

PROJECT NO. 31926

RULEMAKING PROCEEDING TO	§	PUBLIC UTILITY COMMISSION
AMEND P.U.C. SUBSTANTIVE RULE	§	OF TEXAS
25.484, RELATING TO THE ELECTRIC	§	
NO-CALL LIST	§	

**ORDER ADOPTING AMENDMENT TO §25.484
AS APPROVED AT THE JUNE 7, 2006 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts an amendment to §25.484, relating to the Electric No-Call List, with no changes to the proposed text as published in the December 30, 2005 issue of the *Texas Register* (30 TexReg 8781). The amendment reflects an amendment made to Public Utility Regulatory Act, Texas Utilities Code Annotated §39.1025 (Vernon 1998, Supplement 2005) (PURA) by the 79th Legislature. Specifically, the amendment limits electric no-call registration to nonresidential electric customers on or after May 27, 2005. This amendment is adopted under Project Number 31926.

No party requested a public hearing on this rulemaking pursuant to the Administrative Procedure Act, Texas Government Code §2001.029. The commission received no comments on the proposed amendment.

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2005) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and specifically, PURA §39.1025, which grants the commission the authority to operate the no-call database and prohibits the telephone solicitation of an electric customer who has previously advised the commission that he/she does not want to receive such solicitations.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §39.1025.

§25.484. 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. & Comm. 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 Business & Commerce 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 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 person who is either:

- (A) An electric customer who registered prior to May 27, 2005, by application and payment of accompanying fee, for the electric no-call list; or
 - (B) A nonresidential electric customer who registered on or after May 27, 2005, by application and payment of accompanying fee, for the 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.
- (8) **Telemarketer** — A person who makes or causes to be made a telemarketing call that is made to a telephone number in an exchange in the state of Texas.

(d) **Requirement of REPs.**

- (1) 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 electric no-call list.
- (2) A REP shall purchase each published version of the electric no-call list unless:
 - (A) the entirety of the REP's business is comprised of telemarketing calls that are exempt pursuant to subsection (e) of this section;
 - (B) a REP has a written contractual agreement with another telemarketer to make telemarketing calls on behalf of the REP and that telemarketer is contractually obligated to comply with all requirements of this section. In the absence of a written contract that requires the telemarketer to comply with all requirements of this section, the REP and the telemarketer making telemarketing calls on behalf of the REP are both liable for violations of this section.

(e) **Exemptions.** This section shall not apply to a telemarketing 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 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 electric no-call list on January 1, April 1, July 1, and October 1 of each year;
 - (B) **Fees.** The electric no-call 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 electric 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 Business & Commerce Code, Chapter 44 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 the Texas 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.
 - (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 telemarketer complies with section (d)(2) and 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 electric no-call list, unless the entirety of the REP's business is comprised of making or causing to be made telemarketing 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 for telemarketing purposes, a record of all telephone numbers it has contacted for telemarketing purposes, and the date of each, for a period of not less than 24 months from the date the telemarketing call was attempted or completed.

- (2) Upon request from the commission or commission staff, a REP shall provide, within 21 calendar days, all information in its possession and upon which it relies to demonstrate compliance with this section, relating to the commission's investigation of potential violations of the no-call list including, but not limited to, the call logs or phone records described in subsection (i)(1).
 - (3) Failure by a REP to respond, or to produce all information in its possession and upon which it relies to demonstrate compliance with this section, within the time specified in paragraph (2) of this subsection establishes a violation of this section.
 - (4) In response to a request from the commission pursuant to paragraph (2) of this subsection, a REP's failure to produce all telemarketing information in its possession and upon which it relies to demonstrate compliance with this section and, if applicable, to establish an affirmative defense pursuant to subsection (h)(2)(B) of this section, within the time specified in paragraph (2) of this subsection establishes a violation of this section.
- (j) **Evidence.** Evidence provided by the customer that meets the standards set out in Texas Government Code §2001.081, including, but not limited to, one or more affidavits from the recipient of a telemarketing call is admissible to enforce the provisions of this section.
- (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 adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority. It is therefore ordered by the Public Utility Commission of Texas that §25.484 relating to the Electric No-Call List is hereby adopted with no changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE 12th DAY OF JUNE 2006.

PUBLIC UTILITY COMMISSION OF TEXAS

PAUL HUDSON, CHAIRMAN

JULIE PARSLEY, COMMISSIONER

BARRY T. SMITHERMAN, COMMISSIONER