

**PROJECT NO. 37685**

**RULEMAKING TO AMEND SUBST. R. § PUBLIC UTILITY COMMISSION  
25.107 REGARDING CERTIFICATION §  
OF RETAIL ELECTRIC PROVIDERS § OF TEXAS  
(REPS) §**

**ORDER ADOPTING AMENDMENT TO §25.107  
AS APPROVED AT THE OCTOBER 22, 2010 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts an amendment to §25.107, relating to Certification of Retail Electric Providers (REPs), with changes to the proposed text as published in the May 14, 2010 issue of the *Texas Register* (35 TexReg 3711). The amendments will provide requirements for certification as a distributed generation REP serving large commercial customers, allow the commission to draw on a letter of credit upon revocation of a REP certificate, define erroneously imposing switch-holds or failing to remove switch-holds within the prescribed timeline as a significant violation of the rule, and make other clarifying changes to the rule. This order amends a competition rule and is, therefore, subject to judicial review as specified in Public Utility Regulatory Act, Texas Utilities Code Annotated §39.001(e) (Vernon 2007 and Supp. 2010) (PURA). This amendment is adopted under Project Number 37685.

The commission received comments on the proposed amendment from Alliance for Retail Markets (ARM), City of Houston, Direct Energy (Direct), Electric Reliability Council of Texas (ERCOT), Office of Public Utility Counsel (OPUC), Reliant Energy Retail Services (Reliant), Steering Committee of Cities Served by Oncor (Cities), Tenaska Power Services Company (Tenaska), Texas Industrial Energy Consumers (TIEC), Texas Energy Association for Marketers

(TEAM), Texpo Power, LP (Texpo), TXU Energy (TXU), and Young Energy (Young). The commission also received joint initial comments from AEP Texas Central Company, AEP Texas North Company, CenterPoint Energy Houston Electric and Texas New Mexico Power Company (Four Transmission and Distribution Utilities (TDUs)) and joint reply comments from AEP Texas Central Company, AEP Texas North Company, and CenterPoint Energy Houston Electric (Three TDUs).

The commission posed five questions for comment, and the comments are summarized below.

*Question 1. Should an expedited process be established for approval of a change in control pursuant to §25.107(i)(3)(A) where the purpose of such transfer is to avoid a mass transition to Provider of Last Resort (POLR) of a REP's customers? If your response to the question is "yes," please provide suggested language.*

ARM, Reliant and TXU did not believe that the commission should involve itself in the transfer of a REP Certificate. ARM stated that the commission lacks statutory authority to impose this requirement on the sale/transfer/merger transactions in the retail electric market. It contended that the imposition of this requirement in the context of a competitive market is inappropriate as a policy matter. Currently, the commission has to approve or reject an application within 75 days, which ARM contended was unnecessarily lengthy and would create a level of uncertainty in the market about the consummation of the transaction and could cause the deal to disintegrate. Worse yet, ARM stated, an acquiring company might hesitate to enter into such transactions out of concern about the effect a prolonged period of regulatory review would have on its financial

standing while the commission review is being conducted. ARM proposed that if the commission adopts change in control provisions, the timeline should be shortened from 75 days to 30 days and should not be subject to an extension for good cause.

Reliant stated that the fact this question is posed serves to highlight why a preapproval process is not prudent — requiring preapproval interferes with lawful business transactions. The simple fact that the commission might become involved in deciding whether a transaction should go forward actually increases the probability of a potential mass transfer to POLR.

TXU stated that streamlining the transfer of customers that might otherwise go to POLR will benefit customers and the retail market. Given the short timelines for POLR transitions, a preapproval requirement, even on an expedited basis, would hamper a REP's ability to avoid a mass transition. TXU also stated that in most cases the transfer would be to an existing REP and the REP would simply be adding to its customer count. The commission would not normally review a REP adding customers through normal sales channels, and REPs should not be treated any differently under the proposed rule. Finally, TXU added, if the commission were to require preapproval in the one instance in which preapproval is within its authority, a direct transfer or sale of a REP that would result in a previously un-certificated entity providing retail electric service, then it is doubtful that review could be accomplished expeditiously enough to avoid a transition of customers to POLR.

TEAM stated that historically the avoidance of a customer being transferred to POLR has been accomplished through a transfer of customers to an existing REP, but not a change in control of

the REP who is on the verge of exiting the market. If the REP is on the verge of exiting the market, it does not seem that the commission's rules should take extraordinary measures to preserve that certificate. Regulatory preapproval of all transactions involving REP ownership is unnecessary. TEAM also stated that it is important to recognize that an investment of capital in an ongoing operation where there is no change in the management team upon which a REP attained certification is much different than a transaction under which a REP's certificate is being transferred to a new management team.

Four TDUs believed that the new rules should apply to any change of control and allowing an expedited process would increase the likelihood of a sale of a certificate to a party that has not met the rule requirements and would pose risks for the customers and the rest of the market.

*Commission Response*

**The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens and inhibit transactions in the REP market, the commission declines to adopt this change.**

*Question 2. Is it appropriate to require disclosure of a felony or misdemeanor charge where the charge has not resulted in a conviction, a guilty plea, or a plea of nolo contendere?*

ARM, Reliant, TEAM, and TXU did not believe it would be appropriate to require disclosure of a felony or misdemeanor charge when the charge has not resulted in a conviction, a guilty plea,

or a plea of nolo contendere. Reliant, TEAM, and ARM stated that given that the criminal justice system in this country is founded upon the concept of “innocent until proven guilty,” it is inappropriate to require disclosure of charges or allegations. ARM submitted that information of this nature should not be considered for this purpose as it has no real probative value or relevance to the question of whether certification should be granted. TXU agreed and stated that imposition of this inquiry requirement on a REP is tantamount to the REP asking a group of its employees whether they have been arrested in the last ten years. Under Equal Employment Opportunity Commission (EEOC) guidelines, best practices for employers are to avoid inquiring about arrests because the EEOC has determined that the use of arrest records in employment decisions has a disparate impact on some protected groups. TXU stated that at least two troubling consequences may result from the commission requiring REPs to inquire is that first, REP inquiries about arrests may create additional liability exposure for the REP and secondly, the commission may put itself in the position of defending that a REP certification was appropriately denied in a situation where an applicant disclosed requested arrests.

ARM stated that if the commission requires submission of arrest information, then it should require only information about criminal charges that were allegedly committed in a business or commercial context and are relevant to an assessment of managerial and resources and ability.

TEAM stated that if the charge is ongoing and yet unresolved, it may be reasonable to require disclosure, but such disclosure should not serve as an automatic bar to certification.

*Commission Response*

**The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens and inhibit transactions in the REP market, the commission declines to adopt this change.**

*Question 3. What types of misdemeanors described by subsection (g)(3)(C)(iii) would be relevant to certification as a REP?*

TXU commented that the commission has appropriately identified the misdemeanors that would be relevant to certification as a REP.

TEAM stated that proposed subsection (g)(3)(C)(iii) is overly broad and the standard that should be applied is requiring REPs to disclose misdemeanor crimes of moral turpitude.

ARM stated that the distinction drawn in this subsection should be between types of crimes rather than the level of seriousness of the crimes. The types of felonies and misdemeanors specified in subsection (g)(3)(C) should include crimes committed in a business or commercial context that bear directly on an evaluation of the applicant's managerial resources and the ability and experience of its management staff, consistent with proposed subsection (g)(2). ARM stated that they should also include crimes committed in the course of the provision of utility or utility-like services pursuant to a government-issued license or certificate that are also germane to evaluation of managerial resources or duty. ARM recommended that the following crimes be

included within the scope of the proposed rule: bribery, conspiracy, fraud, embezzlement, extortion, forgery, theft, racketeering, and tax evasion. ARM stated that the list was not exhaustive, but the commission should include only those crimes that relate directly to the commission's assessment of an applicant's managerial resources and abilities.

*Commission Response*

**The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens and inhibit transactions in the REP market, the commission declines to adopt this change.**

*Question 4. Should subsection (i)(3)(A)(ii) define a change in control as a sale of a percentage of the REP's assets or as a sale of "all or substantially all" of the REP's assets? If a percentage should be used, what percentage is appropriate?*

TXU, ARM, TEAM and Reliant opposed the standard proposed. TXU believed that this provision was duplicative of provisions in existing commission rules and believed that the proposed rule is beyond the commission's authority to the extent it would capture transactions other than the direct sale or transfer of a REP certificate that would result in a previously un-certificated entity providing retail electric service. To the extent that this provision seeks to capture transfers of customers or assets other than the REP certificate, TXU submitted that it was unnecessary because existing rule provisions, both governing the transfer of customers (§25.493) and requiring a REP to promptly notify and seek a certificate amendment for material changes to

the basis for its certification (§25.107(i)(3)), enable the commission to carry out its statutory charge to ensure that customers are served by REPs with the requisite financial, technical and managerial qualifications. Further, TXU stated, if the sale of assets involved the sale of a REP certificate that would result in a previously un-certificated entity providing retail electric service then it would also be covered by the material change notice and amendment requirement in existing §25.107(i)(3). Alternatively, if the commission disagrees with TXU that the existing requirement is adequate, then the requirement should be changed to 75% or more rather than “all or substantially all” since this would be burdensome to administer. Finally, TXU stated that requiring preapproval of the sale of a REP would exceed the commission’s statutory authority in the case of the transfer of customers to an existing REP because these transactions would not result in a previously un-certificated entity providing retail electric service.

ARM contended that the percentage designated in the proposed rule is irrelevant if the sale of tangible assets will always include the transfer of a REP certificate. The proposed rule defines a change in control of a REP to include when “a REP sells, assigns, or otherwise transfers its REP certificate to another person” and therefore this is redundant and should be eliminated.

TEAM stated that it is the sale of assets coupled with a material change in the management team that should be considered a change in control subject to prior approval. TEAM argued that regulatory preapproval of a change in control is unnecessary and could actually be harmful to customers and the market. TEAM commented that it is important to recognize that an investment of capital in an ongoing REP operation where there is no change in the management

team upon which a REP attained certification is much different than a transaction under which a REP certificate is being transferred to a new management team.

Reliant stated that whether or not the change in control is defined as a percentage of assets or as a sale of “all or substantially all” of the REPs assets is immaterial to the question of whether the commission has authority to pre-approve transactions that result in a change in control. Reliant commented that subsection (i)(3) of the existing rule already provides that a REP must apply to amend its certification within ten working days of a material change to the information provided as the basis for approval of the application. Additionally, Reliant continued, subsection (i)(8) of the current rule requires a REP to respond within three days to a commission staff request for information to confirm continued compliance.

*Commission Response*

**The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens and inhibit transactions in the REP market, the commission declines to adopt this change.**

*Question 5. Should certain REPs, such as REPs certificated under subsection (f)(1)(A), be exempt from subsection (i)(3), which requires prior approval for a change in control of a REP?*

Direct, ARM, Reliant, and TXU Energy opposed prior commission approval for a change in control of a REP. Direct stated that if the commission decides to include subsection (i)(3), it

should not apply to REPs certificated under subsection (f)(1)(A)(i) which pertains to REPs that have met the “access to capital” requirements by means of an investment grade credit rating. Direct stated that it is proper for the commission to set a policy that differentiates compliance with proposed subsection (i)(3) based on the financial strength of a REP as evidenced by the resources utilized to demonstrate and maintain compliance with the financial requirements. According to Direct, an investment-grade credit rating indicates issuance of public debt that has been thoroughly scrutinized by credit rating agencies who have determined that the investment-grade entity has sufficient resources to support its businesses under a range of business scenarios.

TXU stated that if the commission decides to adopt subsection (i)(3)(A)(i) and require preapproval of transfers of REP certificates that would result in a previously un-certificated entity providing retail electric service, there should be no correlation between commission prior approval of a transfer and the investment grade credit rating or tangible net worth standards. Instead, the focus should stay on whether any new, un-certificated entity meets the qualifications to provide retail electric service. ARM stated that if the commission chooses to go forward with the provisions in subsection (i)(3), ARM does not take a position with respect to whether certain REPs should be exempt.

Four TDUs stated that all REPs should be required to demonstrate compliance with the requirements prior to the transfer. They argued that because a REP qualified under subsection (f)(1)(A) is not required to post security, it is particularly important that an entity acquiring such a REP also meet the financial standards of subsection (f)(1)(A) or that it provide the security required under subsection (f)(1)(B) before it takes control.

TEAM stated that to allow an exemption for one group of REPs based solely on the financial standards under which they are certificated does a disservice to the very important remaining standards in the rule, particularly the management experience standards. TEAM argued that such an exemption would unreasonably discriminate against one sector of the market, and would not ensure the necessary protections for customers.

TIEC stated that Option 2 REPs should be exempt from this subsection altogether. TIEC recognized Option 2 REPs are exempt from subsections (i)(3)(D) and (E) but expressed the view that they should also be exempt from subsections (i)(3)(A)-(C). TIEC stated that issues relating to assignment of agreements resulting from the change in ownership for both the REP and the customer are generally addressed in contracts between Option 2 REPs and their customers. These REPs and their customers should have the flexibility to address these issues in the manner most sensible for their particular businesses.

*Commission Response*

**The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens and inhibit transactions in the REP market, the commission declines to adopt this change.**

*General Comments*

ARM, Reliant, and TEAM noted that the commission amended this rule just over one year ago. ARM and Reliant stated that no compelling reason exists to modify the rule again. ARM stated that there is nothing to suggest that the stricter certification requirements in the current rule will not achieve the commission's desired objectives. TEAM stated that some experience with the new rule is necessary before additional major changes are made. Three TDUs replied that the prior amendments to the rule did not address REP transfers and that it is very appropriate to take that issue up in this rulemaking.

*Commission Response*

**The commission agrees with ARM, Reliant, and TEAM that this rule was amended just over a year ago and concludes that it is appropriate to refrain from making extensive changes to this rule that might increase regulatory burdens and inhibit transactions in the REP market.**

City of Houston stated that it serves as the ombudsman for its residents regarding various utility related service issues. City of Houston requested that any municipality in which a REP offers service be designated as a person entitled to notice of events such as a REP's cessation of operations or bankruptcy filing.

*Commission Response*

**The commission declines to modify the rule as requested by the City of Houston. The current rule already requires REPs to notify the commission at least 45 days prior to**

**ceasing operations. The City of Houston and other cities can monitor the commission's filings and can determine whether they would be affected by the REP's notice. The commission believes that it would be burdensome and unnecessary for REPs to provide additional notice to every municipality in which they operate.**

Subsection (b)(3)

ARM proposed to clarify this definition by relocating the phrase, "either directly or indirectly through one or more affiliates."

*Commission Response*

**The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens and inhibit transactions in the REP market, the commission declines to adopt this change.**

Subsection (b)(7) and Subsection (b)(10)

ARM stated that proposed subsection (g)(3)(C)(i)-(ii) broadly requires the submission of criminal history information relating to "any" felony. With respect to criminal history information relating to misdemeanors, it more narrowly attempts to identify the types of those crimes subject to the disclosure requirements in subsection (g)(3)(C)(iii)(iv). These proposed provisions identify misdemeanors involving the provision of utility or utility-type services and subject matter falling into the scope of this requirement. ARM proposed that subsection (g)(3)(C)(i)-(ii) be similarly narrowed, so that only information about felonies germane to the

commission's evaluation of the applicants managerial experience and abilities be required to be disclosed. ARM proposed that subsection (g)(3)(C) simply refer to a "criminal charge" and that subsections (b)(7) and (b)(10) would then no longer be necessary and should be deleted.

*Commission Response*

**The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens and inhibit transactions in the REP market, the commission declines to adopt this change.**

Subsection (c)(2)

ARM opposed the requirement for an applicant for REP certification or certification amendment to provide the results of an independent background investigation from a firm chosen by the commission. First, ARM stated, the commission is not authorized to require an applicant to bear the cost of an independent background investigation and report. Second, requiring an applicant to bear the expense of an independent background investigation and report that is generated in lieu of the commission's own investigation and report raises questions about the appropriateness of shifting the commission's investigative responsibilities to a third party, absent special circumstances. Third, ARM stated, discrimination issues are critical in the application of any independent background investigation requirement, because proposed subsection (c)(2) appears to give the commission sole discretion in determining whether an applicant must undertake and pay for an independent background investigation. This means that some applicants might be required to bear expenses while others are not, and the costs could vary depending on the subject

matter of the background investigation. ARM added that it is unclear how an applicant could submit the results of a background investigation at or near the time it submits its application unless the commission requested the undertaking of an investigation sufficiently in advance of the filing of the application.

TEAM argued that requiring a background investigation creates a barrier to entry and a barrier to selling a stake in a REP to another entity. Additionally, TEAM was concerned about the costs, because presumably the commission would select major accounting and auditing firms. TEAM also argued that the proposal was heavy-handed, because facts would be presented to the commission by the applicant and those facts are to be studied and corroborated by the commission, not the applicant itself.

*Commission Response*

**The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens and inhibit transactions in the REP market, the commission declines to adopt this change.**

*Subsection (d)(2)(B)*

TIEC commented that Option 2 REPs should be exempt from the entirety of subsection (i)(3) of the proposed rule, as detailed in the comment summary for Question No. 5 above, and suggested revised rule language for subsection (d)(2)(B) to that effect.

Reliant stated that rather than exempting Option 2 REPs from preapproval, it would be more appropriate not to require preapproval for either Option 1 or Option 2 REPs, given that the material change provision in the existing rule is adequate to ensure customer protection.

*Commission Response*

**The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens and inhibit transactions in the REP market, the commission declines to adopt this change.**

Subsection (d)(3)

Reliant opposed the addition of an “Option 3” REP category, arguing that such a category is unnecessary. Reliant commented that if the REP would not be interacting with ERCOT, the entire transaction would take place behind the customer’s meter and, therefore, no REP certification is needed. Reliant also commented that if the distributed generation will be connected to the grid for possible delivery, then the generator must register as a power generation company (PGC). Reliant stated that a REP does not need to be inserted between the PGC and the customer because the transaction between the PGC and the customer is not necessarily a sale of electricity to a customer.

*Commission Response*

**The commission disagrees with Reliant. PURA §39.352 states that “(a)fter the date of customer choice, a person . . . may not provide retail electric service in this state unless the**

person is certified by the commission as a retail electric provider.” The Option 3 REP category allows a person to sell electricity to a retail customer from a distributed generation facility located on a site controlled by that customer. A person that provides this type of service is providing retail electric service under PURA §39.352 and must be certified by the commission as a REP. The purpose of this amendment is to permit a person other than the customer to own the distributed generation equipment, which should foster adoption of distributed generation, particularly renewable distributed generation, by commercial customers. Finally, the commission concludes that installation of distributed generation equipment can be performed by a Licensed Electrician, consistent with the requirements of the Texas Department of Licensing and regulation, and modifies the rule accordingly.

Subsection (e)(1)(A)

REPs generally agreed that there is value in branding through multiple names and that to impose new limitations on branding is unnecessary, inefficient, and would not enhance customer protections. ARM stated that the proposed amendment to this subsection inexplicably restricts REPs to the use of a single assumed name as of January 1, 2011, contrary to common business practices. Many REPs have operated under more than one assumed name since 2002 and there is nothing extraordinary or unusual about a company’s use of more than one trade name in a competitive market. ARM stated that a REP may decide to use a distinctive trade name to brand new retail offering predicated on smart meter technology. Some REPs have employed a different trade name in the provision of POLR service. ARM noted that REPs have used a second or third trade name to market retail products to a particular customer class or for the

specialized purpose of serving customers obtained in the course of a sale/transfer/merger transaction. ARM also expressed concern that customers (and others) may wrongly perceive the reduction in assumed names as a mass exit of REPs from Texas as 2011 approaches. This erroneous perception will work to the detriment of consumer confidence in the State's competitive retail electric market. TEAM agreed. ARM proposed that if the commission decides to go forward with this that the compliance deadline must be extended by at least six months so that REPs can achieve compliance with the new requirement.

TEAM agreed that assumed names should not be limited, as this recommendation would hinder REPs from bringing all of the advantages of a competitive electric market. TEAM stated that a REP may want to market pre-paid products under a different business name. The prepaid market is a subset of the residential mass market, and a REP that has already rooted itself in the residential market may want to protect its brand while entering the prepaid market with a new business name. TEAM believed the competitive market is meant to foster company growth such as this. TEAM stated that this proposal is akin to telling Frito Lay that it cannot market its chips under different monikers (Doritos, Tostitos, Sun Chips, etc.) or telling Starbucks that it cannot sell coffee under Seattle's Best. Texpo added that it is common for companies to use different supplier names to reach different market sectors. Texpo provided the examples of Lexus (high service level and more expensive prices) and Toyota (discounted prices for similar cars with a more moderate service level and less luxury items); and other examples. Texpo noted that each of these examples has different marketing strategies, cost structures, target audiences, and prices to accommodate differences in customer preferences just like Texpo.

Texpo stated that no explanation or evidence of customer confusion of trade names was presented. The commission's current rule has been in place for ten years, during which the robust competition in Texas' retail market has become a success story receiving national recognition. If customer confusion posed a significant problem, surely by now (or in 2007 or 2009 when the rules were revised) the commission would have reduced the number of trade names for future REP certification applications. Texpo stated that it is a certificated retail electric provider that actively uses three commission-approved trade names: Texpo Energy, Y.E.P. and Southwest Power and Light. Texpo has invested resources and assets worth several million dollars building each of these brand names. Texpo stated that each trade name is the subject of one or more trademarks or intellectual property rights under common law and otherwise and each has its own logo. Texpo argued that this proposal would potentially have far-reaching implications for Texas' retail electricity market. The long standing commission rule, principles of deregulation, goals of attracting further investment into Texas' electricity markets and market confidence are all at odds with the retroactive effect of the proposal, which would destroy entire brand names, marketing systems, and other valuable property rights, through what may be viewed by lenders and investors and worrisome and a dramatic change to Texas' electricity markets. Texpo objected only to the retroactive effect of the proposal. If the commission wants to reduce the number of permissible REP trade names, it should adopt one or more narrower, less harmful alternatives to the proposal which include: (1) apply the changes prospectively to REPs not yet certificated; (2) apply the change prospectively to any assumed REP name not yet commission-approved; (3) apply the change prospectively to any assumed REP name that is not both commission-approved and currently in use; (5) allow REPs to use trade names acquired through merger and acquisition transactions regardless of the numerical

limit in the rule; and (6) reject the proposal to change the current, long-standing rule regarding REPs trade names.

Texpo stated that this proposal is inconsistent with the commission's treatment of power generation companies, power marketers and aggregators. Texpo also stated that REPs must disclose their trade names and the accompanying certificate number repeatedly and prominently to enrolled and prospective retail customers. Texpo argued that this proposal would impose wasteful and duplicative costs as retroactive aspects of the proposal would require destruction and reordering of business documents, modifications to EFLs, changes to websites and web addresses and many other tasks. Reliant stated that REPs should be allowed to pursue branding strategies that go beyond just having one business name, for reasons similar to those suggested by Texpo.

Young Energy stated that this proposed amendment creates an unreasonable and significant economic hardship on REPs. Young Energy stated that businesses do not act monolithically and neither do customers; within each of these market segments some groups may respond more favorably to one brand name than another and it is essential that a REP be allowed to use multiple assumed names to tailor its marketing brand and message and successfully market its products.

TXU Energy agreed with ARM, Reliant, TEAM, Texpo, and Young Energy that limitations on assumed names would diminish a REP's product branding and goodwill, which would potentially limit REP product offerings in the market. TXU stated that the use of assumed names

is one vehicle by which different brands can be precisely positioned to appeal to specific market segments of customers. TXU believed this practice is positive and a healthy result of a competitive market wherein companies position products and brands to meet the needs of various market niches.

Tenaska urged the commission to apply the assumed name limitation solely to Option 1 REPs, because Option 2 REPs' customers have signed a notarized affidavit stating that the customer is satisfied that the electric provider meets the standards required by PURA. Tenaska uses different assumed names as an accounting and organizational tool. For example, all the meters for one large industrial customer may be grouped and served under a different assumed name. Another example is a customer may require ERCOT settlements applicable to its load to be administered in a way that can best be implemented by segregating its account from that of other customers. ERCOT treats each name as a separate Load Serving Entity for the purposes of registration, qualification and settlement and each of these has been tested at ERCOT. Tenaska strongly prefers to continue using these names and groupings in the future to avoid incurring the financial and resource cost and the potential loss of efficiencies and the disruption to Tenaska's existing REP to Qualified Scheduling Entity (QSE) mapping structure. ERCOT agreed with Tenaska and added that, if the published rule were adopted, a significant number of REPs would have to undergo full qualification testing for each new Load Serving Entity (LSE) registration. Additionally, ERCOT stated that significant and costly changes would be required to the REP to QSE mapping structure at ERCOT. ERCOT also noted that the published rule could require REPs to re-register with the commission and ERCOT for the separate or consolidated REP certifications and LSE registrations.

Three TDUs disagreed with the REP commenters and stated that there is value in limiting the number of business names. Three TDUs stated that the use of multiple assumed names creates complexity and increases the administrative workload for other market participants. For example, a separate Data Universal Numbering System (DUNS) number would usually be required for each business name, with separate deposits and bank accounts in the TDU's system for each one. In addition, although use of multiple names can be used to distinguish between product offerings, it can also be used to hide and confuse. If a REP operates under multiple names, a consumer may think it is switching REPs only to find it is still doing business with the same entity. The limitation will allow customers to have more clarity about who they are dealing with and to more easily make educated choices between REPs. It will also allow the commission to have more ability to track REPs.

*Commission Response*

**The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens and inhibit transactions in the REP market, the commission declines to adopt this change.**

*Subsection (f)(1)(B)*

TXU, ARM, and TEAM opposed deletion of the phrase "or its guarantor" from subsection (f)(1)(B). TXU asserted that the change would require the REP to directly provide and maintain the letter of credit and negotiate directly with financial institutions to obtain the letter of credit.

TXU argued that such a change would impose additional costs on the market and customers, without any commensurate benefit, and that customers and the retail electric market are protected regardless of whether the REP obtains the letter of credit directly from a financial institution or if a guarantor of the REP obtains the letter of credit. ARM argued that the phrase “or its guarantor” should not be deleted because a letter of credit falls within the scope of commitments in the subsection (b)(7) definition of “guarantor.” TEAM expressed concern that such changes to the financial requirements create regulatory uncertainty that impacts the relationships between REPs and their banks and investors.

*Commission Response*

**The commission recognizes that it has recently rewritten a number of rules relating REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens and inhibit transactions in the REP market, the commission declines to adopt this change.**

*Subsection (f)(4)(C)*

Four TDUs stated that the last sentence of subsection (f)(4)(C) should make clear that unaudited statements filed with government agencies can only be used to satisfy the requirement for unaudited quarterly statements, and that unaudited statements should not be a substitute for the filing of yearly audited statements.

*Commission Response*

**The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory**

**burdens and inhibit transactions in the REP market, the commission declines to adopt this change.**

*Subsection (f)(4)(F)*

ARM recommended that subsection (f)(4)(F) further clarify that a letter of credit must permit a draw in part or in full “in accordance with paragraph (6) of this subsection,” because paragraph (6) specifies the manner and order in which the proceeds from a letter of credit may be used.

*Commission Response*

**The commission disagrees with ARM. Subsection (f)(4)(F) governs requirements for a commission-approved letter of credit and provides a clear trigger for drawing funds from letters of credit. The existing rule may not permit the commission to draw on a letter of credit if a REP leaves the market without experiencing a mass transition of its customers but still leaves obligations to customers, ERCOT, or other market participants that are intended to be protected by the letter of credit. Subsection (f)(6) governs the distribution of funds that have been drawn. Because a draw of funds and the distribution of those funds are separate acts, it is not appropriate to require that “a letter of credit must permit a draw in part or in full in accordance with paragraph (6) of this subsection.” In other words, it does not make sense to require that funds must be drawn in accordance with how the funds must be distributed.**

Subsection (g)

OPC stated that refining and strengthening the licensing requirements of REPs as recommended by the proposed rule will increase transparency and accountability in the retail electricity market.

ARM did not believe any changes should be made to the technical and managerial requirements but offered proposed amendments if the commission decided to change the rule. TXU submitted that the technical and managerial requirements found in the current rule are sound and do not require amendment. ARM agreed.

Reliant stated that in general the changes to subsection (g) include numerous changes that attempt to obtain information from applicants including information concerning allegations against a principal or affiliate during the previous ten years and stated that including allegations rather than actual proven complaints is unreasonably burdensome and should not be adopted.

*Commission Response*

**The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens and inhibit transactions in the REP market, the commission declines to adopt this change.**

Subsection (g)(2)

TXU expressed concern that the proposed rule's amendments to subsection (g)(2) are impermissibly and unconstitutionally vague as they fail to provide sufficient guidance and

objective criteria to the commission in determining whether a REP satisfies the technical and managerial requirements. By allowing the commission to consider information discovered by staff during its review of an application, the results of an independent background investigation and any other information, no guidance is provided as to what would serve as the basis for a finding that the REP lacked the requisite managerial and technical requirements.

ARM took issue with the word “may” in subsection (g)(2) as it suggests the commission may exercise its discretion to apply to one or more of the criteria differently from case to case. ARM recommends use of the word “shall.”

ARM proposed to eliminate the independent background investigation requirement. If the requirement is retained, ARM proposed that the background check be performed at the commission’s request by a firm chosen by the commission.

### *Commission Response*

**The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might create additional regulatory burdens and inhibit transactions in the REP market, the commission declines to adopt this change.**

### Subsection (g)(3)

ARM contended that the rule should be revised consistent with its responses in Question (2) and (3). ARM suggested that information solely relating to charges or allegations submitted should

be excluded. ARM stated that no distinction should be drawn between felonies and misdemeanors. ARM commented that the scope of the disclosed information include only business and commercial-related crimes germane to an evaluation of managerial resources and ability, and only crimes committed in the course of the provision of utility or utility-like services should be included. ARM also believed that the ten year period is unduly long and that the required information should be limited to a five year period.

ARM recommended disclosure of a more limited scope of information pursuant to these proposed subsections to make amendments less frequent and burdensome. First, ARM recommended the percentage threshold for ownership of voting securities or other ownership interests of the applicant in subsection (g)(3)(H) should be increased to ten percent, which would result in at most ten persons with an ownership interest in a REP that might need to be reported. ARM offered that the term “executive officers” in subsection (g)(3)(I) is subject to different interpretations by REPs. ARM stated that the three principle executive management positions in most companies are the chief executive officer, chief financial officer, and the chief operating officer. ARM believed that the requirement to disclose the applicants senior management should be deleted as knowing senior management will serve little purpose, given that those employees are not ultimately responsible for the company’s actions and policies in the same manner as executive management, and there is high turnover in those positions and the costs of complying with the amendment requirements would far outweigh any benefits gamine from the disclosure of the information.

TXU requested deleting the phrase “or affiliate of the applicant” from disclosure of certain information about civil, criminal and administrative proceedings. ARM agreed.

TXU also stated that subsection (g)(3)(H) should be modified in two ways. First, the word “disclosure” is overly broad and ambiguous and should be replaced with the “identification.” Second, the term “indirectly” should be deleted because it requires identification of upstream owners that have no impact on the REP’s qualifications for REP certification.

Four TDUs stated that the practice of initiating a REP certificate for the purposes of ERCOT testing, and then selling it to another party should be prohibited.

### *Commission Response*

**The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that proposed to inhibit transactions in the REP market, the commission declines to adopt this change.**

### Subsection (i)(3)

TXU, Reliant, and ARM commented that the commission does not have the authority to require preapproval of a transfer of a REP certificate. TXU commented that proposed subsection (i)(3)(A)(iii)-(iv) exceed the commission’s statutory authority, run counter to the general objectives of the statute, and impose additional burdens in excess of the statute. TXU argued that because PURA §39.352 fails to mention the phrase “changes in control” and only discusses the requirements for certification, the statute indicates that the only entities required to make the

statutory showings to the commission are those that have not previously been certificated. TXU noted that while the commission is statutorily authorized to adopt rules to “amend certificates or registrations to reflect changed ownership or control,” TXU stated that this authority is limited to post-transaction amendments of a REP certificate.

TXU and ARM suggested that by specifically authorizing the commission to pre-approve transactions involving the change in control of a fully-regulated utility, while not creating similar authority for REP transactions, the Legislature has indicated that it does not intend for the commission to have such authority over REPs.

In regard to subsection (i)(3)(B), TXU commented that it would additionally require entities not subject to the commission’s jurisdiction to seek commission approval prior to closing a variety of transactions even if the transaction would not result in any change to the qualifications of the subject REP. TXU claimed that by referencing the “acquiring person,” “surviving entity” and “person who will otherwise gain control,” the subsection requires the parent company, rather than the REP, to seek preapproval. TXU noted that the proposed subsection would impermissibly impact an entity over which the commission does not have jurisdiction because the transaction’s viability could be compromised due to regulatory uncertainty posed by the preapproval process. Additionally, TXU commented that the commission declined to require preapproval as was proposed in 2007.

ARM and Reliant claimed that legislative history demonstrates that the commission lacks authority to require preapproval. Proposed PURA §39.158 in the as-filed version of Senate Bill

7 required a REP to obtain commission approval to merge, consolidate, or otherwise become affiliated with another REP. ARM and Reliant stated that this provision did not survive in the version of the bill that became law.

In reply comments, TEAM stated that it agrees with the comments of many of the other REPs that the existing commission rules provide the necessary authority to review and control the concerns with regard to whether an entity meets the REP certification criteria, as most recently adopted by the commission. TEAM also agreed with other commenters that preapproval is beyond the scope of the commission's statutory authority.

In reply comments, Three TDUs suggested that the commission does have the statutory authority to require preapproval because under PURA the commission is charged with being the gatekeeper and ensuring that no person does business as a REP unless the person meets certain standards. Three TDUs noted that PURA §39.352(a) is clear that a person "may not provide retail electric service in this state unless the person is certified by the commission as a retail electric provider, in accordance with this section." Three TDUs concluded that it would be irrational to interpret PURA as giving the commission the duty to be the gatekeeper, but as not having the power to control entry of providers through a back door. The commission should apply the same standards for providers trying to enter the market through the back door as it does for new entrants into the competitive market.

TXU and ARM commented that the current rule properly addresses changes in control and certificate transfers and that no changes are needed. TXU stated no changes are necessary

because the current version of subsection (i)(3) makes it permissive to seek prior approval and that REPs are required to notify the commission and seek a certificate amendment within ten working days of a change in control that results in a material change. Additionally, TXU noted that subsection (i)(4) of the existing rule creates an additional layer of protection for consumers because it requires notice within 72 hours of non-compliance with the financial requirements of §25.107. TXU commented that the treatment of customers in existing §25.493 is adequate and appropriate and should not be changed.

ARM noted that the current rule requires a REP acquiring control of another REP to amend its certificate in a manner that demonstrates compliance with the rule. ARM also noted that if the party acquiring control in the transaction is not a REP, the acquiring party must obtain a new certificate, or amend the certificate that is transferred in the transaction, as is dictated by PURA §39.352.

ARM also recommended two additions to the current rule. First, ARM recommended that current subsection (i)(3) include a notice requirement for those instances in which a change in control of a REP does not trigger a certificate amendment. ARM noted that every change in control or ownership of a REP may not involve a material change and thus would not require a certificate amendment. ARM stated that these types of transactions could go unreported to the commission. Secondly, ARM suggested that subsection (i)(3) be clarified to state that a REP may seek preapproval of a certificate amendment based on a material change in information, including a change in control.

In reply comments, ARM provided proposed language to effectuate the two additions that ARM recommended in its initial comments.

TEAM commented that requiring preapproval of a change in control sends a signal that there is regulatory risk to investing in Texas in that a sale cannot be completed without approval from a state regulatory body. TEAM also stated that no such preapprovals are required in other jurisdictions that are open to retail electric competition.

Four TDUs commented that this rulemaking closes the gap in the regulatory framework that allows a REP to avoid the screening that occurs when an entity applies for a new REP certificate by purchasing an existing REP certificate. They also noted that after-the-fact reporting of changes in control are not effective, because removing a REP who does not meet required standards can be a long process during which the REP's customers and other market participants are at risk.

In reply comments, Three TDUs suggested that a pre-approval requirement is no more of a barrier to entry than that applicable to anyone seeking a new REP certificate, and that there is no rational basis for declining to apply the same standards to an entity entering the market in some other way. Moreover, Three TDUs noted that preapproval actually decreases the risk for potential investors or new entrants because with preapproval, a buyer will not subject itself to decertification if it finds after the deal closes that it does not or cannot meet the requirements of the rule. In reply comments, TXU stated that it supported the comments filed by ARM, Reliant and TEAM.

*Commission Response*

**The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens or inhibit transactions in the REP market, the commission declines to adopt this change.**

*Subsection (i)(3)(A)(i)*

TXU noted that the commission could require pre-approval for a direct transfer of a REP certificate that would result in a new, previously un-certificated entity providing retail electric service, if the commission determines such requirement is preferable to the existing post-transfer notice and amendment requirements. TXU proposed language to implement its comments regarding this provision.

*Commission Response*

**The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens or inhibit transactions in the REP market, the commission declines to adopt this change.**

*Subsection (i)(3)(A)(ii)*

TXU specifically commented on §25.107(i)(3)(A)(ii), and reiterated that TXU believes the proposed changes exceed the commission's authority and are unnecessary. TXU noted that an existing REP's acquisition of customers through a transfer of customers from another REP is

presently addressed by §25.493. Furthermore, TXU stated that to the extent this provision would capture the transfer of a REP certificate, it is already covered by the amendment process in current §25.107, as well as by proposed subsection (i)(3)(A)(i). Thus, TXU believes this provision should be deleted.

Reliant, TEAM, and ARM noted that the commission modified this rule recently and that there is no compelling reason to do so again at this time. Specifically, TEAM commented that some experience with the current rules is required before major changes are made. In reply comments, Three TDUs noted that the prior project in which this rule was amended did not address the issue of transfers, and that it is appropriate to take it up in this rulemaking.

Several commenters provided comments regarding the 75-day timeline for review of an application for a change in control. These comments are summarized and addressed in response to Question No. 1 above.

*Commission Response*

**The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens or inhibit transactions in the REP market, the commission declines to adopt this change.**

Subsection (i)(3)(B)-(E)

Four TDUs suggested that the commission should require both the existing certificate holder and the entity seeking to assume control to participate in the process for seeking approval of a change of control and to be clear in the rule about which requirements apply to each. Four TDUs provided language to effectuate their proposed changes and suggested differentiating between the “transferring applicant” and the “acquiring applicant.”

In reply comments, ARM commented that the Four TDUs’ suggested changes would require a transferring applicant to provide a substantially greater degree of information and proof than proposed subsection (i)(3) requires in order to obtain preapproval. ARM stated that the scope of requirements in this proposed subsection by Four TDUs is significant, going far beyond a demonstration of continued compliance with the certification rule’s requirements.

Reliant and TEAM, in reply comments, expressed opposition to the changes proposed by Four TDUs. TEAM noted that the Four TDUs did not acknowledge the recent changes to the REP certification rule that provide additional financial safeguards to the TDUs. Reliant described the suggested changes as a burdensome regulatory process, which would provide no real benefit.

*Commission Response*

**The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens or inhibit transactions in the REP market, the commission declines to adopt this change.**

Subsection (i)(6)

Four TDUs stated that a REP that is ceasing operations should be required to satisfy its obligations to all market participants, not just its retail customers, and provided language to effectuate this change. Four TDUs suggested rule language that would require the REP to provide proof of satisfaction of all of its financial obligations to ERCOT and TDUs.

*Commission Response*

**The commission recognizes that it has recently rewritten a number of rules relating to REPs. Rather than adopting extensive changes to this rule that might increase regulatory burdens or inhibit transactions in the REP market, the commission declines to adopt this change.**

Subsection (j)

OPC reiterated its opposition to switch-holds. However, if the commission implements a switch-hold provision in its rules, then to the extent a REP has erroneously applied a switch-hold, the erroneous switch-hold constitutes a violation and should be cause for suspension or revocation of a REP certificate.

TXU proposed to require that this section apply to switch-holds that were willfully or intentionally misapplied, since the result of a violation as proposed is a fine of \$25,000 per violation per day or suspension or revocation of a REP certificate. Cities disagreed with TXU's suggestion. Cities opined that erroneous switch-holds are a danger inherent in authorizing any

switch-holds and the practice of instituting switch-holds is likely to result in erroneous switch-holds due to human error or deficient business processes. Since a switch-hold is the harshest penalty that a REP can impose on a customer, from the perspective of the customer, a wrongful switch-hold imposed by a REP due to error or poor business process is no less harmful than one intentionally imposed without justification. Whether the switch-hold is erroneous or intentional, the result is the same. The Cities recommended no change to the rule as proposed.

*Commission Response*

**The commission disagrees with TXU that only switch-holds that were intentionally and willfully misapplied should be subject to the consequences of subsection (j). Adding a requirement of intentional and willful misapplication would not provide sufficient incentive for companies to build systems and processes to ensure that switch-holds are applied only to customers that are subject to the switch-hold and are removed within the prescribed timeline. The commission agrees with Cities that whether the switch-hold is inadvertent or intentional, the harm is the same from the perspective of the customer. Therefore, the commission declines to adopt TXU's proposed changes. The commission modifies the language as to when a violation of a switch-hold occurs to be consistent with §25.480 as recently amended by the commission in Project Number 36131.**

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission makes other minor modifications for the purpose of clarifying its intent.

This amendment is adopted under PURA §14.002, which requires the commission to adopt rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §39.352, which requires the commission to certify a person as a REP if the person demonstrates, among other things, the financial and technical resources to provide continuous and reliable electric service, the managerial and technical ability to supply electricity at retail in accordance with customer contracts, and the resources needed to meet customer protection requirements and which requires a person applying for certification as a REP to comply with all customer protection provisions, disclosure requirements, and marketing guidelines established by the commission and PURA; PURA §17.004, which authorizes the commission to adopt and enforce rules concerning REPs that protect customers against fraudulent, unfair, misleading, deceptive, or anticompetitive practices and that impose minimum service standards relating to customer deposits and termination of service; PURA §§17.051-17.053, which authorize the commission to adopt rules for REPs concerning certification, changes in ownership and control, customer service and protection, and reports; and PURA §39.101, which authorizes the commission to adopt and enforce rules that ensure retail customer protections that entitle a customer: to safe, reliable, and reasonably priced electricity, to have access to on-site distributed generation and to providers of energy generated by renewable energy resources, to other information or protections necessary to ensure high-quality service to customers including protections relating to customer deposits and quality of service, and to be protected from unfair, misleading, or deceptive practices, and which requires the commission to ensure that its customer protection rules provide at least the same level of customer protection against potential abuses and the same quality of service that existed on December 31, 1999.

Cross Reference to Statutes: PURA §§14.002, 17.004, 17.051-17.053, 39.101, and 39.352.

**§25.107. Certification of Retail Electric Providers (REPs).**

- (a) **Applicability.** This section applies to all persons who provide or seek to provide electric service to retail customers in an area in which customer choice is in effect and to retail customers participating in a customer choice pilot project authorized by the commission. This section does not apply to the state, political subdivisions of the state, electric cooperatives or municipal corporations, or to electric utilities providing service in an area where customer choice is not in effect. An electric cooperative or municipally owned utility participating in customer choice may offer electric energy and related services at unregulated prices directly to retail customers who have customer choice without obtaining certification as a REP.
- (1) A person must obtain a certificate pursuant to this subsection before purchasing, taking title to, or reselling electricity in order to provide retail electric service.
  - (2) A person who does not purchase, take title to, or resell electricity in order to provide electric service to a retail customer is not a REP and may perform a service for a REP without obtaining a certificate pursuant to this section.
  - (3) A REP that outsources retail electric functions remains responsible under commission rules for those functions and remains accountable to applicable laws and commission rules for all activities conducted on its behalf by any subcontractor, agent, or any other entity.
  - (4) All filings made with the commission pursuant to this section, including a filing subject to a claim of confidentiality, shall be filed with the commission's Filing

Clerk in accordance with the commission's Procedural Rules, Chapter 22, Subchapter E, of this title (relating to Pleadings and other Documents).

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

- (1) **Affiliate** -- An affiliate of, or a person affiliated with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under the common control with, the person specified.
- (2) **Continuous and reliable electric service** -- Retail electric service provided by a REP that is consistent with the customer's terms and conditions of service and uninterrupted by unlawful or unjustified action or inaction of the REP.
- (3) **Control** -- The term control (including the terms controlling, controlled by and under common control with) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through ownership of voting securities, by contract, or otherwise.
- (4) **Customer** -- Any entity who has applied for, has been accepted for, or is receiving retail electric service from a REP on an end-use basis.
- (5) **Default** -- As defined in a transmission and distribution utility (TDU) tariff for retail delivery service, Electric Reliability Council of Texas (ERCOT) qualified scheduling entity (QSE) agreement, or ERCOT load serving entity (LSE) agreement.
- (6) **Executive officer** -- When used with reference to a person means its president or chief executive officer, a vice president serving as its chief financial officer, or a

vice president serving as its chief accounting officer, or any other officer of the person who performs any of the foregoing functions for the person.

- (7) Guarantor -- A person providing a guaranty agreement, business financial commitment, or a credit support agreement providing financial support to a REP or applicant for REP certification pursuant to this section.
- (8) Investment-grade credit rating -- A long-term unsecured credit rating of at least “Baa3” from Moody’s Investors’ Service, or “BBB-” from Standard & Poor’s or Fitch, or “BBB” from A.M. Best.
- (9) Permanent employee -- An individual that is fully integrated into a REP’s business organization. A consultant is not a permanent employee.
- (10) Person -- Includes an individual and any business entity, including and without limitation, a limited liability company, a partnership of two or more persons having a joint or common interest, a mutual or cooperative association, and a corporation, but does not include an electric cooperative or a municipal corporation.
- (11) Principal -- A person or a member of a group of persons that controls the person in question.
- (12) Retail electric provider -- A person that sells electric energy to retail customers in this state. As provided in Public Utility Regulatory Act (PURA) §39.353(b), a REP is not an aggregator.
- (13) Shareholder -- The term shareholder means the legal or beneficial owner of any of the equity of any business entity, including without limitation and as the context

and applicable business entity requires, stockholders of corporations, members of limited liability companies and partners of partnerships.

- (14) Tangible net worth -- Total shareholders' equity, determined in accordance with generally accepted accounting principles, less intangible assets other than goodwill.
- (15) Working day -- A day on which the commission is open for the conduct of business.

(c) **Application for REP certification.**

- (1) A person applying for certification as a REP must demonstrate its capability of complying with this section. A person who operates as a REP or who receives a certificate under this section shall maintain compliance with this section.
- (2) An application for certification shall be made on a form approved by the commission, verified by oath or affirmation, and signed by an executive officer of the applicant.
- (3) Except where good cause exists to extend the time for review, the presiding officer shall issue an order finding whether an application is deficient or complete within 20 working days of filing. Deficient applications, including those without necessary supporting documentation, will be rejected without prejudice to the applicant's right to reapply.
- (4) While an application for a certificate is pending, an applicant shall inform the commission of any material change in the information provided in the application within ten working days of any such change.

- (5) Except where good cause exists to extend the time for review, the commission shall enter an order approving, rejecting, or approving with modifications, an application within 90 days of the filing of the application.
- (d) **REP certification requirements.** A person seeking certification under this section may apply to provide services under paragraph (1) or (2) of this subsection, and shall designate its election in the application.
- (1) **Option 1.** This option is for a REP whose service offerings will be defined by geographic service area.
- (A) An applicant must designate one of the following categories as its geographic service area:
- (i) The geographic area of the entire state of Texas;
  - (ii) A specific geographic area (indicating the zip codes applicable to that area);
  - (iii) The service area of specific TDUs or specific municipal utilities or electric cooperatives in which competition is offered; or
  - (iv) The geographic area of ERCOT or other independent organization to the extent it is within Texas.
- (B) A REP with a geographic service area is subject to all subsections of this section, including those pertaining to basic, financial, technical and managerial, customer protection, and reporting and changing certification requirements.

- (C) The commission shall grant a certificate to an applicant proposing to provide retail electric service to a geographic service area in Texas if it demonstrates that it meets the requirements of this section.
  - (D) The commission shall deny an application if the configuration of the proposed geographic area would discriminate in the provision of electric service to any customer because of race, creed, color, national origin, ancestry, sex, marital status, lawful source of income, disability, or familial status; because the customer is located in an economically distressed geographic area or qualifies for low income affordability or energy efficiency services; or because of any other reason prohibited by law.
- (2) **Option 2.** This option is for a REP whose service offerings will be limited to specifically identified customers, each of whom contracts for one megawatt or more of capacity. The applicant shall be certified as a REP only for purposes of serving the specified customers. The commission shall grant a certificate under this paragraph if the applicant demonstrates that it meets the requirements of this paragraph.
- (A) A person seeking certification under this paragraph must file with the commission a signed, notarized affidavit from each customer, with whom it has contracted to provide one megawatt or more of capacity. The affidavit must state that the customer is satisfied that the REP meets the standards prescribed by PURA §39.352 (b)(1)-(3) and (c).

- (B) The following subsections apply to REPs certified pursuant to this paragraph:
- (i) Subsection (e) of this section (relating to Basic Requirements);
  - (ii) Subsection (f)(5) of this section (relating to Billing and Collection of Transition Charges); and
  - (iii) Subsection (i) of this section (relating to Requirements for Reporting and Changing Certification).
- (3) **Option 3.** This option is for a REP that sells electricity exclusively to a retail customer other than a small commercial and residential customer from a distributed generation facility located on a site controlled by that customer. The following subsections do not apply to REPs certified pursuant to this paragraph: subsections (f), (g), (h), and (i)(4)-(5) of this section, except that a person seeking certification under this paragraph shall file an application with the commission that identifies a power generation company that owns the distributed generation facilities and provides the information required in subsection (g)(2)(A) of this section. A person seeking certification under this paragraph shall ensure that the distributed generation facility from which it buys electricity is owned by a power generating company (PGC) that has registered in accordance with §25.109 of this title (relating to Registration of Power Generation Companies and Self Generators), and
- (A) Conforms to the requirements of §25.211 of this title (relating to Interconnection of On-Site Distributed Generation (DG)) and §25.212 of

this title (relating to Technical Requirements for Interconnection and Parallel Operation of On-Site Distributed Generation);

- (B) Is installed by a Licensed Electrician, consistent with the requirements of the Texas Department of Licensing and Regulation; and
- (C) Is installed in accordance with the National Electric Code as adopted by the Texas Department of Licensing and Regulation and in compliance with all applicable local and regional building codes.

(e) **Basic requirements.**

- (1) **Names on certificates.** All retail electric service shall be provided under names set forth in the granted certificate. If the applicant is a corporation, the commission shall issue the certificate in the corporate name of the applicant.
  - (A) No more than five assumed names may be authorized for use by any one REP at one time.
  - (B) Business names shall not be deceptive, misleading, vague, otherwise contrary to §25.272 of this title (relating to Code of Conduct for Electric Utilities and Their Affiliates), or duplicative of a name previously approved for use by a REP certificate holder.
  - (C) If the commission determines that any requested name does not meet the requirements of subparagraph (B) of this paragraph, it shall notify the applicant that the requested name shall not be used by the REP. An application shall be dismissed if an applicant does not provide at least one suitable name.

(2) **Office requirements.** A REP shall continuously maintain an office located within Texas for the purpose of providing customer service, accepting service of process and making available in that office books and records sufficient to establish the REP's compliance with PURA and the commission's rules. The office satisfying this requirement for a REP shall have a physical address that is not a post office box and shall be a location where the above three functions can occur. To evaluate compliance with requirements in this paragraph, the commission staff may visit the office of a REP at any time during normal business hours. An applicant shall demonstrate that it has made arrangements for an office located in Texas.

(f) **Financial requirements.**

(1) **Access to capital.** A REP must meet the requirements of subparagraphs (A) or (B) of this paragraph.

(A) A REP or its guarantor electing to meet the requirements of this subparagraph must demonstrate and maintain:

- (i) an investment-grade credit rating; or
- (ii) tangible net worth greater than or equal to \$100 million, a minimum current ratio (current assets divided by current liabilities) of 1.0, and a debt to total capitalization ratio not greater than 0.60, where all calculations exclude unrealized gains and losses resulting from valuing to market the power contracts and financial instruments used as supply hedges to serve load, and such

calculations are supported by an affidavit from an executive officer of the REP attesting to the accuracy of the calculation.

- (B) A REP electing to meet the requirements of this subparagraph must demonstrate shareholders' equity, determined in accordance with generally accepted accounting principles, of not less than one million dollars for the purpose of obtaining certification, and the REP or its guarantor must provide and maintain an irrevocable stand-by letter of credit payable to the commission with a face value of \$500,000 for the purpose of maintaining certification.
- (i) The required shareholders' equity of one million dollars shall be determined net of assets used for collateral pledged to secure the irrevocable stand-by letter of credit of \$500,000.
- (ii) For the period beginning on the date of certification and ending two years after the REP begins serving load, a REP shall not make any distribution or other payment to any shareholders or affiliates if, after giving effect to the distribution or other payment, the REP's shareholders' equity is less than one million dollars, net of assets used for collateral pledged to secure the irrevocable stand-by letter of credit of \$500,000. The restriction on distributions or other payments contained in this subparagraph includes, but is not limited to, dividend distributions, redemptions and repurchases of equity securities, or loans to shareholders or affiliates.

(iii) A REP that began serving load on or before January 1, 2009 is not required to demonstrate the shareholders' equity required pursuant to subparagraph (B) of this paragraph, and is not subject to the restrictions on distributions or payments to shareholders or affiliates contained in subparagraph (B) of this paragraph.

(2) **Protection of customer deposits and advance payments.**

(A) A REP certified pursuant to paragraph (1)(A) of this subsection shall keep customer deposits and residential advance payments in an escrow account or segregated cash account, or provide an irrevocable stand-by letter of credit payable to the commission in an amount sufficient to cover 100% of the REPs outstanding customer deposits and residential advance payments held at the close of each month.

(B) A REP certified pursuant to paragraph (1)(B) of this subsection shall keep customer deposits and residential advance payments in an escrow account or segregated cash account, or provide an irrevocable stand-by letter of credit payable to the commission in an amount sufficient to cover 100% of the REP's outstanding customer deposits and residential advance payments held at the close of each month. For purposes of this subparagraph only, to qualify as a segregated cash account, the account must be with a financial institution whose deposits, including the deposits in the segregated cash account, are insured by the Federal Deposit Insurance Corporation, the account is designated as containing only customer deposits, the account is subject to the control or management of

a provider of pervasive and comprehensive credit to the REP that is not affiliated with the REP, and the terms for managing the account protect customer deposits.

- (C) In lieu of the requirements of subparagraph (B) of this paragraph, a REP certified pursuant to paragraph (1)(B) of this subsection that is providing electric service under the provisions of §25.498 of this title (relating to Retail Electric Service Using a Customer Prepayment Device or System) shall be required to keep all deposits and an amount sufficient to cover the credit balance that exceeds \$50 for all customer accounts that have a credit balance exceeding \$50 at the close of each month in an escrow account, or to provide an irrevocable stand-by letter of credit payable to the commission in an amount equal to or greater than the amount required to be deposited in the escrow account.
- (D) Each escrow account and segregated cash account shall be reconciled no less frequently than at the close of each month to ensure that it equals or exceeds deposits and residential advance payments held as of the end of the month, and shall maintain at least that amount in the account until the next monthly reconciliation.
- (E) Any irrevocable stand-by letter of credit provided pursuant to this paragraph shall be in addition to the irrevocable stand-by letter of credit required by paragraph (1)(B) of this subsection, if applicable.

(3) **Protection of TDU financial integrity.**

- (A) A TDU shall not require a deposit from a REP except to secure the payment of transition charges as provided in §25.108 of this title (relating to Financial Standards for Retail Electric Providers Regarding Billing and Collection of Transition Charges), or if the REP has defaulted on one or more payments to the TDU. A TDU may impose credit conditions on a REP that has defaulted to the extent specified in its statewide standardized tariff for retail delivery service and as allowed by commission rules.
  - (B) A TDU shall create a regulatory asset for bad debt expenses, net of collateral posted pursuant to subparagraph (A) of this paragraph and bad debt already included in its rates, resulting from a REP's default on its obligation to pay delivery charges to the TDU. Upon a review of reasonableness and necessity, a reasonable level of amortization of such regulatory asset shall be included as a recoverable cost in the TDU's rates in its next rate case or such other rate recovery proceeding as deemed necessary.
- (4) **Financial documentation required to obtain a REP certificate.** The following shall be required to demonstrate compliance with the financial requirements to obtain a REP certificate.
- (A) Investment-grade credit ratings shall be documented by reports of a credit reporting agency.
  - (B) Tangible net worth shall be documented by the audited financial statements of the REP or its guarantor for the most recently completed calendar or fiscal year, and unaudited financial statements for the most

recently completed quarter. Audited financial statements shall include the accompanying notes and the independent auditor's report. Unaudited financial statements shall include a sworn statement from an executive officer of the REP attesting to the accuracy, in all material respects, of the information provided in the unaudited financial statements. Three consecutive months of monthly statements may be submitted in lieu of quarterly statements if quarterly statements are not available. The requirement for financial statements may be satisfied by filing a copy of or by providing an electronic link to its most recent statement that contains unaudited financials filed with any agency of the federal government, including without limitation, the Securities and Exchange Commission.

- (C) Shareholders' equity shall be documented by the audited and unaudited financial statements of the REP for the most recent quarter. Audited financial statements shall include the accompanying notes and the independent auditor's report. Unaudited financial statements shall include a sworn statement from an executive officer of the REP attesting to the accuracy, in all material respects, of the information provided in the unaudited financial statements. Three consecutive months of monthly statements may be submitted in lieu of quarterly statements if quarterly statements are not available. The requirement for financial statements may be satisfied by filing a copy of or by providing an electronic link to its most recent statement that contains unaudited financials filed with any

agency of the federal government, including without limitation, the Securities and Exchange Commission.

- (D) Segregated cash accounts shall be documented by an account statement that clearly identifies the financial institution where the account holder maintains the account, and that clearly identifies the account as an account that is designated as containing only customer deposits and residential advanced payments. Segregated cash accounts shall be maintained at a financial institution that is supervised or examined by the Board of Governors of the Federal Reserve System, the Office of the Controller of the Currency, or a state banking department, and where accounts are insured by the Federal Deposit Insurance Corporation.
- (E) Escrow accounts shall be documented by the current account statement and the escrow account agreement. The escrow account agreement shall provide that the account holds customer deposits and residential advance payments only, and that the deposits are held in trust by the escrow agent and are not the property of the REP or in the REP's control unless the customer deposits are applied to a final bill or applied to satisfy unpaid amounts if allowed by the REP's terms of service. The escrow agent shall deposit the customer deposits and residential advance payments in an account at a financial institution that is supervised or examined by the Board of Governors of the Federal Reserve System, the Office of the Controller of the Currency, or a state banking department, and where accounts are insured by the Federal Deposit Insurance Corporation.

- (F) Irrevocable stand-by letters of credit provided pursuant to paragraphs (1) or (2) of this subsection must be issued by a financial institution that is supervised or examined by the Board of Governors of the Federal Reserve System, the Office of the Controller of the Currency, or a state banking department, and where accounts are insured by the Federal Deposit Insurance Corporation. The REP must use the standard form irrevocable stand-by letter of credit approved by the commission. The irrevocable stand-by letter of credit must be irrevocable for a period not less than twelve months, payable to the commission, and permit a draw to be made in part or in full. The irrevocable stand-by letter of credit must permit the commission's executive director or the designee to draw on the irrevocable stand-by letter of credit if:
- (i) ERCOT performs a mass transition of the REP's customers; or
  - (ii) the commission issues an order revoking the REP's certificate.
- (G) A REP may satisfy the requirements of paragraph (1)(A) of this subsection by relying upon a guarantor that meets one of the capital requirements of paragraph (1)(A) of this subsection, provided that:
- (i) The guarantor is an affiliate of the REP and has executed and maintains the standard form guaranty agreement approved by the commission, or
  - (ii) The guarantor is one or more persons that are affiliates of the REP and such affiliates have executed and maintain guaranty agreements, business financial commitments, or credit support

agreements that demonstrate financial support for credit or collateral requirements associated with power purchase agreements and for security associated with participation at ERCOT, or

(iii) The guarantor is a financial institution that maintains an investment-grade credit rating and has executed and maintains guaranty agreements, business financial commitments, or credit support agreements that demonstrate financial support for credit or collateral requirements associated with power purchase agreements and for security associated with participation at ERCOT, or

(iv) The guarantor is a provider of wholesale power supply to the REP, or one of such power provider's affiliates, and such person has executed and maintains guaranty agreements, business financial commitments, or credit support agreements that demonstrate financial support for credit or collateral requirements associated with a power purchase agreement and for security associated with participation at ERCOT.

(5) **Billing and collection of transition charges.** If a REP serves customers in the service area of a TDU that is subject to a financing order pursuant to PURA §39.310, the REP shall comply with §25.108 of this title.

(6) **Proceeds from an irrevocable stand-by letter of credit.**

(A) Proceeds from an irrevocable stand-by letter of credit provided under this subsection may be used to satisfy the following obligations of the REP, in the following order of priority:

- (i) first, to pay the deposits to retail electric providers that volunteer to provide service in a mass transition event under §25.43 of this title (relating to Provider of Last Resort) of low income customers enrolled in the system benefit fund rate reduction program pursuant to §25.454(f) of this title (relating to Rate Reduction Program);
  - (ii) second, to pay the deposits to retail electric providers that do not volunteer to provide service in a mass transition event under §25.43 of this title of low income customers enrolled in the system benefit fund rate reduction program pursuant to §25.454(f) of this title;
  - (iii) third, for customer deposits and residential advance payments of customers that did not benefit from clause (i) or (ii) of this subparagraph;
  - (iv) fourth, for services provided by the independent organization related to serving customer load;
  - (v) fifth, for services provided by a TDU; and
  - (vi) sixth, for administrative penalties assessed under Chapter 15 of PURA.
- (B) Proceeds from an irrevocable stand-by letter of credit provided under this subsection shall, to the extent that the proceeds are not needed to satisfy an obligation set out in subparagraph (A) of this paragraph, be paid to the REP.

(g) **Technical and managerial requirements.** A REP must have the technical and managerial resources and ability to provide continuous and reliable retail electric service to customers, in accordance with its customer contracts, PURA, commission rules, ERCOT protocols, and other applicable laws.

(1) Technical and managerial resource requirements include:

- (A) Capability to comply with all applicable scheduling, operating, planning, reliability, customer registration, and settlement policies, protocols, guidelines, procedures, and other rules established by ERCOT or other applicable independent organization including any independent organization requirements for 24-hour coordination with control centers for scheduling changes, reserve implementation, curtailment orders, interruption plan implementation, and telephone number, fax number, e-mail address, and postal address where the REP's staff can be directly reached at all times.
- (B) Capability to comply with the registration and certification requirements of ERCOT or other applicable independent organization and its system rules, or contracts for services with entities registered with or certified by ERCOT or other applicable independent organization.
- (C) Compliance with all renewable energy portfolio standards in accordance with §25.173 of this title (relating to Goal for Renewable Energy).
- (D) Principals or permanent employees in managerial positions whose combined experience in the competitive electric industry or competitive

gas industry equals or exceeds 15 years. An individual that was a principal of a REP that experienced a mass transition of the REP's customers to POLR shall not be considered for purposes of satisfying this requirement, and shall not own more than 10% of a REP or directly or indirectly control a REP.

- (E) At least one principal or permanent employee who has five years of experience in energy commodity risk management of a substantial energy portfolio. Alternatively, the REP may provide documentation demonstrating that the REP has entered into a contract for a term not less than two years with a provider of commodity risk management services that has been providing such services for a substantial energy portfolio for at least five years. A substantial energy portfolio means managing electricity or gas market risks with a minimum value of at least \$10,000,000.
- (F) Adequate staffing and employee training to meet all service level commitments.
- (G) The capability and effective procedures to be the primary point of contact for retail electric customers for distribution system service in accordance with applicable commission rules, including procedures for relaying outage reports to the TDU on a 24-hour basis.
- (H) A customer service plan that describes how the REP complies with the commission's customer protection and anti-discrimination rules.

- (2) An applicant shall include the following in its initial application for REP certification:
- (A) Prior experience of one or more of the applicant's principals or permanent employees in the competitive retail electric industry or competitive gas industry;
  - (B) Any complaint history, disciplinary record and compliance record during the 60 months immediately preceding the filing of the application regarding: the applicant; the applicant's affiliates that provide utility-like services such as telecommunications, electric, gas, water, or cable service; the applicant's principals; and any person that merged with any of the preceding persons;
    - (i) The complaint history, disciplinary record, and compliance record shall include information from any federal agency including the U.S. Securities and Exchange Commission; any self-regulatory organization relating to the sales of securities, financial instruments, or other financial transactions; state public utility commissions, state attorney general offices, or other regulatory agencies in states where the applicant is doing business or has conducted business in the past including state securities boards or commissions, the Texas Secretary of State, Texas Comptroller's Office, and Office of the Texas Attorney General. Relevant information shall include the type of complaint, status of

complaint, resolution of complaint, and the number of customers in each state where complaints occurred.

- (ii) The applicant may request to limit the inclusion of this information if it would be unduly burdensome to provide, so long as the information provided is adequate for the commission to assess the applicant's and the applicant's principals' and affiliates' complaint history, disciplinary record, and compliance record.
  - (iii) The commission may also consider any complaint information on file at the commission.
- (C) A summary of any history of insolvency, bankruptcy, dissolution, merger, or acquisition of the applicant or any predecessors in interest during the 60 months immediately preceding the application;
  - (D) A statement indicating whether the applicant or the applicant's principals are currently under investigation or have been penalized by an attorney general or any state or federal regulatory agency for violation of any deceptive trade or consumer protection laws or regulations;
  - (E) Disclosure of whether the applicant or applicant's principals have been convicted or found liable for fraud, theft, larceny, deceit, or violations of any securities laws, customer protection laws, or deceptive trade laws in any state;
  - (F) An affidavit stating that the applicant will register with or be certified by ERCOT or other applicable independent organization and will comply with the technical and managerial requirements of this subsection; or that

entities with whom the applicant has a contractual relationship are registered with or certified by the independent organization and will comply with all system rules established by the independent organization; and

(G) Other evidence, at the discretion of the applicant, supporting the applicant's plans for meeting requirements of this subsection.

(h) **Customer protection requirements.** A REP shall comply with all applicable customer protection requirements, including disclosure requirements, marketing guidelines and anti-discrimination requirements, and the requirements of this section.

(i) **Requirements for reporting and changing certification.** To maintain a REP certificate, a REP must keep its certification information up to date, pursuant to the following requirements:

(1) A REP shall notify the commission within five working days of any change in its business address, telephone numbers, authorized contacts, or other contact information.

(2) A REP that demonstrates compliance with certification requirements of this section by submitting an affidavit shall supply information to the commission to show actual compliance with this section.

(3) A REP shall apply to amend its certification within ten working days of a material change to the information provided as the basis for the commission's approval of the certification application. A REP may seek prior approval of a material

change, including a change in control, by filing the amendment application before the occurrence of the material change. The transfer of a REP certificate is a material change.

- (4) For an Option 1 REP, the REP shall notify the commission within three working days of its non-compliance with subsection (f)(1)(A) or (B) of this section. The notification shall set out a plan of recourse to correct the non-compliance with subsection (f)(1)(A) or (B) of this section within 10 working days after the non-compliance has been brought to the attention of the commission. The commission staff may initiate a proceeding to address the non-compliance.
- (5) For an Option 1 REP, the REP shall file a report due on March 5, or 65 days after the end of the REP or guarantor's fiscal year (annual report), and August 15, or 225 days after the end of the REP or guarantor's fiscal year (semi-annual report), of each year.
  - (A) The annual report shall include:
    - (i) Any changes in addresses, telephone numbers, authorized contacts, and other information necessary for contacting the certificate holder.
    - (ii) Identification of areas where the REP is providing retail electric service to customers in Texas compiled by zip code.
    - (iii) A list of aggregators with whom the REP has conducted business in the reporting period, and the commission registration number for each aggregator.

- (iv) A sworn affidavit that the certificate holder is not in material violation of any of the requirements of its certificate.
- (v) Any changes in ownership.
- (vi) Any changes in management, experience, and personnel relied on for certification in each semi-annual report before the REP begins serving customers and in the first semi-annual report after the REP serves customers.
- (vii) Documentation to demonstrate ongoing compliance with the financial requirements of subsection (f) of this section, including, but not limited to, calculations showing tangible net worth, financial ratios or shareholders' equity, as applicable, and the amount of customer deposits and the balance of an account in which customer deposits are held, supported by a sworn statement from an executive officer of the REP attesting to the accuracy, in all material respects, of the information provided. Any certified calculations provided as part of the annual report to demonstrate such compliance shall be as of the end of the most recent fiscal quarter. A REP may submit any relevant documentation of the type required by subsection (f)(4) of this section to demonstrate its ongoing compliance with the financial requirements of subsection (f) of this section.

(B) The semi-annual report shall include:

- (i) Documentation to demonstrate ongoing compliance with the financial requirements of subsection (f) of this section, including, but not limited to, calculations showing tangible net worth, financial ratios or shareholders' equity, as applicable, and the amount of customer deposits and the balance of an account in which customer deposits are held, and shall be supported by a sworn statement from an executive officer of the REP attesting to the accuracy of the information provided. Any certified calculations provided as part of the semi-annual report to demonstrate such compliance shall be as of the end of the most recent fiscal year and most recent fiscal quarter. A REP may submit any relevant documentation of the type required by subsection (f)(4) of this section to demonstrate its ongoing compliance with the financial requirements of subsection (f) of this section.
- (ii) The audited financial statements of the REP or its guarantor for the most recent completed calendar or fiscal year with accompanying footnotes and the independent auditor's report, if not previously filed.
- (iii) The unaudited financial statements for the most recent six-month financial period that immediately follows the end of its most recent fiscal year. Unaudited financial statements shall include a sworn statement from an executive officer of the REP attesting to the

accuracy, in all material respects, of the information provided in the unaudited financial statements. In lieu of six-month unaudited financial statements, six consecutive months of monthly financial statements may be submitted.

- (C) The requirement for financial statements may be satisfied by filing a copy of or by providing an electronic link to its most recent statement that contains unaudited financials filed with any agency of the federal government, including without limitation, the Securities and Exchange Commission. A REP that is part of a structure that is consolidated for financial reporting purposes and files financial reports with a federal agency on a consolidated company basis may provide financial statements for the consolidated company to meet this requirement.
  - (D) REPs or guarantors with an investment-grade credit rating are not required to provide financial statements pursuant to this section.
- (6) A REP shall not cease operations as a REP without prior notice of at least 45 days to the commission, to each of the REP's customers to whom the REP is providing service on the planned date of cessation of operations, and to other affected persons, including the applicable independent organization, TDUs, electric cooperatives, municipally owned utilities, generation suppliers, and providers of last resort. The REP shall file with the commission proof of refund of any monies owed to customers. Upon the effective cessation date, a REP's certificate will be suspended. A REP must demonstrate full compliance with the requirements of this section, including but not limited to, the requirement to demonstrate

shareholders' equity of not less than one million dollars and its associated restrictions pursuant to subsection (f)(1)(B) of this section, in order for the commission to reinstate the certificate. The commission may revoke a suspended certificate if it determines that the REP does not meet certification requirements.

- (7) If a REP files a petition in bankruptcy, is the subject of an involuntary bankruptcy proceeding, or in any other manner becomes insolvent, it shall notify the commission within three working days of this event and shall provide the commission a summary of the nature of the matter. The commission shall have the right to proceed against any financial resources that the REP relied on in obtaining its certificate, to satisfy unpaid obligations to customers or administrative penalties.
- (8) A REP shall respond within three working days to any commission staff request for additional information to confirm continued compliance with this section.
- (j) **Suspension and revocation.** A certificate granted pursuant to this section is subject to amendment, suspension, or revocation by the commission for a significant violation of PURA, commission rules, or rules adopted by an independent organization. A suspension of a REP certificate requires the cessation of all REP activities associated with obtaining new customers in the state of Texas. A revocation of a REP certificate requires the cessation of all REP activities in the state of Texas, pursuant to commission order. The commission may also impose an administrative penalty on a person for a significant violation of PURA, commission rules, or rules adopted by an independent organization. The commission staff or any affected person may bring a complaint

seeking to amend, suspend, or revoke a REP's certificate. Significant violations include the following:

- (1) Providing false or misleading information to the commission;
- (2) Engaging in fraudulent, unfair, misleading, deceptive, or anticompetitive practices, or unlawful discrimination;
- (3) Switching, or causing to be switched, the retail electric provider for a customer without first obtaining the customer's permission;
- (4) Billing an unauthorized charge, or causing an unauthorized charge to be billed, to a customer's retail electric service bill;
- (5) Failure to maintain continuous and reliable electric service to customers pursuant to this section;
- (6) Failure to maintain financial resources in accordance with subsection (f) of this section;
- (7) Bankruptcy, insolvency, or the inability to meet financial obligations on a reasonable and timely basis;
- (8) Failure to timely remit payment for invoiced charges to an independent organization;
- (9) Failure to observe any applicable scheduling, operating, planning, reliability, and settlement policies, protocols, guidelines, procedures, and other rules established by the independent organization;
- (10) A pattern of not responding to commission inquiries or customer complaints in a timely fashion;

- (11) Suspension or revocation of a registration, certification, or license by any state or federal authority;
- (12) Conviction of a felony by the certificate holder, a person controlling the certificate holder, or principal employed by the certificate holder, or any crime involving fraud, theft, or deceit related to the certificate holder's service;
- (13) Not providing retail electric service to customers within 24 months of the certificate being granted by the commission;
- (14) Failure to serve as a provider of last resort if required to do so by the commission;
- (15) Providing retail electric service in an area in which customer choice is in effect without obtaining a certificate under this section;
- (16) Failure to timely remit payment for invoiced charges to a transmission and distribution utility pursuant to the terms of the statewide standardized tariff adopted by the commission;
- (17) Erroneously imposing switch-holds or failing to remove switch-holds within the timeline described in §25.480 (relating to Bill Payment and Adjustments); and
- (18) Other significant violations, including the failure or a pattern of failures to meet the requirements of this section or other commission rules or orders.

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 §25.107 relating to Certification of Retail Electric Providers (REPs) is hereby adopted with changes to the text as proposed.

**SIGNED AT AUSTIN, TEXAS this the \_\_\_\_\_ day of \_\_\_\_\_ 2010.**

**PUBLIC UTILITY COMMISSION OF TEXAS**

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**BARRY T. SMITHERMAN, CHAIRMAN**

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**DONNA L. NELSON, COMMISSIONER**

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**KENNETH W. ANDERSON, JR., COMMISSIONER**