

The Public Utility Commission of Texas (commission) proposes an amendment to §25.84, relating to Annual Reporting of Affiliate Transactions for Electric Utilities, new §25.272, relating to Code of Conduct for Electric Utilities and Their Affiliates, and new §25.273, relating to Contracts Between Electric Utilities and Their Competitive Affiliates. Section 25.84 establishes the annual reporting requirements for utilities for transactions with affiliates. Section 25.272 establishes broad safeguards to govern the interaction between utilities and their affiliates, including competitive affiliates. Section 25.273 establishes the fair, competitive bidding process that utilities must use to sell certain assets to and obtain certain products and services from a competitive affiliate or other third party, and establishes requirements for any contracts with competitive affiliates that may result from this competitive bidding process. Project number 20936 has been assigned to this proceeding.

Project Number 17549, *Rulemaking to Address Affiliate Activities*, was established June 25, 1997, with a request from commission staff for all parties to file lists of issues to be included in a rulemaking on affiliate relationships. At the outset, the rulemaking encompassed both industries that the commission regulates, electric and telecommunications. On February 13, 1998, the telecommunications portion was severed into a separate rulemaking, and the electric rulemaking was restyled as *Code of Conduct for Electric Utilities and Their Affiliates* and retained Project Number 17549. In Project Number 17549, new rule §§25.84, and 25.271-25.274 were published for comment in the *Texas Register* on May 22, 1998 (23 TexReg 5294). A public hearing was

held on July 13, 1998, pursuant to the Administrative Procedure Act §2001.029, Texas Government Code Annotated (Vernon 1999) (APA) to solicit oral comments from interested parties. On August 20, 1998, the commission withdrew the proposed new rule sections. A new §25.84, relating to Annual Reporting of Affiliate Transactions for Electric Utilities, was published in the *Texas Register* on September 25, 1998 (23 TexReg 9680), and the commission voted to adopt §25.84 at its December 14, 1998, open meeting. Also on December 14, 1998, the commission voted to republish for comment the broader code of conduct provisions contained in §§25.272-275 (formerly numbered as §§ 25.271-274 in the May 1998 proposal).

The commission's decision to withdraw the proposal in August 1998 was based, in part, on the premise that affiliate activities were likely to be addressed in the 1999 Legislative Session in the context of an electric industry restructuring bill. However, after the commission withdrew the proposed rule sections, it became aware of several instances in which improper behavior relating to affiliates may have been occurring. Most notable were Docket Number 17880, *Complaint of Texas Utilities Electric Company Against Hill County Electric Cooperative, Inc., Brazos Power Marketing Cooperative, Inc., and Brazos Electric Power Cooperative, Inc.* and Project Number 19529, *Informal Dispute Resolution for Transmission Access in the Rio Grande Valley*. The commission decided in December 1998 to republish the proposed rule sections because it was concerned that to wait to promulgate rules on utilities' conduct relating to affiliates would be imprudent.

In January 1999, after the start of the 76th Legislative Session, Senate Bill 7, which addressed electric industry restructuring and included provisions for a code of conduct, was filed. The Senate passed Senate Bill 7 on March 17, 1999. Accordingly, on April 8, 1999, after comments were filed by interested parties on the republished code of conduct contained in §§25.272-275, the commission decided to wait for legislative guidance on code of conduct provisions. Senate Bill 7 passed the House of Representatives on May 21, 1999, with amendments. The Senate concurred with House amendments, and the Governor signed Senate Bill 7 into law on June 18, 1999. Senate Bill 7 amends several sections of the Public Utility Regulatory Act (Vernon 1999) (PURA) and is effective September 1, 1999.

The Legislature determined that the production and sale of electricity is not a monopoly warranting regulation of rates, operations, and services and that the public interest in competitive electric markets requires that, except for transmission and distribution services and for the recovery of stranded costs, electric services and their prices should be determined by customer choices and the normal forces of competition. The Legislature enacted Chapter 39 of PURA to protect the public interest during the transition to and in the establishment of a fully competitive electric power industry. PURA §39.157, *Commission Authority to Address Market Power*, directs the commission to adopt rules and enforcement procedures by January 10, 2000, to govern transactions or activities between a transmission and distribution utility and its affiliates to avoid potential market power abuses and cross-subsidization between regulated and competitive activities.

The electric industry will be in a period of transition to competition until January 1, 2002, when each electric utility is required by PURA §39.051 to separate its business activities from one another into the following units: a power generation company, a retail electric provider, and a transmission and distribution company. This separation may be accomplished through the creation of separate nonaffiliated companies or separate affiliated companies owned by a common holding company, or through the sale of assets to a third party. On or before September 1, 2000, each electric utility shall separate from its regulated utility activities its customer energy services business activities that are already widely available in the competitive market. By January 10, 2000, utilities are required to file with the commission plans describing how they intend to unbundle their business activities in a manner that provides for a separation of personnel, information flow, functions, and operations, consistent with the provisions of PURA §39.157(d), which are the code of conduct provisions.

On June 3, 1999, the commission closed Project Number 17549 and opened Project Number 20936, *Code of Conduct for Electric Utilities Pursuant to PURA §39.157(d)*, to revise the formerly proposed code of conduct to conform with the new statutory provisions of PURA §39.157. This rulemaking addresses affiliate activities, and the broader issue of utility unbundling is addressed in Project Number 21083. Initial compliance plans for the code of conduct will be addressed in the context of the commission's review of utility unbundling plans filed pursuant to PURA §39.051(e).

In proposing these rules relating to affiliate activities, the commission has two objectives both during the transition to and after the introduction of competition: avoiding potential market power abuses and preventing cross-subsidization between regulated and competitive activities. The commission seeks to prohibit practices between regulated and competitive activities that may unreasonably restrict, impair, or reduce the level of competition during the transitional separation of personnel, information flow, functions, and operations, and after a competitive market is established. Based on recent experience conducting periodic electric utility rate reviews and on other regulators' recent experiences with the motor carrier, telephone, and natural gas industries, the commission finds that there is a strong incentive for regulated utilities or their holding companies to subsidize their competitive activities with revenues or intangible benefits derived from their regulated monopoly businesses. The commission concludes that it is in the public interest to prevent or limit the opportunities for improper tying, predatory pricing, withholding of production, precluding entry, and collusion. In addition, the commission concludes that articulating new rules that reflect the state of current and future competition in the electric power industry will help prevent anti-competitive behavior, provide regulatory certainty, facilitate more efficient competition to the benefit of customers, and fairly balance the equities among competing service providers.

The commission seeks any comments on the proposed rule that interested parties believe are appropriate. Parties should organize their comments in a manner consistent with the organization of the proposed rules. Furthermore, when commenting on specific subsections of the proposed rules, parties are encouraged to describe "best practice" examples of regulatory policies, and their

rationale, that have been proposed or implemented successfully in other states already undergoing electric industry restructuring, if the parties believe that Texas would benefit from application of the same policies. The commission is only interested in receiving "leading edge" examples which are specifically related and directly applicable to the Texas statute, rather than broad citations to other state restructuring efforts.

In addition, the commission requests that interested parties specifically address the issue of how the code of conduct should apply during the transition to competition. PURA §39.157(d) clearly states that the code of conduct should apply not only after retail competition begins, but also during the transition to competition. Because utilities are not required to fully separate their regulated and competitive business activities pursuant to PURA §39.051 until January 1, 2002, utilities may not have "competitive affiliates" to which certain provisions in the code of conduct would apply during the transition period. Until such unbundling occurs, activities that eventually will be performed by a competitive affiliate, such as retail service marketing, may still reside within the integrated utility. The commission tentatively concludes that it is in the public interest to require each utility to implement an internal code of conduct that will ensure functional separation of regulated and competitive activities during the transition period, before transmission and distribution utilities are required to be entities that are separate and operating independently from their competitive affiliates. The commission seeks comment on its tentative conclusion and seeks input regarding how the rules should be modified, if necessary, during the transition to competition to address this issue.

A related dilemma is that faced by those utilities subject to the Public Utility Holding Company Act (PUHCA), in which several regulated utilities operate under a single holding company. Under a plain reading of the definition of "competitive affiliate" in PURA 39.157(i)(1), certain regulated utilities operating in Texas under such a structure would be competitive affiliates of each other, until such time as their competitive activities are separated from the transmission and distribution portion of the business pursuant to PURA §39.051. In some cases, certain shared functions, such as transmission planning, may be consolidated currently under a single service company affiliate that serves multiple regulated operating utilities; since such services are not permissible corporate support services which can be shared among utilities and their competitive affiliates, the classification of these regulated utilities as "competitive affiliates" during the transition period may pose a significant difficulty for implementation of the code of conduct. In the proposed rules, the commission modifies the definition of "corporate support services" to allow sharing of certain activities exclusively among regulated utility affiliates. The commission requests comment on this proposed solution, and solicits suggestions for other alternative solutions, to address the issue of transition for such PUHCA jurisdictional utilities.

Suzanne L. Bertin, assistant director, Office of Policy Development, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of the enforcing or administering the sections.

Ms. Bertin also has determined that for each year of the first five years the proposed sections are in effect, the public benefit anticipated as a result of enforcing these sections will be improved

regulatory oversight of electric utilities and enhanced competition in the provision of energy-related services. There will be no effect on small businesses or micro-businesses as a result of enforcing these sections.

It is anticipated that there will be economic costs incurred by persons who are required to comply with the new sections as proposed. The costs incurred are likely to vary from utility to utility, and are difficult to ascertain. The benefits accruing from implementation of these rules, however, are expected to outweigh these costs.

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

The commission staff will conduct a public hearing on this rulemaking under Government Code §2001.029 at the commission's offices, located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701, on Monday, October 18, 1999, at 1:00 p.m.

Comments on the proposed new and amended rules (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Reply comments may be submitted within 45 days after publication. 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 20936.

These sections are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated (Vernon 1999) (PURA), and Act of May 27, 1999, 76th Legislature, Regular Session, Senate Bill 7, §39 (to be codified at Texas Utilities Code Annotated §§39.251-39.265) (SB 7) §§11.002(a), 14.001, 14.002, 14.003, 14.151, 14.154, 15.023, 31.001(c), 32.101(c), 35.003(b), 35.034, 35.035, 36.003, 36.058, 38.021, 38.022, 39.001, 39.051, 39.101(2), 39.157, 39.356, 39.357, 51.001, 52.001, and 55.006. Section 11.002(a) requires establishment of a comprehensive and adequate regulatory system by the commission to ensure just and reasonable rates, operations, and services. Section 14.001 grants the commission the general power to regulate and supervise the business of each utility within its jurisdiction. Section 14.002 provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. Section 14.003 grants the commission the authority to require submission of information by the utility regarding its affiliate activities. Section 14.151 grants the commission authority to prescribe the manner of accounting for all business transacted by the utility. Section 14.154 grants the commission limited authority over the utility's affiliates, with respect to their transactions with the utility. Section 15.023 grants the commission authority to impose an administrative penalty against a regulated entity for violation of a rule adopted under this title. Section 31.001(c) requires that the commission formulate and apply rules, policies, and principles to protect the public interest in a more competitive electric market place. Section 32.101(c) requires that customer proprietary information be treated as highly sensitive

trade secrets. Section 35.003(b) prohibits electric utilities from granting undue preference to a person in connection with the purchase or sale of energy or other services. Section 35.034 grants the commission authority to approve transfers of certain assets between utilities and affiliates. Section 35.035 governs the valuation of assets transferred by a utility to or from an affiliate. Section 36.003 requires the commission to ensure that a utility's rates are just and reasonable, sufficient, equitable, and consistent in application to each class of consumer, and not unreasonably preferential, prejudicial, or discriminatory. Section 36.058 sets forth the circumstances under which the commission may allow payments by a utility to an affiliate. Section 38.021 requires that utilities not grant an unreasonable preference to or impose an unreasonable disadvantage on different persons in the same classification. Section 38.022 requires that utilities not discriminate against competitors or engage in practices that restrict or impair competition in the electric market. Section 39.001 states that it is in the public interest to protect the competitive process in a manner that ensures the confidentiality of competitively sensitive information during the transition to a competitive market and after the commencement of customer choice. Section 39.051 requires that each electric utility unbundle personnel, information flow, functions, and operations, consistent with the code of conduct. Section 39.101(2) grants the commission authority to ensure that retail customer protections are established to entitle a customer to privacy of customer consumption and credit information. Section 39.157 grants the commission authority to take actions to address market power and adopt rules and enforcement procedures to govern transactions or activities between utilities and their affiliates. Section 39.356 grants the commission authority to suspend, revoke, or amend a retail electric provider's certificate, a power generation company's registration, or an aggregator's

registration for significant violations of the rules adopted under this title. Section 39.357 grants the commission authority to impose an administrative penalty as necessary to eliminate or to remedy market power abuses.

Cross Reference to Statutes: Public Utility Regulatory Act §§11.002(a), 14.001, 14.002, 14.003, 14.151, 14.154, 15.023, 31.001(c), 32.101(c), 35.003(b), 35.034, 35.035, 36.003, 36.058, 38.021, 38.022, 39.001, 39.051, 39.101(2), 30.157, 39.356, and 39.357.

§25.84. Annual Reporting of Affiliate Transactions for Electric Utilities.

(a) **Purpose.** This section establishes annual reporting requirements for transactions between [~~electric~~] utilities and their affiliates.

(b) **Application.** This section applies to: [~~all electric utilities, as defined in the Public Utility Regulatory Act (PURA) §31.002 (1), operating in the State of Texas, and to affiliates as defined in PURA §11.003 (2) to the extent specified herein.~~]

(1) electric utilities operating in the State of Texas as defined in the Public Utility Regulatory Act (PURA) §31.002 (6), and transactions or activities between electric utilities and their affiliates, as defined in PURA §11.003(2); and

(2) transmission and distribution utilities operating in a qualifying power region in the State of Texas as defined in PURA §31.002(19) upon commission certification of a qualifying power region pursuant to PURA §39.152, and transactions or activities between transmission and distribution utilities and their affiliates, as defined in PURA §11.003(2).

(c) **Definitions.** Any terms defined in §25.272 of this title (relating to Code of Conduct for Electric Utilities and Their Affiliates) have the same meanings herein.

(d) [~~(e)~~] **Annual report of affiliate activities.** A "Report of Affiliate Activities" shall be filed annually with the commission. Using forms approved and provided by the commission, a [~~an electric~~] utility shall report activities among itself and its affiliates in

accordance with all requirements in this section. The report shall be filed by June 1, and shall encompass the period from January 1 through December 31 of the immediately preceding year.

(e) ~~(d)~~ **Copies of contracts or agreements.** A ~~[An electric]~~ utility shall reduce to writing and file with the commission copies of any contracts or agreements it has with its affiliates. The requirements of this subsection are not satisfied by the filing of an earnings report. All contracts or agreements shall be filed by June 1 of each year as attachments to the Report of Affiliate Activities required in subsection (d) ~~(e)~~ of this section. In subsequent years, if no significant changes have been made to the contract or agreement, an amendment sheet may be filed in lieu of refileing the entire contract or agreement.

(f) **Tracking migration of employees.** A utility shall track and document the movement of all employees engaged in transmission and distribution system operations, including persons employed by a service company affiliated with the utility who are engaged in day-to-day transmission and distribution system operations or have knowledge of information that is intended to be protected under PURA §39.157(d), between the utility and its competitive affiliates. Employee migration information shall be made available to the commission on an annual basis in the utility's "Report of Affiliate Activities." The tracking information shall include an identification code for the migrating employee, the

respective titles held while employed at each entity, and the effective dates of the migration.

(g) **Annual reporting of informal complaint resolution.** A utility shall report to the commission information regarding the resolution of informal complaints in accordance with the utility's procedures developed pursuant to §25.272(i)(4) of this title. The information reported shall include the name of the complainant and a summary report of the complaint, including all relevant dates, companies involved, employees involved, and any actions taken to address the complaint. Such information shall be made available to the commission on an annual basis in the utility's "Report of Affiliate Activities".

(h) **Reporting of deviations from the code of conduct.** A utility shall report to the commission information regarding the instances in which deviations from the code of conduct were necessary to ensure public safety and system reliability. The information reported shall include the nature of the circumstances requiring the deviation, the action taken by the utility and the parties involved, and the date of the deviation. Such information shall be made available to the commission on an annual basis in the utility's "Report of Affiliate Activities."

(i) **Annual update of compliance plans.** Initial plans for compliance with § 25.272 of this title, relating to Code of Conduct for Electric Utilities and Their Affiliates, shall be supplied as a part of the utility's unbundling plan filed pursuant to PURA § 39.051.

Additionally, the utility shall file as a part of its annual "Report of Affiliate Activities" any updates to its compliance plans, reflecting any creation of new affiliates or any other changes to the compliance plan.

§25.272. Code of Conduct for Electric Utilities and Their Affiliates.

(a) **Purpose.** The provisions of this section establish safeguards to govern the interaction between utilities and their affiliates, both during the transition to and after the introduction of competition, to avoid potential market power abuses and cross-subsidization between regulated and unregulated activities.

(b) **Application.**

(1) **General application.** This section applies to:

- (A) electric utilities operating in the State of Texas as defined in the Public Utility Regulatory Act (PURA) §31.002(6), and transactions or activities between electric utilities and their affiliates, as defined in PURA §11.003(2); and
- (B) transmission and distribution utilities operating in a qualifying power region in the State of Texas as defined in PURA §31.002(19) upon commission certification of a qualifying power region pursuant to PURA §39.152, and transactions or activities between transmission and distribution utilities and their affiliates, as defined in PURA §11.003(2).

- (2) **No circumvention of the code of conduct.** An electric utility, transmission and distribution utility, or competitive affiliate shall not circumvent the provisions or the intent of PURA §39.157 or any rules implementing those requirements by using any affiliate to provide information, services, products, or subsidies between a competitive affiliate and an electric utility or a transmission and distribution utility.
 - (3) **Petition for waiver.** Nothing in this section is intended to affect or modify the obligation or duties relating to any rules or standards of conduct that may apply to a utility or the utility's affiliates under orders or regulations of the Federal Energy Regulatory Commission (FERC) or the Securities and Exchange Commission (SEC). A utility shall file with the commission a notice of any provision in this section conflicting with FERC or SEC orders or regulations. A utility that is subject to statutes or regulations in any state that conflict with a provision of this section may petition the commission for a waiver of the conflicting provision on a showing of good cause.
- (c) **Definitions.** The following words and terms when used in this section shall have the following meaning unless the context clearly indicates otherwise:
- (1) **Arm's length transaction** — The standard of conduct under which unrelated parties, each acting in its own best interest, would carry out a particular transaction. Applied to related parties, a transaction is at arm's length if the

transaction could have been made on the same terms to a disinterested third party in a bargained transaction.

- (2) **Competitive affiliate** — An affiliate of a utility that provides services or sells products in a competitive energy-related market in this state, including telecommunications services, to the extent those services are energy-related.
- (3) **Confidential information** — Any information not intended for public disclosure and considered to be confidential or proprietary by persons privy to such information. Confidential information includes but is not limited to information relating to the interconnection of customers to a utility's transmission or distribution systems, proprietary customer information, trade secrets, competitive information relating to internal manufacturing processes, and information about a utility's transmission or distribution system, operations, or plans for expansion.
- (4) **Corporate support services** — Services shared by a utility, its parent holding company, or a separate affiliate created to perform corporate support services, with its affiliates of joint corporate oversight, governance, support systems, and personnel. Examples of services that may be shared, to the extent the services comply with the requirements prescribed by PURA §39.157(d) and (g) and rules implementing those requirements, include human resources, procurement, information technology, regulatory services, administrative services, real estate services, legal services, accounting, environmental services, research and development unrelated to marketing activity and/or business development for the competitive affiliate regarding its services and products, internal audit, community

relations, corporate communications, financial services, financial planning and management support, corporate services, corporate secretary, lobbying, and corporate planning. Examples of services that may not be shared include engineering, purchasing of electric transmission, transmission and distribution system operations, and marketing, unless such services are provided by a utility, or a separate affiliate created to perform such services, exclusively to affiliated regulated utilities and only for provision of regulated utility services.

- (5) **Proprietary customer information** — Any information compiled by an electric utility on a customer in the normal course of providing electric service which makes possible the identification of any individual customer by matching such information with the customer's name, address, account number, type or classification of service, historical electricity usage, expected patterns of use, types of facilities used in providing service, individual contract terms and conditions, price, current charges, billing records, or any other information that the customer has expressly requested not be disclosed. Information that is redacted or organized in such a way as to make it impossible to identify the customer to whom the information relates does not constitute proprietary customer information.
- (6) **Similarly situated** — The standard for determining whether a non-affiliate is entitled to the same benefit(s) a utility offers, or grants upon request, to its competitive affiliate for any product or service. For purposes of this section, all

non-affiliates serving or proposing to serve the same market as a utility's competitive affiliate are similarly situated to the utility's competitive affiliate.

- (7) **Transaction** — Any interaction between a utility and its affiliate in which a service, good, asset, product, property, right, or other item is transferred or received by either a utility or its affiliate.
 - (8) **Utility** — An electric utility as defined in PURA §31.002(6) or a transmission and distribution utility as defined in PURA §31.002(19). For purposes of this section, a utility does not include a river authority operating a steam generating plant on or before January 1, 1999, or a corporation authorized by Chapter 245, Acts of the 67th Legislature, Regular Session, 1981 (Article 717p, Vernon's Texas Civil Statutes). In addition, with respect to a holding company exempt under the Public Utility Holding Company Act (PUHCA) §3(a)(2), the term "utility," as used in this section, means the division or business unit through which the holding company conducts utility operations and not the holding company as a legal entity.
- (d) **Separation of a utility from its affiliates.**
- (1) **Separate and independent entities.** A utility shall be a separate, independent entity from any competitive affiliate.
 - (2) **Sharing of employees, facilities, or other resources.** Except as otherwise allowed in paragraphs (3), (4), or (6) of this subsection, a utility shall not share employees, facilities, or other resources with its competitive affiliates unless the

utility can prove to the commission prior to such sharing that the sharing will not compromise the public interest. Such sharing may be allowed if the utility implements adequate safeguards precluding employees of a competitive affiliate from gaining access to information in a manner that would allow or provide a means to transfer confidential information from a utility to an affiliate, create an opportunity for preferential treatment or unfair competitive advantage, lead to customer confusion, or create significant opportunities for cross-subsidization of affiliates. Utilities may share common officers and directors, property, equipment, computer systems, information systems, and corporate support services with competitive affiliates to the extent consistent with the provisions of this section.

- (3) **Employee transfers and temporary assignments.** A utility shall not assign, for less than one year, utility employees engaged in transmission or distribution system operations to a competitive affiliate unless the employee does not have knowledge of confidential information. Utility employees engaged in transmission and distribution system operations, including persons employed by a service company affiliated with the utility who are engaged in transmission system operations on a day-to-day basis or have knowledge of transmission and distribution system operations and are transferred to a competitive affiliate, shall not remove or otherwise provide or use proprietary property or information gained from the utility or affiliated service company in a discriminatory or exclusive fashion, to the benefit of the competitive affiliate or to the detriment of non-

affiliated electric suppliers. Movement of an employee engaged in transmission and distribution system operations, including a person employed by a service company affiliated with the utility who is engaged in transmission and distribution system operations on a day-to-day basis or has knowledge of transmission and distribution system operations from a utility to a competitive affiliate or vice versa may be accomplished through either the employee's termination of employment with one company and acceptance of employment with the other, or a transfer to another company, as long as the transfer results in the utility bearing no ongoing costs associated with that employee. Transferring employees shall sign a statement indicating that they are aware of and understand the restrictions and penalties set forth in this section. The exception to this provision is that employees may be temporarily assigned to an affiliate or non-affiliated utility to assist in restoring power in the event of a major service interruption or assist in resolving emergency situations affecting system reliability.

- (4) **Sharing of office space.** A utility's office space shall be physically separate from that of its competitive affiliates, where physical separation is accomplished by having office space in separate buildings or, if within the same building, by a method such as having offices on separate floors or with separate access, unless otherwise approved by the commission.
- (5) **Separate books and records.** A utility and its affiliates shall keep separate books of accounts and records, and the commission may review records relating to a transaction between a utility and an affiliate.

- (A) In accordance with generally accepted accounting principles or state and federal guidelines, as appropriate, a utility shall record all transactions with its affiliates, whether they involve direct or indirect expenses.
 - (B) A utility shall prepare financial statements that are not consolidated with those of its affiliates.
 - (C) A utility and its affiliates shall maintain sufficient records to allow for an audit of the transactions between the utility and its affiliates. At any time, the commission may, at its discretion, require a utility to initiate, at the utility's expense, an audit of transactions between the utility and its affiliates performed by an independent third party.
- (6) **Limited credit support by a utility.** A utility may share credit, investment, or financing arrangements with its competitive affiliates if it complies with subparagraphs (A) and (B) of this paragraph.
- (A) The utility shall implement adequate safeguards precluding employees of a competitive affiliate from gaining access to information in a manner that would allow or provide a means to transfer confidential information from a utility to an affiliate, create an opportunity for preferential treatment or unfair competitive advantage, lead to customer confusion, or create significant opportunities for cross-subsidization of affiliates.
 - (B) The utility shall not allow an affiliate to obtain credit under any arrangement that would include a specific pledge of any assets in the rate base of the utility or a pledge of cash reasonably necessary for utility

operations. This subsection does not affect a utility's obligations under other law or regulations, such as the obligations of a public utility holding company under §25.271(c)(2) of this title (relating to Foreign Utility Company Ownership by Exempt Holding Companies).

(e) **Transactions between a utility and its affiliates.**

- (1) **Transactions with all affiliates.** A utility shall not subsidize the business activities of any affiliate with revenues from a regulated service. In accordance with PURA and the commission's rules, a utility and its affiliates shall fully allocate costs for any shared services, corporate support services, offices, employees, property, equipment, computer systems, information systems, and any other shared assets, services, or products.
- (A) Sale of products or services by a utility. Unless otherwise approved by the commission and except for corporate support services, any sale of a product or service by a utility shall be governed by a tariff approved by the commission. Products and services shall be made available to any third party entity on the same terms and conditions.
- (B) Purchase of products, services, or assets by a utility from its affiliate. Products, services, and assets shall be priced at levels that are fair and reasonable to the customers of the utility and that reflect the market value of the product, service, or asset.

- (C) Transfers of assets (except for unbundling pursuant to PURA § 39.051 or asset valuation in accordance with PURA § 39.262). For purposes of this subparagraph, assets are defined as all jurisdictional capital assets of the utility. Except for asset transfers implementing unbundling pursuant to PURA §39.051 or asset valuation in accordance with PURA §39.262, assets transferred from a utility to its affiliates shall be priced at levels that are fair and reasonable to the customers of the utility and that reflect the market value of the assets or the utility's fully allocated cost to provide those assets.
 - (D) Transfer of assets implementing unbundling pursuant to PURA §39.051 or asset valuation in accordance with PURA §39.262. The transfer from a utility to an affiliate of assets implementing unbundling pursuant to PURA §39.051 or asset valuation in accordance with PURA §39.262 will be reviewed by the commission pursuant to the applicable provisions of PURA, and any rules implementing those provisions.
- (2) **Transactions with competitive affiliates.** Unless otherwise allowed in this subsection, transactions between a utility and its competitive affiliates shall be at arm's length. A utility shall maintain a contemporaneous written record of all transactions with its competitive affiliates, except those involving corporate support services and those transactions governed by tariffs. Such records, which shall include the date of the transaction, name of affiliate involved, name of utility employee knowledgeable about the transaction, and a description of the

transaction, shall be maintained by the utility for three years. In addition to the requirements specified in paragraph (1) of this subsection, the following provisions apply to transactions between utilities and their competitive affiliates.

- (A) Provision of corporate support services. A utility may engage in transactions directly related to the provision of corporate support services with its competitive affiliates. Such provision of corporate support services shall not allow or provide a means for the transfer of confidential information from the utility to the competitive affiliate, create the opportunity for preferential treatment or unfair competitive advantage, lead to customer confusion, or create significant opportunities for cross-subsidization of the competitive affiliate.
- (B) Purchase of products or services by a utility from its competitive affiliate. Except for corporate support services, a utility may not enter into a transaction to purchase a product or service from a competitive affiliate that has a per unit value of \$75,000 or more, or a total value of \$1 million or more, unless the transaction is the result of a fair, competitive bidding process formalized in a contract subject to the provisions of §25.273 of this title (relating to Contracts Between Electric Utilities and Their Competitive Affiliates).
- (C) Transfers of assets (except for unbundling pursuant to PURA § 39.051 or asset valuation in accordance with PURA §39.262). For purposes of this subparagraph, assets are defined as all jurisdictional capital assets of the

utility. Except for asset transfers facilitating unbundling pursuant to PURA §39.051 or asset valuation in accordance with PURA §39.262, any transfer from a utility to its competitive affiliates of assets with a per unit value of \$75,000 or more, or a total value of \$1 million or more, must be the result of a fair, competitive bidding process formalized in a contract subject to the provisions of §25.273 of this title.

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

- (1) **Products and services available on a non-discriminatory basis.** If a utility makes a product or service, other than corporate support services, available to a competitive affiliate, it shall make the same product or service available, contemporaneously and in the same manner, to all similarly situated entities, and it shall apply its tariffs, prices, terms, conditions, and discounts for those products and services in the same manner to all similarly situated entities. A utility shall process all requests for a product or service from competitive affiliates or similarly situated non-affiliated entities on a non-discriminatory basis. If a utility's tariff allows for discretion in its application, the utility shall apply that provision in the same manner to its competitive affiliates and similarly situated non-affiliates, as well as to their respective customers. If a utility's tariff allows no discretion in its application, the utility shall strictly apply that provision. Utilities are prohibited from using customer-specific contracts to circumvent these requirements. A utility shall not create a product or service arrangement with its

competitive affiliate that is so unique that no competitor could be similarly situated to utilize the product or service.

- (2) **Discounts, rebates, fee waivers, or alternative tariff terms and conditions.** If a utility offers its competitive affiliate or grants a request from its competitive affiliate for a discount, rebate, fee waiver, or alternative tariff terms and conditions for any product or service, it must make the same benefit(s) contemporaneously available, on a non-discriminatory basis, to all similarly situated non-affiliates. The utility shall post a conspicuously placed notice on its Internet site or public electronic bulletin board for at least 30 consecutive calendar days providing the following information: the name of the competitive affiliate involved in the transaction; the rate charged; the normal rate or tariff condition(s); the period for which the benefit applies; the quantities and the delivery points involved in the transaction (if any); any conditions or requirements applicable to the benefit, along with documentation of any cost differential underlying the benefit, and the procedures by which non-affiliates may obtain the same benefit. The utility shall maintain records of such information for a minimum of three years, and shall make such records available for third party review within 72 hours of a written request, or at a time mutually agreeable to the utility and the third party. A utility shall not create any arrangement with its competitive affiliate that is so unique that no competitor could be similarly situated to benefit from the discount, rebate, fee waiver, or alternative tariff terms and conditions.

- (3) **Tying arrangements prohibited.** A utility shall not condition the provision of any product, service, pricing benefit, or alternative terms or conditions upon the purchase of any other good or service from the utility or its competitive affiliate.
- (g) **Information safeguards.**
- (1) **Proprietary customer information.** A utility shall provide a customer with the customer's proprietary customer information, upon request by the customer. Unless a utility obtains prior affirmative written consent or other verifiable authorization from the customer as determined by the commission, it shall not release any proprietary customer information to a competitive affiliate or any other entity, other than the customer, an independent organization as defined by PURA §39.151, or a provider of corporate support services for the sole purpose of providing corporate support services in accordance with subsection (e)(2)(A) of this section. In order to facilitate the transition to customer choice, a utility may, as part of its unbundling plan filed pursuant to PURA §39.051(e) and prior to the start of customer choice, release proprietary customer information to its affiliated retail electric provider without authorization of those customers. A utility may also provide proprietary customer information to a provider of last resort without customer authorization for the purpose of serving customers who have been switched to the provider of last resort. The utility shall maintain records that include the date, time, and nature of information released when it releases customer proprietary information to another entity in accordance with this

paragraph. The utility shall maintain records of such information for a minimum of three years, and shall make the records available for third party review within 72 hours of a written request, or at a time mutually agreeable to the utility and the third party. When the third party requesting review of the records is not the customer, commission, or Office of Public Utility Counsel, the records may be redacted in such a way as to protect the customer's identity.

- (2) **Nondiscriminatory availability of aggregate customer information.** A utility shall make aggregate non-proprietary customer information, including, but not limited to, information about a utility's energy purchases, sales, or operations or about a utility's energy-related goods or services, available to a competitive affiliate only if the utility makes such information available to all non-affiliates under the same terms and conditions and at the same price as it is made available to any of its affiliates. In addition, no later than 24 hours prior to a utility's provision to its competitive affiliate of aggregate customer information, the utility shall post a conspicuously placed notice on its Internet site or other public electronic bulletin board for at least 30 consecutive calendar days providing the following information: the name of the competitive affiliate to which the information will be provided, the rate charged for the information, a meaningful description of the information provided, and the procedures by which non-affiliates may obtain the same information under the same terms and conditions. The utility shall maintain records of such information for a minimum of three years, and shall make such records available for third party review within 72 hours

of a written request, or at a time mutually agreeable to the utility and the third party.

- (3) **No preferential access to transmission and distribution information.** A utility shall not allow preferential access by its competitive affiliates to information about its transmission and distribution systems.
 - (4) **Other limitations on information disclosure.** Nothing in this rule is intended to alter the specific limitations on disclosure of confidential information in the Texas Utilities Code, the Texas Government Code, Chapter 552, or the commission's substantive and procedural rules.
 - (5) **Other information.** Except as otherwise allowed in this subsection, a utility shall not share information, except for information required to perform allowed corporate support services, with competitive affiliates unless the utility can prove to the commission that the sharing will not compromise the public interest prior to any such sharing.
- (h) **Safeguards relating to joint marketing and advertising.**
- (1) **Utility name or logo.** Before September 1, 2005, a utility shall not allow the use of its corporate name, trademark, brand, or logo by a competitive affiliate, on employee business cards or in any written or auditory advertisements of specific services to existing or potential residential or small commercial customers located within the utility's certificated service area, whether through radio or television, Internet-based, or other electronic format accessible to the public, unless the

competitive affiliate includes a disclaimer with its use of the utility's corporate name, trademark, brand, or logo. Such disclaimer of the corporate name, trademark, brand, or logo in the material distributed must be written in a bold and conspicuous manner or clearly audible, as appropriate for the communication medium, and shall state the following: "{Name of competitive affiliate } is not the same company as {name of utility} and is not regulated by the Public Utility Commission of Texas, and you do not have to buy {name of competitive affiliate}'s products to continue to receive quality regulated services from {name of utility}."

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

(A) A utility shall not:

- (i) provide or acquire leads on behalf of its competitive affiliates;
- (ii) solicit business or acquire information on behalf of its competitive affiliates;
- (iii) give the appearance of speaking or acting on behalf of any of its competitive affiliates;
- (iv) share market analysis reports or other types of proprietary or non-publicly available reports, including, but not limited to, market forecast, planning, or strategic reports, with its competitive affiliates; or
- (v) represent to customers or potential customers that it can offer competitive retail services bundled with its tariffed services.

(B) A utility shall not engage in joint marketing, advertising, or promotional activities of its products or services with those of a competitive affiliate in a manner that favors the affiliate. Such joint marketing, advertising, or promotional activities include, but are not limited to, the following activities:

- (i) acting or appearing to act on behalf of a competitive affiliate in any communications and contacts with any existing or potential customers.
- (ii) joint sales calls;
- (iii) joint proposals, either as requests for proposals or responses to requests for proposals;
- (iv) joint promotional communications or correspondence, except that a utility may allow a competitive affiliate access to customer bill advertising inserts according to the terms of a commission-approved tariff so long as access to such inserts is made available on the same terms and conditions to non-affiliates offering similar services as the competitive affiliate that uses bill inserts;
- (v) joint presentations at trade shows, conferences, or other marketing-type events within the State of Texas; and
- (vi) providing links from a utility's Internet web site to a competitive affiliate's Internet web site.

(C) At a customer's unsolicited request, a utility may participate in non-sales meetings with a competitive affiliate to discuss technical or operational subjects regarding the utility's provision of transmission or distribution services to the customer, but only in the same manner and to the same extent the utility participates in such meetings with unaffiliated electric or energy services suppliers and their customers.

- (3) **Requests for specific competitive affiliate information.** If a customer or potential customer makes an unsolicited request to a utility for information specifically about any of its competitive affiliates, the utility may refer the customer or potential customer to the competitive affiliate for more information. Under this paragraph, the only information that a utility may provide to the customer or potential customer is the competitive affiliate's address and telephone number. The utility shall not transfer the customer directly to the competitive affiliate's customer service office via telephone or provide any other electronic link whereby the customer could contact the competitive affiliate through the utility. When providing the customer or potential customer information about the competitive affiliate, the utility shall not promote its competitive affiliate or its competitive affiliate's products or services, nor shall it offer the customer or potential customer any opinion regarding the service of the competitive affiliate or any other service provider.
- (4) **Requests for general information about products or services offered by competitive affiliates and their competitors.** If a customer or potential

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

(i) **Remedies and enforcement.**

- (1) **Internal codes of conduct for the transition period.** During the transition to competition, including the period prior to and during utility unbundling pursuant to PURA § 39.051, each utility shall implement an internal code of conduct consistent with the spirit and intent of PURA §39.157(d) and with the provisions of this section. Such internal codes of conduct are subject to commission review and approval in the context of a utility's unbundling plan submitted pursuant to PURA § 39.051(e); however, such internal codes of conduct shall take effect, on an interim basis, on January 10, 2000. The internal codes of conduct shall be developed in good faith by the utility based on the extent to which its affiliate

relationships are known by January 10, 2000, and then updated as necessary to ensure compliance with PURA and commission rules.

- (2) **Ensuring compliance for new affiliates.** Upon the creation of a new affiliate, the utility shall immediately notify the commission of the creation of the new affiliate. The utility shall ensure that any interaction with the new affiliate is in compliance with this section.
- (3) **Compliance Audits.** No later than one year after the utility has unbundled pursuant to PURA § 39.051, and, at a minimum, every third year thereafter, the utility shall have an audit prepared by independent auditors that verifies that the utility is in compliance with this section. The utility shall file the results of each audit with the commission within one month of the audit's completion. The cost of the audits shall not be charged to utility ratepayers.
- (4) **Informal complaint procedure.** A utility shall establish and file with the commission a complaint procedure for addressing alleged violations of this section. This procedure shall contain a mechanism whereby all complaints shall be placed in writing and shall be referred to a designated officer of the utility. All complaints shall contain the name of the complainant and a detailed factual report of the complaint, including all relevant dates, companies involved, employees involved, and the specific claim. The designated officer shall acknowledge receipt of the complaint in writing within five working days of receipt. The designated officer shall provide a written report communicating the results of the preliminary investigation to the complainant within thirty days after receipt of the

complaint, including a description of any course of action that will be taken. In the event the utility and the complainant are unable to resolve the complaint, the complainant may file a formal complaint with the commission. The utility shall notify the complainant of his or her right to file a formal complaint with the commission, and shall provide the complainant with the commission's address and telephone number. The utility and the complainant shall make a good faith effort to resolve the complaint on an informal basis as promptly as practicable.

- (5) **Enforcement by the commission.** Any transaction or series or set of transactions between a utility and a competitive affiliate – except as explicitly allowed under this section – which results in an abuse of market power shall be deemed a violation of this section. A violation or series or set of violations of this section that materially impairs, or is reasonably likely to materially impair, the ability of a person to compete in a competitive market shall be deemed an abuse of market power.

- (A) In addition to other methods that may be available, the commission may enforce the provisions of this rule by:
- (i) seeking an injunction or civil penalties to eliminate or remedy the violation or series or set of violations;
 - (ii) suspending, revoking, or amending a certificate or registration as authorized by PURA §39.356; or
 - (iii) pursuing administrative penalties under PURA, Chapter 15, Subchapter B.

- (B) The imposition of one penalty under this section does not preclude the imposition of other penalties as appropriate for the violation or series or set of violations.
- (C) In assessing penalties, the commission shall consider the following factors:
 - (i) the utility's prior history of violations;
 - (ii) the utility's efforts to comply with the commission's rules, including the extent to which the utility has adequately and physically separated its office, communications, accounting systems, information systems, lines of authority, and operations from its affiliates, and efforts to enforce these rules;
 - (iii) the nature and degree of economic benefit gained by the utility's competitive affiliate;
 - (iv) the damages or potential damages resulting from the violation or series or set of violations;
 - (v) the size of the business of the competitive affiliate involved;
 - (vi) the penalty's likely deterrence of future violations; and
 - (vii) such other factors deemed appropriate and material to the particular circumstances of the violation or series or set of violations.
- (6) **No immunity from antitrust enforcement.** Nothing in these affiliate rules shall confer immunity from state or federal antitrust laws. Sanctions imposed by the commission for violations of this rule do not affect or preempt antitrust liability,

but rather are in addition to any antitrust liability that may apply to the anticompetitive activity. Therefore, antitrust remedies also may be sought in federal or state court to cure anticompetitive activities.

- (7) **No immunity from civil relief.** Nothing in these affiliate rules shall preclude any form of civil relief that may be available under federal or state law, including, but not limited to, filing a complaint with the commission consistent with this subsection.

§25.273. Contracts Between Electric Utilities and Their Competitive Affiliates.

- (a) **Purpose.** This section establishes the requirements for the implementation of contracts between utilities and their competitive affiliates resulting from a fair, competitive bidding process.
- (b) **Application.**
- (1) **General application.** This section applies to:
- (A) electric utilities operating in the State of Texas as defined in the Public Utility Regulatory Act (PURA) §31.002(6), and transactions or activities between electric utilities and their affiliates, as defined in PURA §11.003(2); and
- (B) transmission and distribution utilities operating in a qualifying power region in the State of Texas as defined in PURA §31.002(19) upon commission certification of a qualifying power region pursuant to PURA §39.152, and transactions or activities between transmission and distribution utilities and their affiliates, as defined in PURA §11.003(2).
- (2) **No circumvention of the code of conduct.** An electric utility, transmission and distribution utility, or competitive affiliate shall not circumvent the provisions or the intent of PURA §39.157 or any rules implementing those requirements by using any affiliate to provide information, services, products, or subsidies between the electric utility, transmission and distribution utility, and a competitive affiliate.

- (3) **Petition for waiver.** Nothing in this section is intended to affect or modify the obligation or duties relating to any rules or standards of conduct that may apply to a utility or the utility's affiliates under orders or regulations of the Federal Energy Regulatory Commission (FERC) or the Securities and Exchange Commission (SEC). A utility shall file with the commission a notice of any provision in this section conflicting with FERC or SEC orders or regulations. A utility that is subject to statutes or regulations in any state that conflict with a provision of this section may petition the commission for a waiver of the conflicting provision on a showing of good cause.
- (c) **Definitions.** Any terms defined in §25.272 of this title (relating to Code of Conduct for Electric Utilities and Their Affiliates) have the same meanings herein.
- (d) **Competitive bidding required.** The utility shall conduct competitive bidding, as required by §25.272 of this title, to procure products and services, other than corporate support services, that are offered by an competitive affiliate or to sell to any competitive affiliate assets that have a per unit value of more than \$75,000, or a total value of more than \$1 million. This section does not apply to transfers that facilitate unbundling under PURA §39.051 or asset valuation under PURA §39.262.
- (1) **Notice.** The utility shall provide reasonable notice of any request for proposals required pursuant to this section. Such notice shall include:
- (A) notice by publication in trade journals or newspapers as appropriate;

- (B) notice by mail to persons who previously requested to be notified of the request for proposals; and
 - (C) notice conspicuously placed on the utility's Internet site or other public electronic bulletin board.
- (2) **Independent evaluator.** The utility shall use an independent evaluator when a competitive affiliate's bid is included among the bids to be evaluated. If an independent evaluator is required, the utility shall maintain a record of communications with the independent evaluator. The independent evaluator shall in writing identify the bids that are most advantageous and warrant negotiation and contract execution, in accordance with the criteria set forth in the request for proposals. The utility retains responsibility for final selection of products or services.
- (3) **Competitive bidding procedures.** The **utility** shall make a request for proposals available to interested persons.
 - (A) The request for proposals must clearly set forth the eligibility and selection criteria and shall specify the weight to be given to any non-cost selection criteria.
 - (B) The utility shall strictly enforce the criteria specified in the request for proposals.
- (4) **Evaluation of bids.** The utility or independent evaluator, as appropriate, shall evaluate each bid submitted in accordance with the criteria specified in the request

for proposals. The utility or independent evaluator may not give preferential treatment or consideration to any bid.

- (5) **Rejection of bids.** The utility is not required to accept a bid and may reject any or all bids in accordance with the selection criteria specified in the request for proposals.
- (e) **Contracts.** A utility shall file with the commission a signed copy of any contracts entered into with a competitive affiliate as the result of the fair, competitive bidding process described in subsection (d) of this section. A contract shall include, at a minimum, the following provisions:
- (1) the effective date of the agreement and parties to the agreement;
 - (2) the term of the agreement;
 - (3) a narrative describing the products or services provided to the utility, including a list by specific service of all the affiliated companies who provide or receive these services, or a narrative describing the assets being sold by the utility to the competitive affiliate;
 - (4) the obligations of the parties;
 - (5) the price for those products, services, or assets governed by the contract; and
 - (6) billing and payment procedures.

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

**ISSUED IN AUSTIN, TEXAS ON THE 9th DAY OF AUGUST 1999 BY THE
PUBLIC UTILITY COMMISSION OF TEXAS
RHONDA G. DEMPSEY**