

**PROJECT NO. 29159**

**PUC RULEMAKING PROCEEDING § PUBLIC UTILITY COMMISSION  
TO AMEND PUC SUBST. R. 25.484, §  
RELATING TO TEXAS ELECTRIC § OF TEXAS  
NO-CALL LIST §**

**PROPOSAL FOR PUBLICATION OF §25.484  
AS APPROVED AT THE FEBRUARY 25, 2004 OPEN MEETING**

The Public Utility Commission of Texas (commission) proposes amendments to §25.484, relating to the Texas Electric No-Call List. The proposed amendments: (1) require Retail Electric Providers (REPs) that make non-exempt telemarketing calls to purchase the Electric No-Call List; (2) require REPs to provide information, such as call logs or phone records, to the commission to investigate alleged violations of the Electric No-Call List; (3) require that such records be maintained by the REP for a period of 24 months; (4) establish presumptions relevant to enforcement of the Electric No-Call List; (5) and specify certain types of evidence that are admissible in an action to enforce the Electric No-Call List. Project Number 29159 is assigned to this proceeding.

Jaime Slaughter, Attorney, Legal and Enforcement Division, has determined that for each year of the first five-year period the proposed section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Slaughter has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be enhanced protection of consumers' privacy rights by a curtailment of unsolicited telemarketing or telephone calls through implementation of an effective enforcement program. There will be no

adverse economic effect on small businesses or micro-businesses as a result of enforcing this section. There may be economic costs to persons who are required to comply with the proposed section. These costs are associated with the cost of purchasing the Texas No-Call List and of maintaining records of consumers contacted by the telemarketer. However, the cost will be a set fee and subscribing to the list will assist the REP in identifying customers who do not wish to receive calls. Three factors mitigate the cost of purchasing and updating the list. First, REPs have been required to comply with the Texas No-Call rule as of June 17, 2002. Second, REPs are required to purchase and update the list in order to comply with Federal Regulations. Therefore, REPs' cost of doing business already reflect the initial costs of the list and quarterly updates. Third, the incremental costs associated with record retention are likely to vary from business to business, based upon types of equipment deployed, and are therefore difficult to ascertain. The commission seeks comments on this issue. However, the commission believes that the benefits accruing to the public from implementation of the proposed section will outweigh these incremental costs.

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

The commission staff will conduct a public hearing on this rulemaking under the Administrative Procedure Act, Texas Government Code §2001.029 at the commission's offices, located in the

William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701, on Tuesday, May 4, 2004, at 3:30 PM.

Comments on the proposed amendments of §25.484 (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Reply comments may be submitted within 45 days after publication. Comments should be organized in a manner consistent with the organization of the proposed rule(s). The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 29159.

These amendments are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2004) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and PURA §39.1025 which provides the commission with the authority to operate the no-call database and prohibits the telephone solicitation of an electricity customer who has previously advised the commission that he/she does not want to receive such solicitations. In addition, these amendments are proposed under the Texas Business and Commerce Code Annotated §§44.101-.104 (Renumbered from §§43.101-.104 by Acts 2003, 78<sup>th</sup> Leg., ch. 1275, §2(3), eff. Sept 1, 2003) (Vernon 2002 and Supplement 2004) which grants the commission the authority to adopt rules to administer and enforce the no-call list.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 39.1025; and Texas Business and Commerce Code Annotated §§44.101 – 44.104.

**§25.484. Texas Electric No-Call List.**

- (a) **Purpose.** This section implements the Public Utility Regulatory Act (PURA) §39.1025, relating to Limitations on Telephone Solicitation, and the Texas Business & Commerce Code Annotated (Bus. & Com. Code) §44.103 relating to rules, customer information, and isolated violations of the Texas no-call list.
- (b) **Application.** This section applies to retail electric providers (REPs) as defined in §25.5 of this title (relating to Definitions). A REP acting as a telemarketer, as defined by §26.37 of this title (relating to Texas No-Call List), is also subject to the provisions of §26.37 of this title.
- (c) **Definitions.** The following words and terms, when used in this section shall have the following meanings, unless the context clearly indicates otherwise.
- (1) **Consumer good or service** — For purposes of this section, consumer good or service has the same meaning as Bus. & Com. Code §44.002(3) relating to Definitions.
  - (2) **Electric no-call database** — Database administered by the commission or its designee that contains the names, addresses, telephone numbers and dates of registration for all Texas electric no-call registrants. Lists or other information generated from the electric no-call database shall be deemed to be a part of the database for purposes of enforcing this section.
  - (3) **Electric no-call list** — List that is published and distributed as required by subsection (f)(2) of this section.
  - (4) **Electric no-call registrant** — A telephone customer who has registered, by application and payment of accompanying fee, for the Texas electric no-call list.

- (5) **Established business relationship** — A prior or existing relationship that has not been terminated by either party, and that was formed by voluntary two-way communication between a person and a consumer regardless of whether consideration was exchanged, regarding consumer goods or services offered by the person.
- (6) **Telemarketing call** — An unsolicited telephone call made to:
- (A) solicit a sale of a consumer good or service;
  - (B) solicit an extension of credit for a consumer good or service; or,
  - (C) obtain information that may be used to solicit a sale of a consumer good or service or to extend credit for sale.
- (7) **Telephone call** — A call or other transmission that is made to or received at a telephone number within an exchange in the state of Texas, including but not limited to:
- (A) a call made by an automatic dial announcing device (ADAD); or,
  - (B) a transmission to a facsimile recording device.
- (d) **Requirement of REPs.** A REP shall not make or cause to be made a telemarketing call to a telephone number that has been published for more than 60 calendar days on the Texas electric no-call list. A REP shall purchase each published version of the electric no-call list unless the REP does not make or cause to be made a telemarketing call, or only makes or causes to be made telephone calls that are exempt pursuant to subsection (e) of this section.

- (e) **Exemptions.** This section shall not apply to a telephone call made:
- (1) By an electric no-call registrant that is the result of a solicitation by a REP or in response to general media advertising by direct mail solicitations that clearly, conspicuously, and truthfully make all disclosures required by federal or state law;
  - (2) In connection with:
    - (A) An established business relationship; or,
    - (B) A business relationship that has been terminated, if the call is made before the later of:
      - (i) the date of publication of the first Texas electric no-call list on which the electric no-call registrant's telephone number appears; or
      - (ii) one year after the date of termination; or,
  - (3) To collect a debt.
- (f) **Electric no-call database.**
- (1) **Administrator.** The commission or its designee shall establish and provide for the operation of the electric no-call database.
  - (2) **Distribution of database.**
    - (A) **Timing.** Beginning on April 1, 2002, the administrator of the electric no-call database will update and publish the entire Texas electric no-call list on January 1, April 1, July 1, and October 1 of each year;
    - (B) **Fees.** The no-call electric list shall be made available to subscribing REPs for a set fee not to exceed \$75 per list per quarter;
    - (C) **Format.** The commission or its designee will make the no-call list available to subscribing REPs by:

- (i) electronic internet access in a downloadable format;
- (ii) Compact Disk Read Only Memory (CD-ROM) format;
- (iii) paper copy, if requested by the REP; and,
- (iv) any other format agreed upon by the current administrator of the no-call database and the subscribing REP.

(3) **Intended use of the electric no-call database and electric no-call list.**

(A) The electric no-call database shall be used only for the intended purposes of creating an electric no-call list and promoting and furthering statutory mandates in accordance with PURA §39.1025 and the Bus. & Com. Code, Chapter 43 relating to Telemarketing. Neither the electric no-call database nor a published electric no-call list shall be transferred, exchanged or resold to a non-subscribing entity, group, or individual, regardless of whether compensation is exchanged.

(B) The no-call database is not open to public inspection or disclosure.

(C) The administrator shall take all necessary steps to protect the confidentiality of the no-call database and prevent access to the no-call database by unauthorized parties.

(4) **Penalties for misuse of information.** Improper use of the electric no-call database or a published electric no-call list by the administrator, REPs, or any other person, regardless of the method of attainment, shall be subject to administrative penalties and enforcement provisions contained in §22.246 of this title (relating to Administrative Penalties).

(g) **Notice.** A REP shall provide notice of the electric no-call list to its customers as specified by this subsection. In addition to the required notice, the REP may engage in other forms of customer notification.

(1) **Content of notice.** A REP shall provide notice in compliance with §25.473 of this title (relating to Non-English Language Requirements) that, at a minimum, clearly explains the following:

- (A) Beginning January 1, 2002, customers may add their name, address and telephone number to a state-sponsored electric no-call list that is intended to limit the number of telemarketing calls received relating to the customer's choice of REPs;
- (B) When a customer who registers for inclusion on the electric no-call list can expect to stop receiving telemarketing calls on behalf of a REP;
- (C) A customer must pay a fee to register for the electric no-call list;
- (D) Registration of a telephone number on the electric no-call list expires on the fifth anniversary of the date the number is first published on the list;
- (E) Registration of a telephone number on the electric no-call list can be accomplished via the United States Postal Service, Internet, or telephonically;
- (F) The customer registration fee, which cannot exceed five dollars per term, must be paid by credit card when registering online or by telephone. When registering by mail, the fee must be paid by credit card, check or money order;
- (G) The toll-free telephone number, website address, and mailing address for registration; and,

(H) A customer that registers for inclusion on the electric no-call list may continue to receive calls from telemarketers other than REPs, and a statement that the customer may instead or may also register for a no-call list that is intended to limit telemarketing calls regarding consumer goods and services in general, including electric service.

(2) **Publication of notice.** A REP shall include notice in its Terms of Service document or Your Rights as a Customer disclosure. The notice shall be easily legible, prominently displayed and comply with the requirements listed in paragraph (1) of this subsection.

(3) **Records of customer notification.** A REP shall provide a copy of records maintained under the requirements of this subsection as specified by §25.491 of this title (relating to Record Retention and Reporting Requirements).

(h) **Violations.**

(1) **Separate occurrence.** Each telemarketing call to a telephone number on the electric no-call list shall be deemed a separate occurrence. Upon request from the commission or commission staff, a REP shall provide, within 21 days of such a request, information sufficient for the commission to investigate complaints regarding violations of the electric no-call list such as call logs or phone records.

(2) **Isolated occurrence.** A telemarketing call made to a number on the electric no-call list is not a violation of this section if the telemarketing call is determined by the commission to be an isolated occurrence.

(A) An isolated occurrence is an event, action, or occurrence that arises unexpectedly and unintentionally, and is caused by something other than a failure to implement or follow reasonable procedures. An isolated occurrence

may involve more than one separate occurrence, but it does not involve a pattern or practice.

(B) The burden to prove that the telemarketing call was made in error and was an isolated occurrence rests upon the REP who made (or caused to be made) the call. In order for a REP to assert as an affirmative defense that a potential violation of this section was an isolated occurrence, the REP must provide evidence of the following:

- (i) The REP has purchased the most recently published update to the Texas electric no-call list, unless the entirety of the REP's business is comprised of making or causing to be made telephone calls that are exempt pursuant to subsection (e) of this section and the REP can provide sufficient proof of such;
- (ii) The REP has adopted and implemented written procedures to ensure compliance with this section and effectively prevent telemarketing calls that are in violation of this section, including taking corrective actions when appropriate;
- (iii) The REP has trained its personnel in the established procedures; and,
- (iv) The telemarketing call that violated this section was made contrary to the policies and procedures established by the REP.

(i) **Record retention; Provision of records; Presumptions.**

(1) A REP shall maintain a record of all telephone numbers it has attempted to contact, a record of all telephone numbers it has contacted, and the date of each, for a

period of not less than 24 months from the date the call was attempted or completed. Such records include all calls the REP has caused to be made or attempted whether by itself or by any other person or entity if such telemarketing calls terminate in this state.

(2) Upon request from the commission or commission staff, a REP shall provide, within 21 calendar days, all information relating to the commission's investigation of complaints regarding violations of the no-call list including, but not limited to, the call logs or phone records described in this paragraph.

(3) Failure by the REP to respond, or to provide a thorough response, within the time specified in paragraph (2) of this subsection establishes a violation of this section.

(4) Failure of a REP to produce records that demonstrate its compliance with subsection (h)(2)(B)(i) of this section within the time specified in paragraph (2) of this subsection establishes a violation of this section.

(j) **Evidence.** The rules of evidence as applied in a non-jury civil case in district court govern contested case hearings, including enforcement proceedings to enforce the provisions of this section, conducted by SOAH, except that evidence inadmissible under those rules may be admitted if it meets the standards set out in Texas Government Code §2001.081. Such evidence may include, but is not limited to, one or more affidavits from the recipient of a telemarketing call.

(k) **Enforcement and penalties.** The commission has jurisdiction to investigate REP violations of this section, as specified in §25.492 of this title (relating to Non-Compliance with Rules or Orders; Enforcement by the Commission).

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

**ISSUED IN AUSTIN, TEXAS ON THE 27th DAY OF FEBRUARY 2004 BY THE  
PUBLIC UTILITY COMMISSION OF TEXAS  
ADRIANA A. GONZALES**

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