of low income customers transferred to LSPs. The commission believes this provision will decrease the bad debt of POLR providers in a mass transition event, as the VREPs will receive funds, and the LSPs may receive funds, from the proceeds of the letter of credit of a REP whose failure occasioned the mass transition. By implementing this change, the commission seeks to protect the most vulnerable customers, those with a low income receiving a discount from the system benefit fund.

The commission acknowledges the comments on deposits and the buffer timeline provided by OPC, RCM, NEM, and TEAM. The commission notes the creativity of the Joint Commenters with respect to its proposed alternative buffer mechanism. The proposal was an excellent catalyst for discussions, which the commission believes was important for the development of the rule that it is adopting. The commission declines to adopt the buffer mechanism proposed by Joint Commenters in this rule, for reasons explained below. The commission believes the amended rule provides increased customer price protection through the enhancement to the volunteer and non-volunteer structures, which require VREPs to offer market-based rate plans as well as LSPs within a certain period of time as advocated by a number of commenters. The commission agrees with TXU that offering customers a market-based, month-to-month price acts as a buffer that will insulate customers from a high MCPE-based price. The commission also believes that the incentives for more REPs to serve as volunteer POLR providers and the expansion of the number of LSPs will spread risks across multiple REPs, thereby alleviating the financial

impacts of acquiring customers in mass transition on short notice and spreading the risk of bad debt among more POLR providers.

The commission agrees with RCM that customers should not bear an undue burden of a default. The commission disagrees with TXU and TIEC that customers who select a higher-risk pricing plan should generally bear the costs associated with that choice if their provider unexpectedly ceases doing business. The competitive electric market is complex and, it is unfair to assume that all customers have the information to decide whether a pricing plan is “higher-risk.” The commission certifies REPs based on criteria that it believes are required for success. Although the commission recently modified the rules to establish more stringent financial and technical standards for REPs with the goal of ensuring that the companies certified to provide electric service will have the financial and technical expertise to navigate the complexities of the retail electric market and weather the uncertainties related to wholesale prices, the commission recognizes that the retail electric business is competitive. In competitive markets, companies fail. If the commission is unable to identify a “high-risk” company and preclude that company from providing electric service to customers, it is unfair to ask the residential customer to bear the burden of doing so, especially when it is often difficult for residential and small commercial customers to assess the financial and technical strength of a REP. In the REP certification rulemaking, REPs were reluctant to provide and update information that would allow the public to assess their financial condition. Even if such information were readily available and up to date, most residential and many small commercial customers would have

difficulty researching and evaluating the background and financial condition of REPs, especially given the complexity of the competitive retail electric market.

The commission appreciates the comments on the buffer proposal, but rejects that concept in favor of one that is more free market. In the event of a mass transition, pricing for residential and small commercial customers is addressed in two ways: first, by providing incentives for REPs to voluntarily serve customers at market-based rates; second, by modifying the POLR rate that LSPs may charge and by limiting the amount of time that LSPs may charge the POLR rate. In addition, the rule strengthens the customer protections related to deposits, which the commission expects will buffer the financial impacts of the transition by limiting the upfront costs to the customer.

The commission appreciates the interest in creating a customer database but concludes that the development of a database is better addressed in another project. Therefore, the commission has opened Project Number 36850, *Rulemaking Relating to Database for Customer Bill Payment Information*, to consider the development of a payment history database.

(c) The emergency service provider would be reimbursed for any bad debt incurred for emergency service during the time period and for the difference between the emergency service rate set pursuant to the existing emergency service rule and the temporary lower rate charged to the mass transition customers during the specified initial period.

The Joint Commenters drafted an alternative market solution in which they proposed that, rather than having a few REPs bear the costs of POLR service, a larger number of market participants should share those costs. They stated that having only REPs bear the cost of POLR service, as OPC suggested (using a fee collected on REP certification or amendment to certification), might create a barrier to new REPs entering the market. Under the Joint Commenters' proposal, an LSP would be reimbursed for the positive difference between the POLR service rate ((actual hourly MCPE for customer * 125% / 1000) + \$0.06 + TDU fees) and the transitional service POLR rate. Reimbursement for this difference in rates, as well as for a portion of unpaid customer balances (bad debt), would be funded from a pool administered by ERCOT. ERCOT would fund the pool by assessing a POLR service fee to all qualified scheduling entities (QSEs) that represent competitive load and competitive resources in customer choice areas. The pool would be maintained at a level of \$50 million with a one-year ramp-up to this value. Once this level was met, the POLR service fee would be suspended, and would be reactivated when reimbursements were made. If reimbursements to LSPs exceed the fund balance, an accelerated fee schedule would be put in place until the target balance was achieved again.

TIEC stated that, once it was in place, the \$50 million fund proposed by Joint Commenters would be insufficient to cover a large REP failure, leading to another round of funding to make the LSPs whole, then another to replenish the fund, causing wild swings in the POLR service fee. TIEC said such a fee would be discriminatory and prejudicial, because it would be assessed for commercial and industrial customers even though this customer class would enjoy no benefits from the fee. TIEC urged the commission to reject the Joint Commenters' proposal, but failing that, industrial and commercial customers should be exempt from the POLR service fee.

TIEC also raised concerns that the proposal by Joint Commenters is a substantial departure from the rule that was proposed by Staff. TIEC commented that because the proposed rule does not provide significant detail or proposed language for this concept, it is unclear how such a plan would be executed, what the cost would be, and how those costs would be recovered. TIEC stated that this concept could entail tremendous costs, and could seriously undermine the proper functioning of the competitive market. Removing costs through a discounted rate, deposit waivers, and a general waiver of any unpaid balances (bad debt) from customers and shifting costs to the market as a whole will promote poor contracting and encourage customers to be less vigilant in evaluating the economics of a potential REP. TIEC argued it could also encourage REPs to ignore these legitimate costs in their business models.

TIEC also opined that allowing transitioned customers to pay a temporarily reduced rate violated PURA §39.106(b), which requires a provider to charge a “fixed, non-discountable rate” to those customers by class. TIEC said that under PURA §39.151(e) the commission can authorize ERCOT to assess fees to cover its own costs, but that a POLR service fee would be outside of the scope of this authorization as the costs in question are not being generated by ERCOT. TIEC further stated that there was credit liability for ERCOT to administer such a fund, because it might have to disburse more than the fund held and then collect the difference. TIEC contended that the scope of the Joint Commenters’ proposal may be such that it constitutes a notice issue under *Deffebach*.

Texas ROSE and First Choice also did not support the concept of a buffer period proposed by the Joint Commenters. Cities commented that the concept of a lower rate and deposit for a limited period is appealing, but expressed reservations regarding the proposal to compensate the provider for bad debt and the “price differential.” OPC supported the concept, subject to finalization of the details and logistics. OPC specifically supported the prospect that customers would not have to pay a deposit and would have time to switch to a competitive product or a new REP prior to being assigned to an MCPE rate. TEAM stated it strongly supports reimbursement for any bad debt incurred by REPs serving mass transitioned customers, and until such a mechanism is in place, TEAM argued that no POLR should be required to offer service at a price that is potentially below cost. TEAM also alluded to the numerous costs associated with accepting a mass transition of customers, such as power purchases, additional billing costs, and additional customer service considerations.

TEAM opined that reimbursement would not promote greater risk-taking by REPs and customers, nor would it remove incentives for good business practices. Rather, the concept of reimbursement recognizes the real mass transition costs incurred by the REPs upon whom the commission places an obligation to serve. TEAM suggested that concerns about risky business behavior are better addressed in Project Number 35767, *Rulemaking Relating to the Certification of Retail Electric Providers*.

Commission Response

The commission agrees with commenters that significant issues remain unsettled relating to the proposal to impose the costs of mass transitions on electric market participants. The

commission agrees with TIEC that this issue needs to be addressed in detail, and this rulemaking is not the appropriate vehicle. While the concept of ensuring low rates for residential customers while also protecting the competitive retail market against the bad debt experienced in the 2008 mass transitions appears at first blush to be attractive, the mechanism needed to make such a change is fraught with difficult legal, and policy issues that have not been properly vetted in this rulemaking. Further, the commission is mindful of the impact fees have on end-use customers and the perception they have on the competitive market.

(d) At the end of the limited period of time, the regular emergency service rate would go into effect.

Joint Commenters contended that using an annual MCPE average rather than the spot MCPE would yield a more stable price that is less sensitive to spot market volatility and provides customers with a known price that would change only annually. Furthermore, the lower MCPE adder may provide a lower rate than the current POLR rate, depending on the one-year average.

If transitioned customers continue to receive service from the LSP after expiration of the buffer period, Joint Commenters suggested that the rate revert to the standard POLR service rate as proposed in subsection (1)(2), but with 125% MCPE adder rather than the current 130%, or the proposed 120%. Joint Commenters suggested this 5% reduction in the MCPE adder in recognition of the reimbursement mechanism in their proposed alternative market structure. In its comments, Joint Commenters noted that in Project Number 31416, the commission indicated

that the risk of providing POLR service, including the risk of bad debt, “is appropriately accounted for in the POLR rate formula.” Joint Commenters did not quantify the bad debt risk.

OPC noted that ideally transitioned customers would have time to switch to a competitive product or a new REP before an MCPE rate would become effective. Texas ROSE stated that the POLR process could subrogate a customer’s choice in REP and suggested that, until ERCOT can adequately modify its mass transition process, immediate measures be taken to identify and honor switches made by customers right after a mass transition.

Commission Response

The commission has chosen to enhance the volunteer tier, thus increasing the availability of market-based rates for the aforementioned reasons.

Regarding the comments by OPC and Texas ROSE, the commission believes that this rule provides adequate mechanisms for customers to switch to competitively priced-product with the POLR provider to which they are transitioned, or to another REP. The commission maintains that the timelines provided for in ERCOT’s current mass transition process address the issues raised by Texas ROSE. Additionally, the commission is revising the timelines for switching in this rule, making it easier and faster for customers to choose a new provider.

Question 2: What is the appropriate source of funding to reimburse the continuous service providers for bad debt and the initial period rate differential?

TIEC submitted that the costs of a REP failure should be recovered from sources that have some relationship to the cause of those costs: the costs should not be shifted to other REPs or other customers.

TXU argued that its suggestions, in connection with the proposed certification rule, could provide the funding to cover some or all of the bad debt and customer deposit exposure. OPC argued that a fund collected through a fee on REP certifications and/or amendments would be the most appropriate funding source. Alternatively, ERCOT could collect the fees at the commission's direction. OPC pointed out that the exiting REPs create the need for the fund; and therefore, they should contribute to the fund. Joint Commenters did not support such a concept. ARM and Reliant believed that if an alternative solution is adopted, all market participants operating in the competitive market should fund the service. OPC's proposal would collect from only one limited part of the competitive market and could have the unintended consequence of reducing the number of market participants, because the POLR fee assessed on a REP for certification could prohibit it from entering the market.

OPC did not support using funds that would otherwise be appropriated as a low-income discount such as the system benefit fund (SBF). TXU generally agreed with OPC that the SBF should be used in ways that are consistent with the current purposes of the fund. TXU suggested that it may be appropriate to consider the use of some of the SBF to protect customers who are the most vulnerable to the potential financial ramifications of a mass transition. TEAM noted that the funding should be in a form that allows the costs to be socialized in a competitively neutral

manner, and argued that the SBF would be a logical choice for this funding. Alternatively, TEAM stated it did not oppose funding of such a mechanism through an ERCOT charge.

Cities doubted the feasibility and appropriateness of socializing compensation to providers, arguing that this approach is fraught with complexity and dispute. Cities opined, and OPC agreed, that if a POLR subsidy is required, it should be based on the differences between the POLR's revenues and actual incurred costs, rather than deviations from a hypothetical pricing formula. Cities explained that this process would be similar to a utility rate case, which increases the complexity of this mechanism. However, they asserted that unless actual revenues and costs are the benchmark, the public has no assurance that the overall market prices are not inflated in order to subsidize excessive POLR profits. Joint Commenters disagreed with Cities' proposed method to determine the costs that are to be shared, because as Cities themselves pointed out, a process such as this would be overly complex and cumbersome, creating a tremendous administrative burden on REPs that are already compelled to provide POLR service.

Commission Response

The commission declines to adopt a proposal that shifts the costs of a mass transition to market participants. The commission further agrees with TXU and OPC that the SBF should only be used in ways that are consistent with PURA.

The commission agrees with TXU that vulnerable populations should be protected in a mass transition and has adopted deposit assistance provisions that should help the most vulnerable customers, low-income customers. The REP certification rule, §25.107(f)(6),

establishes priorities for distribution of proceeds from the irrevocable stand-by letter of credit in the event of a REP default. Consistent with the priorities outlined in §25.107(f)(6), the commission is adopting a mechanism to ensure that low-income customers affected by a mass transition are given priority to the proceeds of the defaulting REP's irrevocable stand-by letter of credit. These customers are among those most likely to have difficulty making timely deposits in the event of a mass transition. As such, it is appropriate to use the letter of credit proceeds to assist such customers with their deposits when transitioning to another REP. These funds will first be used to provide a "reasonable deposit amount" for transitioned customers enrolled in the rate reduction program pursuant to §25.454.

During mass transition events, Staff designated by the Executive Director will determine the deposit amount per customer electric service identifier (ESI ID), up to \$400, unless good cause exists to increase the amount. These deposit credits will be distributed first to any VREP, based on the number of low income customers they receive and second to LSPs, also based on the number of low income customers they receive. The reasonable deposit amount will be calculated at the time of the transition and is intended to encompass factors such as typical residential usage and current residential prices. This shall satisfy in full the customer's initial deposit obligation if the deposit credit to be distributed is sufficient to provide an amount equal to the reasonable deposit amount. VREPs and LSPs may request from a customer the difference between the reasonable deposit amount determined by the Executive Director Staff designee, and the money distributed from the letter of credit proceeds. For example, if the commission were to decide that a \$300 deposit were reasonable, but the proceeds from the letter of credit only allowed the payment of a \$200

deposit on behalf of the low-income customer, the VREP is allowed, but not required, to ask the customer for an additional \$100. This difference shall be collected in accordance with §25.478(e)(3), which allows an eligible customer to pay its deposit in two equal installments, although the deposit credit shall be used toward the first installment. Ninety days after the transition date, VREPs and LSPs are allowed to request an additional deposit amount from transitioned customers, equal to the amount the VREP or LSP would have charged a customer in the same customer class and service area, in accordance with §25.478 (e) at the time of the transition. For example, if the VREP was assessing a deposit of \$400 to customers in the same customer class and service area, but the commission finds a reasonable deposit is \$300, the VREP is allowed, but not required, to ask the customer for an additional \$100 after 90 days. The commission believes that if the customer has stayed with the VREP for 90 days, the provider should be allowed to treat the customer in the same way it would treat all customers.

Question 3: Should the commission consider any other concepts or mechanisms to address these issues? If so, please describe.

TXU shared some of the concerns raised by TIEC and Cities with respect to the possible funding of the alternative proposal, and urged the commission to consider the suggestions made in connection with the REP certification rule regarding posting of collateral and the handling of deposits held by failed REPs as a potential means to provide funding to cover some or all of the bad debt and customer deposit exposure.

First Choice stated that there are two opportunities that would better address the issue of bad debt for all REPs, not just POLR providers, while facilitating the goal of protecting both customers and REPs during mass transition events. Because most of the bad debt incurred in the market is a direct result of a customer's ability to either switch to, or request a move-out in order to initiate service with a new provider despite owing his or her current provider (and perhaps other providers as well) substantial sums of money, First Choice suggested that allowing REPs to delay the execution of a pending switch or move-out until all past due balances are paid in full would mitigate much of the bad debt that currently exists in the market. First Choice pointed out that customers who have been disconnected for non-payment would be required to pay all past due balances before a TDU would be asked to establish their service with another REP. Closing this gap in the market rules would substantially reduce REPs' operating costs, resulting in reduced prices to all consumers, including mass transition customers. This opportunity could be accompanied by a substantial REP-funded bill payment assistance program to be used as an extension to the current "One-time Bill Payment Assistance Program" that is designed to help customers that are having difficulty paying their electric bills. First Choice noted that to date that program remains unfunded. Joint Commenters did not agree with First Choice and argued these issues are outside the scope of this rulemaking project; and therefore, they should not be addressed here.

TXU suggested that the rule stipulate that ERCOT not include estimates of a REP's transitioned load in determining the amount of security ERCOT requires from load serving entities (LSEs). Joint Commenters agreed. ERCOT protocols require Qualified Scheduling Entities (QSEs) to meet certain creditworthiness requirements and maintain any minimum security amounts

required by the Protocols, TXU explained. TXU added that the amount of security required is calculated pursuant to formulas that consider the total amount of load served. Because most REPs serve as their own QSEs, this security requirement is applicable to them; consequently, a large and sudden increase to its load due to a mass transition could greatly increase the security requirement of the REP. TXU stated that including transitioned load in the calculation of security could impose a significant liquidity constraint upon REPs providing a public service under this rule, because they would be required to obtain additional funds to meet the increased security requirement.

Cities opined that the proposed rule provisions for voluntary and mandatory service providers will allow the impacts of service to transitioned customers to be spread across multiple REPs, thereby alleviating the financial impacts of acquiring large amounts of unplanned power supply on short notice. Cities continued that requiring the prices to reflect standard service offers of the REP should provide a price that is within the range of retail market prices. Texas ROSE suggested that POLR prices and terms of service be posted on the Power to Choose website. Cities also noted that given the commission's ability to assign customers to mandatory REPs, it is unclear whether an LSP continues to be necessary.

Commission Response

The commission rejects the suggestions of TXU and Joint Commenters relating to security requirements during a mass transition. ERCOT currently has flexibility in its protocols to manage the security required by REPs in mass transition events and, although the commission agrees that a substantial increase in load can lead to additional collateral

requirements by ERCOT, the commission declines in this rulemaking to impose specific security requirements on ERCOT during mass transition events. Regarding First Choice's suggestion on preventing switching when customers have unpaid bills, the commission agrees with Joint Commenters that these issues are outside the scope of this rulemaking project. The commission acknowledges that the bad debt arising both from mass transitions and normal operations is a serious issue for REPs and the competitive market, because such bad debt has the potential of increasing costs for all customers. It is addressing the issue, in the POLR context, by enhancing the notification, pricing, and deposit provisions in this rule, so that customers should be more likely to pay their bills from POLR providers.

Question 4: Regarding the structure proposed for the Mandatory Emergency Service Providers (MESPs), is the 2% of load the right amount? Should it be less than 2%? Should the number depend on the size of the REP?

Reliant reiterated its preference for the market solution proposed in its comments filed jointly with ARM and supported a system in which the five largest REPs would provide service, with market support to lower the price and deposit obligations for customers transitioned to POLR. Reliant explained that this market solution would make the mandatory threshold question moot, because there would not be any MREPs. Reliant offered that if the commission opts to pursue the tiered structure in the proposed rule, it could support a 2% threshold, with the measurement of 2% tailored to each customer class. Reliant suggested that for the residential, small non-residential, and medium non-residential classes, the proper metric is an ESI ID count; therefore

the 2% should be applied to the number of ESI IDs served by the MREPs. TEAM commented that it believes the 2% load threshold contemplated in the proposed rule may be too low and OPC agreed. ERCOT noted that if the 2% calculation is based on the number of customers in a POLR area, that it may not be significant enough. TEAM suggested a threshold amount of 5% or above. TEAM explained that the administrative and back office costs are not dependent on the size of the entity, and at 2% a REP could incur a large cost to establish systems to serve as POLR yet never be allocated a sufficient number of customers to allow for the recovery of those costs.

TXU agreed that the MREP function should not impose an undue hardship on the REPs required to participate. TXU stated that some REPs have suggested that the requirement will change hedging strategies and costs and could thereby incrementally increase the cost of month-to-month plans. TXU also warned of the harm that could result if the percentage required becomes a slippery slope and is allowed to exceed the levels the REPs can handle. TXU suggested three modifications to the proposed 2% level of the mandatory tier. First, TXU suggested reducing the number of customers or percentage of load the MREP must take to 0.50%. Second, TXU recommended that the commission evaluate the impact on the affected REPs after the first time the MREPs are required to take customers. Third, based on that evaluation, the commission should either: eliminate the MREP category, reduce the percent MREPs are required to take, leave the amount the same, or increase the percent to an amount not to exceed 1.00%.

First Choice stated that a percentage should definitely not be less than 2%, but that for MREPs a threshold should be 3% or more of the total MWhs served in the TDU service area for a

customer class for the 12-month period ending on March 31 of the year the non-volunteering REPs are designated. First Choice reiterated that it is essential that the non-volunteering REPs be sufficiently sized and experienced to handle mass transitions of POLR customers.

Commission Response

The commission was persuaded by the REPs arguments against the mandatory tier, as was originally proposed. The commission believes a combination of the incentives created in the volunteer tier, the expansion of the non-volunteer tier, and the associated market-based pricing is the preferable solution and, most importantly, it is a market-based solution. The volunteer tier provides a layer of protection for customers to aid in keeping as many as possible of them off MCPE-based pricing. The commission does, however, adopt a minimum threshold of 1% for VREPs to qualify for incentives under the new rule, in an effort to increase the number of customers served by VREPs in the event of a mass transition.

Question 5: With respect to the methodology proposed for MCPE, is 120% of MCPE appropriate during times of extremely high prices? Should there be a different percentage of MCPE when prices are very high? If so, what should be the maximum MCPE percentage?

Texas Rose stated that the POLR rate is too high. OPC stated that 5% should be the maximum multiplier, and is appropriate to cover the costs associated with the additional load the LSPs will gain. TEAM urged the commission to consider setting the price at 120% of MCPE, not to exceed a set amount of cents per kWh above MCPE. TEAM argued that when the MCPE is very

low the commission should maintain the concept of a customer charge and a floor price to ensure that a POLR is not required to provide service without the opportunity to recover cost. NEM commented that the change to 120% is appropriate, but that the ceiling rate incorporating the MCPE should be uniform across all providers, the MCPE formula should be clarified, and the MCPE calculation should be a load-weighted average for the class, as opposed to a straight average. NEM opined that changing to a load-weighted average supports the reduction of the premium applied to MCPE. However, NEM stated that there may be instances in which 130% of MCPE continues to be an appropriate component, such as when market rates drop significantly.

Cities argued that 120% is excessive, especially during periods of extremely high prices. They opined that a 20% adder over the actual cost of power can only be characterized as a profit margin for the provider. Cities argued that a reasonable rate of profit should not be based on the commodity input prices and quantities, but on the capital investment of the owners, which more closely resembles a fixed cost. Cities suggested that a more reasonable version of the formula would reflect a power supply price based on MCPE per MWh plus a fixed dollar amount per MWh (*e.g.*, MCPE + \$5/MWh).

TXU commented that there does not appear to be a reasoned basis for adjusting the percentage during times of high prices; Reliant and First Choice agreed. Reliant supported the MCPE methodology in the current rule which includes 130% with an energy floor, with no limit or other modification for extremely high prices. Reliant explained that consideration must be given to the costs associated with providing the service to customers, namely, a price that reflects the short-

term market price for power, non-bypassable charges, and the risk of providing service for such a volatile and unpredictable load.

Reliant stated that the preamble questions imply that an LSP will experience a windfall during periods of high spot market energy prices if the MCPE multiplier used to calculate the rate for service is 120% or higher. Reliant asserted that this suggestion is unfounded and fails to acknowledge that an LSP needs to recover additional costs besides just energy, such as ancillary services and other load related charges, which tend to rise when the average MCPE rises. A reduced MCPE could result in the POLR not recovering all its costs, Reliant warned. While Reliant still supported a multiplier of 150% to MCPE, as supported by the Retail Market Coalition in Project Number 31416, *Evaluation of Default Service for Residential Customers and Review of Rules Relating to the Price to Beat and Provider of Last Resort*, Reliant could support 130% of MCPE. Reliant stated that if the commission were to adopt less than 130%, the policy objectives established in Project Number 31416 would be at risk. Cities disagreed, and stated that Reliant overlooked the fact that the non-bypassable charges, including “ERCOT administrative charges, nodal fees or surcharges, replacement reserve charges attributable to LSP load, and applicable taxes...” are included in the pricing formula. Cities added that ancillary service charges do tend to be higher in sustained periods of high energy prices, but this is not the same as rising in lockstep with the MCPE during extreme price spikes. Cities pointed out that most of the ancillary services are capacity related and tend to be somewhat less volatile than spot energy prices over time periods of intermediate length.

First Choice stated that it is best for customers to go directly to a generally available, variable, month-to-month plan that has no cancellation fee and has a contract term that does not exceed 31 days. This would not only simplify the process for the customer, it would eliminate the costly duplication of effort required when customers are first served by the POLR provider and then transitioned to a non-POLR provider and rate. However, if the commission were to elect continuing pricing POLR service with MCPE, First Choice would support 130% as the multiplier.

Commission Response

The commission notes the suggestions from OPC, Team, and Cities regarding the multiplier to MCPE and suggested alternatives. Given the problems that arose during the Spring of 2008, the commission understands the concerns raised by OPC, Team, and Cities. At this time, the commission adopts 120% as the appropriate multiplier to MCPE pricing for residential customers, and 125% for non-residential customers for the pricing mechanism in subsection (l)(2). As noted by the commission during deliberations on the adoption of the current POLR rule in Project Number 31416, the commission is concerned with an MCPE multiplier that is so low that it might prevent a POLR provider from recovering its costs to serve customers.

REPs in a competitive market cannot provide electric service at a price below their cost or they too will fail. If this commission were to require REPs to provide service at a loss to POLR customers, the most efficient REPs would logically pass that loss on to their entire customer base in the form of price increases. When that happens, the competitive market

loses some of the benefits of that REP's efficiency because of distortions created in the market by a POLR rate that is set too low to allow the provider to recover its costs. In spite of the laudable goal of keeping POLR prices low, the commission cannot sanction a proposal that will unnecessarily increase the cost of electricity in the competitive market. Conversely, the commission has concerns about the multiplier being too excessive. Based on the commission's review of the multipliers applied to the POLR formula during the 2008 mass transitions, the commission concludes that 120% strikes the proper balance between the needs of residential customers and REPs, and that 125% strikes the right balance for non-residential customers, as it can cost more to serve larger customers. Therefore, the commission declines to adopt a lower percentage during high price periods as suggested by OPC and Cities, or a higher percentage as put forth by First Choice, Reliant, and TXU, because the perceived benefits associated with creating a standard for such a recalculation does not justify the complexity of developing and implementing such a standard. The commission agrees with Reliant, TXU, and NEM that the price floor should be used, to account for price anomalies in the MCPE, and because the low-income discount is tied to the price floor calculation. Removing the multiplier to the floor could have an unintended consequence of lowering the low-income discount for customers, therefore the commission uses a 125% multiplier in the calculation of the floor.

The commission agrees with First Choice that it is best for customers to be served using market-based, month-to-month plans, and adopts mechanisms in this rule to incent POLRs to offer market-based rate packages to customers in a mass transition.

Subsection (a) - Purpose

TXU suggested striking emergency and replacing it with interim in the title of this subsection, and throughout the remainder of the rule where appropriate.

Commission Response

The commission declines to adopt the term suggested by TXU. As noted above, while the commission explored the possibility of using an alternative terminology, the amended rule retains the term POLR, which is directly tied to the statute.

Subsection (b) - Application

NEM suggested that because there is a scheduled transition to new POLRs commencing with the 2009 two-year terms, the application of the proposed rules to current POLR providers would significantly change the costs, risks, and benefits of the service that the providers previously agreed to render; and, as such, it raises concerns with the adequacy of notice and due process. NEM urged the commission to adopt any POLR changes in a way that recognizes the practical impacts to REPs.

Commission Response

The commission acknowledges that there are considerations related to the implementation of the new rule, and that providers have already been selected for the 2009 term. The commission adopts modifications to the timing of the selection of POLR providers and has addressed this issue in subsections (h), (i), and (k).

Subsection (c) - Definitions

Texas ROSE argued that there is a statutory mandate that the POLR is obligated to serve any customer that requests service. Texas ROSE argued that if the commission changed the name of POLR service provided under PURA §39.106(g), it would still be required to provide POLR service under §39.106(b). Because the term is so specifically defined in the statute, Texas ROSE asked the commission to continue to call it POLR service. Texas ROSE emphasized that POLR has been used since the opening of the market and is familiar to many customers, and introducing a new term would confuse consumers and would not serve any useful purpose. The TDUs also commented that POLR is used in a variety of contexts in the market that would require additional changes to other commission documents and ERCOT guides and protocols.

In the event the term POLR is renamed, Reliant recommended adding the term “service” to the term “Emergency Area,” the replacement for the term “POLR area.” ERCOT commented that it believes the definition of MREP is too broad and may be confused with other non-emergency large quantity transitions that do not trigger POLR.

TIEC requested a definition be included to define POLR service. OPC and Reliant argued that the term “emergency” may unnecessarily alarm consumers. OPC proposed the term “transitional” instead. Reliant and TXU agreed, and added that the use of the term “emergency” is indicative of imminent peril to the public health, safety, or welfare, and could actually establish and/or reinforce negative perceptions and reactions to a process that was provided as a safety net to more than 45,000 customers in the summer of 2008. Reliant also pointed out that

numerous sections of Substantive Rules, TDU Tariffs, REP scripting, and notices all refer to POLR service.

TXU supported changing the name of the service, but did not agree with the term “emergency,” and submitted the term “transitional” or “interim.” TXU added that the term should convey that the service is temporary and is intended as a stop gap only. If the commission does choose to rename POLR service, Reliant recommended “Temporary Back-Up Service Provider,” “Temporary Continuity of Service,” or “Continuous Service Provider.”

Commission Response

The commission agrees with Texas ROSE that the statute refers to POLR and that introducing a new term could confuse customers and opts not to change the name in this rule. The commission adopts the term TDU area in place of emergency service area. The commission believes these terms better reflect the nature and intent of the adopted rule.

OPC argued that the term “Provider” could mean any REP or emergency service provider (ESP) and that the term ESP should be used throughout the rule, rather than provider. TXU suggested that instead of Provider, using the familiar label of REP, or REP modified as appropriate (Voluntary REP, Mandatory REP, and Interim REP). TXU also proposed renaming Continuous Service Area to Interim Area or Service Area. TXU noted that it really is not necessary to refer to voluntary and mandatory REPs as POLR or interim at all, because these REPs will offer competitive, month-to-month products from the onset of service, and the nature of that service is not necessarily interim or transitional.

TDUs suggested that the use of the term Provider will lead to confusion because it is a word that is frequently used generically in other contexts, and standing alone, it will not be clear whether it is being used as defined in this rule or in the generic sense. TDUs suggested that the term ESP be substituted for Provider, which refers to a VREP, MREP, or LSP in the proposed rule.

Commission Response

The commission agrees with OPC that the nature of POLR service is not interim or transitional, and as noted above, this rule requires VREPs to serve customers at market-based, month-to-month plans. The commission agrees with TDUs that the simple term “Provider” could be confusing, and therefore uses the term POLR provider throughout the rule, where appropriate. The commission specifies in other sections of the rule whether the language refers to only a VREP or LSP.

TDUs also expressed concern over the definition of the term “mass transition” because it is not clear what qualifies as a “large quantity” of transitioned customers. TDUs suggested the term be defined as customers transitioned pursuant to a transaction initiated by ERCOT that carries the mass transition (TS) code. TDUs explained that this transaction is already in use, and can be used by ERCOT when it initiates a customer switch based on one of the conditions listed in subsection (o)(10) of the rule. Similarly, TDUs commented that the term “transitioned customer” should be clarified to mean a customer that takes service as the result of a mass transition, as distinguished from a customer who chooses POLR service pursuant to subsection (o)(1) of the rule. TDUs stressed that certain subsections of the rule apply only to customers

involved in mass transition, and care should be taken throughout the rule to clearly indicate which customers a provision applies to. TDUs offered that in describing both customers that are mass transitioned and customers that request POLR service, the customers should be referred to collectively as “customers who take POLR service.”

TDUs recommended that the definition of VREP should be changed to refer to a REP “designated” pursuant to subsection (i) of the rule, and the word “volunteered” should be removed.

Commission Response

The commission agrees with the TDUs that the term mass transition should be modified, and the term “volunteered” should be replaced with “designated,” and adopts modifications to the rule accordingly. The commission also agrees with TDUs that customers who take POLR service include both transitioned customers and customers that request POLR service.

Subsection (d) - POLR service

Reliant suggested replacing the term “Provider” with LSP in a number of locations within this subsection and throughout the rule for clarification. Reliant commented that the term Provider refers to VREP, MREP, and LSP, and in some places is only applicable to LSP because the LSP has certain responsibilities.

Commission Response

The commission has not adopted the three-tier approach that it originally proposed. It does, however, agree with Reliant that certain parts of the rule will apply only to LSPs and has modified the rule to clarify which provisions apply only to LSPs.

Subsection (d)(4)(B)

TXU commented that the language in subsection (d)(4)(B) could be interpreted to require the REP itself to own call center facilities, and believes that the commission does not intend to impose this requirement and intends only that the REP have call center services available to customers.

Commission Response

The commission agrees with the clarification suggested by TXU, and has made changes in accordance with this recommendation.

Subsection (d)(4)(C)

TXU noted that subsection (d)(4)(C) includes a parenthetical that nothing but standard retail billing may be performed either by the REP or the REP's agent. TXU commented that it is not clear why this parenthetical is required, and it can suggest that other requirements, such as the call center availability, could be provided by the REP's agent. It proposed deleting this parenthetical statement.

Commission Response

The commission agrees with TXU that the parenthetical is confusing and has deleted this provision.

Subsection (d)(5)

TXU proposed two clarifying limitations to subsection (d)(5). The language of the proposed rule does not limit the REP's duty to provide billing and collection duties on a going forward basis or to the transitioned customers assigned to such REPs. Accordingly, TXU proposed changes to make these limitations explicit. Reliant commented that it is administratively more efficient to place on LSPs as opposed to all POLR Providers the requirement to bill and collect transition charges for REPs who have defaulted, rather than placing the obligation on all Providers.

Commission Response

The commission agrees with TXU and has modified the rule to make the limitations more explicit for this provision. The commission agrees with Reliant that the burden to collect from REPs who have defaulted should be placed only on LSPs and has modified the rule accordingly.

Subsection (e)(1) - Standards of service

Reliant suggested replacing the term provider with LSP in subsection (e)(1), so that only an LSP has the responsibility of serving customers that request service. NEM questioned whether it is necessary to include a provision for a customer to voluntarily request POLR service. NEM explained that customers requesting service is a completely different type of customer than a

customer that is required to change REPs as part of a mass transition event. NEM suggested limiting the eligibility for POLR to customers in mass transition will allow REPs to better manage the costs and risk of providing service.

Commission Response

The commission declines to enact the suggestion by NEM that the rule should not apply to customers requesting service from a POLR provider. PURA requires POLRs to provide service to customers that request service. Further, the commission agrees with Reliant's suggestion that customers who are not part of a mass transition should be entitled to receive service from LSPs. VREPs are making a commitment to provide electric service at market-based rates in the event of a REP default. Therefore, the commission concludes that only LSPs should provide POLR service to customers who request it. The commission makes changes in accordance with the recommendation by Reliant.

Subsection (e)(2)

TXU recommended clarifying the requirement that all transitioned customers be treated uniformly in the same class and the same service area. Second, TXU commented that it is preferable to limit the applicability of the subsection (e)(2) to LSPs, because VREPs and MREPs will be serving transitioned customers on competitive plans. Reliant agreed, explaining that only LSPs would serve a customer in accordance with the "standard" Terms of Service. OPC supported modification. Reliant also suggested adding language to permit the LSP to transition residential customers to a market-based, month-to-month product that is listed on www.powertochoose.org.

Reliant also suggested deleting the requirement that ESI IDs transitioned to a competitive rate must be transitioned to a rate that is less than the POLR service rate at the time of the mass transition. To further the objective of placing more customers directly on market-based plans during a mass transition event, the commission should make it relatively simple for even the LSPs to choose to directly transition customers to market-based rates, and Reliant emphasized that the more barriers the rule places on LSPs to transition customers to market-based plans, rather than the POLR rate plan, the less likely it is that LSPs will exercise that option. Reliant also offered language to clarify that the LSP is not required to transition all of the customers in the same class to the competitive retail product at the same time.

If the commission were to find it necessary to impose a rate comparison test before LSPs are allowed to transition customers to market-based plans, Reliant offered alternative language, so that if a comparison is required, the rule should provide clear standards for making the comparison.

TXU agreed with Reliant's suggestion to add language that would permit an LSP to transition residential customers to a market-based, month-to-month plan, without regard to the POLR service price. To the extent the transition is a benefit to the customer, TXU suggested that advanced notice to the customer of the transition should not be required. TXU also agreed that, if the commission decides to retain the price comparison for the LSP, the language should be modified to make clear the standards for the comparison. Finally, TXU also agreed with Reliant's suggestion that an abbreviated enrollment process be allowed with respect to customers

who are only changing plans, not REPs. This would help customers move to more desirable plans more rapidly.

Commission Response

The commission is requiring LSPs that do not offer market-based, month-to-month products at the outset to transition customers off of the MCPE pricing specified in subsection (1)(2) in this rule. However, the commission disagrees with TXU and Reliant that those LSPs should be able to transition those customers without notice. The commission agrees with Reliant that this section should not require LSPs to transition customers to a rate that is less than MCPE rate at the time of the mass transition, because it is extremely difficult to conduct a rate comparison between a month-to-month plan, and the MCPE price. The commission adopts Reliant's language clarifying that the LSP is not required to transition customers to competitive retail products at the same time, because it may not be mechanically possible for a POLR to transition all customers at once. The commission finds that the speed at which a POLR can move the customers will differ from REP to REP, and may differ upon the number of customers the REP has to transition. Therefore, the commission accepts the language offered by Reliant to clarify this provision.

Subsection (e)(3)

TXU questioned whether the requirement that all marketing remind the customer that he or she has the right to switch to another provider or another product from the POLR ultimately benefits the consumer. TXU noted that LSPs serving customers on MCPE-based rates should be required to provide the customer with the notice of these facts. Additionally, TXU added, the commission

or ERCOT should provide notice to the customer of these facts. TXU opined that this requirement for the VREPs and MREPs will put a strain on the marketing to these customers and could actually interfere with the goal of moving these customers off the MCPE product and back to a competitive product. TXU noted three reasons for this outcome. First, most marketing would not include these warnings; and therefore, REPs would be required to prepare separate marketing tailored to transitioned customers which would incur additional costs, undoubtedly to be reflected in the price charged to the customer. Second, the need to create tailored marketing will or may cause delay in getting the marketing to these transitioned customers, resulting in the customer remaining on the interim product for a longer period of time. Third, marketing that contains this somewhat unusual language may be less persuasive to customers, because most marketing does not urge the customer to consider competitors' products or even the marketer's alternative products before buying. In fact, TXU warned, it may make customers concerned enough to decline whatever offer is in the marketing material, pending a review of other products. TXU recommended that customers served by LSPs be informed of other products from that REP and other REPs, but that the disclosure requirement described here should not apply to all marketing of customers in transition.

Joint Commenters supported TXU's comments that would eliminate the requirement that all marketing materials include the reminder that the customer has the right to switch to another provider or product.

Reliant suggested that this subsection should apply only to LSPs serving at the subsection (1)(2) rate, and that it should refer to the enrollment process being developed in Project Number 35768,

Rulemaking Relating to General REP Requirements and Information Disclosures, rather than the enrollment process described in §24.575, relating to Selection of a Retail Electric Provider.

Commission Response

The commission agrees with TXU and Joint Commenters that, because VREPs will be serving customers using market-based, month-to-month products, notification encouraging customers to leave those providers does not accomplish the intent of the rule, and makes changes accordingly.

The commission agrees with TXU that customers served by LSPs at the adopted subsection (1)(2) price (subsection (1)(2) in the proposed rule) should be informed as soon as possible of other products from that REP as well as other REPs. The commission agrees with Reliant that this requirement should apply only to LSPs serving customers at the rate in subsection (1)(2).

Subsection (f) - Customer information

Reliant suggested replacing Provider with LSP in subsection (f) to clarify that only the LSP should serve mass transition customers in accordance with the Standard Terms of Service. Reliant explained that as proposed in subsection (e), VREPs and MREPs would serve mass transition customers at market-based rates and therefore, they would appropriately provide the Terms of Service associated with those market-based plans. OPC supported the modification.

Commission Response

The commission agrees with Reliant’s suggested language and has revised the rule accordingly to specify that only the LSP must serve customers in accordance with the Standard Terms of Service. VREPs would still be required to follow otherwise applicable terms of service requirements in the commission’s rules.

Subsection (h)(1) - REP eligibility to serve as a POLR provider

TXU proposed that the reference to “beginning in January of the following year” in subsection (h)(1) be deleted. Reliant commented that rather than refer to a service area or a TDU service area, the language should reference an emergency service area, because this term is defined in subsection (c). Reliant further stated that the word “transitioned” should be deleted from the initial eligibility calculation to clarify that the calculation is based on market share, and not calculated based on customers transitioned to POLR service during some time period.

Commission Response

The commission is adopting modifications in this rule to account for the new selection process for VREPs and LSPs. The commission agrees with TXU that the reference to January should be removed. For reasons explained earlier in this preamble, the commission retains the term “TDU service area” in the proposed rule. The commission agrees with Reliant that the word transition should be deleted.

Subsection (h)(2)(B)

TXU and Reliant suggested language to clarify in subsection (h)(1)(B) how a REP's percentage of retail sales will be measured and recommended that the measurement be made in megawatt-hours. Reliant suggested adding back the phrase "numeric portion of the" to the paragraph; otherwise, it is likely that few REPs would qualify to serve as a POLR provider.

Commission Response

The commission agrees with Reliant and TXU that this provision should be clarified, and has modified the rule accordingly.

Subsection (h)(2)(E)

TXU suggested language to clarify that subsection (h)(2)(E) refers to an executed delivery service agreement with a TDU, rather than simply an "agreement" in the proposed rule.

Commission Response

The commission agrees with TXU and has revised the rule in accordance with this recommendation.

Subsection (i) - VREP list

Given the changes to the volunteer process and pricing, Reliant recommended that upon adoption of this rule, the commission renew the call for voluntary providers for the 2009-2010 term.

Commission Response

The commission agrees with Reliant that the commission should renew the call for VREPs for the remainder of the 2009-2010 term, and has modified the rule to reflect this change. This is addressed in subsections (h) and (i).

Subsection (i)(1)

TXU proposed that VREPs be allowed to specify the maximum amount of load they are willing to serve, instead of the maximum number of customers for all classes other than residential. Reliant stated that for the residential, small non-residential, and medium non-residential customer classes, a REP should specify the number of ESI IDs it is willing to take in each TDU territory. Reliant added that for the large non-residential class, VREPs should specify the maximum based on load.

Commission Response

The commission does not agree with TXU's proposal that VREPs be allowed to specify the amount of load they are willing to serve, because this does not comport with the assignment of customers at ERCOT during mass transitions of customers. Instead, the rule requires the VREP to specify the number of ESI IDs it is willing to serve for all customer classes, and has revised the rule accordingly. Reliant's proposal that for the large non-residential class, VREPs should specify the maximum they are willing to serve based on load is also inconsistent with the ERCOT process and is not adopted.

Subsection (i)(4)

TDUs recommended that language in subsection (i)(4) be changed to make clear that a VREP may increase or decrease the number of additional customers or load that it is volunteering to accept going forward, but that the VREP is not allowed to shed customers that have already been transitioned to it.

Commission Response

In order to facilitate REPs' participation as VREPs in the POLR program, the commission agrees that VREPs should be allowed to modify the number of ESI IDs that they can accept at any time. The commission also agrees with TDUs that a VREP should not be allowed to shed customers that have already been transitioned to it, and adopts the language proposed by the TDUs.

Subsection (i)(5)

TDUs recommended that in addition to ERCOT, TDUs should be able to raise issues with regard to the ability of a VREP to serve. If a REP is in default under the terms of the standard TDU Tariff for Retail Delivery Service ("TDU Tariff" or "Tariff"), the TDU no longer accepts switches to that REP. Thus, TDUs argued that, at a minimum, customers should no longer be transitioned to a VREP that is in default under the TDU Tariff. Joint Commenters disagreed, and stated that the TDUs have no statutory authority for such a role and the commission should deny the request to include such empowerment in the rule. TDUs argued that subsection (i)(5) should make clear that a disqualified REP must continue serving the customers that have previously been transferred to it. TXU suggested that the language be modified to make clear that a REP

that is also a VREP may still acquire new ESI IDs through normal processes, but is simply prohibited from acquiring additional mass transitioned customers, in cases where the commission staff initiates a proceeding to disqualify a VREP.

Commission Response

The commission acknowledges the comment by TXU regarding a VREP's ability to acquire additional customers through normal channels in the event commission staff initiates a proceeding to disqualify a REP from being a POLR, and concludes that this rule does not need to address whether a REP serving as a VREP may acquire new customers. The commission agrees that TDUs should have the ability to raise issues regarding a REP's ability to serve as a POLR provider, and has modified the rule accordingly. The commission clarifies that, when a TDU provides information to the commission in this manner, it must provide the same information to the VREP. The commission disagrees with Joint Commenters' argument. Transferring customers to a REP that is unable to pay its bills to a TDU could be detrimental to the customers and the TDUs.

NEM suggested additional clarification be provided regarding the proposed three-tier structure, and questioned whether a mandatory category is necessary. ARM opposed the inclusion of the new MREP category. ARM contended that the addition of this tier is unnecessary, confusing, and ultimately harmful to the market. First Choice commented that it is confusing to have both a non-volunteer, mandatory POLR and a non-volunteer POLR or LSP. First Choice argued that having three types of service providers in a mass transition for each rate class would only add to customer confusion. First Choice supported the current structure of voluntary and default, non-

voluntary providers and sees no benefit to dividing the non-voluntary pool. ARM argued that any benefits achieved in the market from the MREP category will be far outweighed by the detriments that ARM perceives will result if the rule is amended in this manner.

Texas Rose supported a POLR structure that would assign the POLR responsibility to the largest REP in a transmission and distribution service area and require the REP to charge residential consumers the same rate taken by a majority of its residential customers. First Choice suggested a similar structure, where POLR customers are transitioned to a designated provider and placed on a variable month-to-month plan with no cancellation fee. Joint Commenters opposed such plans, because the costs to serve transitioned customers are not reflected in rates that REPs offer as competitive month-to-month offers. According to Joint Commenters, REPs often make power purchases in the market in advance to support planned acquisition campaigns. To the extent a REP is suddenly overwhelmed by an influx of transitioned customers from a failed REP, the supply purchased for an acquisition campaign would not be sufficient to support service to the transitioned customers. Joint Commenters argued further that this is exactly why the existing rule allows pricing for POLR service to be based on spot energy prices (i.e., MCPE prices).

ARM offered several reasons to support its opposition to the MREP category. First, ARM questioned whether the MREPs will be justly compensated or will be subject to a regulatory taking. ARM also stated that the other two categories, the VREP and the LSP, are sufficient to carry out the task of providing service in the event of a mass transition. ARM suggested that this category could create confusion in terms of eligible REPs' anticipation of and preparation for providing service in the event of a mass transition. Whereas a non-volunteering POLR under the

existing rule can anticipate with a large degree of certainty that it will be required to provide POLR service in the event of a mass transition of customers, under the proposed rule, that certainty is undermined by the 2% threshold calculation. For those REPs designated as MREPs but which do not qualify as LSPs, the calculation of the 2% threshold for each customer class in each POLR area may or may not result in an obligation to serve. REPs that qualify as both MREPs and VREPs may be required to charge a market-based rate for month-to-month service in one TDU territory, but be permitted to charge a different rate pursuant to proposed subsection (1)(2) to the same customer class in its capacity as an LSP in another TDU territory. ARM called this discriminatory price treatment troubling. ARM questioned why the size of the mass transition event would dictate whether the same REP is required, on the one hand, to charge the customer a market-based price at the outset, or is allowed to charge the customer a rate based on a specified formula on the other hand. ARM opined that the potential disparity in treatment of transitioned customers in terms of price will only exacerbate negative views of POLR service that presently exist.

ARM asserted that implementation of the mandatory tier would pose additional administrative burdens on ERCOT. Such an increase in the number of providers required to serve transitioned customers will require ERCOT to undertake certain operational modifications at an additional cost, for reasons that ARM did not believe are justified. ARM believed that if the mass transition event triggers the provision of POLR service by MREPs to one or more customer classes in one or more TDU areas, then a greater number of providers will need to immediately procure wholesale energy and ancillary services from the spot market to serve their unanticipated increase in load. ARM added that all of the REPs serving as MREPs will bear the administrative

and financial burdens associated with the provision of POLR service, including the increased risk of bad debt that comes with any mass transition event. ARM noted that MREPs must offer a completely separate retail product out of necessity. While the proposed rule contemplates that MREPs can provide retail service using existing products, ARM explained that MREPs will need to reserve a product offering for transitioned customers in order to ensure they can accommodate those customers in the event of a mass transition.

ARM argued that the requirement to charge a market-based, month-to-month price to a transitioned customer is highly problematic. The MREP will need to access the wholesale market for additional power supply required to serve these additional customers. REPs, as a general rule, do not keep contingency excess power on hand for situations such as mass transitions. Further, ARM added that some REPs may strategically take long or short positions in the market, but any wholesale gain or loss associated with the long or short position falls squarely on the REP.

ARM pointed out that the MREP will need to resort to the balancing energy market to meet its sudden need for additional energy and ancillary services. The cost of such energy and services may easily exceed the embedded costs of those components in any of the competitive retail offerings the MREP currently makes available to customers. This scenario raises critical issues about whether it will result in just compensation for the REP.

Lastly, ARM argued that if an MREP is required to post the month-to-month service and market-based price that it uses to meet its POLR service obligation on the Power to Choose website,

customers may interpret it as an advertisement of that service to anyone that requests it. While PURA §39.106 contemplates that a customer may request POLR service from a REP designated by the commission, the unreasonably discriminatory treatment of MREPs in this regard makes their inclusion in the proposed amendments all the more problematic, as a matter of law and policy, ARM argued.

TXU emphasized that MREPs would serve a vitally important function with little to no downside, as customers would be placed on current market-based, month-to-month plans, instead of going directly to the interim or POLR price. TXU agreed with First Choice that most REPs already have variable month-to-month plans that are used for competitively acquired customers as well as for customers who are transitioning away from expired, fixed-price term plans who have not responded to the REP's renewal efforts. These variable month-to-month price plans are responsive to market conditions and give REPs the ability to adjust these price plans as market conditions dictate.

TXU disagreed with ARM's proposal to eliminate the MREP mechanism. TXU disagreed with ARM's argument that the allocation to the MREPs improperly imposes additional burdens on ERCOT and noted that ERCOT did not raise this concern. TXU also disagreed with ARM's assumption that the proposed rule requires MREPs to acquire power at spot market prices but prohibits the MREP from charging prices that justly compensate the REP for the cost of the power. TXU commented that it understood the proposed rule to instead contemplate that an MREP would be called upon to use its capacity to add customers to an existing plan.

Commission Response

The commission does not address the assertions of ARM regarding the difficulty of the MREP category, as the commission has deleted that tier from this rule, instead accomplishing the objectives of that proposal by modifying the LSP tier and by modifying the voluntary tier to encourage more providers to offer market-based rates as VREPs. The commission does not entirely agree with the arguments advanced by ARM regarding the difficulties in providing service as an MREP under the proposed rule. The commission also acknowledges the comments from TXU and First Choice indicate that the service could be viable. The commission believes the expansion of LSPs from five to up to 15 REPs will help to spread the responsibility (and risk) of POLR service among more REPs, which the MREP category was intended to achieve.

Subsection (j)(3)

TXU also suggested adding a due date for the Electricity Facts Label (EFL) required to be prepared and proposed making the EFL due January 31 of each year.

Commission Response

The commission agrees with TXU that a deadline should be added for the LSPs to file an EFL. The EFL should be filed by January of each year.

Subsection (j)(4)

TXU stated that it supports requiring LSPs to provide customer information to the commission after a designated period of time if the customers are still receiving service based on MCPE, but

suggested that the process be modified to lengthen the period of time from 15 to 30 days. Reliant agreed with TXU. TXU also suggested excluding from the list customers for whom a switch or other request has been submitted to get that customer off MCPE pricing required by the rule.

Commission Response

The purpose of the 15-day deadline was to prevent customers from being served by LSPs on an MCPE rate for more than a few days. Because the commission is adopting incentives for LSPs to serve customers using market-based products and requiring the LSPs to move those transitioned customers off MCPE pricing within a set period of time, the commission finds the 15-day requirement is no longer necessary.

Subsection (j)(5)

Reliant suggested changing “may” to “will” to comport with the language in subsection (q)(2) that states that if a LSP defaults or has its status revoked before the end of its term, after a review of the eligibility criteria, the next eligible REP will assume the duties of the former provider.

Commission Response

The commission agrees with Reliant and has modified the rule accordingly.

Subsection (k) - Transfer of customers to providers

NEM and OPC found the language describing the sequence of transfers in this subsection cumbersome and confusing. OPC offered language and suggested deleting subsection (l)(2).

OPC also recommended clarification that customers that are transferred to VREPs or MREPs are on a market-based, month-to-month plan and will be treated as traditional competitive customers. OPC argued that this will reduce the stress of the customers scurrying to find a new REP or competitive product or going through the switching process, and will provide an incentive to the REPs providing volunteer service, as it will increase their customer base. OPC also noted that this treatment will also obviate the need for subsection (q) to apply to VREPs and MREPs.

TXU stressed that the MREP mechanism provides an important second level of protection or buffer against customers being exposed to MCPE prices. TXU explained that there are approximately 5.5 million residential customers in competitive areas, and an MREP requirement of only 1% would create an MREP aggregate capacity of 55,000 customers, more than the total number of customers affected by the REP failure experienced this past Spring. TXU argued that it does not see any reason to dispense of this buffer provision in the event of a large number of customers being transitioned. TXU proposed reducing the 2% level if it is too high, but does not recommend doing away with it altogether. TXU recommended changing this subsection to include MREP assignments in every mass transition in which the number of customers or load exceeds the cumulative capacity of the VREPs.

NEM reiterated that a mandatory provider may be unnecessary. NEM also suggested that customers in a mass transition first be allocated proportionally to VREPs up to the number of customers that each VREP has offered to serve. If there are remaining customers to be served, then those customers should be allocated proportionally to the five LSPs, up to a pre-determined, percentage-based limit of their existing customer base. Alternatively, NEM suggested that if the

remaining customers cannot be allocated and the percentage limit on LSPs' customer bases be retained, then the remaining customers (after the allocation to VREPs) should be allocated proportionately to 10 LSPs. NEM explained that the additional five LSPs essentially would act in place of the proposed MREPs and would be the next five largest in rank order after the five designated LSPs. NEM argued that the larger base of 10 LSPs would mitigate against an undesired increase in market concentration, particularly if the emergency event was precipitated by a default by one of the five LSPs.

ERCOT expressed concern that the 2% maximum used for the number of customers in the POLR area for a class that MREPs serve may not be significant enough. ERCOT proposed that the maximum could be a fixed amount for customer size (such as any mass transition of more than 100,000 ESI IDs is considered "large" and would follow the process of being assigned to MREPs).

Commission Response

As discussed above, the commission declines to adopt the MREP category, so many of the suggestions offered are moot. The adopted rule, however, does expand the number of LSPs as suggested by NEM, because the commission agrees that the expansion of LSPs would act in place of the MREP category and would reduce the risk for each REP serving as an LSP. The adopted rule does not distinguish between the five largest LSPs and the remaining LSPs.

Subsection (k)(1)

TXU recommended a limit on assignment of customers so that the number of customers transitioned to VREPs does not exceed the number of customers VREPs have offered to serve. TXU also recommended that the rule specify the monthly usage level at which the VREPs' prices will be compared, for purposes of allocating customers to VREPs in ascending price per kilowatt-hour (kWh). TXU suggested 1,000 kWh/month.

Commission Response

The commission declines to adopt the suggestion by TXU that a limit be placed on MREPs because the MREP category is deleted from this rule. Because the adopted rule modifies the assignment of customers to VREPs in subsection (k), which requires random assignment, as opposed to by ascending price per kWh as originally proposed, the recommended modification by TXU is no longer applicable.

Subsection (k)(2) and (k)(3)

TXU stated that subsection (k)(2) appeared to overlap with subsection (k)(3), and should include the non-discriminatory requirement in subsection (k)(4).

Commission Response

The commission agrees with TXU and has made a change to this subsection accordingly.

Subsection (l) - Rates

Texas ROSE argued that it supported a structure that would assign the POLR responsibility to the largest REP in a TDU service area, and would require the REP to charge residential consumers the same rate taken by the majority of its residential customers. Texas ROSE stated that the largest REPs should be required to serve as POLRs at a standard retail rate.

TEAM supported the language requiring REPs to charge their customers a market-based, month-to-month rate. NEM recommended that section (l) be modified to require that the ceiling rate be uniform across all types of POLRs. NEM was concerned that customers may be allocated to different POLRs and would be served at different rates. NEM opined this would amplify customer confusion and discontent surrounding the recent REP defaults. NEM argued Using a uniform ceiling rate would benefit REPs as well, because REPs have no leverage to prevent bad debt from customers if they are required to offer a standard market-based, month-to-month rate. NEM explained that at any given time, a POLR operating as a VREP or MREP may have a special promotional rate that it can offer a certain number of customers, but extending it to emergency customers may be cost-prohibitive. At the same time, REPs should be allowed the opportunity to price service below the ceiling rate, when it is within their means to do so, NEM stated.

TXU and Reliant recommended the pricing floor in the current rule be restored. TXU explained that the floor is intended to protect the competitive market from the POLR price. This is vitally important TXU explained, because the MCPE, and the associated POLR price in subsection

(1)(2), can be very low during anomalous periods. TXU stressed that it is important to protect the competitive market from these anomalous price episodes.

Cities commented that the maximum rate allowed by the proposed pricing formula for LSPs will still be excessive. Cities provided estimates for the maximum price allowed by the proposed rule based upon the MCPE during May and June 2008, which demonstrated, in Cities' opinion, that the maximum price allowed in the rule would be substantially higher (126% to 144% higher) than retail market pricing if wholesale power prices spike during a mass transition. Cities argued that since high wholesale power prices are causally associated with REP defaults, its illustration of the impact of the pricing formula is very relevant. Cities offered an alternative for establishing a maximum rate based upon prevailing retail market prices for the month, rather than the formula used in the rule. For example, the maximum rate could be fixed at some percentage, such as 110% or 120% of the median one-month pricing offer for the relevant service area, based upon prices reported on the Power to Choose website.

Cities also opposed the customer charge component for LSPs. For a 1,000 kWh per month residential customer, the provider's customer charge would be \$60. In comparison, integrated electric utilities in Texas typically collect a bundled customer charge less than \$10 a month. Cities argued that the inflated customer cost component of \$.06 cents per kWh explains most of the large differential between the POLR maximum price and prevailing retail market prices. If one assumes that the POLR customer costs were set at \$17 per customer per month, the 26-52% differential between the formula rate and incumbent REP prices would decline 1 to 25%.

TXU disagreed with Cities' suggestion to use retail price data derived primarily from the effect of bilateral wholesale contracting in earlier periods to calculate the appropriate cost to provide POLR-type service.

Commission Response

The commission agrees that a market-based, month-to-month product is preferable to the MCPE price formula. This adopted rule requires VREPs to offer such a product to customers. The rule also requires LSPs to move transitioned customers to a similar product after a certain period of time, if an LSP declines to do so at the beginning of service. The commission concludes that because of varying market conditions and the unknown size of mass transitions, it may be necessary for an LSP to serve customers at the MCPE formula; therefore, it is retained in this rule. The commission agrees with TXU and Reliant that the price floor should be restored, and has made revisions to the rule accordingly. As explained previously, the low-income discount is tied to the formula for the price floor.

The commission agrees with Cities, in part, concerning the level of the MCPE rate and adopts the 120% formula in the proposed rule for residential customers only. For all other customers, the MCPE multiplier is 125%. The commission does not adopt the alternative pricing proposal put forth by Cities that is based on retail prices. Historical retail prices may not reflect current conditions in the wholesale market and thus may not adequately compensate LSPs for providing the service.

Subsection (1)(2)

TXU proposed using 15-minute interval data instead of hourly data in the calculation of the MCPE. This change would eliminate the need to define the term “actual hourly MCPE.”

Commission Response

The commission retains the reference to hourly MCPE data for the residential class, and retains the reference to 15-minute interval data for all other customer classes.

Subsection (1)(2)(c)

TIEC commented that the rate for large non-residential customers in both the existing and the proposed rule results in excessive charges for transitioned customers, and allows the LSP to collect more than it needs to cover costs. In addition to the 120% multiplier, \$7.25 floor, and the \$6.00 per kW/month demand charge, the larger customers must pay a customer charge of nearly \$3,000 per month. Cumulatively, TIEC explained, these charges are excessive and impose an unreasonable burden on industrial customers who are transitioned to LSPs. TIEC urged the commission to eliminate the demand charge from the proposed rule, arguing that this charge is not justified because the transitioned customer will already be paying the market price plus a large premium for the energy it consumes. While a demand charge makes sense when a customer has “reserved” power at a certain price, it does not make sense when the REP is guaranteed to recover the costs of serving a customer from the energy charge alone.

Joint Commenters disagreed with TIEC’s request to remove the demand charge, because inclusion of a demand charge provides a deterrent to customers switching back and forth

between POLR service and competitive offers on the basis of price, using the POLR as an arbitrage opportunity. POLR service was never intended to be a competitive alternative and certainly should not be structured so that large non-residential customers could use POLR service to arbitrage the prices they pay for retail service. Joint Commenters argued that demand charges are a common rate design element for commercial and industrial customers. TXU also opposed TIEC's proposal to eliminate the demand charge for large industrial customers under the POLR rules unless it is replaced by another recovery mechanism to keep the POLR providers whole.

Commission Response

The commission agrees with Joint Commenters that the demand charge for large industrial customers should not be eliminated; and consistent with the commission's determination in the current POLR rule, a demand charge is a necessary component to the POLR rate. However, the commission believes that it should be prorated for transitioned customers, and has addressed this issue below.

On the other hand, customers that request service from an LSP (in contrast to those that are assigned an LSP during a mass transition event) will not have the demand charges prorated. While TIEC opined that the 120% multiplier is excessive, the commission believes a 125% multiplier is a reasonable rate to ensure that LSPs serving large non-residential customers are able to recover their costs, and it is a decrease from the 130% multiplier in the current rule. The commission concludes that a customer who consumes a

lot of power in a short period of time, such as a high demand customer, is more costly to serve than one which uses the same amount of power over a longer period of time.

Subsection (l)(6)

TIEC noted that if demand charges will not be pro-rated for partial months when the transitioned customer switches to a new, permanent provider, then there is no incentive for customers to switch quickly to a new provider or enter into a long-term contract with the LSP. TIEC argued that this aspect of the rule is inconsistent with the ultimate goal of encouraging transitioned customers to enter into new service agreements as quickly as possible. TIEC explained that a 50 MW industrial customer would incur customer and demand charges of more than \$270,000 if it were switched to an LSP for even a few hours. This is in addition to having to pay 120% of MCPE. This result is egregious, as the REP will not incur anything close to this level of cost in serving the large non-residential customer for only a brief period, and therefore TIEC requested that the commission add language to require LSPs to pro-rate any demand charges for the non-residential customer class based on the number of days that a customer takes POLR service.

Joint Commenters opposed TIEC's request that the rule be amended to require REPs that provide POLR service under the formula rates to prorate demand charges for the non-residential customer classes. Demand charges are based on the highest demand in the time period for which service is rendered. Therefore, the demand that is registered for the period that service is provided to the customer should be the demand charge applied to the customer's rate.

Joint Commenters explained that the importance of including a demand charge is made clear by considering a low load factor customer. Customers with a low load factor will typically have a peak demand that is not sustained for a large period of time and most usage will occur at demands far less than the peak demand. Therefore, usage for a low load factor customer will be much lower than usage for a high load factor if the peak demands of each customer are the same.

Joint Commenters stated that it is the actual demand being recorded that is charged, and there is no reason to prorate this charge for service that does not span a full month. According to Joint Commenters, TIEC is re-urging positions that the commission has soundly rejected in prior POLR rulemakings and should be rejected again.

Commission Response

As noted in the response above, the commission is adopting a rule that provides for demand charges for large customers to be prorated if they are customers transferred to an LSP during a mass transition event. In this adopted rule, the commission seeks to strike the right balance between POLR rates that are not punitive to retail customers while at the same time allow enough revenue for POLR providers to cover expected costs. Consistent with these objectives, the commission agrees with TIEC that a non-residential customer on a POLR rate should not have to pay a full month's customer and demand charges if the customer switches to a REP of choice before a full month of service has been provided. Rather, the commission believes rates should reflect costs incurred by the POLR providers; therefore, it has modified the language in this subsection accordingly.

Subsection (o)

TDUs recommended that the provisions included under this subsection be broken out into three separate parts. TDUs explained that the duties and obligations that are included in current subsections (o)(2) through (o)(9) appear to apply regardless of whether the REP acquires the customer through a mass transition, or through the customer requesting service. Therefore, TDUs suggested these provisions be separated from subsection (o)(1), which applies only to customer requests for service, and to also separate them from subsections (o)(10) through (o)(16), which appear to apply only to mass transitions.

Commission Response

The commission acknowledges the comments by TDUs that subsection (o) is lengthy. Nonetheless, the commission concludes that the provisions in that subsection are appropriately organized and additional subsections are unnecessary.

TEAM stated that the commission should consider a mechanism that allows for quicker switching away from POLR service. TEAM offered several solutions, such as the TDU waiving the out-of-cycle meter read costs, with the TDU given recovery of the costs from the SBF or through a regulatory asset in base rates. TEAM added that given the oncoming deployment of advanced meters (AMS), the proposed rule should be written to recognize the deployment of that technology. OPC agreed with TEAM and strongly favored a system in which mass transitioned customers will be moved swiftly to competitive products.

Commission Response

The commission agrees with TEAM and has adopted a requirement in subsection (o) to require the TDU to waive out-of-cycle meter read charges and recover the costs through a regulatory asset. The commission agrees with TEAM that the coming deployment of AMS will also ease the burden for customers by reducing switching times. Additionally, with AMS deployment the costs of switching to a new REP and the costs of out-of-cycle meter reads will decrease over time, and will be addressed in other commission proceedings.

Subsection (o)(1) - Transition of customers to POLR Service Providers

Reliant recommended modifying this subsection (o)(1) to clarify that only LSPs will be required to serve customers requesting service.

Commission Response

As explained above, the commission agrees with Reliant that only LSPs should be required to serve customers requesting service and has modified the rule accordingly.

Subsection (o)(7)

TDUs recommended that POLRs only be required to obtain customer contact information from ERCOT, rather than from both ERCOT and the TDU. TDUs explained that the customer contact information in the TDU system may contradict that held by ERCOT, which is likely to be more accurate given the new reporting requirements incorporated in the proposed rule.

TXU also proposed changing subsection (o)(7) to make clear that the information a POLR provider is permitted to request pursuant to this section is limited to the information for the customers transitioned to that REP. Reliant stated that the language referring to a mass transition initiated by the provider should be deleted, because under the existing rule, POLR providers initiated transitions until July 1, 2007. The mass transition has been revised and is now initiated by ERCOT, and the language should therefore be deleted.

Commission Response

The commission disagrees with TDUs that POLRs should only be able to obtain contact information from ERCOT. Given the preponderance of poor customer data during the transitions in 2008, the commission concludes that the REPs shall be able to obtain contact information from TDUs. Therefore, the commission retains the language in this subsection. The commission agrees with TXU and Reliant and has modified the rule in accordance with these suggestions.

Subsection (o)(8)

TXU recommended a modification to reflect the fact that information referred to in subsection (o)(8) may not be available in Texas SET format.

Commission Response

The commission accepts TXU's modification and has reflected the change in the rule.

Subsection (o)(13)

TXU expressed concerns that a switch request scheduled for a date prior to the initiation of a mass transition would be negated until the next available switch date. TXU explained that customers who had chosen a new REP and are expecting a switch to that REP would instead be subjected to the mass transition. OPC and Texas ROSE agreed. Texas ROSE stated that an immediate fix is necessary to protect switches requested before a transition. TIEC requested that the commission revise this section to clarify that a customer will be allowed to switch to a new permanent provider even if the customers' request is made *after* a mass transition is initiated.

Commission Response

The commission agrees with these commenters that customers should be allowed to switch to a new permanent provider even if the request is made after a mass transition is initiated, and the mechanisms provided in subsection (o)(14), noted below, will enable this to occur.

Subsection (o)(14)

ERCOT, TXU, and the TDUs did not support a new transaction for POLR, and recommended removing this language. ERCOT argued that the market has developed the transactions and business processes to support transitions to POLR during the TX SET 3.0 project that went live in June 2007. TXU commented that a TX SET change would impose millions of dollars of costs on the market, and recommended that the commission direct ERCOT to instead explore ways to adapt existing transactions to avoid the additional cost. TDUs recommended further consideration before a new transaction is required. The market has already developed an electronic transaction that carries a flag indicating that it is a switch being initiated by ERCOT as

part of a mass transition. This transaction is in use today, and development of a different transaction will require more than a year of work, and would be very costly.

Texas ROSE stressed the importance of streamlining the mass transition process. Texas ROSE emphasized that the processes at ERCOT are extremely important in providing seamless service to residential consumers. Last summer, consumers attempted to switch before the REP defaulted but their switch request was “trumped” in the ERCOT mass transition, sending them to POLR, Texas ROSE explained. These customers had to wait until their next meter reading date for their switch to be honored. If ERCOT would query its system for all switches in process for mass transition ESI IDs, this problem could be minimized.

Texas ROSE pointed out that problems from the previous POLR transitions included customers that were switched to POLR, that could not afford the high price, then signed up for services with another REP. Because the POLR did not receive a security deposit, some customers were disconnected by the POLR, even though they had affirmatively refused POLR service, and had attempted to switch to another REP. Texas ROSE argued that in a functioning competitive market, customers should be able to switch away from a defaulting provider and never be a POLR customer. Texas ROSE also stated that if it ERCOT is unable to create a new mass transition process that works better for consumers until 2010, a temporary “work around” solution should be created to identify and honor switches customers make right after a mass transition to avoid high POLR costs and to maintain continuous service.

TXU recommended the addition of a new paragraph to address the potential effects of estimated meter readings. Specifically, TXU argued, TDUs should be required to calculate the actual average daily use within 10 days of obtaining actual meter data. TXU suggested that if the actual daily usage is more than 50% greater or less than the estimated average daily usage sent to the exiting REP, the TDU should be required to cancel and re-bill both the exiting REP and the gaining REP. TDUs disagreed with TXU Energy's recommendation, and argued that the commission has previously declined to adopt these types of specific requirements for estimating procedures. TDUs explained there are many technical and logistical impacts to be considered, and this issue should be brought up in a different proceeding, in which all estimates can be addressed.

Commission Response

The commission agrees with the TDUs and directs ERCOT to explore ways to adapt existing transactions to avoid the additional cost of a new transaction. However, if after discussion with stakeholders, a determination is made that a new transaction is the only solution for this issue, then a transition shall be in place no later than 14 months from adoption of this rule. The commission finds that modifying the mechanisms at ERCOT and a new transaction will assuage the concerns noted by Texas ROSE.

The commission agrees with TXU that new language is needed to address the potential effects of estimated meter readings for mass transitioned customers, and has added language to subsection (o)(17) to address this issue. The language in subsection (o)(17) requires the TDUs to calculate the actual usage within 10 days of receiving actual meter

data. The provision also states that if the average daily estimated usage sent to the exiting REP is more than 50% greater than or less than the average actual kWh usage per day, the TDU shall promptly cancel and re-bill both the exiting REP and the POLR using the average actually daily usage. The commission expects a greater level of accuracy for estimates in this market. The commission expects estimates to be accurate - and clarifies that the 50% provision does not set the standard in the market for the accuracy of estimates, but rather is the threshold at which estimate errors must be re-billed during mass transitions. The commission also notes that with the deployment of advanced metering, this calculation will become less of an issue for REPs as well as TDUs.

Subsection (o)(16)

ERCOT recommended adding language allowing REPs to use current market processes for dispute of TDU charges if they are charged in error for the out-of-cycle read. ERCOT noted that rates are confidential, and it does not have visibility into what rates customers may be charged by REPs. ERCOT explained that the process outlined in the Retail Market Guide allows REPs to dispute charges received by TDUs. ERCOT continued that this process has been in effect since July 1, 2007, and should be the tool that REPs and TDUs use to communicate when the fee for an out-of-cycle meter read charge should not be assessed.

Commission Response

The commission agrees with ERCOT and has modified the rule accordingly.

TEAM and OPC did not oppose the concept of a regulatory asset to recover the costs of out-of-cycle meter reads. Reliant opposed creating a regulatory asset to account for out-of-cycle meter reading charges associated with transitioning customers away from the defaulting REP, instead of continuing the current practice of charging the defaulting REP. Reliant stated that the defaulting REP should assume those charges rather than creating a regulatory asset for which the remaining REPs pay. TIEC opposed waiving the charge during a mass transition. Although these charges are typically small, if they are aggregated into a regulatory asset during a mass transition, the financial impact on TDU rates could be significant. TIEC argued that the costs of a REP default should be generally borne by the defaulting REP and the customers who selected the entity as their provider. Further, requiring customers with no relationship to a defaulting REP to pay for the costs of out-of-cycle meter reads would undermine the risks and rewards of customer choice. TIEC opined this would result in a “discounted” POLR service rate, and is a clear violation of PURA; therefore, transitioning customers should each be required to pay their respective meter-read charges.

TDUs recommended that TDU charges associated with a mass transition not be suppressed as proposed in subsection (o)(16) of the rule. There are two TDU charges that may be incurred in a mass transition. TDUs explained the first is a nominal fee that covers the cost of the out-of-cycle estimate or meter read that occurs when the TDU executes the mass transition and switches the customer to the new provider. This charge is currently billed to the defaulting REP and in almost every instance is not paid. They become part of the TDU’s bad debt associated with the REP in default. TDUs pointed out that if the amendments to the REP certification rule that are currently proposed in Project Number 35767, *Project Relating to the Certification of a Retail Electric*

Provider, are adopted, the unpaid charge would be collected in a regulatory asset by the TDU as part of bad debt and reviewed for reasonableness in the next rate case for collection. Therefore, the TDUs asserted that if the rule prohibited the failing REPs from billing the fee to the customer, there would be no need to suppress the fee because it would already be moved into a regulatory asset.

TDUs pointed out that the second TDU fee associated with a mass transition is not always incurred. When the customer who is mass transitioned seeks to leave the POLR, there is no fee associated with the switch if the customer transfers to the new REP, as of its normal meter read date. It is only if the customer switches outside of the normal billing cycle that an out-of-cycle meter read fee is charged to the REP that is gaining the customer. Suppressing this fee would be difficult, because the switch request does not identify the customer as being on POLR service, or having been mass transitioned. TDUs stated this is why there is currently no way for the TDU to know that fee suppression should apply without comparing a list of previously mass transitioned customers to every switch request every day. This would be an impossible task to accomplish manually; and therefore, each TDU would have to build a system to perform the query electronically.

According to the TDUs, further complicating matters is the fact that if a customer moves to the POLR's competitive rate, often there is no switch and thus no way to know that the fee suppression should no longer apply. Because the switching time period will vary by customer from a day or two to approximately a month, a process to handle this level of complexity would

be extremely time consuming and costly to develop, and perhaps impossible. The TDUs recommended against suppressing this second fee.

Reliant supported the idea of suppressing out-of-cycle meter read charges for mass transitioned customers when the customer switches away from the POLR provider. However, Reliant acknowledged there are technical processing issues that need to be addressed and clarified to effectuate the commission's goal. Questions relating to the mechanics of achieving this goal such as the implementation costs, timing (how long the prohibition of the charge will be in effect following a mass transition), and whether normal transaction processing will be need to be addressed. Reliant suggested that a workshop is needed so that all participants can understand the process and work on a solution.

Finally, the TDUs requested the rule adopt the same language for creating the regulatory asset, as adopted in Project Number 35767 for the REP certification rule, in order to ensure that TDU auditors will allow creation of the asset.

Commission Response

The commission does not agree with TIEC that the costs of off-cycle meter reading charges should be borne by the customer forced into mass transition. The commission disagrees with TIEC that the financial impact of the regulatory asset will be significant. Reliant's suggestion that the TDU's recourse for the off-cycle charges be limited to recovery from the defaulting is impractical - historically, the defaulting REP exits the market without providing accurate customer information, if any, and owes money to various parties. It is

highly unlikely that the TDU will be able to recover the charges from the defaulting REP. Because these charges are unpredictable and sporadic, the commission finds that the regulatory asset provision is the most cost-effective method to protect a TDU's financial integrity. Current practice allows customers who attempt to switch during a mass transition event to ask for an out-of-cycle switch. However, experience from the recent 2008 transitions and earlier events demonstrate that most customers are unaware of this option. Additionally, not all REPs are able to process out-of-cycle switches. Allowing for cost recovery through a TDU regulatory asset will prevent the customer from having to specifically request an out-of-cycle switch and pay an additional charge. The regulatory asset will also ensure that transitioned customers will not be charged for out-of-cycle meter reading charges in transitioning to the POLR provider, or when transitioning away from the POLR provider.

The commission agrees with Joint TDUs' recommended language to satisfy audit standards and make it clear that the regulatory asset is to be reviewed for reasonableness before it is included in rates. The commission modifies subsection (f)(3)(B) consistent with Joint TDUs' recommendation. In the REP certification rulemaking, the commission determined that the rule should be clear that the regulatory asset must be adjusted for bad debt charges that are already being recovered through the TDU's rate. Finally, the commission notes that cost recovery of a regulatory asset related to bad debt will be subject to review in a rate case pursuant to PURA §36.051.

Subsection (p)(1)(B)

TDUs recommended that the wording of subsection (p)(1)(B) be changed to correctly reflect that default occurs under the TDU Tariff without a commission order. TDUs explained that if the REP fails to pay delivery charges in accordance with the specified timelines, it is automatically in default. Therefore, TDUs argued it is inappropriate to say that the commission would issue an order “declaring” that the REP is in default, although the commission may issue an order recognizing that the default has occurred.

In addition, TDUs pointed out that under the TDU Tariff, if the defaulting REP fails to choose another option, the TDU is required to “immediately implement option (B)” of section 4.6.2.1(5), which requires the competitive retailer (REP) to transition customers to another competitive retailer or the POLR. TDUs concluded that ERCOT should initiate a mass transition upon receiving notice from the TDU that a transition is required pursuant to this TDU Tariff provision. Alternatively, TDUs offered that this section should provide that the transition should occur upon issuance of a commission order, recognizing that the REP is in default under the terms of the Tariff.

Commission Response

The commission acknowledges that if a REP fails to pay for delivery charges in accordance with the timelines set out in the TDU Tariff, the REP is automatically in default. The commission disagrees with TDU’s suggestion that ERCOT should initiate a mass transition upon receiving notice from the TDU that a transition is required. The commission adopts language to allow TDUs to notify the commission in the event of a REP default under the

TDU Tariff in subsections (h) and (i). While the commission has not initiated a mass transition, it believes it has the right to do so, by commission order.

Subsection (p)(2)

Reliant proposed deleting the word “provider” following “LSP” for consistency and deleting MREPs because MREPs include all eligible REPs and there will not be a “replacement” REP for a defaulting MREP, as is the case with the five largest REPs making up the LSP defaults.

Commission Response

The commission declines to adopt Reliant’s suggestion, as it is not adopting the MREP category in this rule. POLR provider replaces the term LSP in this paragraph.

Subsection (p)(3)

Reliant proposed changing “Provider” to “LSP” throughout the rule, because Provider includes MREPs, VREPs, and LSPs. Reliant explained that only LSPs will serve customers on the MCPE-based priced formula in subsection (l)(2); and therefore, subsection (p) should apply only to those customers served by LSPs who may still be on the subsection (l)(2) rate. Reliant suggested further clarification so that the transfer at the end of a POLR term applies only to those customers still served under the pricing described in subsection (l)(2).

Commission Response

The commission agrees with the change offered by Reliant and has revised the rule accordingly.

Subsection (s) - Notice of Transition to POLR service

TEAM supported the change in notice in the proposed rule. TEAM highlighted that faster notification to customers of a mass transition will lead to customers making choices in the market and switching to new providers. TXU proposed language in the notice to the effect that the price determined under subsection (l) would apply only to REPs charging that price, the LSPs. Finally, TXU recommended adding language consistent with subsection (o)(16) that provides that customers will not be charged for out-of-cycle meter reads. TIEC requested clarification that this provision will apply when a customer is moved to a POLR during a mass transition.

Reliant suggested that the two-day requirement for notice to customers only apply to ERCOT, as it will take a REP serving as the new POLR provider more than two days to prepare and print the proper terms of service, EFLs, and welcome letters. Further, LSPs will need more time to decide whether to offer the MCPE-based pricing allowed by subsection (l)(2) or some other market-based plan and to fulfill the documentation requirements accordingly.

Commission Response

The commission agrees with Reliant that it may take longer than two days for a REP to prepare and send welcome letters, EFL, and terms of service. However, the commission believes that the POLR provider should make every effort to send the notice to customers within two days. The commission retains the language, but notes that the REP has some flexibility in meeting this requirement for larger transitions.

Subsection (s)(1)

TEAM supported the requirement for a post-card notice containing the official commission seal. Reliant suggested adding “ERCOT” to clarify that the notice methods contemplated here apply only to ERCOT.

Commission Response

In response to TEAM, the adopted rule maintains inclusion of the official commission seal. The commission agrees with Reliant and has modified the rule accordingly.

Subsection (s)(3)(B)

Reliant recommended changing “non-volunteering provider,” which includes MREPs and LSPs, to “LSP” only. Only the LSP will serve customers using the proposed subsection (1)(2) MCPE-based price formula, and so only LSPs should be providing notice to customers that the POLR price is generally higher than available competitive prices.

Commission Response

The commission agrees with Reliant and has modified the rule accordingly.

Subsection (s)(3)(E)

Reliant proposed removing the word “Standard” from the phrase “Standard Terms of Service” because VREPs and MREPs would send Terms of Service documentation consistent with the market-based plans to which they would transition customers. Reliant explained that only the

LSP will send the Standard Terms of Service described in this rule, and only if it chooses to serve at the subsection (l)(2) price, rather than a market-based plan, as allowed for in proposed subsection (e).

Commission Response

The commission agrees with Reliant and has modified the rule accordingly.

Subsection (s)(3)(H)

Reliant suggested clarification that after enrolling in a competitive product, a mass transition customer is no longer considered a transitioned customer, but is considered a customer.

Commission Response

The commission agrees with Reliant and has modified the rule accordingly.

Subsection (s)(3)(I) and (J)

Reliant recommended modifications to recognize that only customers being served on the proposed subsection (l)(2) price formula should be informed of the need to switch to a competitive product or have their proprietary information made available to a competitive REP for marketing purposes.

Commission Response

The commission agrees with Reliant and has modified the rule accordingly.

Former subsection (v) - Reporting by REPs

TDUs applauded the proposal to require all REPs to frequently report customer contact information to ERCOT. In order to reinforce the seriousness of this obligation, the TDUs recommended that the requirement state explicitly that not only is “accurate” information required, but that “complete” information must be provided. Reliant suggested that REPs be allowed to report customers phone numbers, email addresses, and customer name *only* if available.

Commission Response

The commission agrees with TDUs’ and Reliant’s suggestions and has modified the rule accordingly, and this language is inserted into subsection (o)(6).

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

This amendment is adopted under PURA, Texas Utilities Code Annotated (Vernon 2007 and Supp. 2008) §14.002, which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; §39.106, which requires that the commission designate retail electric providers of last resort; and PURA §39.101, which authorizes the commission to adopt and enforce rules that ensure retail electric customer protections that entitle a customer: to safe, reliable, and reasonably priced electricity, to be served by a provider of last resort that offers a commission-approved standard service package, to be protected from unfair, misleading, or deceptive practices, to other information or

protections necessary to ensure high-quality service to customers including minimum service standards relating to customer deposits and extension of credit, switching fees, levelized billing programs, termination of service, and quality of service, and which requires the commission to ensure that its customer protection rules provide at least the same level of customer protection against potential abuses and the same quality of service that existed on December 31, 1999.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 17.004, 39.101, and 39.106.

§25.43. Provider of Last Resort (POLR).

- (a) **Purpose.** The purpose of this section is to establish the requirements for Provider of Last Resort (POLR) service and ensure that it is available to any requesting retail customer and any retail customer who is transferred to another retail electric provider (REP) by the Electric Reliability Council of Texas (ERCOT) because the customer's REP failed to provide service to the customer or failed to meet its obligations to the independent organization.
- (b) **Application.** The provisions of this section relating to the selection of REPs providing POLR service apply to all REPs that are serving retail customers in transmission and distribution utility (TDU) service areas. This section does not apply when an electric cooperative or a municipally owned utility (MOU) designates a POLR provider for its certificated service area. However, this section is applicable when an electric cooperative delegates its authority to the commission in accordance with subsection (q) of this section to select a POLR provider for the electric cooperative's service area. All filings made with the commission pursuant to this section, including filings subject to a claim of confidentiality, shall be filed with the commission's Filing Clerk in accordance with the commission's Procedural Rules, Chapter 22, Subchapter E, of this title (relating to Pleadings and other Documents).
- (c) **Definitions.** The following words and terms when used in this section shall have the following meaning, unless the context indicates otherwise:

- (1) **Basic firm service** -- Electric service that is not subject to interruption for economic reasons and that does not include value-added options offered in the competitive market. Basic firm service excludes, among other competitively offered options, emergency or back-up service, and stand-by service. For purposes of this definition, the phrase "interruption for economic reasons" does not mean disconnection for non-payment.
- (2) **Billing cycle** -- A period bounded by a start date and stop date that REPs and TDUs use to determine when a customer used electric service.
- (3) **Billing month** -- Generally a calendar accounting period (approximately 30 days) for recording revenue, which may or may not coincide with the period a customer's consumption is recorded through the customer's meter.
- (4) **Business day** -- As defined by the ERCOT Protocols.
- (5) **Large non-residential customer** -- A non-residential customer who had a peak demand in the previous 12-month period at or above one megawatt (MW).
- (6) **Large service provider (LSP)** -- A REP that is designated to provide POLR service pursuant to subsection (j) of this section.
- (7) **Market-based product** -- For purposes of this section, a rate for residential customers that is derived by applying a positive or negative multiplier to the rate described in subsection (1)(2) of this section is not a market-based product.
- (8) **Mass transition** -- The transfer of customers as represented by ESI IDs from a REP to one or more POLR providers pursuant to a transaction initiated by the independent organization that carries the mass transition (TS) code or other code designated by the independent organization.

- (9) **Medium non-residential customer** -- A non-residential retail customer who had a peak demand in the previous 12-month period of 50 kilowatt (kW) or greater, but less than 1,000 kW.
 - (10) **POLR area** -- The service area of a TDU in an area where customer choice is in effect, except that the service area for AEP Texas Central Company shall be deemed to include the area served by Sharyland Utilities, L.P.
 - (11) **POLR provider** -- A volunteer retail electric provider (VREP) or LSP that may be required to provide POLR service pursuant to this section.
 - (12) **Residential customer** -- A retail customer classified as residential by the applicable TDU tariff or, in the absence of classification under a tariff, a retail customer who purchases electricity for personal, family, or household purposes.
 - (13) **Transitioned customer** -- A customer as represented by ESI IDs that is served by a POLR provider as a result of a mass transition under this section.
 - (14) **Small non-residential customer** -- A non-residential retail customer who had a peak demand in the previous 12-month period of less than 50 kW.
 - (15) **Voluntary retail electric provider (VREP)** -- A REP that has volunteered to provide POLR service pursuant to subsection (i) of this section.
- (d) **POLR service.**
- (1) There are two types of POLR providers: VREPs and LSPs.
 - (2) For the purpose of POLR service, there are four classes of customers: residential, small non-residential, medium non-residential, and large non-residential.

- (3) A VREP or LSP may be designated to serve any or all of the four customer classes in a POLR area.
- (4) A POLR provider shall offer a basic, standard retail service package to customers it is designated to serve, which shall be limited to:
 - (A) Basic firm service;
 - (B) Call center facilities available for customer inquiries; and
 - (C) Benefits for low-income customers as provided for under PURA §39.903 relating to the System Benefit Fund.
- (5) A POLR provider shall, in accordance with §25.108 of this title (relating to Financial Standards for Retail Electric Providers Regarding the Billing and Collection of Transition Charges), fulfill billing and collection duties for REPs that have defaulted on payments to the servicer of transition bonds or to TDUs.
- (6) Each LSP's customer billing for residential customers taking POLR service under a rate prescribed by subsection (1)(2) of this section shall contain notice to the customer that other competitive products or services may be available from the LSP or another REP. The notice shall also include contact information for the LSP, and the Power to Choose website, and shall include a notice from the commission in the form of a bill insert or a bill message with the header "An Important Message from the Public Utility Commission Regarding Your Electric Service" addressing why the customer has been transitioned to a LSP, a description of the purpose and nature of POLR service, and explaining that more information on competitive markets can be found at www.powertochoose.org, or toll-free at 1-866-PWR-4-TEX (1-866-797-4839).

(e) **Standards of service.**

- (1) An LSP designated to serve a class in a given POLR area shall serve any eligible customer requesting POLR service or assigned to the LSP pursuant to a mass transition in accordance with the Standard Terms of Service in subsection (f)(1) of this section for the provider customer's class. However, in lieu of providing terms of service to a transitioned customer under subsection (f) of this section and under a rate prescribed by subsection (l)(2) of this section an LSP may at its discretion serve the customer pursuant to a market-based month-to-month product, provided it serves all transitioned customers in the same class and POLR area pursuant to the product.
- (2) A POLR provider shall abide by the applicable customer protection rules as provided for under Subchapter R of this chapter (relating to Customer Protection Rules for Retail Electric Service), except that if there is an inconsistency or conflict between this section and Subchapter R, the provisions of this section shall apply. However, for the medium non-residential customer class, the customer protection rules as provided for under Subchapter R of this chapter do not apply, except for §25.481 of this title (relating to Unauthorized Charges), §25.485(a)-(b) of this title (relating to Customer Access and Complaint Handling), and §25.495 of this title (relating to Unauthorized Change of Retail Electric Provider).

(f) **Customer information.**

(1) The Standard Terms of Service prescribed in subparagraphs (A)-(D) of this paragraph apply to POLR service provided by an LSP under a rate prescribed by subsection (l)(2) of this section.

(A) Standard Terms of Service, POLR Provider Residential Service:

[Figure: 16 TAC §25.43\(f\)\(1\)\(A\)](#)

(B) Standard Terms of Service, POLR Provider Small Non-Residential Service:

[Figure: 16 TAC §25.43\(f\)\(1\)\(B\)](#)

(C) Standard Terms of Service, POLR Provider Medium Non-Residential Service:

[Figure: 16 TAC §25.43\(f\)\(1\)\(C\)](#)

(D) Standard Terms of Service, POLR Provider Large Non-Residential Service:

[Figure: 16 TAC §25.43\(f\)\(1\)\(D\)](#)

(2) An LSP providing service under a rate prescribed by subsection (l)(2) of this section shall provide each new customer the applicable Standard Terms of Service. Such Standard Terms of Service shall be updated as required under §25.475(f) of this title (relating to General Retail Electric Provider Requirements and Information Disclosures to Residential and Small Commercial Customers).

(g) **General description of POLR service provider selection process.**

- (1) All REPs shall provide information to the commission in accordance with subsection (h)(1) of this section. Based on this information, the commission's designated representative shall designate REPs that are eligible to serve as POLR providers in areas of the state in which customer choice is in effect, except that the commission shall not designate POLR providers in the service areas of MOUs or electric cooperatives unless an electric cooperative has delegated to the commission its authority to designate the POLR provider, in accordance with subsection (q) of this section.
- (2) POLR providers shall serve two-year terms. The initial term for POLR service in areas of the state where retail choice is not in effect as of the effective date of the rule shall be set at the time POLR providers are initially selected in such areas.

- (h) **REP eligibility to serve as a POLR provider.** In each even-numbered year, the commission shall determine the eligibility of certified REPs to serve as POLR providers for a term scheduled to commence in January of the next year. On a schedule to be determined by the commission, POLR providers shall be designated to complete the 2009-2010 period pursuant to the requirements of this section. REPs designated to provide service as of February 26, 2009 may continue providing such service pursuant to the requirements of this section as they existed prior to the 2009 re-adoption of this section, until such time as new POLR providers are required to provide service pursuant to the current requirements of this section. POLRs may serve customers on a market-

based, month-to-month rate and provide notice pursuant to the provisions of this section as of this section's effective date.

- (1) All REPs shall provide information to the commission necessary to establish their eligibility to serve as a POLR provider for the next term, except that for the 2009-2010 term, the information already provided for that term shall serve this purpose. Starting with the 2011-2012 term REPs shall file, by July 10th, of each even-numbered year, by service area, information on the classes of customers they provide service to, and for each customer class, the number of ESI IDs the REP serves and the retail sales in megawatt-hours for the annual period ending March 31 of the current year. The independent organization shall provide to the commission the total number of ESI ID and total MWh data for each class. All REPs shall also provide information on their technical capability and financial ability to provide service to additional customers in a mass transition. The commission's determination regarding eligibility of a REP to serve as POLR provider under the provisions of this section shall not be considered confidential information.
- (2) Eligibility to be designated as a POLR provider is specific to each POLR area and customer class. A REP is eligible to be designated a POLR provider for a particular customer class in a POLR area, unless:
 - (A) A proceeding to revoke or suspend the REP's certificate is pending at the commission, the REP's certificate has been suspended or revoked by the commission, or the REP's certificate is deemed suspended pursuant to

§25.107 of this title (relating to Certification of Retail Electric Providers (REPs));

- (B) The sum of the numeric portion of the REP's percentage of ESI IDs served and percentage of retail sales by MWhs in the POLR area, for the particular class, is less than 1.0;
- (C) The commission does not reasonably expect the REP to be able to meet the criteria set forth in subparagraph (B) of this paragraph during the entirety of the term;
- (D) On the date of the commencement of the term, the REP or its predecessor will not have served customers in Texas for at least 18 months;
- (E) The REP does not serve the applicable customer class, or does not have an executed delivery service agreement with the service area TDU;
- (F) The REP is certificated as an Option 2 REP under §25.107 of this title;
- (G) The REP's customers are limited to its own affiliates;
- (H) A REP files an affidavit stating that it does not serve small or medium non-residential customers, except for the low-usage sites of the REP's large non-residential customers, or commonly owned or franchised affiliates of the REP's large non-residential customers and opts out of eligibility for either, or both of the small or medium non-residential customer classes; or
- (I) The REP does not meet minimum financial, technical and managerial qualifications established by the commission under §25.107 of this title.

- (3) For each term, the commission shall publish the names of all of the REPs eligible to serve as a POLR provider under this section for each customer class in each POLR area and shall provide notice to REPs determined to be eligible to serve as a POLR provider. A REP may challenge its eligibility determination within five business days of the notice of eligibility by filing with the commission additional documentation that includes the specific data, the specific calculation, and a specific explanation that clearly illustrate and prove the REP's assertion. Commission staff shall verify the additional documentation and, if accurate, reassess the REP's eligibility. Commission staff shall notify the REP of any change in eligibility status within 10 business days of the receipt of the additional documentation. A REP may then appeal to the commission through a contested case if the REP does not agree with the staff determination of eligibility. The contested status will not delay the designation of POLR providers.
- (4) A standard form may be created by the commission for REPs to use in filing information concerning their eligibility to serve as a POLR provider.
- (5) If ERCOT or a TDU has reason to believe that a REP is no longer capable of performing POLR responsibilities, ERCOT or the TDU shall make a filing with the commission detailing the basis for its concerns and shall provide a copy of the filing to the REP that is the subject of the filing. If the filing contains confidential information, ERCOT or the TDU shall file the confidential information in accordance with §22.71 of this title (relating to Filing of Pleadings, Documents, and Other Materials). Commission staff shall review the filing, and shall request that the REP demonstrate that it still meets the qualifications to provide the

service. The commission staff may initiate a proceeding with the commission to disqualify the REP from providing POLR service. No ESI IDs shall be assigned to a POLR provider after the commission staff initiates a proceeding to disqualify the POLR provider, unless the commission by order confirms the POLR provider's designation.

- (i) **VREP list.** Based on the information provided in accordance with this subsection and subsection (h) of this section, the commission shall post the names of VREPs on its webpage, including the aggregate customer count offered by VREPs. A REP may submit a request to be a VREP no earlier than June 1, and no later than July 31, of each even-numbered year. This filing shall include a description of the REP's capabilities to serve additional customers as well as the REP's current financial condition in enough detail to demonstrate that the REP is capable of absorbing a mass transition of customers without technically or financially distressing the REP and the specific information set out in this subsection. The commission's determination regarding eligibility of a REP to serve as a VREP, under the provisions of this section, shall not be considered confidential information.

- (1) A VREP shall provide to the commission the name of the REP, the appropriate contact person with current contact information, which customer classes the REP is willing to serve within each POLR area, and the number of ESI IDs the REP is willing to serve by customer class and POLR area in each transition event.

- (2) A REP that has met the eligibility requirements of subsection (h) of this section and provided the additional information set out in this subsection is eligible for designation as a VREP.
- (3) Commission staff shall make an initial determination of the REPs that are to serve as a VREP for each customer class in each POLR area and publish their names. A REP may challenge its eligibility determination within five business days of the notice of eligibility by submitting to commission staff additional evidence of its capability to serve as a VREP. Commission staff shall reassess the REP's eligibility and notify the REP of any change in eligibility status within 10 business days of the receipt of the additional documentation. A REP may then appeal to the commission through a contested case if the REP does not agree with the staff determination of eligibility. The contested status will not delay the designation of VREPs.
- (4) A VREP may file a request at any time to be removed from the VREP list or to modify the number of ESI IDs that it is willing to serve as a VREP. If the request is to increase the number of ESI IDs, it shall provide information to demonstrate that it is capable of serving the additional ESI IDs, and the commission staff shall make an initial determination, which is subject to an appeal to the commission, in accordance with the timelines specified in paragraph (3) of this subsection. If the request is to decrease the number of ESI IDs, the request shall be effective five calendar days after the request is filed with the commission; however, after the request becomes effective the VREP shall continue to serve ESI IDs previously acquired through a mass transition event as well as ESI IDs the VREP acquires

from a mass transition event that occurs during the five-day notice period. If in a mass transition a VREP is able to acquire more customers than it originally volunteered to serve, the VREP may work with commission staff and ERCOT to increase its designation. Changes approved by commission staff shall be communicated to ERCOT and shall be implemented for the current allocation if possible.

- (5) ERCOT or a TDU may challenge a VREP's eligibility. If ERCOT has reason to believe that a REP is no longer capable of performing VREP responsibilities, ERCOT shall make a filing with the commission detailing the basis for its concerns and shall provide a copy of the filing to the REP that is the subject of the filing. If the filing contains confidential information, ERCOT or the TDU shall file it in accordance with §25.71 of this title (relating to General Procedures, Requirements and Penalties). Commission staff shall review the filing of ERCOT and if commission staff concludes that the REP should no longer provide VREP service, it shall request that the REP demonstrate that it still meets the qualifications to provide the service. The commission staff may initiate a proceeding with the commission to disqualify the REP from providing VREP service. No ESI IDs shall be assigned to a VREP after the commission staff initiates a proceeding to disqualify the VREP, unless the commission by order confirms the VREP's designation.

- (j) **LSPs.** This subsection governs the selection and service of REPs as LSPs.
- (1) The REPs eligible to serve as LSPs shall be determined based on the information provided by REPs in accordance with subsection (h) of this section.
 - (2) In each POLR area, for each customer class, the commission shall designate up to 15 LSPs. The eligible REPs that have the greatest market share based upon retail sales in megawatt-hours, by customer class and POLR area shall be designated as LSPs. Commission staff shall designate the LSPs by October 15th of each even-numbered year, based upon the data submitted to the commission under subsection (h) of this section. Designation as a VREP does not affect a REP's eligibility to also serve as a LSP.
 - (3) For the purpose of calculating the POLR rate for each customer class in each POLR area, an EFL shall be completed by the LSP that has the greatest market share in accordance with paragraph (2) of this subsection. The Electricity Facts Label (EFL) shall be supplied to commission staff electronically for placement on the commission webpage by January 1 of each year, and more often if there are changes to the non-bypassable charges. Where REP-specific information is required to be inserted in the EFL, the LSP supplying the EFL shall note that such information is REP-specific.
 - (4) An LSP serving transitioned residential and small non-residential customers under a rate prescribed by subsection (l)(2) of this section shall move such customers to a market-based month-to-month product, with pricing for such product to be effective no later than either the 61st day of service by the LSP or beginning with the customer's next billing cycle date following the 60th day of service by the

LSP. For each transition event, all such transitioned customers in the same class and POLR area must be served pursuant to the same product terms, except for those customers specified in subparagraph (B) of this paragraph.

- (A) The notice required by §25.475(d) of this title to inform the customers of the change to a market-based month-to-month product may be included with the notice required by subsection (s)(3) of this section or may be provided 14 days in advance of the change. If the §25.475(d) notice is included with the notice required by subsection (s)(3) of this section, the LSP may state that either or both the terms of service document and EFL for the market-based month-to-month product shall be provided at a later time, but no later than 14 days before their effective date.
- (B) The LSP is not required to transfer to a market-based product any transitioned customer who is delinquent in payment of any charges for POLR service to such LSP as of the 60th day of service. If such a customer becomes current in payments to the LSP, the LSP shall move the customer to a market-based month-to-month product as described in this paragraph on the next billing cycle that occurs five business days after the customer becomes current. If the LSP does not plan to move customers who are delinquent in payment of any charges for POLR service as of the 60th day of service to a market-based month-to-month product, the LSP shall inform the customer of that potential outcome in the notice provided to comply with §25.475(d) of this title.

- (5) Upon a request from an LSP and a showing that the LSP will be unable to maintain its financial integrity if additional customers are transferred to it under this section, the commission may relieve an LSP from a transfer of additional customers. The LSP shall continue providing continuous service until the commission issues an order relieving it of this responsibility. In the event the requesting LSP is relieved of its responsibility, the commission staff designee shall, with 90 days notice, designate the next eligible REP, if any, as an LSP, based upon the criteria in this subsection.
- (k) **Mass transition of customers to POLR providers.** The transfer of customers to POLR providers shall be consistent with this subsection.
- (1) ERCOT shall first transfer customers to VREPs, up to the number of ESI IDs that each VREP has offered to serve for each customer class in the POLR area. ERCOT shall use the VREP list to assign ESI IDs to the VREPs in a non-discriminatory manner, before assigning customers to the LSPs. A VREP shall not be assigned more ESI IDs than it has indicated it is willing to serve pursuant to subsection (i) of this section. To ensure non-discriminatory assignment of ESI IDs to the VREPs, ERCOT shall:
- (A) Sort ESI IDs by POLR area;
 - (B) Sort ESI IDs by customer class;
 - (C) Sort ESI IDs numerically;
 - (D) Sort VREPs numerically by randomly generated number; and

- (E) Assign ESI IDs in numerical order to VREPs, in the order determined in subparagraph (D) of this paragraph, in accordance with the number of ESI IDs each VREP indicated a willingness to serve pursuant to subsection (i) of this section. If the number of ESI IDs is less than the total that the VREPs indicated that they are willing to serve, each VREP shall be assigned a proportionate number of ESI IDs, as calculated by dividing the number that each VREP indicated it was willing to serve by the total that all VREPs indicated they were willing to serve, multiplying the result by the total number of ESI IDs being transferred to the VREPs, and rounding to a whole number.
- (2) If the number of ESI IDs exceeds the amount the VREPs are designated to serve, ERCOT shall assign remaining ESI IDs to LSPs in a non-discriminatory fashion, in accordance with their percentage of market share based upon retail sales in megawatt-hours, on a random basis within a class and POLR area, except that a VREP that is also an LSP that volunteers to serve at least 1% of its market share for a class of customers in a POLR area shall be exempt from the LSP allocation up to 1% of the class and POLR area. To ensure non-discriminatory assignment of ESI IDs to the LSPs, ERCOT shall:
- (A) Sort the ESI IDs in excess of the allocation to VREPs, by POLR area;
 - (B) Sort ESI IDs in excess of the allocation to VREPs, by customer class;
 - (C) Sort ESI IDs in excess of the allocation to VREPs, numerically;
 - (D) Sort LSPs, except LSPs that volunteered to serve 1% of their market share as a VREP, numerically by MWhs served;

- (E) Assign ESI IDs that represent no more than 1% of the total market for that POLR area and customer class less the ESI IDs assigned to VREPs that volunteered to serve at least 1% of their market share for each POLR area and customer class in numerical order to LSPs designated in subparagraph (D) of this paragraph, in proportion to the percentage of MWhs served by each LSP to the total MWhs served by all LSPs;
 - (F) Sort LSPs, including any LSPs previously excluded under subparagraph (D) of this paragraph; and
 - (G) Assign all remaining ESI IDs in numerical order to LSPs in proportion to the percentage of MWhs served by each LSP to the total MWhs served by all LSPs.
- (3) Each mass transition shall be treated as a separate event.
- (1) **Rates applicable to POLR service.**
- (1) A VREP shall provide service to customers using a market-based, month-to-month product. The VREP shall use the same market-based, month-to-month product for all customers in a mass transition that are in the same class and POLR area.
 - (2) Subparagraphs (A)-(C) of this paragraph establish the maximum rate for POLR service charged by an LSP. An LSP may charge a rate less than the maximum rate if it charges the lower rate to all customers in a mass transition that are in the same class and POLR area.

(A) **Residential customers.** The LSP rate for the residential customer class shall be determined by the following formula:

$$\text{LSP rate (in \$ per kWh)} = (\text{Non-bypassable charges} + \text{LSP customer charge} + \text{LSP energy charge}) / \text{kWh used}$$

Where:

- (i) Non-bypassable charges shall be all TDU charges and credits for the appropriate customer class in the applicable service territory, and other charges including ERCOT administrative charges, nodal fees or surcharges, replacement reserve charges attributable to LSP load, and applicable taxes from various taxing or regulatory authorities, multiplied by the level of kWh and kW used, where appropriate.
- (ii) LSP customer charge shall be \$0.06 per kWh.
- (iii) LSP energy charge shall be the sum over the billing period of the actual hourly MCPEs for the customer multiplied by the level of kWh used multiplied by 120%.
- (iv) “Actual hourly MCPE” is an hourly rate based on a simple average of the actual interval MCPE prices over the hour.
- (v) “Level of kWh used” is based either on interval data or on an allocation of the customer’s total actual usage to the hour based on a ratio of the sum of the ERCOT backcasted profile interval usage data over the hour to the total of the ERCOT backcasted profile interval usage data over the customer’s entire billing period.

(vi) For each billing period, if the sum over the billing period of the actual hourly MCPEs for a customer multiplied by the level of kWh used falls below the simple average of the zonal MCPE prices over the 12-month period ending September 1 of the preceding year multiplied by the total kWh used over the customer's billing period, then the LSP energy charge shall be the simple average of the zonal MCPE prices over the 12-month period ending September 1 of the preceding year multiplied by the total kWh used over the customer's billing period multiplied by 125%. This methodology shall apply until the commission issues an order suspending or modifying the operation of the floor after conducting an investigation.

(B) **Small and medium non-residential customers.** The LSP rate for the small and medium non-residential customer classes shall be determined by the following formula:

$$\text{LSP rate (in \$ per kWh)} = (\text{Non-bypassable charges} + \text{LSP customer charge} + \text{LSP demand charge} + \text{LSP energy charge}) / \text{kWh used}$$

Where:

(i) Non-bypassable charges shall be all TDU charges and credits for the appropriate customer class in the applicable service territory, and other charges including ERCOT administrative charges, nodal fees or surcharges, replacement reserve charges attributable to LSP load, and applicable taxes from various taxing or regulatory

authorities, multiplied by the level of kWh and kW used, where appropriate.

- (ii) LSP customer charge shall be \$0.025 per kWh.
- (iii) LSP demand charge shall be \$2.00 per kW, per month, for customers that have a demand meter, and \$50.00 per month for customers that do not have a demand meter.
- (iv) LSP energy charge shall be the sum over the billing period of the actual hourly MCPes, for the customer multiplied by the level of kWh used, multiplied by 125%.
- (v) “Actual hourly MCPE” is an hourly rate based on a simple average of the actual interval MCPE prices over the hour.
- (vi) “Level of kWh used” is based either on interval data or on an allocation of the customer’s total actual usage to the hour based on a ratio of the sum of the ERCOT backcasted profile interval usage data over the hour to the total of the ERCOT backcasted profile interval usage data over the customer’s entire billing period.
- (vii) For each billing period, if the sum over the billing period of the actual hourly MCPes for a customer multiplied by the level of kWh used falls below the simple average of the zonal MCPE prices over the 12-month period ending September 1 of the preceding year multiplied by the total kWh used over the customer’s billing period, then the LSP energy charge shall be the simple average of the zonal MCPE prices over the 12-month

period ending September 1 of the preceding year multiplied by the total kWh used over the customer's billing period multiplied by 125%. This methodology shall apply until the commission issues an order suspending or modifying the operation of the floor after conducting an investigation.

- (C) **Large non-residential customers.** The LSP rate for the large non-residential customer class shall be determined by the following formula:

$$\text{LSP rate (in \$ per kWh)} = (\text{Non-bypassable charges} + \text{LSP customer charge} + \text{LSP demand charge} + \text{LSP energy charge}) / \text{kWh used}$$

Where:

- (i) Non-bypassable charges shall be all TDU charges and credits for the appropriate customer class in the applicable service territory, and other charges including ERCOT administrative charges, nodal fees or surcharges, replacement reserve charges attributable to LSP load, and applicable taxes from various taxing or regulatory authorities, multiplied by the level of kWh and KW used, where appropriate.
- (ii) LSP customer charge shall be \$2,897.00 per month.
- (iii) LSP demand charge shall be \$6.00 per kW, per month.
- (iv) LSP energy charge shall be the appropriate MCPE, determined on the basis of 15-minute intervals, for the customer multiplied by 125%, multiplied by the level of kilowatt-hours used. The energy charge shall have a floor of \$7.25 per MWh.

- (3) If in response to a complaint or upon its own investigation, the commission determines that a LSP failed to charge the appropriate rate prescribed by paragraph (2) of this subsection, and as a result overcharged its customers, the LSP shall issue refunds to the specific customers who were overcharged.
 - (4) On a showing of good cause, the commission may permit the LSP to adjust the rate prescribed by paragraph (2) of this subsection, if necessary to ensure that the rate is sufficient to allow the LSP to recover its costs of providing service. Notwithstanding any other commission rule to the contrary, such rates may be adjusted on an interim basis for good cause shown and after at least 10 business days' notice and an opportunity for hearing on the request for interim relief. Any adjusted rate shall be applicable to all LSPs charging the rate prescribed by paragraph (2) of this subsection to the specific customer class, within the POLR area that is subject to the adjustment.
 - (5) For transitioned customers, the customer and demand charges associated with the rate prescribed by paragraph (3) of this subsection shall be pro-rated for partial month usage if a large non-residential customer switches from the LSP to a REP of choice.
- (m) **Challenges to customer assignments.** A POLR provider is not obligated to serve a customer within a customer class or a POLR area for which the REP is not designated as a POLR provider, after a successful challenge of the customer assignment. A POLR provider shall use the ERCOT market variance resolution tool to challenge a customer class assignment with the TDU. The TDU shall make the final determination based upon

historical usage data and not premise type. If the customer class assignment is changed and a different POLR provider for the customer is determined appropriate, the customer shall then be served by the appropriate POLR provider. Back dated transactions may be used to correct the POLR assignment.

(n) **Limitation on liability.** The POLR providers shall make reasonable provisions to provide service under this section to customers who request POLR service, or are transferred to the POLR provider, individually or through a mass transition; however, liabilities not excused by reason of force majeure or otherwise shall be limited to direct, actual damages.

(1) Neither the customer nor the POLR provider shall be liable to the other for consequential, incidental, punitive, exemplary, or indirect damages. These limitations apply without regard to the cause of any liability or damage.

(2) In no event shall ERCOT or a POLR provider be liable for damages to any REP, whether under tort, contract or any other theory of legal liability, for transitioning or attempting to transition a customer from such REP to the POLR provider to carry out this section, or for marketing, offering or providing competitive retail electric service to a customer taking service under this section from the POLR provider.

(o) **REP obligations in a transition of customers to POLR service.**

(1) A customer may initiate service with an LSP by requesting such service at the rate prescribed by subsection (1)(2) of this section with any LSP that is designated to

serve the requesting customer's customer class within the requesting customer's service area. An LSP cannot refuse a customer's request to make arrangements for POLR service, except as otherwise permitted under this title.

- (2) The POLR provider is responsible for obtaining resources and services needed to serve a customer once it has been notified that it is serving that customer. The customer is responsible for charges for service under this section at the rate in effect at that time.
- (3) If a REP terminates service to a customer, or transitions a customer to a POLR provider, the REP is financially responsible for the resources and services used to serve the customer until it notifies the independent organization of the termination or transition of the service and the transfer to the POLR provider is complete.
- (4) The POLR provider is financially responsible for all costs of providing electricity to customers from the time the transfer or initiation of service is complete until such time as the customer ceases taking service under this section.
- (5) A defaulting REP whose customers are subject to a mass transition event shall return the customers' deposits within seven calendar days of the initiation of the transition.
- (6) ERCOT shall create a single standard file format and a standard set of customer billing contact data elements that, in the event of a mass transition, shall be used by the exiting REP and the POLRs to send and receive customer billing contact information. The process, as developed by ERCOT shall be tested on a periodic basis. All REPs shall submit timely, accurate, and complete files, as required by ERCOT in a mass transition event, as well as for periodic testing. The

commission shall establish a procedure for the verification of customer information submitted by REPs to ERCOT. ERCOT shall notify the commission if any REP fails to comply with the reporting requirements in this subsection.

- (7) When customers are to be transitioned or assigned to a POLR provider, the POLR provider may request usage and demand data, and customer contact information including email, telephone number, and address from the appropriate TDU and from ERCOT, once the transition to the POLR provider has been initiated. Customer proprietary information provided to a POLR provider in accordance with this section shall be treated as confidential and shall only be used for mass transition related purposes.
- (8) Information from the TDU and ERCOT to the POLR providers shall be provided in Texas SET format when Texas SET transactions are available. However, the TDU or ERCOT may supplement the information to the POLR providers in other formats to expedite the transition. The transfer of information in accordance with this section shall not constitute a violation of the customer protection rules that address confidentiality.
- (9) A POLR provider may require a deposit from a customer that has been transitioned to the POLR provider to continue to serve the customer. Despite the lack of a deposit, the POLR provider is obligated to serve the customer transitioned or assigned to it, beginning on the service initiation date of the transition or assignment, and continuing until such time as any disconnection request is effectuated by the TDU. A POLR provider may make the request for deposit before it begins serving the customer, but the POLR provider shall begin

providing service to the customer even if the service initiation date is before it receives the deposit – if any deposit is required. A POLR provider shall not disconnect the customer until the appropriate time period to submit the deposit has elapsed. For the large non-residential customer class, a POLR provider may require a deposit to be provided in three calendar days. For the residential customer class, the POLR provider may require a deposit to be provided after 15 calendar days of service if the customer received 10 days' notice that a deposit was required. For all other customer classes, the POLR provider may require a deposit to be provided in 10 calendar days. The POLR provider may waive the deposit requirement at the customer's request if deposits are waived in a non-discriminatory fashion. If the POLR provider obtains sufficient data, it shall determine whether a residential customer has satisfactory credit based on the criteria the POLR provider routinely applies to its other residential customers. If the customer has satisfactory credit, the POLR provider shall not request a deposit from the residential customer.

- (A) At the time of a mass transition, the Executive Director or staff designated by the Executive Director shall distribute available proceeds from an irrevocable stand-by letter of credit in accordance with the priorities established in §25.107(f)(6) of this title. These funds shall first be used to provide deposit payment assistance for transitioned customers enrolled in the rate reduction program pursuant to §25.454 of this title (relating to Rate Reduction Program). The Executive Director or staff designee shall, at the time of a transition event, determine the reasonable deposit amount

up to \$400 per customer ESI ID, unless good cause exists to increase the level of the reasonable deposit amount above \$400. Such reasonable deposit amount may take into account factors such as typical residential usage and current retail residential prices, and, if fully funded, shall satisfy in full the customers' initial deposit obligation to the VREP or LSP.

- (B) The Executive Director or the staff designee shall distribute available proceeds pursuant to §25.107(f)(6) of this title to VREPs proportionate to the number of customers they received in the mass transition, who at the time of the transition are enrolled in the rate reduction program pursuant to §25.454 of this title, up to the reasonable deposit amount set by the Executive Director or staff designee. If funds remain available after distribution to the VREPs, the remaining funds shall be distributed to the appropriate LSPs by dividing the amount remaining by the number of low income customers allocated to LSPs, up to the reasonable deposit amount set by the Executive Director or staff designee.
- (C) If the funds distributed in accordance with §25.107(f)(6) of this title do not equal the reasonable deposit amount determined, the VREP and LSP may request from the customer payment of the difference between the reasonable deposit amount and the amount distributed. Such difference shall be collected in accordance with §25.478(e)(3) of this title (relating to Credit Requirements and Deposits) that allows an eligible customer to pay its deposit in two equal installments provided that:

- (i) The amount distributed shall be considered part of the first installment and the VREP or LSP shall not request an additional first deposit installment amount if the amount distributed is at least 50% of the reasonable deposit amount; and
 - (ii) A VREP or LSP may not request payment of any remaining difference between the reasonable deposit amount and the distributed deposit amount sooner than 40 days after the transition date.
 - (D) Notwithstanding §25.478(d) of this title, 90 days after the transition date, the VREP or LSP may request payment of an amount that results in the total deposit held being equal to what the VREP or LSP would otherwise have charged a customer in the same customer class and service area in accordance with §25.478(e) of this title, at the time of the transition.
- (10) On the occurrence of one or more of the following events, ERCOT shall initiate a mass transition to POLR providers, of all of the customers served by a REP:
- (A) Termination of the Load Serving Entity (LSE) or Qualified Scheduling Entity (QSE) Agreement for a REP with ERCOT;
 - (B) Issuance of a commission order recognizing that a REP is in default under the TDU Tariff for Retail Delivery Service;
 - (C) Issuance of a commission order de-certifying a REP;
 - (D) Issuance of a commission order requiring a mass transition to POLR providers;

- (E) Issuance of a judicial order requiring a mass transition to POLR providers;
and
 - (F) At the request of a REP, for the mass transition of all of that REP's
customers.
- (11) A REP shall not use the mass transition process in this section as a means to cease providing service to some customers, while retaining other customers. A REP's improper use of the mass transition process may lead to de-certification of the REP.
- (12) ERCOT may provide procedures for the mass transition process, consistent with this section.
- (13) A mass transition under this section shall not override or supersede a switch request made by a customer to switch an ESI ID to a new REP of choice, if the request was made before a mass transition is initiated. If a switch request has been made but is scheduled for any date after the next available switch date, the switch shall be made on the next available switch date.
- (14) Customers who are mass transitioned shall be identified for a period of 60 calendar days. The identification shall terminate at the first completed switch or at the end of the 60-day period, whichever is first. If necessary, ERCOT system changes or new transactions shall be implemented no later than 14 months from the effective date of this section to communicate that a customer was acquired in a mass transition and is not charged the out-of-cycle meter read pursuant to paragraph (16) of this subsection. To the extent possible, the systems changes should be designed to ensure that the 60-day period following a mass transition,

when a customer switches away from a POLR provider, the switch transaction is processed as an unprotected, out-of-cycle switch, regardless of how the switch was submitted.

- (15) In the event of a transition to a POLR provider or away from a POLR provider to a REP of choice, the switch notification notice detailed in §25.474(l) of this title (relating to Selection of Retail Electric Provider) is not required.
- (16) In a mass transition event, the ERCOT initiated transactions shall request an out-of-cycle meter read for the associated ESI IDs for a date two calendar days after the calendar date ERCOT initiates such transactions to the TDU. If an ESI ID does not have the capability to be read in a fashion other than a physical meter read, the out-of-cycle meter read may be estimated. An estimated meter read for the purpose of a mass transition to a POLR provider shall not be considered a break in a series of consecutive months of estimates, but shall not be considered a month in a series of consecutive estimates performed by the TDU. A TDU shall create a regulatory asset for the TDU fees associated with a mass transition of customers to a POLR provider pursuant to this subsection. Upon review of reasonableness and necessity, a reasonable level of amortization of such regulatory asset shall be included as a recoverable cost in the TDU's rates in its next rate case or such other rate recovery proceeding as deemed necessary. The TDU shall not bill as a discretionary charge, the costs included in this regulatory asset, which shall consist of the following:
 - (A) fees for out-of-cycle meter reads associated with the mass transition of customers to a POLR provider; and

- (B) fees for the first out-of-cycle meter read provided to a customer who transfers away from a POLR provider, when the out-of-cycle meter read is performed within 60 calendar days of the date of the mass transition and the customer is identified as a transitioned customer.
- (17) In the event the TDU estimates a meter read for the purpose of a mass transition, the TDU shall perform a true-up evaluation of each ESI ID after an actual meter reading is obtained. Within 10 days after the actual meter reading is obtained, the TDU shall calculate the actual average kWh usage per day for the time period from the most previous actual meter reading occurring prior to the estimate for the purpose of a mass transition to the most current actual meter reading occurring after the estimate for the purpose of mass transition. If the average daily estimated usage sent to the exiting REP is more than 50% greater than or less than the average actual kWh usage per day, the TDU shall promptly cancel and re-bill both the exiting REP and the POLR using the average actually daily usage.
- (p) **Termination of POLR service provider status.**
- (1) The commission may revoke a REP's POLR status after notice and opportunity for hearing:
- (A) If the POLR provider fails to maintain REP certification;
- (B) If the POLR provider fails to provide service in a manner consistent with this section;
- (C) The POLR provider fails to maintain appropriate financial qualifications;
- or

- (D) For other good cause.
- (2) If an LSP defaults or has its status revoked before the end of its term, after a review of the eligibility criteria, the commission staff designee shall, as soon as practicable, designate the next eligible REP, if any, as an LSP, based on the criteria in subsection (j) of this section.
- (3) At the end of the POLR service term, the outgoing LSP shall continue to serve customers who have not selected another REP.
- (q) **Electric cooperative delegation of authority.** An electric cooperative that has adopted customer choice may select to delegate to the commission its authority to select POLR providers under PURA §41.053(c) in its certificated service area in accordance with this section. After notice and opportunity for comment, the commission shall, at its option, accept or reject such delegation of authority. If the commission accepts the delegation of authority, the following conditions shall apply:
- (1) The board of directors shall provide the commission with a copy of a board resolution authorizing such delegation of authority;
- (2) The delegation of authority shall be made at least 30 calendar days prior to the time the commission issues a publication of notice of eligibility;
- (3) The delegation of authority shall be for a minimum period corresponding to the period for which the solicitation shall be made;
- (4) The electric cooperative wishing to delegate its authority to designate an continuous provider shall also provide the commission with the authority to apply

the selection criteria and procedures described in this section in selecting the POLR providers within the electric cooperative's certificated service area; and

- (5) If there are no competitive REPs offering service in the electric cooperative certificated area, the commission shall automatically reject the delegation of authority.
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- (r) **Reporting requirements.** Each LSP that serves customers under a rate prescribed by subsection (1)(2) of this section shall file the following information with the commission on a quarterly basis beginning January of each year in a project established by the commission for the receipt of such information. Each quarterly report shall be filed within 30 calendar days of the end of the quarter.
 - (1) For each month of the reporting quarter, each LSP shall report the total number of new customers acquired by the LSP under this section and the following information regarding these customers:
 - (A) The number of customers eligible for the rate reduction program pursuant to §25.454 of this title;
 - (B) The number of customers from whom a deposit was requested pursuant to the provisions of §25.478 of this title, and the average amount of deposit requested;
 - (C) The number of customers from whom a deposit was received, including those who entered into deferred payment plans for the deposit, and the average amount of the deposit;

- (D) The number of customers whose service was physically disconnected pursuant to the provisions of §25.483 of this title (relating to Disconnection of Service) for failure to pay a required deposit; and
 - (E) Any explanatory data or narrative necessary to account for customers that were not included in either subparagraph (C) or (D) of this paragraph.
- (2) For each month of the reporting quarter each LSP shall report the total number of customers to whom a disconnection notice was issued pursuant to the provisions of §25.483 of this title and the following information regarding those customers:
- (A) The number of customers eligible for the rate reduction program pursuant to §25.454 of this title;
 - (B) The number of customers who entered into a deferred payment plan, as defined by §25.480(j) of this title (relating to Bill Payment and Adjustments) with the LSP;
 - (C) The number of customers whose service was physically disconnected pursuant to §25.483 of this title;
 - (D) The average amount owed to the LSP by each disconnected customer at the time of disconnection; and
 - (E) Any explanatory data or narrative necessary to account for customers that are not included in either subparagraph (B) or (C) of this paragraph.
- (3) For the entirety of the reporting quarter, each LSP shall report, for each customer that received POLR service, the TDU and customer class associated with the customer's ESI ID, the number of days the customer received POLR service, and whether the customer is currently the LSP's customer.

- (s) **Notice of transition to POLR service to customers.** When a customer is moved to POLR service, the customer shall be provided notice of the transition by ERCOT, the REP transitioning the customer, and the POLR provider. The ERCOT notice shall be provided within two days of the time ERCOT and the transitioning REP know that the customer shall be transitioned and customer contact information is available. If ERCOT cannot provide notice to customers within two days, it shall provide notice as soon as practicable. The POLR provider shall provide the notice required by paragraph (3) of this subsection to commission staff at least 48 hours before it is provided to customers, and shall provide the notice to transitioning customers as soon as practicable. The POLR provider shall email the notice to the commission staff members designated for receipt of the notice.
- (1) ERCOT notice methods shall include a post-card, containing the official commission seal with language and format approved by the commission. ERCOT shall notify transitioned customers with an automated phone-call and email to the extent the information to contact the customer is available pursuant to subsection (o)(6) of this section. ERCOT shall study the effectiveness of the notice methods used and report the results to the commission.
- (2) Notice by the REP from which the customer is transferred shall include:
- (A) The reason for the transition;
 - (B) A contact number for the REP;

- (C) A statement that the customer shall receive a separate notice from the POLR provider that shall disclose the date the POLR provider shall begin serving the customer;
- (D) Either the customer's deposit plus accrued interest, or a statement that the deposit shall be returned within seven days of the transition;
- (E) A statement that the customer can leave the assigned service by choosing a competitive product or service offered by the POLR provider, or another competitive REP, as well as the following statement: "If you would like to see offers from different retail electric providers, please access www.powertochoose.org, or call toll-free 1-866-PWR-4-TEX (1-866-797-4839) for a list of providers in your area;"
- (F) For residential customers, notice from the commission in the form of a bill insert or a bill message with the header "An Important Message from the Public Utility Commission Regarding Your Electric Service" addressing why the customer has been transitioned to another REP, the continuity of service purpose, the option to choose a different competitive provider, and information on competitive markets to be found at www.powertochoose.org, or toll-free at 1-866-PWR-4-TEX (1-866-797-4839);
- (G) If applicable, a description of the activities that the REP shall use to collect any outstanding payments, including the use of consumer reporting agencies, debt collection agencies, small claims court, and other remedies

allowed by law, if the customer does not pay or make acceptable payment arrangements with the REP; and

- (H) Notice to the customer that after being transitioned to POLR service, the customer may accelerate a switch to another REP by requesting a special or out-of-cycle meter read.
- (3) Notice by the POLR provider shall include:
- (A) The date the POLR provider began or shall begin serving the customer and a contact number for the POLR provider;
 - (B) A description of the POLR provider's rate for service. In the case of a notice from an LSP that applies the pricing of subsection (1)(2) of this section, a statement that the price is generally higher than available competitive prices, that the price is unpredictable, and that the exact rate for each billing period shall not be determined until the time the bill is prepared;
 - (C) The deposit requirements of the POLR provider and any applicable deposit waiver provisions and a statement that, if the customer chooses a different competitive product or service offered by the POLR provider, a REP affiliated with the POLR provider, or another competitive REP, a deposit may be required;
 - (D) A statement that the additional competitive products or services may be available through the POLR provider, a REP affiliated with the POLR provider, or another competitive REP, as well as the following statement:
"If you would like to choose a different retail electric provider, please

access www.powertochoose.org, or call toll-free 1-866-PWR-4-TEX (1-866-797-4839) for a list of providers in your area;”

- (E) The applicable Terms of Service and Electricity Facts Label (EFL); and
 - (F) For residential customers that are served by an LSP under a rate prescribed by subsection (1)(2) of this section, a notice to the customer that after being transitioned to service from a POLR provider, the customer may accelerate a switch to another REP by requesting a special or out-of-cycle meter read.
- (t) **Market notice of transition to POLR service.** ERCOT shall notify all affected Market Participants and the Retail Market Subcommittee (RMS) email listserv of a mass transition event within the same day of an initial mass-transition call after the call has taken place. The notification shall include the exiting REP’s name, total number of ESI IDs, and estimated load.
- (u) **Disconnection by a POLR provider.** The POLR provider must comply with the applicable customer protection rules as provided for under Subchapter R of this chapter, except as otherwise stated in this section. To ensure continuity of service, service under this section shall begin when the customer’s transition to the POLR provider is complete. A customer deposit is not a prerequisite for the initiation of service under this section. Once service has been initiated, a customer deposit may be required to prevent disconnection. Disconnection for failure to pay a deposit may not occur until after the

proper notice and after that appropriate payment period detailed in §25.478 of this title has elapsed, except where otherwise noted in this section.

- (v) **Deposit payment assistance.** Customers enrolled in the rate reduction program pursuant to §25.454 of this title shall receive POLR deposit payment assistance when proceeds are available in accordance with §25.107(f)(6) of this title.
- (1) Using the most recent Low-Income Discount Administrator (LIDA) enrolled customer list, the Executive Director or staff designee shall work with ERCOT to determine the number of customer ESI IDs enrolled on the rate reduction program that shall be assigned to each VREP, and if necessary, each LSP.
 - (2) The commission staff designee shall distribute the deposit payment assistance monies to the appropriate POLRs on behalf of customers as soon as practicable.
 - (3) The Executive Director or staff designee shall use best efforts to provide written notice to the appropriate POLRs of the following on or before the second calendar day after the transition:
 - (A) a list of the ESI IDs enrolled on the rate reduction program that have been or shall be transitioned to the applicable POLR; and
 - (B) the amount of deposit payment assistance that shall be provided on behalf of a POLR customer enrolled on the rate reduction program.
 - (4) Amounts credited as deposit payment assistance pursuant to this section shall be refunded to the customer in accordance with §25.478(j) of this title.

SIGNED AT AUSTIN, TEXAS this the _____ day of MAY 2009.

PUBLIC UTILITY COMMISSION OF TEXAS

BARRY T. SMITHERMAN, CHAIRMAN

DONNA L. NELSON, COMMISSIONER

KENNETH W. ANDERSON, JR., COMMISSIONER