

PROJECT NO. 37623

RULEMAKING PROCEEDING TO § PUBLIC UTILITY COMMISSION
AMEND ENERGY EFFICIENCY §
RULES § OF TEXAS

**ORDER ADOPTING AMENDMENT TO §25.181
AS APPROVED AT THE JULY 30, 2010 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts an amendment to §25.181 relating to Energy Efficiency Goal, with changes to the proposed text as published in the February 12, 2010 issue of the *Texas Register* (35 TexReg 983). The amendment as adopted raises an electric utility's energy efficiency goal from 20% to 25% of annual growth in the electric utility's demand of residential and commercial customers by program year 2012, and 30% of the electric utility's annual growth in demand by program year 2013. The amended rule also includes cost caps to minimize the impact of the higher goals on customers, who bear the costs of the program.

The amendment also updates the cost effectiveness standard by adjusting the avoided cost of capacity and the avoided cost of energy. In addition, the amendment modifies the calculation of a performance bonus for an electric utility that exceeds its goal. Finally, the amended rule will apply to all electric utilities, not just electric utilities that are subject to Public Utility Regulatory Act, Texas Utilities Code Annotated §39.905 (Vernon 2007 and Supplement 2009) (PURA). This amendment is adopted under Project Number 37623. This rule is a competition rule subject to judicial review as specified in PURA §39.001(e).

The commission invited comments on the proposed rule changes and the following questions:

1. Should the commission adopt a lost revenue adjustment mechanism for an electric utility's programs administered pursuant to §25.181?
2. Each utility is requested to, and other parties may, provide an estimate of the customer impact of the cost caps in the rule under subsection (f)(8), Cost Recovery.
3. Should the commission adopt a cost cap based on customer impact, rather than total program cost?

Comments

Written comments were filed on March 12, 2010 and reply comments were filed on March 29, 2010. The commission received comments on the proposed amendments from HEB, Walmart, Methodist Hospital, Historical Westside Association, Port Arthur Independent School District (Port Arthur ISD), A Better Insulation, Star Efficiency Services, EcoFactor, ClimateMaster, CLEAResult Consulting, Good Company Associates, on behalf of Consert, Good Company on behalf of a coalition of companies referred to as Efficiency Texas (consisting of the Texas Building Owners and Managers Association, Texas Hotel and Lodging Association, the Texas Restaurant Association, the Texas Retailers Association, and Texas Impact), KGRA Energy, McKinstry Company, Texas Home Energy Rating Organization (Tx HERO), Texas Renewable Energy Industries Association (TREIA), Solar Alliance, Steering Committee of Cities Served by Oncor (Cities), Texas Industrial Energy Consumers (TIEC), Texas Legal Services Center and Texas Ratepayers' Organization to Save Energy and (TLSC-Tx ROSE), Office of Public Utility Counsel (OPC), Texas Public Policy Foundation (Policy Foundation), Texas CHP Initiative (Tx CHP), Demand Response Texas (including Cirro Energy Services, CPower, Inc., and EnerNOC,

Inc.), Sierra Club, American Council for an Energy-Efficient Economy (ACEEE), Environmental Defense Fund (EDF), U.S. Department of Energy Gulf Coast Clean Energy Application Center (GC-CEAC), Oncor Electric Delivery Company (Oncor), CenterPoint Energy Houston Electric LLC (CenterPoint), Entergy Texas (Entergy), Southwestern Public Service Company (SPS), El Paso Electric Company (EPE), Representative Joseph Deshotel, Dwight Wagner, Joe Johnson, Kirk Vital, William C. Velasquez Institute, Retail Electric Provider Coalition (REP Coalition), Coalition of Regulatory Entities (CORE), Alliance of Xcel Municipalities (AXM), the City of Houston, the National Association of Energy Service Companies (NAESCO), and Electric Utility Marketing Managers of Texas (EUMMOT).

AXM membership includes Amarillo, Booker, Borger, Canadian, Canyon, Crosbyton, Dalhart, Earth, Fritch, Gruver, Happy, Hereford, Levelland, McLean, Muleshoe, Pampa, Perryton, Plainview, Post, Slaton, Spearman, Stinnett, Sunray, Tahoka, Vega and White Deer.

The coalition of individuals led by the Texas Campaign for the Environment includes Robin Schneider, Jodie Hebert, Michael Karcher, Pete Alvarado, Kristine Moore, Daniel Hurlbert, Molly Walker, Ted Blanchard, Janelle Irish, Kathryn Albee, Erica Martinez-Castro, Debbie Newman, Roy West, Claudia Reynolds, Storms Reback, Tim Chamberlain, Sarah Caldwell, Tommy Savage, Adrian Juarez, Dawn Obermoeller, Lisa Tauriac, Lana Marker, Cecilia Martin, Birdie Perkins, Claudia Hernandez, Robert Aberg, Kristmas Marron, Vaden Riggs, Jennifer Finch, Christopher Kribs Zaleta, Jen Kalt, Lynn Riddick, Raynd Lopez, Robert Klug, Larry Ketcham, Chris Sharon, Dorinda Scott, Julie Sears, Ellen Gonzalez, Bill Jacoby, Lisa Coyle, Michael Ball, P. Chen, Katherine Homan, Cynthia Stuart, Kay Bryan, Kenneth Hawley, Denzel

Wiseman, Ben May, Stacy Guidry, Don Blackley, Julie Strong, Patti Arvin, Laura Beikman, Deborah Freeman, Snehal Oswal, Judy Sanchez, Karen Mercado, Richard Liebman, Steven Vaughan, Barbara Draughon, Sidney Anderson, Judy G. Ranney, Debra Maitre, Courtney Hall, Lydia Garza, Bobby Womble, Nichole Sowell, Joy Menyhert, Cecelia Ottenweller, Anne Johnson, George Mader, Tim Dreslinski, Rhonda Gudewich, Thao Dam, Daron Shiflet, Kimberly Vizurraga, James Noble, Ravi Mantena, Emmanuelle Cudennec, John Tinney, Alex DeCicco, Virginia Fugman, Jordan Michel, E. A. Davis, Helen Fosdick, Elaine Harris, Michael Hoeffner, Kambiz Kaboli, Gloria Achterberg, Jason Swiergol, Lauren Tata, Carlos Orrego, Tom Rutz, Jeffrey Jacoby, Gerald Sullivan, Daniel Reynolds, Brian Kahl, Susan Wambsganss, Jon Heffley, Frederick and Patricia Buob, Gordon Pingenot, Mary Boone, Danielle LaFleur, Lorie McCloud, Lauren Oholendt, Scott Whiting, Amber Pevey, Leslie Patout, Carol Geiger, Martha Schlott, Eric White, Dallas May, Richard Casper, Debby Patterson, Sylvana Alonzo, Ana Cardoze, Jennifer Waters, Tom Kusnierz, Germaine Swenson, Joyce Kling, Kate Dixon, Timothy Massey, Marc Dugger, Emanuel Charhon, Maggie Spillers, Chris Anger, Michelle Harvey, Margaret Reese, Tim Corder, Don Strickler, George Smith, Rainbow Di Benedetto, Evan Woodruff, Ovidio Oliveras, Richard Malnory, Kenneth Elder, Sherrill Bodie, Katina Espinoza, Patsy Gillham, Wendy Campbell, Jon Savage, James Hadden, Norman Phillips, Jan Reneau, Michael Wicker, Mildred Stone, Debra Alvarez, Melinda Page, Matilda Reeder, Joel Rahn, Marisa Luera, Debra Neel, Conrado Acevedo, Jeff Murray, Craig Railsback, Izabella Dabrowski, Fabian Solberg, Kathleen Hanson, Nicole Gruenberger, Marybell Martinez, Robert Strane, Lucy Conley, Deb Murphy, Carmen Druke, Gail Smith, Nancy Ramsay, Lynda Effertz, Liisa Pursiheimo-Marcks, Gerald L. Soliday, Elizabeth Stripling, Scott Driggs, Hall Hammond, Dean McKinnon, Karen Rasmussen, Robert Shadowen, Stephanie Rice, Robert Plsek, Julia

Makkaoui, Alan B. Loud, John Knupp, Lorine Besse, Jennifer Turkeyilmaz, Candace Smith, Brett St. Onge, Patricia Fall, Janet Montes-Diaz, Mark Carlson, Desiree' Webb, Daniel Vaughn, Dabney Shires, Barbara Sturgeon, Holly Hope, Rob Ganger, Susan Trahan, Sherwin Daryani, Cecely Valderrama, Susan Hansen, Deanna Van Besien-Kozacek, Brigette Yawn, Anne Burnham, Donna Ploetz, Michele May, Sonya Taft, Teresa Burr, Larry Symns, Karen Mayer, Nancie Wing, Stuart Leija, Terri Camara, Raya Miller, Jim Veach, Dwight Haas, Cynthia Claybrook, Alissa Catalano, Constantine Lau, Joseph Jensen, Nola Dean, Marisa Beck, Julia Hunt, Parth Patel, Ada Gonzalez, Philip Huffeldt, Janine Lund, Catherine McGinley, Jerry Stefani, Kathleen Delle, Toni Austin-Allen, Travis Williams, Donna Millay, John Wormuth, Gaylin Bonner, Sarah Rose, Susan Rardin, Taylor Johnson, Grace Taupo, Pete Ybarra, Elemi Brown, Devereaux Morkunas, Gilbert Starkey, Mark McKim, Timothy Adams, Dan Bedell, Mike Peters, Michael Pitre, Jeremy Johnson, Carol Bowers, Laura Utrecht, Emily Rollins, Mary Cato, Laurie Edmonds Goodin, Marti Freitag, Scotty Stevenson, Kathleen Riney, Mark Sims, Eric Fry, Shannon Brown, Robert Germain, Susanna Sharpe, Richard Maddox, Terry Niemeyer, Pat Cole, Renee Vaughan, Sandra Keiser, Pat Smiley, Tamara Houston, Melissa Litwin, Charlee Helms, Jeff Dieter, Joseph Sheldon, Mary Wilson, Deborah Young, Corin Hodder, James Penas, Hayley Wallace, Mike Durkee, Dena Mapa, Cyndy Reynolds, Lois Schafer, Donna Houston, Marti Cockrell, Chris Noland, Stephanie Galo, Leigh Hallock, Daniel Chappel, Eliz Gaylord, Gary Schweda, Josephine Garcia, William Crane, Linda Parman, Patrick Cox, Leslie LaConte, Robert Rutishauser, Patricia Stanford, Laura Keany, Cari Hooper, Ashley Smith, Gina Howington Mantsch, Roger Mathre, Carolyn Croom, Stephanie Falck, Sandra Axelrad-Boccaro, Kevin Riley, Bion Pohl, Linda Didsbury, Jason Tanton, J. R. Schroder, Merrit Teddlie, Patricia Kelcher, Kimka Hesalroad, Joy Roberts, Eric Tinsley, Mark Boone, King Grossman, Chungwei

Gonzales, Susan Roberts, Katharyn Reiser, Laura Lieck, John Allgair, Jim Thomas, Michael Strasser, George Rehman, Jane Hemmi, Rebecca Travis, Melissa Kohout, Jeanne Morman, Steve Lahey, Layne Duesterhaus, Nona Grieshaber, Mailand Edlin, Michael Nolan, Nakisha Nathan, Michelle Baccheschi, Barbara Gittinger, Michael Higgins, Aysha Anas, Pawan Gautam, Derek R. Gartman, Mike Wittum, Kathryn Eubank, Sherilyn Coldwell, Philip Comer, Lisa Endresen, Samuel Bean, Jere` Rodriguez, Myra Armstrong, Erika Luck, Tara Spies, Jacquelyn Welsh, Ann Hall, Lynn Gustafson, Audrey Williams, Janice Curry, Yesika Cerecedo, Kevin Schermann, Susan Wukasch, Sharon Gre pares, Samuel Bean, Stan Lockett, Melanie Simpson, Jesse Brown, David Archer, Thomas Manaugh, Michelle Upchurch, Marilyn Buck, Tonya Connell, Gary Bynum, Cathy Juan, Logan Bell, Alyson Murphy, Michael A. Kravetz, Joy Abernathey, Linda Stark, Anne Freeman, Ginger Yocum, Eduardo Robles, Joslyn Carbajal, Carolyn Robinett, Milan Bender, Stephen Schlachter, Michael Melton, Cerese Buckler and Leighton Clark.

The coalition of companies filing joint comments with the REP Coalition includes the Alliance for Retail Markets (ARM), CPL Retail Energy, Reliant Energy Retail Services LLC, Texas Energy Association of Marketers (TEAM), TXU Energy Retail Company LLC, and WTU Retail Energy. The membership of ARM includes Constellation New Energy, Inc., Direct Energy LP, and Green Mountain Energy Company. The membership of TEAM includes Accent Energy, Amigo Energy, Cirro Energy, Green Mountain Energy Company, Just Energy, Hudson Energy Services, StarTex Power, Stream Energy, Tara Energy and TriEagle Energy.

The coalition of companies filing joint comments with the Coalition of Regulatory Entities (CORE) includes the Texas Coast Utilities Coalition of Cities (TCUC), the Alliance of Oncor

Cities (AOC), and the Alliance for TNMP Municipalities (ATM). The TCUC membership includes cities served by CenterPoint Energy Houston Electric, LLC (Angleton Baytown, Clute, Freeport, League City, Pearland, Shoreacres, West Columbia and Wharton). The membership of ATM includes cities served by Texas-New Mexico Power Company (Angleton, Brazoria, Gatesville, Hamilton, Hico, Kermit, League City, Olney, Pearland, Pecos, Sweeny, West Columbia and Whitney). The membership of AOC includes cities served by Oncor (Balch Springs, Blooming Grove, Commerce, Corsicana, Crockett, Denton, Diboll, Heath, Hickory Creek, Hillsboro, Jacksboro, Jacksonville, Kennedale, Kerens, Lufkin, Mart, Mexia, Pflugerville, Princeton, Riesel, Rockdale, Round Rock, Rusk, Trophy Club, Troup, and Wortham).

The coalition of utility companies filing joint comments with EUMMOT includes Oncor, CenterPoint, AEP Texas North Company, AEP Texas Central Company, Southwestern Electric Power Company, Entergy, SPS, EPE, and Texas-New Mexico Power Company (TNMP). The AEP Companies (Texas North Company, AEP Texas Central Company, and Southwestern Electric Power Company) also filed joint comment separate from the EUMMOT comments, and the other utilities also filed separate comments.

NAESCO members include Honeywell, Johnson Controls, Siemens, Trane, Comfort Systems USA Energy Services, Schneider, Duke Energy, Pacific Gas & Electric, Southern California Edison, the New York Power Authority, ConEdison Solutions, FPL Energy Services, Pepco Energy Services, Constellation Energy Projects and Services and Energy Systems Group, AECOM Energy, NORESKO, Onsite Energy, EnergySolve Companies, Ameresco, UCONS,

Chevron Energy Solutions, Synergy Companies, Wendel Energy Services, Control Technologies and Solutions, Clark Realty Capital, McClure, SAIC, and Lockheed Martin.

A public hearing on the proposed rule was not requested but the commission held a hearing concerning this proposed amendment and possible changes to §25.173, relating to Goal for Renewable Energy, on June 30, 2010.

Lost Revenue Mechanism

Several parties disagreed that the commission should adopt a lost revenue adjustment mechanism (LRAM) for an electric utility's energy efficiency programs under §25.181, including ACEEE, the Sierra Club, NAESCO, CORE, Cities, the City of Houston, NAESCO, the REP Coalition, OPC, Walmart, TLSC-Tx ROSE, and TIEC. The Sierra Club, CORE, Cities, the REP Coalition, OPC, TIEC, and TLSC-Tx ROSE stated that the commission lacks the statutory authority to implement a lost revenue recovery mechanism. Several parties including Walmart, the Sierra Club, CORE, Cities, the REP Coalition, OPC, TIEC, TLSC-Tx ROSE, and NAESCO opposed LRAM, because the current rule already allows for cost recovery for energy efficiency programs. EUMMOT, CenterPoint, Entergy, and EPE argued that LRAM is both beneficial and legal.

Walmart, the Sierra Club, CORE, Cities, the REP Coalition, TLSC-Tx ROSE and TIEC noted that the current rules already allow the utilities to recover their costs through an energy-efficiency cost-recovery rider (EECRF). They argued that if LRAM were allowed in tandem with the performance bonus, it would create a windfall for the utility, shift the expense to the ratepayer, negate any cost savings for customers, and offset the energy efficiency-related savings that customers may realize. They argued that provisions in the current rule providing for a

review of the EECRF every three years ensure that the utility receives the appropriate revenue recovery, and therefore LRAM is unnecessary.

Walmart stated that a general rate case is the appropriate forum for considering a utility's decrease in revenues resulting from energy efficiency initiatives. It asserted that an adjustment to recover lost revenues is a mechanism to reduce the risk of lost earnings due to reductions in sales, and the commission needs to consider the impact of the risk reduction through the rate of return for the utility. Walmart cautioned that if the commission were to adopt LRAM despite these problems, any such adjustment mechanism should be designed to target only the lost revenues attributable to the utility's promotion of energy efficiency to its customers. NAESCO also disagreed with the utilities' position that they should be allowed to recover energy efficiency "lost revenues" as a standalone adjustment to rates, because lost revenues are a very small portion of total utility revenues that can easily be tracked, and the impact of the lost revenue should be considered in the utilities' periodic rate cases, as part of their overall revenue requirements.

The Sierra Club and CORE stated that the Legislature has not approved a utility's receiving payments for electricity that is never generated, in addition to receiving performance bonuses for exceeding its goal. The REP Coalition, TIEC and TLSC-Tx ROSE argued that LRAM is inconsistent with PURA §39.905(a)(2) and the ability of customers to realize a reduction in energy costs through energy efficiency. OPC, CORE, TLSC-Tx ROSE and TIEC argued that PURA §39.905(b-1) requires that the utilities not recover more than their energy efficiency costs and any incentives that they may be granted, and also requires a comprehensive review of a

utility's overall revenues. The REP Coalition stated inclusion of "lost revenues" would allow an electric utility to recover transmission and delivery charges for a level of service not actually provided. TIEC, TLSC-Tx ROSE, and Cities stated "lost revenues" are neither costs nor expenditures for the utilities; rather, they are purely hypothetical amounts that the utility *might* have collected. TIEC stated that *guaranteeing* a certain level of revenue, rather than providing a "reasonable opportunity" to earn a "reasonable return," would conflict with PURA §36.051, which requires rates be just and reasonable to both the utility and the consumer. Cities argued that a utility's rates will be adjusted for revenue changes, incorporating the actual energy efficiency impacts, when the utility's base rates are fixed in a rate case. OPC noted that PURA specifically provides for cost recovery and an incentive and, in order to authorize LRAM, PURA would need to be amended. OPC argued that an agency has only those powers expressly conferred upon it by the Legislature, which has specifically provided for cost recovery and an incentive but not LRAM.

Several parties supported the adoption of a lost revenue adjustment mechanism for an electric utility's energy efficiency programs, including Tx HERO, CLEAResult, EUMMOT, CenterPoint, Entergy and EPE. CenterPoint argued that LRAM would not be "automatic" and that in an EECRF proceeding, the commission could review a utility's filing and deny the adjustment if it were determined to be unnecessary or unreasonable. The Sierra Club and EPE urged that LRAM be studied further and evaluated in a stand-alone rulemaking or during the legislative session. In particular, policy-makers should consider whether other states that have adopted similar measures and the impact of LRAM on the utility and ratepayers. Tx HERO stated it is desirable that the profitability of utility companies not depend upon the quantity of energy delivered or

consumed. According to Tx HERO, it is reasonable to develop and use LRAM during a period of transition to a completely decoupled charge for transmission and distribution, which is probably a matter for legislation. CLEAResult supported LRAM based on its belief that the current incentives fail to make a utility whole for the investments they make in energy efficiency.

CenterPoint contended the comments of CORE, TIEC and TLSC-Tx ROSE ignore that the Legislature has already decided that costs associated with energy efficiency should be considered outside the context of a fully-contested base rate case. CenterPoint argued that the Legislature gave the commission authority to establish *annual* EECRF mechanisms, and if the Legislature had intended for costs associated with energy efficiency to be litigated in the context of base rate cases and thus subject to extended regulatory lag, it would not have created the EECRF process. According to CenterPoint, LRAM offers the opportunity to remove the financial disincentive to energy efficiency in a more efficient, lower-cost manner than through the litigation process of a fully contested base rate case. CenterPoint stated that the arguments of CORE, TIEC, the REP Coalition, and TLSC-Tx ROSE fail to recognize PURA §39.905(b-1), which states the energy efficiency cost recovery factor under subsection (b)(1) may not result in an over-recovery of costs but may be adjusted each year to change rates to enable utilities *to match revenues against energy efficiency costs* and any incentives a utility is granted.

CenterPoint stated that PURA §39.905(b-1) demonstrates the clear intent of the Legislature to keep utilities financially whole through the EECRF mechanism and, without some means of addressing the issue of lost revenue, this objective cannot be accomplished. CenterPoint cited several cases that demonstrate that, when construing statutes, a reviewing court's primary goal is

to determine and give effect to the Legislature's intent, and that, to determine legislative intent, the court will look to the statute as a whole, as opposed to isolated provisions. In this vein, when all of §39.905 is considered, the commission clearly has the authority to adopt a lost revenue adjustment mechanism to carry out its express responsibility of encouraging energy efficiency in Texas. CenterPoint offered several "leading edge" example LRAM tariffs in Kentucky, Ohio, Oregon, and North Carolina. Three of the tariffs were approved within the past 12 months and include a lost revenue recovery mechanism that operates in conjunction with the recovery of direct program costs or incentives. Several of the tariffs also contain true-up components. According to CenterPoint, these models could be readily adapted to the current cost-recovery structure in Texas, and any LRAM could be reviewed and trued-up in the context of each utility's annual EECRF proceeding. CenterPoint stated that the arguments of CORE, TIEC, the REP Coalition and TLSC-Tx ROSE presuppose that adoption of LRAM would require "decoupling," which is simply not the case. Decoupling involves a broader process for adjusting utility revenues for any deviation between expected and actual sales, regardless of the reason for the deviation. LRAM, on the other hand, can be designed to target reimbursement for only those lost revenues related to the utility's direct promotion of energy efficiency measures.

CenterPoint argued that the financial disincentive that currently exists can be removed either by adopting a generic lost revenue adjustment mechanism for all utilities or allowing utilities to propose their own LRAM as a part of their annual EECRF filing. It also argued that either alternative is a better solution than the filing of a costly base rate case, the utility's only other method of addressing the revenue loss. CenterPoint stated that the energy efficiency programs impair the ability of utilities to recover commission-authorized costs, because energy efficiency

programs encourage customers to reduce their consumption of electricity. CenterPoint estimated that if the commission raises the energy efficiency goals as proposed (to 30% of demand growth in 2012, 40% of demand growth in 2013, and 50% of demand growth in 2014), their goals will increase from approximately 60 megawatts (MW) in 2012 to 100 MW in 2014. Assuming that CenterPoint achieves the savings needed for the maximum performance bonus each year, its program costs will rise from approximately \$44 million in 2012 to \$116 million in 2014, and its revenue loss from the energy efficiency programs will increase from approximately \$18 million in 2012 to \$30 million in 2014. CenterPoint submitted that as the demand goal increases the performance “bonus” ceases to be an effective incentive, and the policy objective of the performance incentive to encourage energy efficiency would be undermined. It urges the commission to act in this rulemaking to implement LRAM.

EPE and Entergy supported the adoption of LRAM for similar reasons. Entergy noted that the proposed increase in energy efficiency goals and in the capacity factor for calculating the energy savings goal would further increase their revenue losses, resulting in lost margins of approximately \$0.05 per kWh, as opposed to lost margins of approximately \$0.02 per kWh for transmission and distribution utilities. Entergy stated that by exceeding the goals it achieved a performance bonus of about \$1.7 million, but lost about \$1.4 million through sales lost as a result of energy efficiency programs. Entergy identified areas of energy efficiency cost recovery that should be addressed to make the utility financially indifferent as to whether energy resource needs are met through supply-side or demand-side alternatives: (1) program cost recovery; (2) performance bonus/shared savings; and (3) recovery of lost contribution to fixed costs. Entergy concluded that if the lost revenues were recovered through LRAM, the performance bonus would

then serve the purpose for which it was intended—to reward the utility for running its programs efficiently.

EUMMOT supported LRAM as a means to ensure that a utility’s energy efficiency investments do not lead to financial distress, which it said is a long-standing regulatory principle. It noted that NARUC resolutions have urged regulatory commissions to “consider the loss of earnings potential connected with the use of demand-side resources; and . . . otherwise ensure that the successful implementation of a utility’s least-cost plan is its most profitable course of action.” EUMMOT also noted that the National Action Plan for Energy Efficiency urges regulators to remove disincentives to energy efficiency and provide utilities with incentives for successful energy efficiency programs. EUMMOT stated that, as an alternative to LRAM, the performance bonus mechanism could be modified to account for lost revenue and reward utilities for exceeding energy efficiency goals, and that modifying the existing bonus mechanism may be the simpler approach. EUMMOT noted that at least 19 states have approved a decoupling mechanism for electric utilities and another seven have decoupling mechanisms pending. Specifically, LRAMs have been introduced in Colorado, Oklahoma, Ohio, North Carolina, South Carolina, and Wyoming. A combination of performance incentives and either LRAMs or a decoupling mechanism are available in California, Colorado, Connecticut, Kentucky, Massachusetts, Michigan, Minnesota, North Carolina, Oklahoma, Rhode Island, Vermont, and Wisconsin.

EUMMOT noted the use of straight fixed/variable (SFV) rate design, which has been applied to natural gas utilities in Florida, Ohio, Georgia, Illinois, Missouri, Nebraska, North Dakota,

Oklahoma, and Texas, as an alternative approach. Recovery of costs through fixed charges allows “utilities to recover the cost of facilities that must be in place regardless of usage.” EUMMOT argued that this rate design goes to the heart of the issue that an LRAM attempts to address and is an appropriate alternative methodology that the commission has at its disposal to ensure a utility’s revenues are not jeopardized as a result of promoting energy efficiency.

TIEC, in response to the CenterPoint argument, reiterated that the commission has no authority to adopt LRAM under PURA §39.905(b-1). PURA allows rates to be adjusted “to enable utilities to match revenues against energy efficiency costs and any incentives to which they are granted,” but does not authorize EECRFs to be adjusted to recover lost revenues, which are not costs. The discussion of LRAMs that have been implemented in other states demonstrates that the energy efficiency programs in those states are governed by different statutory language, and, in fact, the Kentucky statute cited by CenterPoint explicitly authorizes LRAMs. TLSC-Tx ROSE also urged that CenterPoint’s legal argument be rejected.

ACEEE strongly recommended the use of “true symmetrical decoupling” instead of LRAM or other rate design options. CORE and TIEC disagreed with ACEEE’s “true symmetrical decoupling” proposal on the basis that it is beyond the commission’s authority to implement. CORE stated that a decoupling mechanism would directly violate PURA and would unjustly guarantee revenue. CORE further stated that the legislature has repeatedly rejected commission requests for additional flexibility in electric utility ratemaking. TIEC contended that decoupling would remove the utility’s incentive to minimize costs in order to earn its awarded rate of return, which underlies the entire ratemaking scheme set forth in PURA §36.051. This section provides

that utilities' rates be set at a level that allows a reasonable *opportunity* to earn a reasonable return on its investments. TIEC concluded that "true symmetrical decoupling" is not authorized by PURA, is inconsistent with Chapter 36, is against public policy, and should not be adopted.

Walmart recommended that any commission approved lost revenue or other adjustment mechanism should not permit a utility to recover for revenues lost due to energy efficiency measures that are implemented and funded by customers outside of the utility's programs, such as loss of revenues through customers' adoption of more efficient appliances outside of the energy efficiency program. Walmart also argued that a lost revenue mechanism should not permit an electric utility to recover revenues that are "lost" as a result of events of weather variations, force majeure, changes in the number of customers served by the utility, changes in economic conditions, and changes in building codes. Walmart concluded that the commission must ensure that rates are just and reasonable, and in doing so, must carefully balance this objective with the objective of promoting energy efficiency.

The Sierra Club noted they are not favorable to this mechanism at present due to the increased cost of the program and the impacts on ratepayers however they are not opposed to studying the issue further in future rulemaking or during the legislative session.

Commission Response

The commission concluded in Docket Number 38213 that lost revenues are not energy-efficiency costs that may be recovered through an EECRF under PURA §39.905.

Consistent with that decision, the commission declines to adopt an LRAM mechanism in this rule.

Cost of Amendments

Regarding preamble question two, each utility is requested to, and other parties may, provide an estimate of the customer impact of the cost caps in the rule under subsection (f)(8), Cost Recovery.

HEB supported increased funding for the utility's incentive programs due to its long-standing frustration with the lack of adequate funding for customers' proposed projects and the common occurrence that all funds for an entire year are committed within a few minutes time. HEB noted that many of the energy projects it implemented during the past few years would not have met internal financial return hurdles without the utility incentives. HEB suggested that these programs could make a huge difference for customers of all classes to reduce energy waste.

Sierra Club recommended that the commission consider both costs and benefits when considering cost caps. Sierra Club referred to such benefits as reduced transmission congestion, less generation needed, and lower individual energy bills for program participants.

EUMMOT stated that the component of residential consumer bills used to cover the cost of energy efficiency would increase from \$0.64/month in 2011 to \$3.38/month (assuming 1,000 kWh per month consumption and statewide average EECRF rates) by 2014, assuming program budgets were capped at the proposed levels. As a comparison, the component of residential

consumer bills used to collect energy efficiency costs would increase to \$4.87/month if program budgets were not capped, but adequate funds were allotted so as to meet the proposed goals. Thus, the proposed cost caps based on total program costs would prevent utilities from meeting the higher demand goals proposed for 2013 and 2014. Total statewide program expenditures (as included in the utilities' April 1, 2009 energy efficiency plan and report filings) totaled \$112 million in 2010. Consequently, total expenditures would be capped at \$280 million in 2013 and \$336 million in 2014 under the proposed cost caps. Estimated program expenditures required to meet the aggressive demand goals as proposed total \$293 million in 2013 and \$484 million in 2014, resulting in a significant budget shortfall for both years. Itron estimated \$426 million in total spending would to meet similar goals by 2014, suggesting that the proposed cap must be raised by more than 25%.

According to Entergy, the impact on customers would be significant. Currently, the program cost is around \$0.94 per month for residential customers using 1000 kWh per month, but could be over \$5.50 per month by 2015. EPE estimated that the customer impact of the proposed cost caps under proposed subsection (f)(8) would be significant. The projected customer impacts of the proposed caps for 2012 through 2014 for 1000 kWh would be \$15.39 in 2012 and \$24.53 in 2014.

The REP Coalition stated that the current version of §25.181 would allow utilities to recover up to approximately \$115 million for energy efficiency program costs and accrued bonuses based on transmission and distribution service providers' (TDSP) filed 2010 budgets. The REP Coalition claimed the proposed amendments would greatly increase the amount utilities would

be permitted to recover. For example, proposed subsection (f) would allow them to recover program expenditures for 2014 in an amount up to 300% of their program budgets for 2010 and raise performance bonus caps to 40% of program expenditures. Thus, the proposed rule would permit utilities to recover almost \$407 million for energy efficiency program costs and bonuses in 2014. The REP Coalition stated that the permitted level of cost recovery for utilities under the amended rule should consider the economic impact on end-use consumers, which is the group that ultimately bears these costs. Accordingly, the REP Coalition recommended the use of a \$1 per MWh cost cap for residential and commercial customers to keep the level of cost recovery in check while still allowing utilities to recover sufficient funds to operate energy efficiency programs. The REP Coalition provided an estimate of revenue recovery at a \$1/MWh cap with 2012 costs of \$205 million; 2013 costs at \$208 million; and 2014 costs at \$212 million. The REP Coalition concluded a \$1 per MWh cost cap for residential and commercial customers would reduce, by roughly half, the cost impact of the proposed rule for the year 2014.

OPC noted that the Itron Study estimated the potential economic savings on customers' monthly bills, calculated from reduced sales, from the utility perspective rather than from the perspective of customers' bills. As OPC understands it, the Itron Study however, does not include an estimate of the cost to customers, nor does it consider the cost of the utilities' bonuses or the proposed increases in program budgets. OPC noted that Oncor residential customers, for example, are currently paying \$0.92 per month for energy efficiency, based on recovery of \$53,578,615. OPC stated if the proposed rule is adopted, Oncor residential customers could reimburse Oncor in 2014 in the amount of \$132,811,590 in program costs and \$53,124,636 for a bonus, for a total of \$185,936,226. That is over a threefold increase in four years.

TLSC-Tx ROSE recommended that the rule be amended to incorporate stronger review and approval standards to ensure program effectiveness and efficiency. TLSC-Tx ROSE argued that the proposed significant rate increases—up to almost a 500% increase over a five year period—comes with no added assurances that consumers will benefit from the energy efficiency programs. TLSC-Tx ROSE noted that, without added assurances that the statutorily-required targeted weatherization programs will be fully implemented, the neediest of low income Texas consumers will be required to pay ever-higher rates with no benefits.

TIEC agreed with the REP Coalition that a cost cap should be based on customer impact rather than total program cost. TIEC stated that the customer impact estimates provided by the REP Coalition demonstrate that the increased goals proposed by the commission could have significant rate impact on customers, especially when coupled with the potential performance bonus awards. TIEC urged the commission to be mindful of the potential impacts the increased goals may have for customers, and ensure that the ratepayer funds spent on energy efficiency programs are expended in a cost-effective manner. TIEC also argued that if cost caps are applied, they should be applied on a class-specific basis. The \$1/MWh cap proposed by the REP Coalition would need to be modified for classes that pay energy efficiency costs based on different billing determinants (such as on a demand or customer basis). PURA §39.905(b)(4) provides that the costs associated with the programs under the rule should be borne by the customer classes that receive services under the programs. Because program costs are allocated on a customer-class basis, and collected through rates that reflect those class characteristics, it is appropriate to calculate and apply a cost cap on a customer-class basis.

TIEC concluded the application of a specific cost cap for a given class may be more appropriately developed through each utility's EECRF proceeding than in the rule.

CORE replied that the commission should consider all factors that affect the cost of the programs, not just the energy efficiency goals, to determine how to best minimize the programs' impact on customers, while promoting energy efficiency in evaluating the economic impact on customers. CORE argued that the higher energy efficiency goal does not alone determine the customer impact, and all factors must be considered to determine what needs adjusting. CORE proposed any one of the following factors, all of which are within the discretion of the commission, may affect the economic impact of the programs on customers: deemed savings estimates; cost-effectiveness standard; marketing for programs; administration cost caps; estimates for avoided cost of capacity and avoided cost of energy; and bonus caps. CORE urged the commission to consider what factors would cause the energy efficiency programs to have significantly greater impact on the customer and keep foremost in its deliberations the impact on customers. CORE noted of particular importance is that deemed savings, avoided cost of capacity, and avoided cost of energy be properly estimated. In addition, costs related to administration and bonuses must not be excessive.

Commission Response

The commission appreciates the comments on this question. The commission has considered these comments in connection with adopting amendments to subsection (f), relating to cost recovery.

Cost Caps

Several parties opposed the adoption of a cost cap based on customer impact, rather than total program cost, including NAESCO, TLSC-Tx ROSE, Tx HERO, EPE, CLEAResult, OPC, Entergy, Sierra Club, and Cities. NAESCO urged the commission to set the energy efficiency program budgets at levels that allow the utilities to achieve the higher goals, based on utility estimates of the budgets required to meet the goals. NAESCO argued that the constraint on budgets should be the cost effectiveness of the programs, not an arbitrary per customer or total budget number. It also urged the commission to analyze the potential increases in customer bills using net analyses, which include both the increased program costs and the estimated benefits from the programs, particularly the effect of peak load reductions in a competitive supply market like Texas.

OPC was of the opinion that a total program cost cap is preferable to a customer cost cap. The programs should drive the budgets rather than available funding driving the programs. In the 2009 EECRF cases, OPC favored total program cost allocation rather than customer cost allocation, and expressed the view that a program cost cap is more appropriate, based on the nature of the benefits of energy efficiency. EPE argued that a utility is in a better position to manage its expenditures based on a cap on program costs, rather than trying to target a customer impact amount, which would vary with customer growth and consumption. Sierra Club expressed a similar view: that a cost cap based on program costs would be easier to measure and track, since it does not depend upon a changing number of customers or changing energy demand.

EUMMOT stated that it may be simpler and more efficient to apply caps on total budgets, rather than on the impact on any given customer or customer class, but it argued that the cost caps in the proposed rule would result in inadequate funding for the utilities to meet future demand reduction goals. It stated that the members of EUMMOT are generally indifferent as to whether caps are applied based on customer impact or total program costs. EUMMOT noted that any cost caps must be set at levels that are high enough to ensure they do not become an impediment to a utility's ability to meet higher demand goals. Caps could potentially be exceeded for reasons that have nothing to do with energy efficiency budgets—for example, a change in cost allocation or fluctuations in billing units due to the weather or the impact of economic conditions upon utility sales. It also noted that class-specific caps could have an effect on the programs offered to specific customer classes.

Entergy opposed the cost cap because it would limit funds that utilities will need in order to achieve the proposed expanded energy efficiency goals in later years. The Itron Study indicated that to achieve a 50% savings threshold, at least 600% of the 2010 budget would be needed, whereas the proposed cap is around 300% of the 2010 budget. Entergy stated that for 2014 a budget of \$44.734 million would be required to achieve its goal, but with the proposed budget caps, it could only spend \$31.8 million. Entergy stated even if more-achievable goals are approved by the commission, budget caps should not be a part of the proposed rule, arguing that the utility's annual EECRF filings are the appropriate place to establish a utility's budget. The EECRF proceedings provide for actual goals and the costs of achieving the goals and can be reviewed on a utility-by-utility basis.

CLEAResult stated that a cost cap based on customer impact considers a narrow range of inputs and does not serve the public well in establishing long-term energy policy, since customer impact looks only at the cost to a particular customer on a monthly or annual basis and ignores the other economic realities of fuel costs. CLEAResult noted that the primary reason that electricity costs are lower today than in 2005 is due to the low cost of natural gas which serves as the fuel for 65% of the electricity generation in Texas. As the nation, and to a lesser extent Texas, was subject to a severe economic contraction in 2008 and 2009, this reduced the demand for natural gas and placed downward pressure on prices. As the nation emerges from this bitter economic situation, energy consumption will rise and this will place upward pressure on natural gas prices and, as a result, prices of other commodities, such as coal and oil, will rise. This will also have a severe impact on ratepayers, and any discussion of cost caps should take these matters into consideration. CLEAResult believed a more effective method of managing the cost of energy impacts for ratepayers is reducing energy use through the participation in the utilities energy efficiency programs. CLEAResult encouraged broader, more comprehensive programs as a method of limiting the cost impacts for customers. CLEAResult concluded that the small economic cost of expanding energy efficiency in Texas will result in public and economic benefits to both those directly participating in energy efficiency programs and, ultimately, to all business and residential ratepayers.

The REP Coalition supported a cost cap based on customer impact rather than on the program budget. The REP Coalition submitted that a \$1 per MWh cost cap for residential and commercial customers is a critical component in the commission's determination of the amount of energy efficiency program costs that utilities should be allowed to recover. A \$1 per MWh

cost cap would serve as an appropriate marker for recoverable costs and would ensure that customers and REPs can determine the maximum financial impact that could occur, while providing an incentive to utilities to maximize the effectiveness of each program dollar spent on achieving the rule's socioeconomic goals. The cost cap in the current version of §25.181 has been successful in maintaining the impact to residential customers at below \$1 per MWh, while providing utilities with adequate funding to not only meet, but also far exceed their energy efficiency goals. From a REP perspective, it is important to establish clear-cut boundaries on how much retail customers will pay for these programs. The REP Coalition noted the need for transparency; minimizing the escalation of TDSP charges because REPs bear the brunt of customer dissatisfaction and frustration from any increases in retail bills, whether such increases are due to increases in regulated utility rates or other wholesale costs. Therefore, REPs would prefer to limit increases whenever possible.

CenterPoint agreed with adoption of a cost cap based on customer impact, so long as that cost cap provides CenterPoint an adequate level of funding to meet the commission's goals and attain a performance bonus. That is, any cost cap, whether based on total program costs or customer impact, must be sufficient to allow CenterPoint to: (1) maintain the continuity of its standard offer and market transformation programs, (2) respond to changing market conditions and customer needs, (3) position CenterPoint to meet future research and development and pilot program investments, (4) increase programs that are particularly cost-effective and can be relied upon to meet future energy efficiency goals, and (5) give CenterPoint the opportunity to reach the maximum performance incentive in any given year. It agreed with other commenters that if the commission adopts the proposed demand reduction goals, the total program costs caps in the

proposed rule would result in revenue that would be inadequate. Similarly, any cost cap based on customer impact that is set to recover the same level of expense would also be too low. NAESCO agreed with the utilities that the energy efficiency program budgets should be set at levels that would allow them to achieve the higher goals. NAESCO concluded that the constraint on budgets should be the cost effectiveness of the programs, not an arbitrary per customer or total budget number.

Tx HERO stated that, obviously, the commission should and will consider the impact of total program costs to customers, but the emphasis should be on maximizing benefits of and opportunities for improved efficiency and new energy services while maintaining reliability. Thus, the commission should be guided by its judgment of the total program costs that are reasonable and necessary to support a market that drives technology improvements. TLSC-Tx ROSE stated that the commission should not establish any new cost caps. Instead, the most effective and efficient method consistent with the public interest would be to set budgets on a utility-by-utility basis as part of a contested case proceeding where consumers and their representatives can review and evaluate the reasonableness and efficiency of proposed energy efficiency programs. The current procedures essentially lock the public out of the process of approving the energy efficiency plans before they are implemented. The commission's position has been to deny public participation in reviewing utility energy efficiency plans and reports before the plans are implemented. There has been at least one attempt by the public to initiate a proceeding to evaluate and shape programs for the public good before implementation but that attempt was denied. TLSC-Tx ROSE noted that there is no opportunity to question the reasonableness or effectiveness of the plans or to verify the information in the utility reports.

Consequently, the current procedures establish rates to be paid and bonuses to be calculated without public input into whether the plan is deficient or creates inefficient or ineffective programs. TLSC-Tx ROSE expressed the view that this process adversely affects programs available to low income consumers. In almost all of the most recent utility EECRF filings substantial budget funds scheduled for the targeted weatherization programs were not spent on these programs but shifted to other programs. The result for low income consumers was that many of the most financially fragile consumers did not obtain the benefits of this program. TLSC-Tx ROSE argued that while the legislature did set certain budget parameters for the energy efficiency program, it did not establish ever increasing budget caps, as the proposed amendments would do.

In reply comments, CORE argued that the commission may not eliminate cost caps without violating PURA §39.905, which expressly provides for such caps on program costs.

Walmart supported the cost cap concept, but it took no position on whether a cap based on customer impact is superior to the current cap based on total program costs. Walmart noted that large commercial customers that engage in energy efficiency on their own can meaningfully assist in meeting energy savings goals without tapping into funds collected from customers through an EECRF. Walmart included in its comments a proposal to encourage such investment in energy efficiency that would help utilities meet their energy savings goals, without increasing the program costs that are collected from ratepayers.

Commission Response

The commission appreciates the comments on this question. The commission has considered the comments in connection with the adoption of amendments to subsection (f), relating to cost recovery.

A number of commenters submitted statements that supported the proposed amendments, including the individuals filing comments in connection with the Texas Campaign for the Environment, the Historical Westside Association, Port Arthur ISD, Representative Joe Deshotel, Dwight Wagner, Joe Johnson, Kirk Vital, the William C. Velasquez Institute, Tx CHP, Efficiency Texas, McKinstry Company, and KGRA Energy. In addition, the commission received emails from about 50 other individual supporting an energy efficiency goal of one percent of peak demand and greater transparency in the energy efficiency program.

§25.181(a): Purpose

EUMMOT proposed modifying §25.181(a) and urged the commission to retain some latitude to establish lower goals for specific utilities if a utility demonstrates that a lower goal would be appropriate, based on market conditions and other factors that might impact the utility's ability to meet a goal.

Commission Response

The commission agrees with EUMMOT that the commission should be able to establish lower goals or provide higher caps for a utility in certain cases. The commission modifies the amendment in subsection (e) to allow the commission to establish lower goals or higher

caps if the utility demonstrates that compliance with the goal or cap is not reasonably possible and that good cause supports the lower goal or higher cap.

Application

§25.181(b): Application

No changes to subsection (b) were proposed by the commission.

Definitions

§25.181(c): Definitions

EPE supported the proposed changes to subsection (c) and proposed adding a definition for “pilot program” and clarifying whether “peak demand” in §25.181(c)(24) refers to Texas-jurisdictional retail peak demand or total company peak demand.

Tx HERO recommended deleting “incentive’ from the definition of “energy efficiency incentive program.”

CenterPoint proposed the addition of a new definition for lost revenues that would treat them as a program cost for purposes of the EECRF, and would calculate lost revenues as an amount equal to the forecasted reduction in revenues due to the reduction in kWh sales and demand resulting from energy efficiency programs, by multiplying the forecasted deemed savings reduction in kWh sales and demand by the applicable customer class rates.

ClimateMaster proposed modifying the definition of “renewable demand side management technologies.” ClimateMaster noted certain renewable DSM measures, such as solar water heaters, are considered “generation offset technologies” under §25.173(c) of this title (relating to Goal for Renewable Energy), rather than “renewable energy resources” due to the fact that they neither generate electricity nor “exclusively” rely on renewable sources. A solar water heater does not generate electricity, but the amount of energy it offsets can be quantified and is eligible for renewable energy generation credits in certain circumstances. Additionally, a solar water heater requires some electricity to function properly so it does not “exclusively” rely on renewable sources, but the use of a renewable energy to preheat water significantly reduces the electric demand of the device as compared to a conventional water heater, so it should qualify it as a renewable DSM technology.

ClimateMaster proposed addition of a definition for “generation offset technology” to properly account for all of the renewable DSM technologies that should be eligible for incentives. It recommended that the term be defined by reference to the definition in §25.173(c).

Commission Response

The commission does not adopt EPE’s recommendation to add a definition for “pilot program.” The commission believes that the concept of a pilot program is well understood, and participants in the EEIP have worked to develop a template for a pilot program that would call for the utilities to report the results of these programs annually. The commission adopts EPE’s recommendation to specify that “peak demand” under §25.181(c)(24) refers to Texas-jurisdictional retail peak demand. This amendment clarifies

that a utility's energy efficiency requirements under this rule are based not on the utility's total peak demand, which may include load outside of Texas and wholesale load, but exclusively on Texas retail load.

The commission does not adopt Tx HERO's recommendation to delete "incentive" from the definition of "energy efficiency incentive program," because the term "incentive" differentiates this program from a "rebate" program. The commission does not adopt CenterPoint's recommendation to add a new definition for lost revenues. For the reasons explained in the response to the comments on question 1, the commission is not adopting a lost revenue mechanism, so the definition is unnecessary. The commission is not adopting the new definition proposed by ClimateMaster for renewable DSM technologies including customer-sited solar photovoltaic panels, solar water heaters, and geothermal heat pumps. Renewable technologies are already permissible under the rule, with appropriate limits, and therefore the proposed new definition is not necessary.

Cost-effectiveness

§25.181(d): Cost-effectiveness standard

CORE, EUMMOT, TIEC, and the REP Coalition recommended that a target date certain be established for updating avoided cost values each year for revisions to the avoided costs of capacity and energy under subsection (d). CORE recommended posting revisions in a project specified in the rule, or posted on a website to permit stakeholders to timely file challenges. The REP Coalition recommended posting notification of the revisions on or before February 1, and EUMMOT recommended posting notification of the revisions on or before March 15 on a

webpage designed for this purpose. TIEC stated that posting the revised cost of capacity and energy on a webpage does not constitute sufficient notice and would raise due process concerns. TIEC concluded the commission should publish *Texas Register* notice of the revised factors to ensure that parties have a full and fair opportunity to challenge the revisions, if necessary.

Commission Response

The comments of CORE, EUMMOT, TIEC, and the REP Coalition imply the need for notification of a target date for making changes in avoided capacity and energy costs. The commission currently requires the utilities to notify the energy efficiency service companies (ESCOs) of changes in incentive levels, because the programs depend on their participation, and the incentive levels are clearly a matter of importance to them. The incentives should be set at a level that keeps the ESCOs engaged in the utility energy efficiency programs. The commission is adopting a requirement that notification of changes be posted no later than March 15th on a webpage designed for this purpose. The commission is not adopting TIEC's proposal to publish notification of the revisions in the *Texas Register*. The commission believes that the web posting will provide better notice to persons who are interested in the energy efficiency program than notice in the *Texas Register*.

Texas Efficiency, Tx HERO and the Sierra Club supported the proposed mechanisms to determine the avoided cost of capacity and energy. The Sierra Club contended that most energy efficiency measures will cost significantly less than these avoided costs and that the proposed avoided costs are more realistic than the current calculation under the program. Sierra Club

hoped these more liberal avoided costs calculations would encourage utilities to try new programs while the overall cost of the program remains low.

EPE supported the avoided cost of capacity, contingent upon the commission retaining the provisions in subsection (d)(2)(B) of the proposed rule that permit non-ERCOT utilities to petition the commission to use a different avoided cost of capacity. EPE did not support the proposed avoided cost of energy, noting that the calculation applies to ERCOT utilities, and EPE is not in ERCOT.

Cities proposed revising the method for establishing the annual avoided cost of capacity and energy under subsections (d)(2) and (d)(3), as these provisions have become more significant in affecting rates than when the initial rule was adopted in 2001. Cities noted that the proposed rule also increases the cap on bonus payments, and that the bonus paid to utilities includes the summation of avoided energy and capacity costs, increasing the significance of the avoided cost calculation. Cities urged the commission to ensure greater accuracy in the development of avoided costs in order to avoid harm to ratepayers by adoption of programs which may not be cost-effective and through payments of excessive bonuses to utilities.

Cities and CORE recommended revising the avoided capacity costs under subsection (d)(2) to include a reasonable economic carrying charge of 8.5% and a specified fixed charge rate of 10.4% to the EIA combustion turbine investment. In their view, this method is more consistent with expected recovery of peaking capacity in competitive markets and could be used to escalate fixed charges for energy efficiency programs with differing lives, thereby recognizing the higher

avoided costs associated with programs which have a longer duration. TIEC agreed with Cities and CORE that the proposed avoided capacity costs and energy costs are too high, conceptually incorrect, and that the rule provide no basis for the excessive increases that are unsupported by current market prices. TIEC noted that an inflated avoided cost would result in an incorrect evaluation of the cost effectiveness of the programs; result in utilities spending significant sums on ineffective programs; and the utilities would not achieve the demand reduction goals. TIEC stated that it is not clear that any increases are warranted, and decreases may be necessary in consideration of the current energy and demand costs in ERCOT. It asserted the commission should ensure that the avoided cost calculations reflect current, accurate cost levels, and the use of energy and capacity costs that existed in 2007 would be wholly incorrect and inconsistent with the statutory requirement of cost-effectiveness. The Policy Foundation and TLSC-Tx ROSE also opposed the proposed increases in avoided cost of capacity and energy. TLSC-Tx ROSE stated that the savings do not support an economical increase in the program and opposed the proposed increase in the avoided energy and capacity costs.

Cities and CORE recommended that avoided energy costs under subsection (d)(3) should be based on the fuel expense associated with the combustion turbine generation which is used to determine avoided capacity costs. Cities and CORE stated that EIA indicates a 10,800 heat rate for the combustion turbine, which implies an energy price of \$43/MWh based on the 2009 Henry Hub gas price, or \$48/MWh using the EIA forecasted 2010 Henry Hub gas price of \$4.58. They suggested this method would be simpler and more straightforward, would result in an avoided energy cost consistent with the method used to develop the avoided capacity cost, and would prevent double counting the capacity component when the total avoided costs are tabulated. Cities and CORE also argued that the proposed \$100/MWh avoided energy cost is in excess of

energy prices in the ERCOT market, as the 2006-2008 balancing energy price in ERCOT was \$63/MWh. Cities and CORE noted that ERCOT is an energy-only market, and capacity costs are recovered through the market clearing price of energy. Thus, it is not an appropriate methodology to use the average ERCOT balancing energy price for all hours during the peak period for the previous two years as proposed. Cities and CORE claimed the proposal to double the avoided energy cost is ironic because energy prices declined significantly last year, with gas prices falling to their lowest level since 2002. Cities and CORE concluded because both capacity and energy costs are recovered through ERCOT hourly energy prices, the energy price is appropriate only for estimating *combined* avoided capacity and energy costs. In addition, confining avoided energy costs only to peak hours is unrealistic because energy efficiency measures, such as lighting, produce avoided energy costs in *both* peak and off-peak periods.

The REP Coalition recommended that the cost-effectiveness standard in subsection (d)(2) should be modified to state that the commission may establish different avoided costs consistent with the parameters set forth in the rule. It agreed that the avoided cost of capacity should be based on information reported by the Energy Information Administration (EIA) in the Cost and Performance Characteristics of New Central Station Electricity Generating Technologies, as reported in EIA's *Annual Energy Outlook* for the base overnight cost of a new conventional combustion turbine, but it recommended that this capacity cost apply to all electric utilities, unless the commission establishes a different cost of capacity. The REP Coalition similarly recommended that subsection (d)(3) be modified to establish the avoided cost of energy at \$0.10/kWh for all electric utilities, unless the commission establishes a different cost of energy.

Texas Efficiency stated that its analysis of all program costs showed these programs are highly cost effective and at the current 5.5 cents per kWh, \$80 per kW, a ten year life, and a 10% discount rate, the ratio of avoided costs to actual costs over the life of the program since its inception in 2002 has been about 3.1:1. It noted that the ratio for 2008 was also 3.1:1, which suggested that the exemption of the transmission-level industrial customers in 2008 had little impact on the overall cost effectiveness of the energy efficiency programs. Texas Efficiency stated that a seven year life yields a benefit-to-cost ratio of 2.5 to 1, which is clear evidence that the current programs are cost effective. Economists would encourage the state to invest up to the point that marginal costs just equal marginal returns, in order to optimize total benefits to all customers. Efficiency Texas suggested that by investing \$1 billion in energy efficiency over the next several years, even if the cost effectiveness of programs declines to 2:1, rate payers will have avoided \$2 billion in power costs, based on the commission's own, conservative avoided cost estimates under the current rule. Efficiency Texas disagreed with the utilities' case that the costs of acquiring efficiency will double under the proposed rule. Texas Efficiency stated that cost will no doubt increase somewhat as program goals increase, and increased incentives may be required to increase the penetration of emerging new technologies, but that increased efficiency investments will save customers money compared to doing nothing, as long as the programs are cost effective, as required by PURA 39.905.

EPE and Entergy opposed the use of an arbitrary calculation of the avoided cost of energy as it does not reflect the utilities' actual costs. They noted these utilities are not in the ERCOT region, and there is no correlation between the market clearing price for balancing energy in ERCOT and their avoided cost of energy. Entergy further stated that it is impractical to force

one single set of avoided capacity and energy numbers, as they operate in discrete markets that each have distinct avoided energy costs based on different power prices, emission allowance costs, and natural gas costs. Entergy suggested the use of modified formulae for the non-ERCOT utilities, due to these differences in market conditions. Entergy urged the commission to allow non-ERCOT utilities to seek good cause exceptions or permit other methodologies for calculating avoided costs, because of the unique assumptions and market conditions that utilities encounter. Entergy believed that using a pre-defined and transparent avoided capacity and energy cost calculation methodology would be a flexible, accurate, and unambiguous means for estimating avoided costs to evaluate energy efficiency programs. Entergy noted that it is a part of a multi-state system that operates according to the principles of security-constrained economic dispatch, and thus flexibility is needed for them to administer the energy efficiency programs in a cost-effective manner.

Cities foresaw several problems with Entergy's avoided cost proposal to allow utility-specific avoided capacity cost calculations for non-ERCOT utilities. Cities opposed the proposal because Entergy's corporate resource planning assumptions are highly sensitive and confidential, and its generation forecasts are based on confidential discussions with vendors. Cities argued that using avoided capacity costs based on confidential assumptions and data would be inappropriate. Cities stated that the use of utility-specific avoided capacity cost calculations, as opposed to a single generic calculation, would increase the potential for controversy and dispute in EECRF proceedings.

Cities took issue with the details of Entergy's proposal for calculating avoided costs for including such factors as capacity reserves, line losses and transmission-distribution costs, which the commission has chosen to exclude from the calculation in the past. Cities objected to Entergy's avoided cost of energy proposal, noting that it is wholly inappropriate to use the utilities' forecasted wholesale prices as a measure of the avoided cost of energy as the methodologies for these forecasts are generally confidential and highly sensitive information. Cities agreed with the comments of others that the energy efficiency program currently lacks transparency and utilizing utilities' highly sensitive forecasts for the cost of energy would only exacerbate the existing transparency problem. Cities suggested using current technology heat rates and gas prices to determine avoided energy costs, which would reduce potential controversy over long term energy forecasts.

The REP Coalition opposed Entergy and Cities' proposed alternative methodologies to calculate the avoided cost of energy. The REP Coalition disagreed with Cities' proposed MCPE-based method to calculate avoided energy cost with respect to utilities located within ERCOT.

EUMMOT responded to Cities' argument that the avoided capacity cost is overstated and that the avoided energy cost estimate is too high. EUMMOT concluded there are many different approaches to calculating avoided capacity costs, but the approach that has been used by the commission over the past ten years has produced reasonable results, and updates to the current approach are generally appropriate. EUMMOT supported provisions of the proposed rule that would permit a non-ERCOT utility to propose avoided costs that may differ from those

calculated for the ERCOT utilities. This would allow differences in costs among power regions to be appropriately recognized.

Commission Response

The commission recognizes that the avoided costs in the proposed rule are higher than today's electricity prices. The avoided costs in the proposed rule were based on the peak-hour energy prices in the ERCOT balancing energy market in 2008 and 2009. The commission agrees with several of the commenters that the avoided energy costs in the proposed rule are too high. Prices in 2008 were higher than prior or subsequent periods, and the commission concludes that the avoided costs being adopted in this rule should not include 2008 prices. Accordingly, the commission is setting the initial avoided energy price based on 2009 peak prices only. ERCOT does not operate a long-term capacity market. ERCOT does operate various daily capacity markets (regulation, responsive reserve, non-spinning reserve, and replacement reserve services) and obtains other services from resources (voltage support, black start, reliability must-run, out-of-merit capacity, and out-of-merit energy services). As a result, resources operating in ERCOT have the opportunity to obtain payments from a number of different services from ERCOT in addition to balancing energy services, many of which can be provided only when a resource is not providing balancing energy service. The revenues obtained by resources from the provision of these various services can vary considerably from resource to resource. In addition, energy efficiency measures can reduce transmission and distribution costs and line losses, which supply-side resources do not. These reductions in costs can vary considerably based on the particular circumstances. For this reason, the rule has relied on

an Energy Information Administration estimate of capacity costs for the avoided capacity cost and ERCOT market-based prices for the avoided energy costs. The commission believes that this approach is reasonably accurate and is transparent and straight-forward. The commission believes that it is important to provide separate incentives for capacity and energy in the energy efficiency program, to provide adequate inducement for energy efficiency service providers to operate programs that save both capacity and energy. Both kinds of savings have a value for society and customers. CORE proposed that a formula be used for avoided energy costs, based on the expected cost of gas times the heat rate of a combustion turbine. The commission believes that this avoided cost is not consistent with the fact that energy prices in the ERCOT region are determined by competitive forces and may be higher or lower than the formula proposed by CORE. The avoided cost being adopted by the commission should provide higher avoided costs and the possibility of higher incentives for energy efficiency measures, when generation resources are in short supply and energy prices are high, and will provide lower avoided costs and lower incentives for energy efficiency measures, when the supply of generation resources is adequate and energy prices are low. The commission concludes that in this market environment, the price response in the rule that is being adopted is appropriate. The rule that is being adopted makes it clear that the avoided energy costs will be based on the prices in the ERCOT real-time market, unless it approves an alternate calculation of the avoided cost of energy.

The commission concludes that there is value in transparency and that avoided capacity and energy costs should be based on information that is readily accessible to persons who

are interested in the energy efficiency program. For this reason, it does not agree with Entergy's request for a broad "good cause" exception that would permit the utilities to petition the commission for approval of alternative methodologies to calculate avoided costs. At the same time, the accuracy of an avoided cost calculation is also important. The commission modifies the proposed rule to permit a non-ERCOT utility to apply for an alternative calculation of the avoided cost of capacity, based on the costs of a resource acquisition or power-purchase agreement that the utility has fully disclosed in a public filing at the commission, or an alternative calculation of the avoided cost of energy, based on market-based avoided costs, if the utility operates in a region with an energy market for which prices are reported publicly. If the utility does not operate in such a region, the rule will permit it to use an avoided energy cost based on the expected heat rate of the gas-turbine generating technology specified in the rule, multiplied by a publicly reported cost of natural gas. The commission believes that such an alternative provides adequate transparency, while giving utilities an option that may better reflect their avoided costs.

The commission does not agree with Cities and CORE that confining avoided energy costs only to peak hours is unrealistic because energy efficiency measures, such as lighting, produce avoided energy costs in *both* peak and off-peak periods. It is true that some measures, such as lighting, provide energy savings in a large number of off-peak hours. On the other hand, because the rule establishes goals for reducing demand in peak hours, many of the measures that are used to meet the goals, such as measures that address air-conditioning load, will provide most of their energy savings during peak hours. To provide incentives for many of the measures that address peak consumption, higher avoided costs

that reflect peak energy prices are likely to be needed. Accordingly, the commission believes that it is appropriate to use peak-hour energy costs as the avoided cost of energy.

The commission has made several proposed modifications to subsection (d) to provide more clarity to this subsection.

OPC argued that, in order to assess and evaluate the cost-effectiveness of the energy efficiency programs, the bonuses that the utilities are eligible to earn must be considered under the cost effectiveness standard. OPC noted that in the 2009 EECRF cases, each utility was awarded a bonus. OPC stated that it has been effective in the past to measure the cost effectiveness of a program by comparing the cost of the program (which includes the cost of incentives, measurement and verification, and the actual or allocated research and development and administrative costs) to the benefits of the program (which include the value of the avoided costs), but as the bonuses increase, the accuracy of the standard decreases, and the impact of the bonuses would need to be considered. OPC, TLSC-Tx ROSE and CORE proposed that subsection (d)(1) be amended to require the bonus to be included as a program cost.

Commission Response

The commission agrees with OPC, TLSC-Tx ROSE, and CORE's recommendation to include the bonus in the program cost, for the purpose of applying the cap. The commission is concerned about the costs of achieving higher energy efficiency goals, and one of the things it has done to control the costs is to make the bonus subject to the costs caps that it is adopting. The commission also notes that the higher goals in the rule will

result in increased revenue losses, which the commission is not addressing at this time. While the bonus is not designed to offset such losses, it does provide a successful utility a means of offsetting revenue losses associated with the energy efficiency program.

TLSC-Tx ROSE argued that the energy efficiency program has not resulted in an economical increase in energy efficiency for residential and low-income customers, due to increasing program costs without a guaranteed increase in energy savings and program benefits. They stated that, due to approved changes in the life of energy efficiency measures, the Energy Star Home incentive is now calculated based on a 23 year life, and that revisions to deemed savings for a retrofit air conditioner has been lowered from SEER 13.00 to SEER 12.44, both resulting in an increase in payment and with *no added energy efficiency benefit to the consumer or the utility*. TLSC-Tx ROSE referenced a 2006 study by Summit Blue that recommended programs to: (1) promote installation of cost-effective measures that produce high energy savings (kWh) but that are not being heavily pursued by sponsors; (2) allow different incentive levels for different measures within the same program; and (3) promote or require the installation of multiple measures at customer sites. They argued, however, that total incentive paid per measure should be capped and not exceed incentives paid in 2008 over a ten year useful life.

Commission Response

The program changes that TLSC-Tx ROSE addressed were made for valid reasons. The use of measure lives for calculating program benefits that reflect actual measure lives is a means of improving the accuracy of the calculation of benefits and permitting additional measures to be used in the energy efficiency program. Lowering the SEER for the air

conditioner replacement program was based on a study that showed that many customers were replacing parts on air conditioners, so that the efficiency of the resulting equipment was lower than the federal standard for purchase of a new air conditioner. The commission believes that historical program costs are not necessarily indicative of the costs that may be expected in the future. The utilities have argued, in fact, that significantly higher costs will be required to achieve the proposed goals, because of the expected adoption of new building codes and appliance standards. Other commenters have noted that significant funding from the American Recovery and Reinvestment Act for energy efficiency may make it more difficult and expensive in the future for utilities to meet their goals. The commission made the change in the rule relating to measure lives when it last amended the rule, to permit additional measures to be used, in light of the higher goals that the Legislature had adopted. The commission concludes that it would not be conducive to meeting higher goals to reverse its prior decision on measure lives.

Utility Goals

§25.181(e): Annual energy efficiency goals

NAESCO, Tx HERO and the Sierra Club proposed higher goals than the goals in the proposed amendments to §25.181. The Sierra Club also proposed increasing the proposed capacity factor. NAESCO argued that much higher goals have already been achieved in other states with new programs in states that have far less utility energy efficiency program experience than Texas. Tx HERO strongly supported the increases in annual energy efficiency goals and the inclusion of a transition to a new metric based on total demand in lieu of growth in demand, on the basis that it would provide utilities and the efficiency market a more dependable basis for planning.

Efficiency Texas submitted the utilities could meet the proposed increased goals. It argued that stimulus funds, building codes and new appliance standards will not have an appreciable impact on the utilities' ability to ramp up energy efficiency efforts for the foreseeable future, because of the large stock of existing inefficient housing and commercial buildings. Efficiency Texas claimed that other states have pursued far more aggressive goals for an extended period, which suggests that Texas utilities can achieve elevated goals. Efficiency Texas urged the commission to adopt the proposed transition to a goal based on a percentage of total load, as a more stable and predictable baseline. Efficiency Texas agreed with EUMMOT that the goals proposed are relatively aggressive and recognized the challenges faced by the utilities in meeting the proposed goals. In a spirit of collaboration, it proposed a compromise that moved the 1.0% goal to 2015, if the commission would also modify the utility plans for 2011 and 2012 to ramp the current programs up more quickly, rather than allowing the programs to languish at their current levels for two more years.

EUMMOT, EPE and Entergy concluded that not all of the utilities could meet the proposed increased goals. The Policy Foundation and TLSC-Tx ROSE stated the goals should not increase as the energy efficiency program was not cost-effective. EUMMOT recommended that the goal increase to 30% of load growth to avoid the price tag associated with the more aggressive, less feasible proposals. EUMMOT agreed with Entergy, the REP Coalition, and Cities that the commission must weigh the benefits of expanded energy efficiency programs against the rate increases that would impact consumers with adoption of the proposed aggressive goals.

EUMMOT questioned aggressively raising goals when many of the energy efficiency programs are under-subscribed. EUMMOT noted that Efficiency Texas and HEB complained that insufficient incentive funds are available and argued that greater funding is necessary to ensure that all qualifying projects can benefit from these utility programs. According to EUMMOT, the available incentive funds typically exceed the requests for standard offer program incentives, and only in several popular programs offered by some of the larger utilities are incentive funds reserved very quickly. However, this is not true for the majority of the programs. EUMMOT concluded that a driving force for those who want to significantly increase the energy efficiency goals is the misconception that incentive funds in today's programs are reserved by project sponsors within seconds of being offered. EUMMOT stated that some utilities have stirred competition among service providers to complete energy efficiency projects in a timely fashion by paying incentives on a first-invoiced basis, which is a departure from reserving funds for programs. EUMMOT stated that at the end of the program years 2006-2008, the commercial programs had more than \$17.3 million remaining, or nearly 18.6% of the commercial program budgets; residential programs had more than \$8.6 million remaining, or 10.5% of the program budgets; and the Hard-to-Reach programs had just under \$14.5 million remaining, or 15.8% percent of the program budgets.

EUMMOT said they cannot support a demand reduction of more than 30% of load growth, which is a middle ground to those arguing for much higher goals. EUMMOT stated that, as the energy efficiency goals continue to grow, so will the adverse financial impacts of energy efficiency achievements, absent a regulatory mechanism such as a lost revenue adjustment

mechanism or higher bonuses than proposed in the rule. EUMMOT noted that adverse financial impacts have become a realistic and serious concern and the utilities alone support the implementation of a regulatory mechanism to limit the adverse financial impact.

EUMMOT noted that ACEEE, the Sierra Club, Efficiency Texas, and CLEAResult Consulting recommend more aggressive goals and yet have said the least about the likely impact of such goals upon consumers' electricity rates. EUMMOT claimed there is no free lunch and if higher goals are established, higher cost must inevitably be recovered from ratepayers through rates. EUMMOT noted that several commenters voiced opposition to paying for the increased costs of higher energy efficiency goals, and, yet, they still argued in favor of the higher goals. EUMMOT stressed that the only way to constrain the rate impacts of these programs is to limit the demand reduction goals to moderate and achievable levels.

The Policy Foundation questioned whether the commission could adopt the increase in the goals without contravening specific statutory language or imposing burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions. The Policy Foundation stated that while little can be done administratively to reduce the negative impact of the current energy efficiency goals, the commission should not increase the economic costs of this program by adopting this proposed increase in the goals. The Policy Foundation stated that the commission certainly has significant authority to adopt rules to implement the program, but caution should be exercised in extending that authority to the proposed increase in the efficiency goals. The Policy Foundation stated that the utilities reduce their revenues by reducing their overall demand and are mostly compensated for the expenses of these programs. However, the utilities have a

burden beyond the statutory provisions of the current 20 percent goal, because they have no means for increasing demand and the associated revenues except through the commission. The Policy Foundation concluded it is doubtful that the current language of the statute allows the commission to adopt goals beyond the specific statutory goal of 20 percent. The Policy Foundation contended that the energy efficiency programs were not cost effective and therefore the commission should not increase the economic costs of this program by adopting the proposed increase in the goals. It stated that, under the §25.181(d) cost-effectiveness standard, an energy efficiency program is deemed to be cost-effective if the cost of the program to the utility is less than or equal to the benefits of the program. The Policy Foundation stated that since the agency cannot accurately determine at this point whether or not the programs under this rule are actually cost effective, the proposed increases should not be adopted.

TLSC-Tx ROSE proposed that no action be taken by the commission, unless better program controls are in place to raise program efficiency standards and to prevent increasing program costs. TLSC-Tx ROSE stated that there are no measurable energy efficiency benefits, because of the adoption of more liberal deemed savings standards. TLSC-Tx ROSE expressed concern that the savings that are required to be achieved through programs for hard-to-reach customers (defined as household income up to 200% of the federal poverty guideline) remain unchanged at 5% of the utility's total demand reduction goal. TLSC-Tx ROSE cited statistics from the Texas Department of Housing and Community Affairs (TDHCA) that on any given day there are 14,000 households on weatherization waiting lists with close to three million households meeting the income eligibility requirements for the program. TLSC-Tx ROSE claimed the \$326 million

from the U.S. Department of Energy in stimulus funds being made available can weatherize about 70,000 homes and will only assist about 0.3% of the eligible population.

Entergy opposed the increased goal of a 50% increase in peak demand savings by 2015 stating it is not reasonable and suggested that a 30% increase by 2015 is the maximum that should be implemented. EPE opposed increases to the peak demand savings goals for electric utilities with peak demand of less than 3,000 MW. EPE stated that the increased goals impose an unrealistic and impracticable expectation upon some utilities to meet the goals, without adequate cost recovery. EPE stated that the median family income in El Paso is approximately \$36,500, which is 31% below the state average and limits the number of residential and small commercial customers with sufficient disposable income to install energy efficiency measures in their homes or businesses. EPE further stated more than 85% of the homes in El Paso use energy-efficient, cost-effective evaporative cooling systems, which use only about a quarter of the energy used by a refrigerated air conditioning (AC) system. Therefore, many of EPE's customers do not need to install an expensive new energy efficient refrigerated AC system; the building shell and duct efficiency improvements that constitute the majority of residential efficiency savings produce little, if any, electricity savings in homes with evaporative cooling; and the addition of insulation also has little impact on electricity use in homes or businesses that use evaporative cooling. EPE noted the 2008 Itron study's two impediments to achieving the aggressive new energy efficiency goals are that (1) there has been a shift in baseline energy usage because of higher codes and standards for energy efficiency measures, and (2) a number of recently enacted, well-funded federal and state programs will compete with traditional utility programs over the next several years, in particular the American Recovery and Reinvestment Act (ARRA) funds will depress

savings that typically would have been captured through EPE's energy efficiency programs. EPE stated that two ARRA programs would be in direct competition with EPE's energy efficiency programs, the \$288 million received by TDHCA to weatherize 40,000 low-income homes and the ARRA funds distributed through the State Energy Conservation Office.

Commission Response

The commission believes the progressively higher goals it is adopting are appropriate and are consistent with its authority. In recognition of the impact of the higher goals on program costs and customers' bills, however, it is adopting lower goals than those that it proposed. PURA §39.905 establishes a goal of reducing growth in demand in 2009 by at least 20%, but does not set out specific goals for years after 2009. It does direct the commission to provide oversight of the energy efficiency program and adopt rules and procedures to ensure that utilities meet the goals of §39.905. The commission concludes that PURA §§14.001, 36.052, and 39.905 permit it to adopt specific demand goals for years subsequent to 2009, which may be higher than the 2009 goals. Higher goals are achievable, they provide significant benefits, and they were generally supported by legislators in the last legislative session. Several commenters have pointed out that other states have adopted higher goals than the current Texas goals, and incremental increases in the goals have resulted in the large utilities successfully meeting the goals. Increasing the demand and energy savings will reduce energy costs for program participants and air emissions from power plants. It is clear that the program has a cost that is borne by all customers and particularly by customers that do not participate in the program and obtain the reductions in consumption that efficiency measures achieve. The commission is balancing the benefits

of the program with the costs to electricity customers in adopting higher goals. The commission is adopting a goal of 20% of growth in demand for 2010 and 2011, 25% of growth in demand for 2012, and 30% of growth in demand for 2013 and subsequent years. The rule that was published for comment included goals based on total peak demand, which the commission is not adopting. The goal in the proposed rule that was based on peak demand would represent a higher goal than the demand growth goal that the commission is adopting, and the commission considers that the appropriate balance of the competing interests would be to not adopt such a goal. The current rule includes a ratchet provision, so that if demand growth ceases, a utility's prior goal for demand savings (in megawatts) would not be reduced. The commission is retaining this ratchet in the rule that is being adopted.

The commission agrees with EPE that homes with evaporative cooling do not benefit from a weatherization program designed for homes with central air conditioning. In fact the commission has previously required a separate template for climates with evaporative cooling. The commission believes that opportunities exist for EPE to meet the goals through installation of technologies other than central air conditioning and weatherization. In addition the commission has established a mechanism under subsection (e) for a utility to request a lower goal or a higher cost cap to meet the goal.

TREIA, Sierra Club and Tx HERO supported raising the capacity factor from 20% to 25%. Sierra Club stated that reducing peak demand will lower peak emissions and may prevent the need for additional generation, but reducing energy use will have greater benefits in terms of

overall emissions, while saving consumers money. It argued that reducing overall energy demand is of greater importance. Sierra Club supported raising the capacity factor to 30% or even 35% and understands that for some utilities achieving these greater energy savings goals will be challenging. Sierra Club concluded that most utilities are already achieving a 25% capacity factor and, therefore, the commission should consider raising the capacity factor to 25% in 2012 and 2013 and to 30% in 2014. Sierra Club recommended establishing separate programs: a demand response program to reduce peak demand and an energy efficiency program to reduce energy use.

The Cities opposed the increase in the capacity factor for energy savings in the proposed amendment. Cities stated that the indirect effect of increasing the capacity factor would be to raise avoided energy costs and potentially increase the bonuses paid to utilities. Cities argued that the proposed increase in the capacity factor is unsupported by any evidence corresponding to changes in the types of programs which utilities should undertake, and that energy efficiency measures undertaken by utilities should be prioritized on the basis of cost effectiveness.

Commission Response

Increasing the capacity factor may increase the cost of the program. Increasing the capacity factor means that the utilities must obtain more energy savings, relative to capacity savings, so they must adopt programs that include sufficient energy-saving measures. Energy savings have clear benefits to customers who participate in the program. Residential customers, for example, are not billed for demand, only for energy, so reductions in their energy consumption reduce their bills. Energy savings have

environmental benefits as well, since most sources of energy result in air emissions. However, because of its concerns about the cost of the energy efficiency program, the commission is not adopting a higher capacity factor to calculate the energy savings goal. The capacity factor in the current rule appropriately balances the benefits of energy savings with the costs to ratepayers.

TREIA and Tx HERO supported either commission-established goals for distributed renewable technologies or allowing utilities to establish set asides for distributed renewable technologies, without being limited to a particular maximum or minimum.

ClimateMaster proposed modifications to subsection (e)(3)(F) regarding distributed renewable technologies to clarify there is not an imposition or an artificial cap on incentives for geothermal heat pumps, which can be considered distributed renewable technologies. ClimateMaster recommended amending subsection (e)(3)(F) to require a minimum set-aside for distributed renewable technologies of 20% and make it clear that geothermal heat pumps are included as distributed renewable technologies.

CenterPoint asserted one type of energy efficiency measure or class of customers should not be favored over others and that utilities should retain flexibility to administer energy efficiency programs best tailored to their service territories and customers. CenterPoint stated proposals from ClimateMaster, Solar Alliance, Efficiency Texas, Walmart, the REP Coalition and TLSC-Tx ROSE ask the commission to adopt a “one size fits all” approach to the advantage of specific efficiency measures and customer classes. CenterPoint submitted that §25.181 provides a

flexible framework that should not be disturbed so as to benefit any particular set of energy efficiency measures or class of customers.

Demand Response Texas, Efficiency Texas, and the Sierra Club proposed that the commission adopt a separate goal for demand response programs. Efficiency Texas noted that under the current rules, the utilities are able to use one-year load management commitments as a means to exceed their minimum demand reduction goals and achieve their maximum allowable bonus for any given level of effort. Without a specific goal for demand response, the utilities will continue to contract for the same exact load response, from the same customers, in order to reach this bonus, rather than acquiring demand response commensurate with its full inherent potential. Efficiency Texas sought a demand response goal, so that utilities would provide additional demand response opportunities for their customers, thereby reducing peak demand and benefiting all consumers. TIEC opposed the demand response mandate proposed by these commenters. TIEC stated that demand response programs are best addressed through ERCOT and utility-specific cases, rather than through the utility-mandated energy efficiency programs. TIEC also opposed a specific goal for demand response programs for the following reasons: (1) ERCOT has the most successful market-based demand response ancillary service programs in the country; (2) the commission should be exceedingly wary of creating any utility-based programs that would undermine or interfere with the current ERCOT programs, which must meet strict reliability standards before they can be implemented; and (3) the energy-only market provides incentives directly to consumers to shift loads away from high-cost periods and these market mechanisms are extremely effective and yet require no subsidies or mandates to work.

TIEC argued that establishing a separate goal for demand response programs is contrary to PURA §39.905(a)(1), which requires utilities to provide energy efficiency programs in a “market-neutral, nondiscriminatory manner.” TIEC further argued that PURA §39.905(c) requires that standard-offer programs be technology neutral, and to favor a particular type of program, such as demand response, would be inconsistent with PURA. CLEAResult disagreed with TIEC’s argument that demand response programs that impact system reliability, such as load balancing and peak shedding, should be addressed through ERCOT.

Cities, the REP Coalition and EUMMOT also opposed the suggestion by Demand Response Texas for a set-aside for a demand response program that would interrupt or reduce usage at times of peak demand. Cities stated that large industrial customers are the primary beneficiaries of demand side response technology, and a set-aside for demand response technology would benefit only large industrial customers. Cities noted that currently, only residential and small commercial class customers fund the EECRF.

EUMMOT opposed set-asides and special programs for special interests. EUMMOT noted various proposals for set-asides and other program mandates: the REP Coalition wants at least 25% of program funds for retail electric providers; ClimateMaster and SOLAR Alliance want an additional goal for renewable energy projects; Demand Response Texas and Efficiency Texas want a special goal for demand response, and Efficiency Texas wants standard offer programs to be favored over market transformation efforts. EUMMOT stated that more granular goals and set-asides impair the utility’s flexibility to allocate funds to promising efficiency opportunities to ensure that overall goals are met, and that as additional goal constraints are placed upon the

utilities, these programs would become more costly and risky to administer and would compete with each other and the existing goals. EUMMOT stated that the proposed increased energy goals conflict with the proposal from the demand response program providers seeking more load management, which provides little, if any, energy savings. EUMMOT further stated that demand response goals could lead to conflicts with ERCOT's Emergency Interruptible Load Service program. EUMMOT expressed concern that the establishment of minimum goals for renewable energy technologies could lead to a violation of any budget caps or rate impact caps and take funding away from other energy efficiency measures, given the relatively high cost of achieving savings through renewable energy projects.

EUMMOT also argued that the program managers at the utilities are in the best position to determine the need for these market transformation programs, based on considerations such as the potential savings within the utility's service area, the program's likely effectiveness, the size of the utility's overall budget, the utility's ability to develop and administer additional programs within its budget constraints, program costs, the economies of scale associated with running certain programs, and compatibility with the goals established by the commission.

Walmart agreed with TIEC that large customers have sufficient incentives to respond to demand, without participating in utility-sponsored programs. The Legislature recognized this and specifically exempted industrial customers from the energy efficiency mandate however, the commission applied the exemption only to transmission-voltage customers and many industrial customers have distribution-level load and are therefore subject to the current rule. This includes

industrial customers that take service directly from a substation, who are essentially the same as transmission customers but for one additional transformation.

TIEC and Walmart discussed a proposal from Walmart that would permit any customer that consumes at least one million kWh annually and demonstrates that it has proactively implemented energy efficiency or demand-side management programs to opt out of the energy efficiency program. TIEC took no position on this proposal, but noted that under PURA industrial customers are not subject to the energy efficiency mandates, and need not “opt-out.” If the commission decides to implement an opt-out for certain customers, it should ensure that it does not alter the position of the industrial customers taking service at transmission voltage. TIEC concluded the commission should amend the rule to ensure that all industrial customers are properly exempted from the energy efficiency programs in the rule, consistent with the Legislature’s directive.

EUMMOT opposed Walmart’s proposal to permit customers to opt out of the program. EUMMOT stated that Walmart’s proposal is unnecessary and overly broad because PURA already provides an opt-out for industrial customers receiving service at transmission-level voltage. EUMMOT expressed concern that Walmart’s proposal would significantly reduce the number of customers and revenue over which cost recovery would occur. EUMMOT noted that the commercial sector represents 37% of the state’s projected achievable energy savings as shown in the Itron Market Potential Study and that the potential for energy efficiency from any one sector depends not just on the amount of available efficiency potential, but on the number of transactions that might be required to reach that potential. EUMMOT expressed concern that

Walmart's opt-out proposal would place an inappropriate burden of the cost on those fewer customers who are not permitted to opt-out of participation. EUMMOT argued that Walmart has participated in several utilities' commercial standard offer programs for the past several years, and is currently participating in some 2010 programs and has reaped the benefits of participation. EUMMOT concluded that Walmart, therefore, should be prohibited from opting-out for at least the remaining life of measures for which it has received financial incentives.

GC-CEAC stated that the 2008 CHP report by Summit Blue Consulting estimated that an additional 13,400 MW of combined heat and power (CHP) technology could be economically developed in Texas by 2023 and, therefore, the commission should focus additional attention on CHP opportunities, including emerging small-scale CHP projects under 10 MW. Tx CHP also supported additional commission attention on CHP issues.

TLCS-TxROSE recommended a larger set-aside for programs implemented for the low-income customer class, and the REP Coalition recommended a set-aside for programs implemented for by the REPs.

Commission Response

The commission agrees with Cities, TIEC, Solar Alliance, Walmart, EUMMOT, and CenterPoint that the rule should continue to avoid set-asides for specific programs, such as those proposed by GC-CEAC, Demand Response Texas, Efficiency Texas, the Sierra Club, ClimateMaster, Solar Alliance, TLSC-Tx ROSE, and the REP Coalition. Set-asides for more expensive programs would make it more difficult for the utilities to meet their goal and to achieve a bonus, resulting in a less favorable revenue position for the utilities. The

rule does not prohibit the utilities from adopting programs that address the measures supported by GC-CEAC Demand Response Texas, ClimateMaster, Solar Alliance, Walmart, TLSC-Tx ROSE, or members of the REP Coalition that would assist them in meeting their goals. The utilities are required to meet the overall energy efficiency goal and other goals in the rule, such as providing programs for all customer classes. They are therefore in the best position to select programs to meet the goals. In addition, the budget limits in the rule will necessarily limit the amount that utilities will have available to develop and operate programs and provide incentives for multiple technologies. Set-asides for specific technologies and customer classes could limit the availability of funds for other potentially beneficial energy efficiency programs and limit the flexibility that the utilities need to choose cost-effective programs to achieve their goals.

The commission agrees with GC-CEAC that CHP projects of ten megawatts or less in size are eligible under the current rule. The utilities' broad latitude in the selection of programs would permit a utility to establish a program specifically for CHP options, but there is nothing in the rule that requires it to do so. The commission believes that utilities' discretion with respect to program selection should reflect factors that relate to the likelihood of achieving cost-effective savings, but CHP should not be arbitrarily rejected by utilities. CHP would appear to qualify for commercial standard offer programs, but the energy savings from a large CHP project might stress the budget limits of such a program. The commission recognizes that there may be uncertainty about how to calculate the savings from a CHP project. This is an issue that could be explored separately, after the current rulemaking proceeding is completed.

The commission does not believe that a provision permitting an individual customer to opt out of the program is reasonable. It might be difficult for utilities to track individual customers to apply different rates, and there is a risk that a customer would opt out after obtaining the benefits of the program, so that it would not share the costs in the same way that other customers do.

EUMMOT proposed clarifying that peak demand, as used in subsections (e)(1) and (c), refers to a weather adjusted peak demand for residential and commercial customers. EPE requested clarifying language in proposed subsections (e)(2)(B) and (e)(2)(C) to clarify contradictory language. EPE expressed the view that the 130% minimum demand reduction requirement is inconsistent with subsections (e)(2) and (e)(3). EPE concluded the commission should eliminate the 130% demand growth reduction requirement in subsection (e)(3)(D) or otherwise clarify this apparent discrepancy.

The REP Coalition recommended clarifying language in subsection (e) to tie the goals back to the cost cap language proposed in subsection (f)(8). The REP Coalition recommended modifying subsections (e)(1), (e)(2), and (e)(4) to include the phrase “subject to the cost cap specified in subsection (f)(8).”

Commission Response

The commission is not adopting the proposed changes relating to weather adjusted peak demand for residential and commercial customers, because it believes that rule provides

for a weather-adjusted peak in the provisions relating to how peak demand is calculated, and that the section is clear. The commission agrees that the 130% provision may have been confusing and is deleting it. The commission does not agree with the REP Coalition's recommendation as formulated. The cost caps are clearly expressed in subsection (f)(8) and the commission finds there is no need to be duplicative.

Cost Recovery

§25.181(f): Cost recovery

SPS stated that PURA §39.905 and §25.181 do not apply to SPS and cited *Application of Southwestern Public Service Company for Approval of Energy Efficiency Cost Recovery Factor Rider and Related Exception*, Docket Number 35738, Preliminary Order (September 15, 2008). SPS requested the commission determine whether §25.181 applies to it and, if so, whether the cost recovery and incentive provisions apply to SPS. SPS sought assurance that it would be entitled to recovery of cost as well as a phased-in approach to higher goals should the commission find it has authority to include SPS under §25.181. SPS believed the statutory authority for the proposed amendments to §25.181 does encompass SPS, so that the rule, if adopted, would be distinguishable from the commission's decision in Docket Number 35738. SPS requested that the commission affirmatively conclude that it is encompassed within §25.181 and allow SPS the flexibility to obtain the increased goals.

The Association of Xcel Municipalities (AXM) requested that the commission deny SPS's request for an "affirmative declaration" that the cost recovery and performance incentives of the proposed amendments to the rule would apply to SPS. AXM requested that the commission delete the statement in the preamble that the rule will apply to all utilities. However, should the

commission ultimately apply §25.181 to SPS, it should apply all provisions of §25.181 to SPS so that SPS is required to meet the State's energy efficiency goals and also be subject to penalties as set forth in the rule. AXM made the following arguments: (1) nothing in PURA §14.002 gives the commission the rulemaking authority to apply §25.181 to SPS; (2) PURA §36.204 does not give the commission the authority to apply cost recovery and performance bonus mechanisms established by §39.905 to SPS; (3) the commission does not have the implied authority to apply §25.181 or the cost recovery and performance bonus mechanisms of §39.905 to SPS; (4) the Legislature has not amended §39.905 to make it applicable to all utilities; (5) in amending limited provisions of a rule, the commission may not retroactively undo the statute pursuant to which provisions established by the initial rule were adopted; (6) SPS cannot "cherry pick" provisions of §39.905 or §25.181 that apply to it; (7) advisory opinions are prohibited as set forth in the federal Declaratory Judgment Act, so that the commission lacks jurisdiction to issue §2001.038 declaratory judgments; (8) the cost recovery and performance bonus mechanisms in §25.181 may not be applied to SPS; (9) the EECRF implemented by rule 25.181 is exclusively established by PURA §39.905; (10) PURA §39.905 more clearly expresses the legislative intent regarding the cost recovery of energy efficiency expenses; (11) PURA §39.905's limited application is an exception to PURA §36.204; (12) applying the EECRF to SPS violates PURA §39.204; (13) the commission may not rely on §14.001 to apply energy efficiency provisions established under §39.905 to SPS; (14) the commission's broad rulemaking authority under §14.002 does not permit it to adopt amended §25.181 so that all of its provisions apply to all utilities; (15) the commission may not reverse the Legislature exclusion of SPS from §39.905; and (16) the commission cannot undo the adoption of §25.181 relying on PURA §39.905 through an amendment.

Commission Response

The commission disagrees with AXM that PURA does not allow the commission to apply §25.181 to utilities that are not subject to PURA §39.905. PURA §14.001 gives the commission the general power to regulate and supervise the business of each public utility within its jurisdiction, PURA §36.052 reflects a state policy in favor of energy conservation, and PURA §36.204 gives the commission authority to allow timely recovery of the reasonable costs of conservation and to authorize additional incentives for conservation. These provisions give the commission authority to apply §25.181 to utilities not subject to PURA §39.905. Through this amendment, the commission is making it clear that §25.181 applies to all electric utilities, including SPS. The commission also concludes that the procedural issues cited by AXM are not an obstacle to the adoption of a rule that applies §25.181 to SPS. This proceeding is not a request for a declaratory order; rather, it is a rulemaking proceeding under the Texas Administrative Procedure Act. The commission has included in its proposed rule explicit provisions applying the amended rule to SPS, and the amended rule was published for comment by interested persons. The commission has complied with the procedural requirements for a rulemaking proceeding, and it has the authority to adopt the amendments applying this section to SPS. The policy reasons that support the application of the rule to other utilities are not different for SPS, and the commission concludes that this utility should be subject to the same rules as the other utilities that are under the commission's jurisdiction.

Cities supported cost recovery caps at 250% through 2014. Cities expressed concern that without a cap on recovery, utilities will be free to spend unlimited amounts of ratepayer money, all in the name of “energy efficiency,” and the cost recovery caps are crucial to maintaining the cost effectiveness of the program. Cities stated that cost caps do not deter spending on energy efficiency programs and noted EPE’s position that “cost caps” are truly “recovery caps.” Cities concluded that utilities may choose to spend additional amounts on energy efficiency measures to increase the likelihood that the utility will exceed its goal and receive a bonus under §25.181(h) and that the cost-caps contained at §25.181(f)(8) merely limit the amount a utility may recover through the EECRF. Cities argued that it is necessary to avoid spending cap “creep” in order to incentivize utilities to efficiently administer their programs and to ensure true load growth decrease. Cities proposed cost caps as follows: recovery of program expenditures for 2012 may not exceed 175% of the utility’s program budget for 2010, as included in its April 1, 2009 filing; for 2013 may not exceed 250% of the budget for 2010; and for 2014 may not exceed 250% of the budget for 2010.

Tx HERO supported the proposed caps on program expenditures for program years 2012 through 2014 as a transition mechanism, and would support higher caps because ultimately efficiency is the cleanest, cheapest and most dependable resource in our mix of alternatives for energizing sustainable economic growth and, as such, should not be capped. Tx HERO concluded that utility charges should allow cost recovery to obtain maximum practical efficiency improvement. The Solar Alliance supported higher cost caps, as a way of allowing utilities to respond to more customers’ requests for support of solar distributed generation.

The Sierra Club supported the cost caps as utilities moved forward to meet the doubling of the energy efficiency goal from 10 percent to 20 percent of load growth. The legislation contemplated in 2009 also contained cost caps. Sierra Club believed the Legislature clearly indicated the desire to have cost caps. Sierra Club noted that the proposed caps would allow a particular utility to spend up to, but not more than, three times its 2010 program expenditures to meet its 2014 goals. Since the goals in 2010 are at 20 percent of growth and the goals in 2014 are at 50 percent of growth, a 300 percent limit should be reasonable. Sierra Club stated that some utilities have indicated that the future cost of energy efficiency may increase as the lowest hanging fruit in energy efficiency is already being taken advantage of. Sierra Club commented that with minimum energy codes for new construction increasing throughout the state as cities like Waco, Weslaco, Dallas and Houston approve codes that meet or exceed the 2009 international codes, programs like energy star homes become more costly and may require higher incentives. Sierra Club concluded that, because of ARRA, there are significant dollars that will be spent in 2011 that may take care of many homes that could have been targeted by the utilities. Sierra Club proposed increasing the caps slightly to reflect higher costs to achieve energy savings, suggesting for 2012 a cap of 200% of the 2010 program budget; for 2013 a cap of 300% of the 2010 program budget, and for 2014 a cap of 400% of the program budget. Sierra Club concluded if a utility actually reached the proposed cap, the monthly impact might rise from approximately \$1 dollar per month today to \$5 dollars per month in 2014.

TLSC-Tx ROSE stated neither the current nor the proposed rule promote rational decision making. TLSC-Tx ROSE opposed the budget caps set out in subsection (f)(8).

The REP Coalition does not believe it is prudent to have ambiguity as proposed under subsection (f)(8) which sets forth limits such that a utility may not recover program expenditures for 2012 that exceed 175% of the utility's 2010 budget, or expenditures for 2013 that exceed 250% of the utility's program budget for 2010, or expenditures for 2014 that exceed 300% of the utility's program budget for 2010, yet the proposed rule does not expressly designate a cost cap for the years following 2014. This ambiguity can be interpreted in two ways: there is no limit on utility expenditures starting in 2015, or the limit specified for 2014 will apply to subsequent years until expressly changed by the Legislature or the commission. The REP Coalition also argued that the proposed cost cap in subsection (f)(8) is not a true cap on the amount the electric utility can recover through its EECRF. The REP Coalition stated that even if one calculates "300% times the program budget," that calculation would not include the amount attributable to any performance bonus rewarded to the utility. The proposed rule includes language in subsection (h) that allows for bonus payments based on a percentage of the net benefits for every 1-2% that the demand reduction exceeds a certain percentage of the goal. When taking into account the 10% additional Hard-To-Reach bonus available to TDSPs, these bonus payments may be as high as 44% of the utility's program costs by 2014, resulting in the true limit of customer's cost exposure reaching 436% of the 2010 program budget by 2014. The REP Coalition stated even with this information, this provides customers with no practical upfront awareness of how much will be charged to customers for the program.

The REP Coalition recommended that subsection (f)(8) be replaced in its entirety with new cost cap language, which would impose more transparent boundaries around the utility's recovery of energy efficiency costs. This transparent cost cap would allow the commission to specify the

level of costs that customers will pay on the front end, so there is a clear understanding of how much money may be spent. Of course, the commission would maintain discretion to delineate a different amount of money to spend on the energy efficiency programs, but the REP Coalition believes that its proposed \$1/MWh cost cap for each non-transmission level customer class places a reasonable limitation on the level of the utility's recoverable energy efficiency costs, including any performance bonus and administrative costs. (By comparison, the system benefit fund, established in PURA §39.903 as one of the critical elements of the original SB 7 market structure, may not exceed \$0.65/MWh.) The REP Coalition believed that the commission should take a measured approach to cost recovery for utility-funded energy efficiency programs and establish this cost limitation at the outset in a manner that provides transparency to the public.

Entergy, EPE and EUMMOT opposed the cost recovery caps under §25.181(f). Entergy argued that the proposed cost cap does provide utilities sufficient funds for the energy efficiency programs to achieve the proposed goals in later years. The Itron Study indicates that, to achieve a 50% savings threshold, at least 600% of ETI's 2010 energy efficiency budget would need to be invested, whereas the proposed cap is around 300% of ETI's 2010 budget. Thus, the proposed rule would not provide ETI sufficient funds to meet the mandated increased demand goals. EPE and EUMMOT recommended elimination of the proposed cost caps included in subsection (f)(8). EPE claimed the proposed caps would constrain EPE's ability to recover reasonable costs necessary to meet the increased energy efficiency goals, which is contrary to PURA §39.905(b) and §25.181(f). These sections of the statute and rule expressly provide that utilities should be allowed to recover their reasonable expenditures to meet the goal in an EECRF proceeding. EPE stated that the proposed cost caps are not truly "cost" caps; they are "recovery" caps that pre-

determine the upper limit of a utility's reasonable costs for meeting the commission's new goals without giving the utility the opportunity to prove the reasonableness of those costs. EPE contended that it must develop new programs, expand current programs and probably increase incentives paid to its EESPs and project sponsors to meet the increased energy efficiency goals. EPE concluded that it is only speculative at this point what a reasonable budget for making these investments would be, but it is certain that the cost to meet the 40% and 50% demand reduction goals in 2013 and 2014 would be considerably higher than EPE's costs to meet the current goals.

EUMMOT recommended that the proposed budget caps be removed or at least modified to a level commensurate with the proposed higher energy efficiency goals, or even lower more reasonable goals, so that reasonable budgets can be established in each utility's EECRF proceeding, based upon updated information pertaining to costs and program opportunities. EUMMOT asserted that the proposed budget cap levels would prevent many utilities from meeting more aggressive goals for energy efficiency. EUMMOT stated that the annual EECRF proceedings are the appropriate place to establish utility budgets, wherein actual goals and the cost of achieving those goals could be examined on a utility-specific basis annually. In EUMMOT's view, the goal based on a percent of peak load would lead to high costs, far in excess of the proposed budget cap. EUMMOT noted that to meet the peak load goals would require statewide budget expenditures approximately 44% higher than the proposed budget caps, resulting in residential rate impacts exceeding those calculated under the proposed budget cap by \$1.50/month (assuming 1,000 kWh per month consumption).

EUMMOT noted that the costs incurred by the utilities in meeting the current goals vary among the utilities, and if this differential persists, the residential bill impacts would range from \$2.51/month to \$9.06/month in 2014, under the proposed goals. As a comparison, rate impacts for residential customers in 2011 under today's energy efficiency goals are estimated between \$0.35/month and \$1.75/month. EUMMOT stressed that the proposed budget caps will prevent utilities from meeting the proposed higher goals and would necessitate very large increases in program budgets. The Itron report estimated that the cost per kW of demand reduction would have to double by 2014 in order to meet demand goals similar to those proposed by the commission. The Itron report stated that, in order for utilities to reduce demand by 541 MW in 2014, program funding would have to reach an estimated \$426 million. EUMMOT stated their calculations using updated data on program costs were similar to Itron's: the total statewide demand reduction goal for 2014 would be 537 MW and cost approximately \$484 million. EUMMOT asserted that even if lower, more achievable goals were approved by the commission, budget caps should be removed from the proposed rule.

Texas Efficiency surmised that EUMMOT over-estimated the cost of additional efficiency. Texas Efficiency expressed skepticism of EUMMOT's claims that that the proposed budget cap levels would prevent many utilities from meeting more aggressive goals for energy efficiency. Texas Efficiency stated that there has not been a comprehensive study of how the cost of efficiency programs change as efficiency gains are accumulated over time, and the assumption by EUMMOT is unsubstantiated that the cost of energy efficiency would double (per kW saved) over the next five years to meet the more aggressive goals proposed by the commission. Texas Efficiency stated that increased energy efficiency spending would save money for Texas

consumers, and the increase in costs due to expansion of the energy efficiency programs would not be as dramatic as projected by EUMMOT. Texas Efficiency argued that raising the energy efficiency goal and the resulting higher overall cost for savings achieved is still much better than the alternative, so long as the cost remains well below avoided costs. NAESCO urged the commission to establish program budgets, through separate proceedings for that purpose, that are sufficient for the utilities to meet their goals.

The REP Coalition stated that knowledge and certainty about the level of TDSP non-bypassable charges is critical. The REP Coalition said it understands that the EECRF will change based on the level of energy efficiency expenditures, recovery of accrued performance bonuses, and changing sizes of the EECRF billing determinants each year, and REPs need to understand the extent to which those changes will occur so communications with customers are productive and meaningful. The REP Coalition stated that there is no way to predict the magnitude of future EECRFs with any certainty, and, at best, the REPs can only predict that EECRFs will increase each year as utility spending increases and larger performance bonuses may be achieved.

Commission Response

The commission has considered comments discussing the proposed budget caps under preamble questions two and three in evaluating proposals for this subsection. The commission adopts caps for residential customers based on the impact on customers' bills, because of its concern for the impact of the cost of the program on customers. The commercial customers fall into several different rate classes, and the commission concludes that it is not practical to adopt a rate cap for them in this rule. It is instead adopting a cost

cap that is based on specified rates times the level of energy consumption of the commercial customers that are assessed a charge for energy efficiency. As is noted in connection with the discussion of higher goals, energy efficiency provides direct benefits to program participants in lower consumption and lower energy costs and results in lower air emissions. These benefits warrant the higher goals and, in order to reach higher goals, utilities will have to conduct more extensive programs. For these reasons, the commission believes that the budget caps must increase as the goals increase. The utilities argue that each megawatt of savings will be more expensive, as the goals increase and other efforts to improve the State's energy efficiency are implemented. However, the commission agrees with the comments that argue that there will still be many opportunities for cost-effective energy efficiency during the period for which this amendment prescribes goals and budget caps. In view of the lower goals that are being established, the commission believes that the cost of achieving the goals is less likely to dramatically increase, and the levels of the caps reflect this expectation. The commission has specified an effective date of December 1, 2010 to clarify that the amendments to the rule do not apply to pending EECRF dockets.

Higher caps than those specified in this section might be appropriate to reach the goals under subsection (e), and lower goals than those specified in this section may be appropriate for utilities that face specific problems in meeting the goals in this section. The commission has, therefore, amended the section to permit utilities to request such modifications. The commission is adopting a rate cap for residential customers, because it should be more effective in controlling the costs of the program to customers. The

alternative, using a budget cap, would provide less certainty concerning costs for REPs and customers.

CORE recommended amending subsection (f)(5) to require a utility seeking to establish its initial EECRF to do so in a general rate proceeding; to permit a utility to adjust an existing EECRF in an EECRF proceeding; and to require a utility filing general rate proceedings to include review of its EECRF for possible adjustment in that general rate proceeding. CORE stated that a utility recovering energy efficiency costs through base rates does not have an EECRF to “change” in a general rate proceeding, or any other proceeding. CORE contended that the appropriate proceeding to remove expenses from base rates and to establish a rider is a general rate proceeding. CORE and TIEC stated that the amended rule should not preclude a utility from adjusting its EECRF in a general rate case. TIEC submitted that it is appropriate for all of a utility’s riders, including the EECRF, to be reviewed and adjusted in a general rate proceeding.

TLSC-Tx ROSE stated the proposed subsection (f)(13) calls for an EECRF filing separate from the utility’s reconciliation filing, even if both are filed on the same day. TLSC-Tx ROSE claimed that this process encourages the continuation of inefficient and ineffective programs and the utilities failure to properly implement their targeted weatherization programs under PURA §39.905(f). TLSC-Tx ROSE argued that the commission approved the EECRFs without any direction to address their failures to implement these much-needed and statutorily-required weatherization programs; §25.181 does not allow for this type of energy efficiency plan review; the utility can apparently fail to provide the weatherization programs until the reconciliation, which is to be held every three years; and since there has not been a reconciliation proceeding

yet, plan deficiencies such as this one will not be addressed. TLSC-Tx ROSE claimed that the required program is not being enforced; and neither the current nor the proposed rule promotes the public interest, because the legislative intent that the neediest of Texas consumers actually benefit from targeted weatherization programs is not being met.

Cities proposed that subsection (f)(13) require a yearly reconciliation proceeding which would coincide with the utilities' EECRF filing on May 1. The current rule provides for reconciliation every three years under §25.181(f)(13). Reconciliation of the prior year's expenditures would allow a better review of the effectiveness and reasonableness of the programs. Allowing reconciliation of the prior year's expenditures would provide context for a review of the prospective program costs as submitted on May 1. Combining the review with the filing provides the added benefit of preventing surcharges and credits from accumulating into excessive balances. Because the review will cover only one year, the scope of issues should be small and, therefore, would not delay setting the EECRF. Cities concluded that combining the reconciliation proceeding with the EECRF filing makes sense logically and provides a better review of the effectiveness of the programs. As Texas is a load growth state, it only makes sense to review the effectiveness of the program yearly in order to best address energy efficiency in the most cost effective manner possible.

CenterPoint urged the commission to reject proposal to complicate the annual energy efficiency cost recovery process. CenterPoint and Entergy opposed CORE and TLSC-Tx ROSE's recommendation to establish annual reconciliation proceedings that would require a review of all costs, expenditures and budgets using traditional ratemaking principles. CenterPoint noted that

the commission rejected similar arguments from TLSC-Tx ROSE and the Association of Retail Marketers when it last amended §25.181 and specifically determined that the extensive review contemplated by CORE and TLSC-Tx ROSE“ would impede the objectives of timely cost recovery and higher program goals.” CenterPoint submitted that nothing has changed since the commission’s decision in Project Number 33487, and parties have the opportunity to fully explore and contest issues in the triennial reconciliation proceedings established by the rule. Entergy also argued that for a utility that has no energy efficiency costs in its base rates, it makes no sense to have an EECRF implemented in a base rate case, as certain parties suggested. Entergy stated that the purpose of the EECRF is to timely implement the EECRF to allow the programs to go forward, and if a utility’s programs meet the requirements of the rule, the EECRF should be implemented. Entergy concluded that an annual reconciliation of the energy efficiency program costs is not necessary or required, and a reconciliation proceeding every three years to determine the prudence of energy efficiency costs is sufficient.

Commission Response

The commission disagrees with CORE that an EECRF should be established only in a base rate proceeding. Such a requirement could prevent a utility from timely recovering energy efficiency expenditures as required by PURA §39.905(b)(1) and allowed by PURA §36.204(1). CORE did not expressly state the reason for this position, but presumably it is based on avoiding double recovery. Energy efficiency revenues are typically identified in a rate order, so that the commission may avoid double recovery in a rate proceeding that is not a base rate case by setting an EECRF that allows the utility to recover only energy efficiency expenses that exceed the energy efficiency expenses being recovered through base

rates. The commission also notes that it has approved EECRFs for several utilities outside of base rate proceedings under the current version of §25.181.

The commission disagrees with CORE and TIEC that the commission should require review of an existing EECRF in every base rate proceeding. Section 25.181 requires a utility to file an application to adjust its EECRF on May 1 of each year so that the commission may approve the EECRF sufficiently in advance of the January 1 beginning of the utility's next energy efficiency program year. Because a base rate proceeding will not necessarily be conducted along a similar timeline, the commission declines to require review of an EECRF in every utility base rate proceeding. The commission disagrees with TLSC-Tx ROSE's suggestion that a reconciliation proceeding should not be separate from a utility's annual EECRF adjustment proceeding. The current rule contemplates that the EECRF proceeding is expedited, so that the EECRF may be approved before the next energy efficiency program year begins. Combining a reconciliation proceeding with the annual EECRF adjustment proceeding would add issues to the proceeding and make it difficult for the commission to approve an EECRF on a timely basis. The commission disagrees with Cities' comment that the reconciliation proceeding should be conducted annually. Reconciliation every three years appropriately balances the need to reconcile costs recovered through an EECRF with the time and resources required for such a proceeding, particularly in view of the number of utilities for which such reconciliations will be required.

Performance Bonuses

§25.181(h): Energy efficiency performance bonus

Terminology for bonuses

CenterPoint proposed substituting “performance incentive” for “performance bonus” in describing the calculation of a bonus for meeting the demand reduction goal. TIEC opposed CenterPoint’s recommendation because “incentive” is used throughout the rule to describe the payment made by a utility to an energy efficiency service provider under an energy-efficiency program, and CenterPoint’s proposed change would create confusion. TIEC concluded that a bonus is something that is in addition to what is expected and the performance bonus paid to utilities under the rule meets this definition.

Commission Response

The commission agrees with TIEC that the term incentive is used throughout the rule to describe payments from a utility to an energy efficiency service provider for implementing programs and that CenterPoint’s proposal could create confusion. The commission believes that performance bonus is a very descriptive term for what PURA §39.905(b)(2) describes as an incentive for exceeding the statutory goals.

How to calculate bonus

CenterPoint stated that the parties in Docket Number 36952 argued that subsection (h) of the rule did not permit CenterPoint to include in the calculation of its performance bonus the savings achieved through spending \$10 million, pursuant to a settlement agreement, and based on a strict interpretation of §25.181(h), the commission agreed. CenterPoint proposed clarifying subsection

(h) to establish that the exclusion in the bonus calculation of demand or energy savings of programs other than programs implemented under this section was meant to refer to legacy DSM programs, which are no longer offered by the ERCOT utilities, only by non-ERCOT utilities. CenterPoint argued that eliminating this language would remove a disincentive to settlements.

CORE, Cities, and TIEC stated that only programs implemented under §25.181 should count towards the goal and performance bonus and thus opposed CenterPoint's request to include savings from a settlement agreement in the calculation of the performance bonus. TIEC concluded that the rule is not ambiguous and that rejecting CenterPoint's suggested language would ensure that energy efficiency programs funded by customers outside of the rule will not be subject to a performance bonus.

Commission Response

The purpose of a performance bonus under the rule is to provide incentives to utilities to meet certain objectives established by the rule. The commission therefore believes that energy efficiency programs funded by customers outside of the rule, such as the CenterPoint settlement program, should not be subject to a performance bonus. The commission has made such determination already in Docket Number 36952, and the commission concludes that sound policy supports those decisions. Rate case settlements have various components that are inextricably interrelated, and therefore settlement provisions addressing energy efficiency cannot be viewed in isolation from the costs and benefits of provisions that have nothing directly to do with energy efficiency. Thus,

obligations that a utility takes on through a settlement do not have the same status as those established as commission policy in a rule.

Level of bonus—substitute for LRAM

OPC expressed concern that the bonuses are being increased by such a large amount that it is almost lost revenue recovery, which the Legislature has not provided authority for. ACEEE noted that a performance incentive mechanism is in place in 19 states, including Texas and that the proposed bonus levels especially for years 2012-2015 are higher than any currently in place in other states. ACEEE commented that although states vary, performance incentives are capped at between 8% (in Connecticut) and 20% (in Colorado) of total energy efficiency program costs. Arizona and Michigan represent more typical incentives with bonus payments capped at 10% and 15% of energy efficiency program expenditures, respectively. ACEEE stated that, while performance bonuses can provide an effective motivation for increased energy efficiency, it is important that such incentives not be so high as to trigger public opposition to the energy efficiency policy. A typical utility rate of return is somewhere in the neighborhood of 10%, so a bonus level in the range of 30% to 40% may be perceived as excessive.

The Sierra Club and OPC supported bonus payments to utilities if they exceed their goal only if the companies meet both their demand and energy goals. The Sierra Club also recommended an increase in the potential bonus from 20 percent to 40 percent for utilities that exceed their goals; and another additional bonus for companies relying to a greater extent on Hard-to-Reach programs, up to the bonus cap; and another additional performance bonus of 1% to 10% for companies exceeding 100% of their demand reduction goal through distributed renewables. The

Sierra Club and OPC opposed the proposed 108 percent requirement for a one for one bonus and suggested that utilities achieve 120 percent of the goal in order to be eligible for such a bonus. Sierra Club favored providing an extra bonus to utilities that achieve a certain percentage of their demand and energy savings goals through solar and other distributed renewable technologies.

Cities agreed with the concerns of ACEEE, the REP Coalition, and TLSC-Tx ROSE that the proposed bonuses are too high. Cities stated that bonuses that are too high unfairly penalize consumers for conserving energy; allow the utility to receive excessive rewards for performance that is ordinary rather than extraordinary; and there is no statutory authority to award lost revenue through a bonus mechanism. While energy efficiency should be encouraged, Cities objected to utilities receiving a dramatic increase in their bonuses, because this is not cost effective from the perspective of ratepayers. While utility companies should be incentivized to administer energy efficiency programs, the proposed doubling of the potential bonus is grossly disproportionate in regard to the savings seen by ratepayers. As utilities are allowed to spend increasingly more and more on energy efficiency programs, their bonuses would also increase, as bonuses are tied to spending. Nothing in the proposed rules raises the standards for what types of measures are eligible to be considered energy efficiency measures; the proposed changes simply allow for increased spending without any guarantee of increased results. Cities actively supported the conservation of electricity through increased efficiency. However, the energy efficiency implementation program should be done in a cost effective manner. Cities opposed the proposed 2% escalation rate as it is higher than the current rate of inflation and will not accurately measure cost escalation. Cities suggested using a more accurate measure of inflation, such as the Producers' Price Index, as reported for the prior year.

The REP Coalition stated that the proposed performance bonus levels are excessive and therefore would undermine the benefit of energy efficiency. The REP Coalition noted that the 20% limit was high enough for the 2008 program year for Oncor to achieve a bonus of \$9,308,085; CenterPoint to achieve a bonus of \$2,854,336; and AEP Central to achieve a bonus of \$1,462,753. It stated there does not appear to be a sound justification for raising the percentage cap to the 30% and 40% levels proposed. The REP Coalition opposed a decrease in the bonus calculation's ratio between net benefits and demand reduction for utilities that exceed 108% of their demand goals and recommended maintaining the current ratio equal to 1% of the net benefits for every 2% that the demand reduction goal is exceeded. It stated the proposed rule lowers the threshold to increase bonuses for utilities that overachieve despite the fact that there has been no showing that the current rule's calculation for the performance bonus is insufficient to get utilities to pursue energy efficiency that will result in performance bonuses. The REP Coalition suggested that subsection (h) of the proposed rule be revised to retain the net benefit/demand reduction goal percentages in the bonus formula used in the current rule.

CenterPoint stated they are troubled by stakeholder's assertions that the "performance bonus" mechanism somehow serves to compensate utilities for lost revenues. It further stated the bonus mechanism is not automatic, is not excessive, does not serve to compensate utilities for lost revenues, and is only achieved where the utility can: (a) exceed its demand reduction goal, and (b) manage its energy efficiency programs in a cost-effective manner. It noted that PURA §39.905(b)(2) speaks only in terms of "rewarding" utilities, and thus the performance bonus mechanism provides an incentive for utilities to exceed the demand goals and to reward

exceptional performance in the area of energy efficiency. CenterPoint and Entergy stated that utilities continue to lose revenue even as they exceed their demand goals, and for each kWh by which a utility exceeds its demand goal that permits it to qualify for a “performance bonus,” there is also a corresponding loss of revenue. This revenue loss could reach approximately \$33 million by 2014. CenterPoint contended that if they were kept financially whole, customers would avoid potential “rate shock” in a subsequent base rate case.

Entergy supported the new bonus structure but recommended that it be used in conjunction with LRAM. Entergy commented that the implementation of energy efficiency programs should not lead to undue financial burden to the utility. It noted that only utilities that exceed their energy efficiency goals are provided a bonus, and even with the bonus enhancements proposed in the rule, utilities will still remain in a negative financial situation due to the proposed increases to the current energy efficiency goals. Entergy argued that the proposed increase in the goals will only exacerbate the situation; and that the bonus structure was designed to reward the utility for energy efficiency programs that exceed the minimum goals, and not to bridge the financial gap resulting from running the energy efficiency programs. Entergy contended that the proposed changes to the bonus rule penalize a utility that is close to achieving its goal but falls short.

EUMMOT expressed concern that the proposed bonus would be insufficient to compensate utilities for their revenue losses for 2010–2013. EUMMOT opposed the proposal that only utilities that exceeded their goals would be provided a bonus, thus providing no compensation for utilities unable to meet goals if they are set at unattainable levels. EUMMOT proposed to provide compensation for utilities that exceed 80% of its demand reduction goal, equal to 1% of

the net benefits for every 1% that the demand reduction goal has been exceeded, with a maximum of 20% of the utility's program costs. EUMMOT agreed when a utility does not exceed its goal for energy efficiency and only meets 99% of its goal due to insufficient participation in the utility's programs, as commonly occurs during economic downturns or when federal government actions change the baselines from which savings are calculated, the utility would receive no bonus, and thus no compensation for lost revenues. EUMMOT proposed a solution to raise the bonus cap to 40% of program cost beginning in 2011, arguing that this change would compensate the utilities for the revenues foregone as a result of their energy efficiency programs. EUMMOT noted, however, that this proposal would do little to help utilities that failed to meet their minimum goals due to insufficient participation. EUMMOT stated the present bonus structure worked well when the goals for energy efficiency were set at 10% or 20% of load growth, but with higher goals the bonus will not be sufficient to compensate the utilities for lost revenues. Such a result would be inconsistent with the principle that a utility should not be left financially worse off as a result of its investment in energy efficiency.

TLSC-Tx ROSE stated that the bonus provided by the current rule language is excessive. TLSC-Tx ROSE questioned the need for an increase in the level of bonus and the rule's exemption of amounts paid in bonus from the PUC Assessment as there is no justification for the substantial increase in the level of bonus opportunity. It summarized bonuses approved by the commission for six utilities' 2008 program year results, which totaled \$14.6 million for expenditures of \$91.3 million. The bonuses added 16% to costs, for a grand total of \$107.3 million for the 2008 program year. That means that for every ten dollars consumers paid in their rates for energy efficiency programs in 2008, they are now paying an additional \$1.60 in rates in 2010 to cover

the cost of bonuses earned in 2008. TLSC-Tx ROSE argued that bonuses are being paid even though the utilities already had developed energy efficiency programs that exceeded the statutory goals even before the Legislature added a bonus provision in PURA §39.905. TLSC-Tx ROSE argued that the incentives provided the utilities were too high or the performance standards were too low under the current rule, as a performance bonus should be a tool to achieve goals that would not otherwise be met. TLSC-Tx ROSE stated that the proposed bonus increases are an added cost of questionable benefit to consumers, and the money would be better spent on energy efficiency programs or as consumers' disposable income. TLSC-Tx ROSE recommended that 30% of all savings be obtained through savings from programs serving hard-to reach customers and that the performance bonus provisions of the rule require 40% of savings be achieved through hard-to-reach programs in order for a utility to qualify for the bonus. TLSC-Tx ROSE further stated that DOE's \$326 million for weatherizing low-income homes will only assist about 70,000 homes or 0.3% of the eligible population.

CORE disagreed with the arguments by utility companies that current performance bonuses are insufficient to make up for the revenue that they are "losing" as a result of the energy efficiency programs. CORE opposed EUMMOT's suggestion that a bonus be permitted for a utility that achieves 80% of its goal. CORE stated that EUMMOT's proposal to "reward" utilities for achieving 80% of the energy efficiency goals—*that is*, underperforming by 20%—is contrary to the plain language in §39.905. CORE concluded that bonuses should not be available to utilities that do not exceed the energy efficiency goals.

CenterPoint submitted a response to TLSC-Tx ROSE's claim that utilities are somehow being overcompensated under the current bonus mechanism. CenterPoint charged that TLSC-Tx ROSE were attempting to mislead the commission by comparing total program expenditures and performance bonus amounts awarded, yet they failed to note the net savings provided to customers through implementation of these energy efficiency programs. CenterPoint stated that in 2008 the net benefit from energy efficiency programs to customers in CenterPoint's service area was over \$83 million; their 2008 costs were \$24.2 million; the bonus \$2.8 million; the net program benefits were \$83 million and the bonus as a percent of 2008 net savings was 3.7%.

Commission Response

The commission agrees with the Sierra Club and OPC that a performance bonus should be allowed only for utilities that meet both demand and energy goals. The energy goal reflects that energy savings are important measures of the value of the program to customers and are important for the reduction of air emissions from power plants. The energy goal also precludes utilities from over-emphasizing short-term demand response measures that may be achieved with minimal effort.

The commission disagrees with the Sierra Club and OPC that a utility must exceed 120% of its demand goal in order to receive a bonus. The proposed rule would have allowed a bonus of 1% of the net benefits for each 2% by which the utility exceeded its demand goal. If a utility exceeded its goal by more than 8%, it would earn a bonus of 1% of net benefits for each additional 1% of savings. The proposed bonus was graduated, with a lower bonus amount available for exceeding the goal by a small amount and a higher bonus available

for exceeding the goal by a larger amount. The commission is not adopting this proposed bonus structure. Instead, the commission is adopting a bonus formula that is essentially the formula in the current rule. The formula that is being adopted does not include an additional bonus for a utility that reaches 120% of its demand goal and achieves 10% of the goal from hard-to-reach programs. In addition, the bonus provisions that are being adopted will make the bonus subject to the caps on costs to customers set out in subsection (e). The reasons for these changes are explained below. The commission is not adopting goals that are significantly more difficult for the utilities to reach, which was the rationale for the modified bonus formula. The commission believes that it is more likely that costs will not be significantly higher, so that the bonus formula should be essentially the same. The commission does not agree with the Sierra Club's proposals for additional performance bonuses of 20 percent to 40 percent for utilities that exceed their goals through specific measures related to technologies, programs, or customer groups. Elsewhere, the commission rejects proposals for set asides for specific programs. A bonus for specific programs could operate the same way as set asides, providing a utility an inducement to adopt and stress the specific programs for which there is a bonus multiplier. Because the commission is declining to adopt set asides, it believes that program-specific bonuses should also not be adopted.

The current bonus provision under subsection (h) permits a utility that achieves its goal to be awarded a bonus and a utility that achieves at least 120% of its goal to be awarded a bonus at a higher level. There is also an additional 10% bonus for achieving at least 10% of a utility's goal through HTR programs. The cap on the bonuses, rather than utility

achievements, was what capped some of the bonuses that were awarded for performance in 2008. The proposed rule would cap the bonuses initially at 20% of program costs, but this cap would increase to 30% in 2012 and 40% in 2014. The commission is adopting goals in the rule that are somewhat more modest than the goals in the proposed rule. The utilities commented that the proposed goals would be difficult and expensive, and in response to these concerns, the commission is modifying them to some degree. With goals that are less difficult, the commission believes it is appropriate to establish caps on the bonuses that will result in smaller bonuses. As several parties have commented, the amount that could be awarded as a bonus will increase as the program costs and caps on program costs increase. These parties argued that there was no need to also increase the percentage amount applied to program costs to calculate the cap on the bonus. Accordingly, the commission is setting the cap on the bonuses at the same level as in the current rule, 20% of program costs. This will still permit utilities to earn a significant bonus, if the performance warrants it, as program costs increase. The commission is making it clear that the bonus is subject to the overall cost caps in subsection (f), in order to maintain control over the costs that are charged to customers.

The commission appreciates EUMMOT's concern that the proposed rule would provide no compensation for lost revenues for utilities that are unable to meet goals set at unattainable levels, but the commission does not agree with EUMMOT's suggestion that the bonus should be awarded for performance of less than 100% of the goal. The bonus is meant to reward utilities that meet or exceed the goal and should be awarded only to those utilities that do so. The bonuses are intended to reward exemplary performance in the area of

energy efficiency, and the commission believes that predictable incentives will provide a real inducement for exemplary performance.

The commission believes that TLSC-Tx ROSE's recommendation to require the utilities to achieve 30% of all savings through HTR programs is not appropriate. The HTR programs are already given special emphasis through a set aside, which no other programs have. The energy efficiency program is intended to serve all customer classes, and a larger set aside or larger multiplier could reduce opportunities for customers in other classes. The set aside would also make programs more expensive, because programs for HTR customers are typically more expensive than for other customers. The commission recognizes that the U.S. DOE is providing \$326 million for low-income programs in Texas, an amount that is in excess of the utilities' cumulative budgets. While it is unlikely that the program funded by the DOE and the utilities' HTR programs will serve all of the eligible customers, the same is true of programs to serve other customer classes. During the June 30 hearing, a representative of the Texas Department of Housing and Community Affairs discussed the large amount of DOE funding that will be available for low-income programs in the next couple of years. The commission believes that the utilities should be given somewhat greater latitude with respect to the HTR and low-income weatherization programs, because of this additional federal funding for similar programs. For this reason, the commission is eliminating the additional bonus for meeting 10% of savings from the HTR program. The commission is retaining the 5% goal for the HTR program, but it is modifying the bonus calculation to permit the commission to reduce the bonus if a utility does not meet the goal for the HTR program. The programs for low-income customers are important, so the commission believes that the 5% goal should be retained, and that the

possibility of reducing the bonus for failure to meet the goal will provide an incentive for the utilities to pursue the HTR program. The additional funding from DOE, which may be a relatively short-term measure, may result in difficulties for energy-efficiency service providers implementing these programs, so the commission is preserving the latitude to consider the circumstances that the utility and the service providers encounter in deciding whether to reduce a bonus, if a utility fails to meet the goal.

Penalties

Walmart suggested that the proposal concerning the performance bonus should be considered in the context of the adoption of a punitive measure for utilities that fail to meet the energy savings targets. The proposed increased performance bonus, which would enable a utility to earn an even larger return, should be balanced by the inclusion of some downside risk if electric utilities fail to meet the goal. The lack of a punitive measure in the performance bonus provision is a problem, because an energy utility that does not face the risk of a punitive measure does not have a full incentive to efficiently and cost-effectively pursue energy efficiency. Walmart concluded that the addition of a punitive measure when energy utilities fail to meet the energy savings target would introduce a full range of incentives for the utilities to efficiently and cost-effectively pursue energy savings.

Commission Response

The commission does not agree with Walmart's suggestion that specifically awarding a bonus necessarily means that there should be corresponding penalties for poor performance. The commission notes that §25.181(u) permits the commission to provide a

discretionary administrative penalty and believes that this possibility suffices to ensure that utilities are held accountable for poor performance.

Allocation of costs

TIEC submitted that the rule should specify that the performance bonus is to be allocated only to those customers that participate in the underlying energy efficiency programs. Both program costs and the performance bonus are costs associated with the energy efficiency programs, and should be allocated to customers in the same manner. PURA §39.905(b)(2) directly ties the performance bonus to the energy efficiency programs by providing that the commission shall establish “an incentive. . . to reward utilities administering programs under this section that exceed the minimum goals established by this section.” Similarly, current subsection (h) states that a utility shall be eligible to earn a performance bonus based on meeting the demand reduction goals established in the rule. Additionally, the rule directs that the calculation of the performance bonus cannot include demand or energy savings that result from programs other than programs implemented under the rule. Thus, the performance bonus is directly tied to the demand reductions achieved through the programs implemented pursuant to PURA and the rule. Thus, it is reasonable—and consistent with PURA and cost-causation principles—for the performance bonus to follow program costs.

CORE and Cities opposed TIEC’s proposal that performance bonuses be allocated only to customer classes who participate in the energy efficiency programs, as such an allocation inaccurately assumes that only customers participating in energy efficiency programs receive the benefits of such programs. CORE and Cities concluded rather that all customers benefit from the

programs' demand reductions and energy savings, including industrial customers. By reducing demand, utilities can avoid incremental power construction or purchases, creating savings for all customer classes. Cities stated that all consumers benefit from lowered demand resulting in decreased demand for generation investment, reduced wholesale generation prices and lower rates for all consumers. CORE further stated that, contrary to TIEC's claims, §39.905 does not require that only customers participating in the energy efficiency programs pay for the performance bonuses. Section 39.905 distinguishes "cost" from bonuses by referring to bonuses as "performance incentives." Thus, pursuant to the cost-causation principles that TIEC relies on in its own comments, and consistent with §39.905, CORE contends that the cost of the energy efficiency programs should be borne by all customer classes. In comments filed in connection with the June 30 hearing, Sierra Club suggested that the provision of the rule relating to allocation of costs is more restrictive than the statute, and that the commission should modify the rule to more closely track the statute.

Commission Response

The commission is not adopting TIEC's proposal. To the extent that the commission has the latitude to allocate costs of the performance bonuses differently, there may be valid reasons to do so, which may be considered in an EECRF proceeding. The arguments of CORE and Cities suggest that there are policy reasons for a different allocation. The commission also notes that it rejected in Docket Number 36958 the position urged by TIEC here. The commission is adopting Sierra Club's proposal on conforming the provision on cost to the statute to provide additional latitude in allocating costs.

Administration**§25.181(i): Utility administration****Other issues**

The Sierra Club suggested modifying proposed subsection (i)(6) to encourage cooperation between the commission's utility programs and other energy efficiency programs offered through other entities. The Sierra Club noted that this should help utilities avoid wasting resources where resources are already available and to better coordinate resources. The Sierra Club also proposed that each individual utility and the commission provide clear information on a website on energy efficiency. A Better Insulation and Star Efficiency Services expressed concern that utilities continue to outsource their energy efficiency program, making the amount of the funds spent on administration hard to track. They concluded that the rule needs to limit these costs, whether spent by the utility or their contractors. They also argued that the current funding for standard offer programs is not sufficient to allow all ratepayers, especially many low-income multi-family properties, to participate in the programs.

Commission Response

The commission believes that cooperation among utilities and coordination of programs is generally appropriate, and it believes that the utilities are aware of other programs being offered by each other and by other organizations in their service areas. It does not believe that mandating cooperation is needed. The commission agrees with the Sierra Club that it is desirable for clear information to be available on a website regarding the energy efficiency program, but the commission believes that the rule need not set out the requirements for such a website. Rather, it is appropriate for the commission to work with

the utilities and others who are interested in energy efficiency to improve the Texas Efficiency website and the commission's website.

Administrative Cost Caps

Cities and OPC opposed increasing the available costs of administration to 20%. The costs of administration are fixed and unlikely to change, even as programs expand because utilities already have these programs and the infrastructure to administer the programs. Cities concluded that allowing any administrative cost recovery may allow the utility double recovery, since some administrative costs are also recovered in a utility's base rates. Cities also argued that the utilities' administrative costs typically recover allocated corporate overhead expenses, such as board of director and executive compensation, general consultant and law firm expense, and charitable contributions, which are items unrelated to the direct provision of energy efficiency programs. According to Cities, little or no evidence exists to demonstrate that increasing administrative costs is cost effective, and the cap should not be increased unless it is accompanied by a rigorous examination of the reasonableness and necessity of the expenses. OPC also concluded that because administrative costs are a percentage of the total costs, they increase as the costs of the programs increase. OPC stated that there is no need to siphon off a larger portion of the money that would otherwise be used directly for a program to apply towards administrative expenses. CORE stated that under subsection (i) a 15% administrative cost allowance would be an excessive increase of 5% from what is currently allowed, arguing that the utilities did not provide any justification for the proposed increase of administrative costs to 15% of a utility's total program cost. CORE expressed concern that the utilities may essentially spend what they are currently spending on administration expenses plus take half of what may be spent

on research and development for administration, which will hinder growth of new programs rather than encourage more efficient operations. CORE recommended that the current caps on spending for program administration and for research and development be maintained. CORE concluded that if a utility requires additional funds for administration, the utility may prove up those expenses as reasonable and necessary in its next EECRF or general rate proceeding.

TLSC-Tx ROSE and CORE opposed the proposed amendment to subsection (i) that would allow utilities to increase the administrative cost allowance to 15% of a utility's total program costs, provided that the total costs designated for both administration and research and development do not exceed 20% of total program costs. A similar proposal was made in the rule amendments proposed in Project Number 33487 in 2007 and was rejected by the commission. The commission should take similar action in this rulemaking. TLSC-Tx ROSE urged the commission to maintain the 10% cap on program administration and require all utilities to operate within that cap to be eligible for a performance bonus. The REP Coalition also opposed increasing the current rule's cap for the cost of administration from 10% to 15% of program costs. The REP Coalition supported an increased cost cap of 15% only for electric utilities with peak demands less than 3,000 MW, as they understood that electric utilities with peak demands less than 3,000 MW may require a higher percentage of administrative costs to reach the proposed energy efficiency goals. The REP Coalition argued that unnecessarily high administrative costs could devour too much of the resources that would otherwise be devoted directly to the energy efficiency programs, and that the larger utilities have yet to demonstrate that the current cap of 10% is insufficient. CORE argued that allowing the utilities to apply funds that should be used on research and development to administration would hinder growth of

new programs, rather than encourage more efficient operations. CORE recommended that the current caps on spending for program administration and for research and development be maintained, but would permit a utility that requires additional funds for administration to prove the need for those expenses in its next EECRF adjustment or general rate proceeding.

AEP urged the commission to raise the utility administration cost cap from 10% to 15% of total program costs, arguing that this increase would be necessary in order for utilities to meet the higher goals proposed in the rule. AEP and EUMMOT countered Cities' assertion that raising the administrative cost cap to 15% is not necessary. They noted that Cities failed to take into consideration that the higher goals would require the design and administration of new programs, and, as new programs are added, hiring and training of additional utility staff to manage them. AEP noted that this view is in concert with the national emphasis on job creation through energy efficiency. AEP noted that a standard offer program with multiple project sponsors requires a contract for each sponsor, involving far more time than a market transformation program with a single implementer. AEP commented that the numbers of site inspections that must be performed by utility personnel to verify measures have been installed and are capable of performing intended functions increases as the goal increases, just as the number of project sponsors must increase in order to deliver the additional savings. CenterPoint also argued that, in order to pay for further program enhancements and process changes that will make achievement of the higher goals possible, higher administrative costs must necessarily be incurred and utilities must be allowed to conduct programs to communicate and encourage participation. New programs and the ability to communicate what these programs entail will be

needed to assist in achieving the goals. Tx HERO supported increased flexibility for utilities with respect to administrative and research and development costs.

AEP disagreed with TLSC-Tx ROSE's assertions that program changes do not support the modest 5% increase to the administrative cost cap in the proposed rule. AEP noted that SWEPCO and TNC are indicative of smaller Texas utilities that struggle to contain administrative costs within the existing 10% of total costs cap. AEP explained that the proposed amendment would not require a utility to spend 15% of its program costs for administrative functions, only allow expenditures up to that amount. APE and CenterPoint argued that significant obstacles would arise to achieving the increasing goals for energy efficiency. Energy efficiency for each successive year must tap more deeply, requiring more effort, as well as additional costs. Obstacles will also emerge as major code and standards changes are enacted in the next two years and measures that currently qualify for incentive payments will no longer qualify. For example, many of the new motor efficiency standards established by the National Electrical Manufacturers Association will go into effect in December 2010. In addition, beginning January 1, 2011, the baseline for linear fluorescent commercial fixtures will become the standard electronic T-8 fluorescent fixture. In addition, federally-funded energy efficiency programs are to be carried out at levels well beyond historical levels. Some of the smaller utilities such as SWEPCO and TNC have less dense customer populations and more rural service territories which makes it more difficult to attract potential energy efficiency service providers.

AEP agreed with the REP Coalition and Tx HERO's proposal to allow greater utility flexibility with respect to administration costs for smaller utilities. AEP stated that, in addition to resources

that will need to be expanded to administer programs, the magnitude of regulatory filing activities alone have more than doubled in the past two years with the advent of the EECRF, and with heightened activity of the commission's EEIP. AEP stated that, in many instances, the EECRF proceedings have been fully litigated, involving extensive expenditure of time and resources for responding to discovery, preparing testimony and trying the matters through contested hearings. These activities are in addition to the yearly Energy Efficiency Plans and Reports filings, which are time-consuming projects that require intensive, detailed preparation to provide the commission and other stakeholders with the most accurate report and plan information. The commission held numerous EEIP meetings in 2009 to discuss potential changes to §25.181, the subject of this project. The EUMMOT utilities have the responsibility for filing petitions to update and add deemed savings values. The modification and addition of deemed savings requires substantial communication between the EUMMOT utilities, their contractors, as well as other EEIP stakeholders. The workload pertaining to these regulatory compliance activities has fallen on the utilities' energy efficiency staffs due to their expertise, consuming time otherwise spent managing programs. EUMMOT also expressed the view that some of the opposition to increasing utility administrative budgets may be due to a misunderstanding of administrative budgets. In addition to activities normally considered to be "administrative" in nature (such as processing applications for incentives, program design, maintaining program databases, contracting, working with the project sponsors), other types of costs are categorized as administrative. Under the commission's rules, any costs that are not program incentives or research and development are categorized as administrative costs. Consequently, a large share of administrative costs are actually associated with the measurement and verification of reported savings, on-site inspections, the development of new programs,

reporting savings to the commission, regulatory proceedings, and studies ordered by the commission.

AEP characterized TLSC-Tx ROSE's recommendation that a utility should be ineligible for a performance bonus if its administration costs exceed 10% of total program costs as unreasonable and punitive. AEP said this recommendation would unfairly penalize smaller utilities like AEP TNC and SWEPCO that must make higher administrative expenditures to meet the higher goals and that larger utilities may be able to achieve such goals more easily. AEP strongly supported the adoption of amendments that would raise the administration cost cap from 10% to 15%.

Commission Response

The commission believes that the utilities' higher goals clearly will require the utilities to design new programs, hire and train additional staff to manage the new programs, and verify savings from the new programs. The amount allowed for administrative costs and research and development will increase as total program budgets increase, and the commission is not changing the percentage of program costs that may be used for these purposes. The amendments to the section will permit utilities more latitude in using funds for research and development or administration. The commission believes that the higher goals in the amended section are achievable, but they are likely to be a challenge for at least some of the utilities, and flexibility in applying funds to research and development or other administrative tasks should assist the utilities in meeting the goals. The commission is not adopting the proposal to disqualify a utility from receiving a bonus if its administration costs exceed 10%. As AEP pointed out, the small utilities may face special challenges in

meeting their goals, even with the greater flexibility provided by the amended section in applying funds to administration and research and development needs. The bonuses should be achievable by any utility that meets the goals specified in the section, and the provisions on administrative and research and development costs should not arbitrarily impose obstacles on their qualifying for bonuses.

Allocation of costs

TLSC-Tx ROSE suggested that administrative costs to facilitate REP participation in energy efficiency programs should be assigned to the REPs participating in the programs. The REP Coalition opposed this suggestion, stating that PURA §39.905(a)(4) requires that electric utilities in the ERCOT region use best efforts to encourage and facilitate the involvement of REPs in the delivery of energy efficiency and demand response programs. The proposed rule, as modified through amendments proposed by the REP Coalition, would provide REPs with better opportunities to provide more substantial programs to retail customers. Further, to actually carry out any programs that might come about from changes to the rule, REPs will be required to make substantial investments of their own. The REP Coalition concluded that it would be inappropriate to hamstring such programs by assessing REPs and their customers additional charges for those services.

Commission Response

The commission agrees with the REP Coalition that PURA §39.905(a)(4) requires that electric utilities in the ERCOT region use their best efforts to encourage and facilitate the involvement of REPs in the delivery of energy efficiency programs and that it would be

inappropriate to assess REPs and their customers additional charges for those services. REPs participating in the energy efficiency program will be expected to achieve verifiable demand and energy savings, in the same way that ESCOs participating in the program are required to do. The program works by developing programs that will permit individual customers or groups of customers to improve the efficiency of their energy use, with the efficiency measures funded by the general body of customers and customers' investments in more efficient equipment. There is not any reason why participation by REPs in the program should be funded any differently, particularly where the legislature has required utilities to encourage their participation.

Program set-aside

The REP Coalition recommended subsection (i)(5) include a set-aside of 25% of the utility's budget for programs delivered by REPs, although no individual REP would be able to request more than a third of the aggregated amount of the set-aside, unless funds remain available as of April 1. The REP Coalition also suggested that the REP set-asides include provisions for long-term funding for multi-year programs, and that program rules and schedules give retail electric providers sufficient time to plan, advertise, and conduct energy efficiency programs, while preserving the utility's ability to meet their goals. The REP Coalition suggested establishing programs facilitated by advanced meters, where retail electric providers may provide time-of-use prices, home-area network devices such as in home displays, premise energy/load management equipment and other retail service offerings, if reduction in demand and energy consumption can be quantified and verified. Good Company argued that the demand response provision in

subsection (i)(5) should not be limited to REPs but should be open to other energy efficiency service providers.

Tx HERO supported the participation of REPs in utility programs, but stated that it is possible to misread the proposed language in subsection (i)(5) to require specific programs for REPs, which does not seem necessary nor what was originally intended. Tx HERO stated that the limited funds is the most significant deterrent to REP participation, and requiring REP-only programs or establishing a preference for REP participation in all efficiency programs, either of which might be construed as the intention of the proposed rule, would only eliminate smaller players in the market, without increasing the amount of efficiency achieved. Tx HERO proposed a review of program rules and contracts to eliminate specific barriers to REP participation.

Commission Response

The commission has addressed many of these comments in subsection (e). It is adopting Good Company's suggestion that the demand response provision apply to both REPs and energy efficiency service providers. Demand response options could be provided by either a REP or an energy efficiency service provider that is not a REP, and the commission concludes that, while it should encourage demand response programs, it should not suggest that eligibility to provide such programs would be limited to REPs.

Standard Offer and Market Transformation Programs

§25.181(l): Requirements for standard offer and market transformation programs

OPC discussed two bills that were introduced in the 81st Regular Legislative Session, HB 280 and SB 546, and suggested several amendments to incorporate concepts that were included in

these bills. OPC noted that if either of the bills had been enacted, they would have limited the length of time that a market transformation pilot program could continue without review by the commission. OPC suggested amending subsection (b) to limit pilot programs to three years, unless the commission determines that a pilot program is appropriate to address special market barriers. OPC also recommended a requirement that program incentives be passed on to end-use customers through rebates, discounts on products and services, and other direct benefits that reduce the costs of the products and services to the end-use customer, a concept that was included in HB 280 and SB 546. OPC suggested that the rule require energy service companies to disclose the incentive that they receive, which would add credibility to the utility programs and perhaps allow the incentives to be passed directly to end-use customers as contemplated by the bills. If a company is required to disclose that they are going to receive an incentive for installing a measure for an end-use customer, it only stands to reason from a marketing or competitive standpoint that the company would pass some of that incentive on to the customer.

Commission Response

The commission does not adopt OPC's recommendation, as formulated. The energy efficiency program relies on competition, with multiple ESCOs providing service to customers, and the value of the incentive paid by the utility to an ESCO should be reflected in the price and the services to the customer. One factor in the success of the program is that the commission does not over-regulate the energy efficiency services market. The incentives should support an ESCO's providing the customer efficiency enhancements that result in a tangible reduction in consumption and cost that are valuable for the customer. The commission adopts the recommendation that allows an ESCO to identify that it is

operating under a utility program, because that information is valuable to the customer. The ESCOs are approved by the utility to implement the program, and therefore it is reasonable that they be able to provide that information to customers.

Tx HERO supported proposed amendments to subsection (1)(4) that would require competitive procedures for selecting implementers of market transformation programs and for reporting a justification for any sole-source selections.

TLSC-Tx ROSE noted that proposed subsection (1) adds language allowing a utility to conduct information and advertising campaigns to foster participation in standard offer and market transformation programs. TLSC-Tx ROSE referred to Project Number 21074, where administrative and other program costs were to be lower than for programs under the old regulated system because the service providers would be responsible for marketing the programs. In past rulemaking proceedings, TLSC-Tx ROSE have recommended that a third party administrator be hired to serve as a central contact statewide for energy efficiency program information. TLSC-Tx ROSE commented that utility ratepayers should not be responsible for paying for advertising in a competitive energy services market. This is clearly a role that is the responsibility of the service providers and the proposed rule does not address solutions to this potential problem. TLSC-Tx ROSE noted that proposed subsection (1)(4) adds language that requires a utility to use fair and competitive procedures to select a market transformation program provider while still permitting sole source providers, but commented that, as written, the rule provides no assurance that the utility will select the program service providers through a competitive process.

TLSC-Tx ROSE noted that information provided in discussions at commission workshops indicates that the utilities review market transformation program proposals that are brought to them by individual entities for their consideration. They expressed the view that moving forward with more efficient technologies is the most important aspect of energy efficiency program planning, and that all ideas should be considered, not just those brought forth by a handful of providers. If the energy efficiency industry had a process available for introducing new programs, it is likely that utilities would be approached with many ideas and would be able to choose the best programs from among the multiple submissions. Under such a competitive procedure, even if only one company submits a market transformation program concept, the utility would have the duty and the advantage of being able to compare that single source proposal with others in a fair and objective manner. TLSC-Tx ROSE commented that an annual solicitation would make the process more open and ensure that the utility is informed of all the ideas for market transformation available in the market.

The REP Coalition proposed modifying subsection (l) to permit a utility to conduct information and advertising campaigns to foster participation in standard offer and market transformation programs only in areas that are not open to retail competition. The REP Coalition expressed a concern that having the utility advertise creates unnecessary expense for the utilities, which reduces funding for the actual delivery of energy efficiency programs.

EUMMOT disagreed with TLSC-Tx ROSE and the REP Coalition's with respect to enabling utilities to better promote their programs. EUMMOT referred to the comments of Texas

Campaign for the Environment, Sierra Club, and EDF, who all saw a need for the commission or the utilities to increase the public's awareness of energy efficiency opportunities. Despite the impacts that unbundling has had on the relationships between the utilities that serve in the ERCOT power market and retail consumers, the utilities remain a trusted and market-neutral source of information about the energy efficiency programs they administer. EUMMOT stated their experience with appliance recycling programs in recent years has highlighted the importance of promotional efforts in some programs' success. An appliance recycling program in the SWEPCO service area, where the commission has eased restrictions on the utility's ability to promote its programs, has proven successful. In the ERCOT utilities' service areas, similar programs have proven unsuccessful due to the restrictions placed on utilities' promotion of their programs through bill inserts and other means. In short, increasing the flexibility of the utilities in promoting their programs is essential to attaining higher goals.

EPE also supported the provision of proposed subsection (l) permitting utilities to conduct information and advertising campaigns to foster participation in standard offer and market transformation programs. EPE noted it has struggled in the past to generate participation by energy efficiency companies in its programs, particularly in programs aimed at residential and small commercial customers. It noted that participation in the Residential Standard Offer Program or Hard to Reach Standard Offer Program consisted of nine companies in 2006, two in 2007, five in 2008, and one in 2009. EPE commented that the limited participation in its programs and limited competition among energy service companies has been a major factor in its struggles to meet the energy efficiency goals. EPE also encouraged the commission to provide additional guidance as to what constitutes fair and competitive procedures and what the effect

will be on utilities that cannot generate competition among energy service companies in their service areas. CenterPoint also disagreed with the REP Coalition's argument that utilities in competitive areas should not be allowed to conduct marketing and advertising campaigns, because the REPs are not held responsible for meeting the commission's energy savings goals. CenterPoint believed that it has both a need and a duty to spend program funds on marketing that educates customers about energy efficiency and advertising that promotes its programs. CenterPoint also recommended that the proposed revisions to §25.181 allowing increased administrative costs be adopted.

Commission Response

The commission does not agree with the suggestion of TLSC-Tx ROSE for an annual solicitation for market transformation programs. The commission is amending subsection (l) to require competitive procedures to select service providers to carry out market transformation programs, but it does not believe that it has sufficient information to adopt more specific requirements relating to competitive procedures. Experience in implementing this new provision may result in suggestions for improvement. The commission is not adopting the proposal of the REP Coalition to limit utility information activities to areas “only where retail customer choice is not available” in subsection (l) or subsection (m)(2)(J). The bigger goals in the program will be more difficult to achieve if the utilities cannot conduct programs to call the attention of consumers to the program.

OPC supported the utilities' use of pilot programs as a means to explore new technologies for a period of three years. OPC therefore proposed that a new pilot program continue for no longer

than three years as a pilot program. After three years the program would have to be discontinued or comply with the requirements of subsection (l). OPC concluded that during the 81st Regular Legislative Session (2009), HB 280 was introduced by Representative Anchia and a similar bill, SB 546, was introduced by Senator Fraser. If either of the bills had been enacted, they would have limited the length of time that a market transformation pilot program could continue without review by the commission. OPC believed this is a valuable provision, and suggested that the rule reflect this limitation.

ClimateMaster agreed with the technology-neutral requirement for the energy efficiency programs and supported programs available to the broadest number of consumers and technologies. ClimateMaster urged the commission to take every action possible to ensure incentives under the programs are made available to all technologies that can provide similar demand and energy reductions as the pilot programs and market transformation programs launched recently to provide incentives for specific technologies, such as solar photovoltaics.

Walmart proposed that customers that invest in energy efficiency measures, including investments made in conjunction with a utility standard offer program, should own any “environmental attributes” associated with the measure. The REP Coalition disagreed with this suggestion, because the broad policy considerations were beyond the scope of this rulemaking.

EDF, Sierra Club and the Texas Campaign for the Environment proposed that the utilities create an energy efficiency portal to provide consumers with information and documents about energy efficiency programs and opportunities. EUMMOT agreed with this proposal and noted that the

utilities are planning to add features to www.texasefficiency.com that are expected to be completed by the end of 2010. With these changes in the efficiency website, it will provide much of the information recommended by these parties.

The REP Coalition suggested that the rule permit the use of various behavioral measures (for example, devices that control equipment usage and consumer responses to home energy displays and innovative pricing programs) in programs that could result in energy savings. Consert also suggested incentives for in-home energy displays. EUMMOT agreed that such measures should play a greater role in energy efficiency programs, provided the proper measurement and verification is conducted by the service providers.

Commission Response

The commission is not adopting OPC's suggestion concerning pilot programs. Participants in the EEIP have worked to develop a template for a pilot program that would call for the utilities to report the results of these programs annually. The opportunity to review information on pilots is a more flexible approach than a fixed limit on the duration of a pilot. The commission is not addressing the issue of environmental attributes. This issue should be the subject of broader public comment to warrant the adoption of substantive rules. As is noted above, the enhancement of the utilities' energy efficiency website does not require a specific provision in this rule. The commission agrees with inclusion of the use of various behavioral measures when conducted in concert with a pilot program or with a rigorous measurement and verification, which would be required in order for an incentive to be paid for such a program.

Plans and Reports**§25.181(m): Energy efficiency plans and reports**

The REP Coalition proposed modifying subsection (m)(2)(J) to reflect their view that utility informational activities should be limited to areas where retail customer choice is not available.

Sierra Club expressed concern that while the rules offer an improvement on transparency and oversight of the programs and utility plans, they are not specific enough. The Sierra Club recommended additional language to allow the public more access to documents and more ability to make comments and require utilities to consider those comments when designing programs and plans. Sierra Club proposed procedures for the review of plans and reports under new subsection (m)(3). This proposal calls for an energy efficiency plan and report to be subject to review, which could be initiated by the commission Staff or through the EEIP process, and would require a utility to respond to the commission in writing within 30 days to any substantive comment filed by a member of the public or commission Staff. The utility response would include a statement whether the utility would change its energy efficiency plan or report as a result of the comment.

Commission Response

For the reasons discussed in subsection (l) above, the commission does not agree with the proposal of the REP Coalition to limit informational activities to areas where retail customer choice is not available.

There are several opportunities for interested persons to obtain information about the energy efficiency program, beyond the annual reports filed by the utilities, which are available on the commission's website. The commission is adopting a requirement that a utility must respond in writing to questions raised by a participant in the EEIP on a timely basis. The commission recognizes that the utilities will file their EECRFs by May 1, which may be followed by extensive discovery. In addition, questions may be posed on an informal basis by stakeholders during the EEIP relating to the utilities' programs.

TLSC-Tx ROSE claimed there is no formal approval process and this obviously means that the plan can be implemented without approval under subsections (m) and (n). TLSC-Tx ROSE commented that contracts can be signed, foreclosing the opportunity to consider options without increasing costs. TLSC-Tx ROSE expressed concern with program accountability, program standards, deemed savings and the lack of a regular review process to ensure that the best energy efficiency investments are being made with ratepayer dollars. EDF, the Sierra Club, TLSC-Tx ROSE, OPC, Cities and CORE claimed a lack of overall oversight, transparency, accountability and the need to adopt specific procedures for the review of energy efficiency plans and reports.

TLSC-Tx ROSE opposed EUMMOT's recommendation that the proposed budget caps be removed and that reasonable budgets be established through the EECRF process. TLSC-Tx ROSE claimed EUMMOT's recommendation is made in the absence of any modification to the current process to assure that the budgets are reasonable. TLSC-Tx ROSE argued in favor of a prior review of programs and budgets, arguing that once the energy efficiency funds are collected and spent, it is difficult to determine the amount of overcharges and how they can be

fairly refunded to consumers. TLSC-Tx ROSE stated the rule should include a provision for an annual staff report for each utility and statement on the content of the energy efficiency plans and reports and EECRF levels, as there is no official source of information for parties to access except for the individual utility filings. TLSC-Tx ROSE supported the recommendation of EDF that a mechanism be established for commission staff to communicate program goals and incentives to other state agencies that manage efficiency programs to avoid duplication of effort.

Commission Response

The energy efficiency rule is structured to provide incentives to utilities to carry out their programs efficiently and cost-effectively. The commission believes that the performance bonus provision in subsection (h) encourages utilities to choose the most cost-effective programs to assist in reaching and exceeding their goal and thus receiving a bonus. The program is not designed, however, to provide review and pre-approval of utilities' commitments to ESCOs that are conducting market-transformation programs. Adopting a pre-approval process might obviate expensive contracts with an ESCO, but adopting such a process would increase the administrative costs for the utilities and could lead to litigation over contracts by a competitor of the ESCO that the utility has selected for a project. The commission concludes that the possible detriment of a pre-approval process outweighs the possible benefit. The commission agrees with TLSC-Tx ROSE and EDF that the utilities should take steps to avoid duplication of effort among different energy efficiency programs that are being funded by the utilities or taxpayers. The utilities already take such steps, and the scope of their current activities may be appropriate for further review. The commission does not believe that the rule needs to require an

additional formal mechanism to avoid duplication. The commission believes that additional information about the utility program should be provided, but it does not believe that including a requirement to do so in the rule is necessary.

EE Implementation Project

§25.181(q): Energy Efficiency Implementation Project - EEIP

EUMMOT recommended modifying proposed subsection (q) in order to ensure a fair exchange of information in the EEIP. EUMMOT suggested that any entity participating in the EEIP be required to provide timely responses to questions posed by other participants that are relevant to the tasks of the EEIP. EUMMOT recommended exploring the draft processes developed through the EEIP in 2008, as the EEIP remains the appropriate forum for discussions about program plans and activities. EUMMOT stated the website (www.texasefficiency.com) would also further improve the transparency of the program planning process.

Entergy stated that it should be allowed to develop and offer the energy efficiency programs of its choosing, without interference from others, as long as the programs meet the guidelines prescribed in §25.181. Entergy said that it remains open to suggestions for new program offerings or enhancements to current program from energy efficiency service providers, energy service companies, or any other entity that provides a viable program that reduces demand and energy usage in a cost-effective manner. Entergy said that it is willing to visit with interested parties at any time to discuss its energy efficiency programs, but a review of its programs should not be permitted to occur that would interfere with the preparation of its annual plan and report or its EECRF filing. Moreover, Entergy expressed a strong preference that energy efficiency

programs be chosen by the utility, considering all relevant factors and depending on what the utility believes is reasonable and consistent with the commission's rules. Entergy opposed the portions of the proposed rule that would require utilities alone to respond to data requests. The EEIP process should be a collaborative process used by all participants, and all participants, not just utilities, should be obligated to provide data in the EEIP. EPE supported an open process under subsection (q) by which interested entities may offer their assessments of its programs and suggest effective new programs. EPE commented that the changes in subsections (n) and (q) should not be used to foster litigation to force utilities to adopt the particular energy efficiency programs being promoted by a litigant. EPE supported a reasonable process that does not perpetuate endless litigation or impose delays on its energy efficiency cost recovery.

GC-CEAC stated that the EEIP is an excellent tool to promote energy efficiency and to enhance deployment of these technologies, but it needs to be improved in the following ways: (1) an evaluation of the benefits of expanding the program, while remaining consistent with market needs, should be conducted; (2) the commission should work to identify and secure additional sources of funding to allow the program to be expanded; (3) goals and tracking mechanisms should be established for each of the three technology groups, traditional passive energy efficiency technologies, on-site renewable technologies, and combined heat and power technologies; (4) incentives should be provided for the TDSPs to actively seek opportunities for on-site renewable energy and combined heat and power projects; and (5) the EEIP should evaluate opportunities for TDSPs to adjust incentive levels by technology group, thereby providing incentive funding at the level required to stimulate adoption.

NAESCO urged the commission to order the utilities to implement periodic program design reviews, open to all stakeholders, and to incorporate their successful program design and implementation experience from other jurisdictions in Texas programs, and expand the roster of program designs to allow direct install programs, which have proven to be more successful in certain customer classes than standard offer programs.

Commission Response

The commission agrees with Entergy that the EEIP process should be a collaborative process with an open exchange of information by all participants. It is questionable, however, whether the commission could require, as EUMMOT has proposed, that participants in the EEIP respond to questions from utilities or other participants. The commission has authority to oversee the utilities' programs, but it is less clear that it could enforce such a requirement with respect to an entity other than a utility. A number of parties have suggested that the program needs more transparency, and the commission is adopting a requirement that utilities provide timely responses to questions from EEIP participants to address this suggestion. In view of the magnitude of the programs and their impact on customers' rates and bills, this additional obligation is reasonable. The commission agrees with EPE and supports a reasonable process to strike a balance with more transparency while avoiding litigation or delays on energy efficiency cost recovery. The GC-CEAC recommendations appear to contemplate significant changes in the energy efficiency program that other commenters have not addressed in their comments. The commission does not believe that it is appropriate to adopt such changes without broader public comment. The commission agrees with NAESCO's recommendation to implement a

periodic review process, and the commission plans to host three EEIP stakeholder workshops annually. Ordinarily, the first EEIP meeting will be held in May, following the utilities' April 1st filings, to discuss results of their previous year's program and highlight their future plans. The second EEIP will be held in June to review the midcourse progress by each utility. The third EEIP will be held in September prior to development of the utilities' program manuals required by ESCOs in order to learn the rules prior to implementing the utilities' energy efficiency plans.

Retail Providers

§25.181(r): Retail providers

CenterPoint and the Sierra Club supported the proposed rule to encourage utilities to work with retail electric providers and access to the programs.

Other Issues

§25.181(s): Customer protection

No changes were proposed to this subsection. Tx HERO stated that one issue not addressed in the proposed rule that it would like to see included relates to information and advertising campaigns. Tx HERO proposed a requirement that utility bill "information" but not the bill itself be available in a standardized format. Tx HERO recommended that any residential customer be able to access, and permit a designated home energy auditor to receive or access, a utility bill history of at least 12 months that includes at least monthly energy consumption (kWh) and demand (kW) and average effective cost. Tx HERO further recommended that residential

customers be able to access a history and current average residential consumption and demand by zip code.

Commission Response

The commission appreciates this thoughtful comment in support of guiding homeowners to reduce their electric consumption and for energy efficiency auditors to guide homeowners in the selection of the most cost-effective measures to do so. PURA §39.107 provides that, in areas where retail competition has been introduced, customers own the meter data and may authorize its release to a REP. Utilities in competitive areas do not have billing information, however. The commission would like to further explore through the EEIP the development of a standardized format that would facilitate the provision of detailed customer electric consumption data. Different information would be available from the utilities, depending on whether the area is one that is open to retail competition.

§25.181(u): Administrative penalty

EPE recommended including a “safe harbor” provision to exempt a utility from any sanction for which the utility would have been responsible if it had failed to meet the energy efficiency goals, if the failure to meet the goal were caused factors outside of the utility’s control. EPE recommended copying language from PURA §39.905(g) in subsection (u).

Commission Response

The commission agrees with EPE that the language in the rule should conform to the language in PURA to avoid confusion. The commission does not agree that additional

language is necessary to create a safe harbor because the rule already gives the commission discretion not to impose an administrative penalty.

Opt out of EECRF

Walmart proposed that the rule be amended to permit industrial or large commercial customers to opt out of an obligation to pay an Energy Efficiency Cost Recovery Factor (EECRF). Walmart suggested that opt out provisions would create greater opportunities for those customers that wish to proactively invest in their own energy efficiency programs. Given that large commercial customers are already creating their own additional energy efficiency programs to maintain competitiveness, no additional incentive is needed. Additionally, Walmart argues that, through their investments in energy efficiency, large commercial customers create “network benefits.” The REP Coalition opposed this suggestion, noting that PURA §39.905 establishes the criteria for which customer groups are eligible for and pay for the energy efficiency program, and that the programs are for “residential and commercial customers.” In the REP Coalition’s view, allowing an opt-out provision for specific customers would be contrary to PURA §39.905 and should not be adopted. The REP Coalition also argued that there is no compelling policy reason for the commission to create an EECRF opt-out provision for individual customers like Walmart. The REP Coalition noted the Legislature has established the parameters of the State’s energy efficiency program, and the commission cannot, by rule, modify the terms of the program established in PURA.

Commission Response

The commission does not believe that a provision permitting an individual customer to opt out of the program is reasonable. It might be difficult for utilities to track individual customers to apply different rates, and there is a risk that a customer would opt out after obtaining the benefits of the program, so that it would not share the costs in the same way that other customers do.

The amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §§14.001, 14.002, 36.052, 36.204, and 39.905 (Vernon 2007 and Supplement 2009) (PURA). Section 14.001 provides the commission the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by PURA that is necessary and convenient to the exercise of that power and jurisdiction; §14.002 provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; §36.052 reflects a state policy in favor of energy conservation; §36.204 authorizes the commission to establish rates for an electric utility that allow timely recovery of the reasonable costs for conservation and load management and that include additional incentives for conservation and load management; and §39.905 requires the commission to provide oversight of energy efficiency programs of electric utilities subject to that section and adopt rules and procedures to ensure that electric utilities subject to that section can achieve their energy efficiency goals, including rules establishing an energy efficiency cost recovery factor and an incentive for electric utilities that meet the energy efficiency goals.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.001, 14.002, 36.052, 36.204, and 39.905.

§25.181. Energy Efficiency Goal.

- (a) **Purpose.** The purpose of this section is to ensure that:
- (1) electric utilities administer energy efficiency incentive programs in a market-neutral, nondiscriminatory manner and do not offer competitive services, except as permitted in §25.343 of this title (relating to Competitive Energy Services) or this section;
 - (2) all customers, in all eligible customer classes and all areas of an electric utility's service area, have a choice of and access to energy efficiency alternatives that allow each customer to reduce energy consumption, peak demand, or energy costs; and
 - (3) each electric utility provides, through market-based standard offer programs or limited, targeted, market-transformation programs, incentives sufficient for retail electric providers and competitive energy service providers to acquire additional cost-effective energy efficiency for residential and commercial customers to achieve the goals in subsection (e) of this section.
- (b) **Application.** This section applies to electric utilities.
- (c) **Definitions.** The following terms, when used in this section, shall have the following meanings unless the context indicates otherwise:
- (1) **Affiliate** --
 - (A) a person who directly or indirectly owns or holds at least 5.0% of the voting securities of an energy efficiency service provider;

- (B) a person in a chain of successive ownership of at least 5.0% of the voting securities of an energy efficiency service provider;
- (C) a corporation that has at least 5.0% of its voting securities owned or controlled, directly or indirectly, by an energy efficiency service provider;
- (D) a corporation that has at least 5.0% of its voting securities owned or controlled, directly or indirectly, by:
 - (i) a person who directly or indirectly owns or controls at least 5.0% of the voting securities of an energy efficiency service provider; or
 - (ii) a person in a chain of successive ownership of at least 5.0% of the voting securities of an energy efficiency service provider; or
- (E) a person who is an officer or director of an energy efficiency service provider or of a corporation in a chain of successive ownership of at least 5.0% of the voting securities of an energy efficiency service provider;
- (F) a person who actually exercises substantial influence or control over the policies and actions of an energy efficiency service provider;
- (G) a person over which the energy efficiency service provider exercises the control described in subparagraph (F) of this paragraph;
- (H) a person who exercises common control over an energy efficiency service provider, where “exercising common control over an energy efficiency service provider” means having the power, either directly or indirectly, to direct or cause the direction of the management or policies of an energy efficiency service provider, without regard to whether that power is

established through ownership or voting of securities or any other direct or indirect means; or

- (I) a person who, together with one or more persons with whom the person is related by ownership, marriage or blood relationship, or by action in concert, actually exercises substantial influence over the policies and actions of an energy efficiency service provider even though neither person may qualify as an affiliate individually.
- (2) **Capacity factor** -- The ratio of the annual energy savings goal, in kWh, to the peak demand goal for the year, measured in kW, multiplied by the number of hours in the year; or the ratio of the actual annual energy savings, in kWh, to the actual peak demand reduction for the year, measured in kW, multiplied by the number of hours in the year.
- (3) **Commercial customer** -- A non-residential customer taking service at a metered point of delivery at a distribution voltage under an electric utility's tariff during the prior calendar year and a non-profit customer or government entity, including an educational institution. For purposes of this section, each metered point of delivery shall be considered a separate customer.
- (4) **Competitive energy efficiency services** -- Energy efficiency services that are defined as competitive under §25.341 of this title (relating to Definitions).
- (5) **Deemed savings** -- A pre-determined, validated estimate of energy and peak demand savings attributable to an energy efficiency measure in a particular type of application that an electric utility may use instead of energy and peak demand savings determined through measurement and verification activities.

- (6) **Demand** -- The rate at which electric energy is used at a given instant, or averaged over a designated period, usually expressed in kilowatts (kW) or megawatts (MW).
- (7) **Demand savings** -- A quantifiable reduction in demand.
- (8) **Eligible customers** -- Residential and commercial customers. In addition, to the extent that they meet the criteria for participation in load management standard offer programs developed for industrial customers and implemented prior to May 1, 2007, industrial customers are eligible customers solely for the purpose of participating in such programs.
- (9) **Energy efficiency** -- Improvements in the use of electricity that are achieved through facility or equipment improvements, devices, or processes that produce reductions in demand or energy consumption with the same or higher level of end-use service and that do not materially degrade existing levels of comfort, convenience, and productivity.
- (10) **Energy efficiency measures** -- Equipment, materials, and practices at a customer's site that result in a reduction in electric energy consumption, measured in kilowatt-hours (kWh), or peak demand, measured in kilowatts (kW), or both. These measures may include thermal energy storage and removal of an inefficient appliance so long as the customer need satisfied by the appliance is still met.
- (11) **Energy efficiency program** -- The aggregate of the energy efficiency activities carried out by an electric utility under this section or a set of energy efficiency projects carried out by an electric utility under the same name and operating rules.

- (12) **Energy efficiency project** -- An energy efficiency measure or combination of measures undertaken in accordance with a standard offer or market transformation program.
- (13) **Energy efficiency service provider** -- A person who installs energy efficiency measures or performs other energy efficiency services under this section. An energy efficiency service provider may be a retail electric provider or commercial customer, provided that the commercial customer has a peak load equal to or greater than 50kW.
- (14) **Energy savings** -- A quantifiable reduction in a customer's consumption of energy that is attributable to energy efficiency measures.
- (15) **Growth in demand** -- The annual increase in demand in the Texas portion of an electric utility's service area at time of peak demand, as measured in accordance with this section.
- (16) **Hard-to-reach customers** -- Residential customers with an annual household income at or below 200% of the federal poverty guidelines.
- (17) **Incentive payment** -- Payment made by a utility to an energy efficiency service provider under an energy-efficiency program.
- (18) **Inspection** -- Examination of a project to verify that an energy efficiency measure has been installed, is capable of performing its intended function, and is producing an energy saving or demand reduction.
- (19) **Load control** -- Activities that place the operation of electricity-consuming equipment under the control or dispatch of an energy efficiency service provider, an independent system operator or other transmission organization or that are

controlled by the customer, with the objective of producing energy or demand savings.

- (20) **Load management** -- Load control activities that result in a reduction in peak demand on an electric utility system or a shifting of energy usage from a peak to an off-peak period or from high-price periods to lower price periods.
- (21) **Market transformation program** -- Strategic programs intended to induce lasting structural or behavioral changes in the market that result in increased adoption of energy efficient technologies, services, and practices, as described in this section.
- (22) **Measurement and verification** -- Activities intended to determine the actual energy and demand savings resulting from energy efficiency projects as described in this section.
- (23) **Off-peak period** -- Period during which the demand on an electric utility system is not at or near its maximum. For the purpose of this section, the off-peak period includes all hours that are not in the peak period.
- (24) **Peak demand** -- Electrical demand at the times of highest annual demand on the utility's system. Peak demand refers to Texas retail peak demand and, therefore, does not include demand of retail customers in other states or wholesale customers.
- (25) **Peak demand reduction** -- Reduction in demand on the utility system throughout the utility system's peak period.

- (26) **Peak period** -- For the purpose of this section, the peak period consists of the hours from one p.m. to seven p.m., during the months of June, July, August, and September, excluding weekends and Federal holidays.
- (27) **Program year** -- A year in which an energy efficiency incentive program is implemented, beginning January 1 and ending December 31.
- (28) **Renewable demand side management (DSM) technologies** -- Equipment that uses a renewable energy resource (renewable resource), as defined in §25.173(c) of this title (relating to Goal for Renewable Energy) that, when installed at a customer site, reduces the customer's net purchases of energy, demand, or both.
- (29) **Standard offer contract** -- A contract between an energy efficiency service provider and a participating utility specifying standard payments based upon the amount of energy and peak demand savings achieved through energy efficiency measures, the measurement and verification protocols, and other terms and conditions, consistent with this section.
- (30) **Standard offer program** -- A program under which a utility administers standard offer contracts between the utility and energy efficiency service providers.
- (d) **Cost-effectiveness standard.** An energy efficiency program is deemed to be cost-effective if the cost of the program to the utility is less than or equal to the benefits of the program.
- (1) The cost of a program includes the cost of incentives, measurement and verification, and actual or allocated research and development and administrative costs. The benefits of the program consist of the value of the demand reductions and energy savings, measured in accordance with the avoided costs prescribed in

this subsection. The present value of the program benefits shall be calculated over the projected life of the measures installed under the program.

- (2) The avoided cost of capacity is \$80 per kW-year for all electric utilities, unless the commission establishes a different avoided cost of capacity in accordance with this paragraph. The avoided cost of capacity shall be revised beginning with program year 2012, in accordance with this paragraph.

(A) By March 15 of each year, commission staff shall post a notice of a revised avoided cost of capacity on the commission's website, on a webpage designated for this purpose, effective for the next program year. If the avoided cost of capacity has not changed, staff shall post a notice that the avoided cost of capacity remains the same.

(i) Staff shall calculate the avoided cost of capacity from the base overnight cost of a new conventional combustion turbine as reported by the United States Department of Energy's Energy Information Administration's (EIA) Cost and Performance Characteristics of New Central Station Electricity Generating Technologies associated with EIA's *Annual Energy Outlook*. If EIA cost data that reflects current conditions in the industry does not exist, staff may establish an avoided cost of capacity using another data source.

(ii) If the EIA base overnight cost of a new conventional combustion turbine is less than \$650 per kW, the avoided cost of capacity shall be \$80 per kW. If the base overnight cost of a new conventional

combustion turbine is at or between \$650 and \$800 per kW, the avoided cost of capacity shall be \$100 per kW. If the base overnight cost of a new conventional combustion turbine is greater than \$800 per kW, the avoided cost of capacity shall be \$120 per kW.

- (iii) The avoided cost of capacity calculated by staff may be challenged only by the filing of a petition within 45 days of the date the avoided cost of capacity is posted on the commission's website on a webpage designated for that purpose.
 - (B) A non-ERCOT utility may petition the commission for authorization to use an avoided cost of capacity different from the avoided cost determined according to subparagraph (A) of this paragraph by filing a petition no later than 45 days after the date the avoided cost of capacity calculated by staff is posted on the commission's website on a webpage designated for that purpose. The avoided cost of capacity proposed by the utility shall be based on a generating resource or purchase in the utility's resource acquisition plan and the terms of the purchase or the cost of the resource shall be disclosed in the filing.
- (3) The avoided cost of energy is \$0.064 per kWh for all electric utilities, unless the commission establishes a different avoided cost of energy in accordance with this paragraph. The avoided cost of energy shall be revised beginning with program year 2012, in accordance with this paragraph.

- (A) Commission staff shall post a notice of a revised avoided cost of energy each year on the commission's website, on a webpage designated for this purpose, effective for the next program year. If the cost of energy has not changed, staff shall post a notice that the cost of energy remains the same. Staff shall calculate the avoided cost of energy using the simple average of the market clearing price in ERCOT for balancing energy for all hours during the peak period for the previous two calendar years. When ERCOT nodal prices are available, the avoided energy price shall be adjusted to the zonal average of nodal prices in the real-time market for all hours during the peak period.
- (B) A non-ERCOT utility may petition the commission for authorization to use an avoided cost of energy other than that otherwise determined according to this paragraph. The avoided cost of energy may be based on peak period energy prices in an energy market operated by a regional transmission organization if the utility participates in that market and the prices are reported publicly. If the utility does not participate in such a market, the avoided cost of energy may be based on the expected heat rate of the gas-turbine generating technology specified in this subsection, multiplied by a publicly reported cost of natural gas.

(e) **Annual energy efficiency goals.**

- (1) An electric utility shall administer energy efficiency programs to achieve the following minimum goals:

- (A) 20% reduction of the electric utility's annual growth in demand of residential and commercial customers for the 2010 and 2011 program years;
 - (B) 25% reduction of the electric utility's annual growth in demand of residential and commercial customers for the 2012 program year; and
 - (C) 30% reduction of the electric utility's annual growth in demand of residential and commercial customers for the 2013 program year and for subsequent program years.
- (2) The commission may establish for a utility a lower goal than the goal specified in paragraph (1) of this subsection or a higher budget cap than the cap specified in subsection (f) of this section if the utility demonstrates that compliance with that goal or cap is not reasonably possible and that good cause supports the lower goal or higher cap.
- (3) Each utility's demand-reduction goal shall be calculated as follows:
- (A) Each year's historical demand for residential and commercial customers shall be adjusted for weather fluctuations, using weather data for the most recent ten years. The utility's growth in residential and commercial demand is based on the average growth in retail load in the Texas portion of the utility's service area, measured at the utility's annual system peak. The utility shall calculate the average growth rate for the prior five years.
 - (B) The demand goal for energy-efficiency savings for a year is calculated by applying the percentage goal, prescribed in paragraphs (1) and (2) of this subsection, to the average growth in demand, calculated in accordance

with subparagraph (A) of this paragraph. Unless the commission establishes a goal for a utility under paragraph (2) of this subsection, a utility's demand goal in any year shall not be lower than its goal for the prior year.

- (C) A utility may submit for commission approval an alternative method to calculate its growth in demand, for good cause.
 - (D) Savings achieved through programs for hard-to-reach customers shall be no less than 5.0% of the utility's total demand reduction goal.
- (4) An electric utility shall administer an energy efficiency program designed to meet an energy savings goal calculated from its demand savings goal, using a 20% capacity factor.
- (5) Electric utilities shall administer energy efficiency programs to effectively and efficiently achieve the goals set out in this section.
- (A) Incentive payments may be made under standard offer contracts or market transformation contracts, for energy savings and demand reductions. Each electric utility shall establish standard incentive payments to achieve the objectives of this section.
 - (B) Projects or measures under either the standard offer or market transformation programs are not eligible for incentive payments or compensation if:
 - (i) A project would achieve demand or energy reduction by eliminating an existing function, shutting down a facility or operation, or would result in building vacancies or the re-location

of existing operations to a location outside of the area served by the utility conducting the program, except for an appliance recycling program consistent with this section.

- (ii) A measure would be adopted even in the absence of the energy efficiency service provider's proposed energy efficiency project, except in special cases, such as hard-to-reach and weatherization programs, or where free riders are accounted for using a net to gross adjustment of the avoided costs, or another method that achieves the same result.
 - (iii) A project results in negative environmental or health effects, including effects that result from improper disposal of equipment and materials.
- (f) **Cost recovery.** A utility shall establish an energy efficiency cost recovery factor (EECRF) that complies with this subsection to timely recover the reasonable costs of providing energy efficiency programs pursuant to this section.
- (1) A utility may request that an EECRF be established to recover all of the utility's forecasted annual energy efficiency program costs, if the commission order establishing the utility's base rates does not expressly include an amount for energy efficiency program costs and any bonus earned under subsection (h). If a utility's existing base rate order expressly includes an amount for energy efficiency program costs, the utility may request that an EECRF be established to recover forecasted annual energy efficiency program costs and any bonus earned under subsection (h) in excess of the costs recovered through base rates.

- (2) Base rates shall not be set to recover energy efficiency costs.
- (3) The EECRF shall be calculated to recover the costs associated with programs under this section from the customer classes that receive services under the programs.
- (4) Not later than May 1 of each year, a utility with an EECRF shall apply to adjust the EECRF effective in January of the following year. An application filed pursuant to this paragraph shall reflect changes in program costs and bonuses and shall minimize any over- or under-collection of energy efficiency costs resulting from the use of the EECRF. The EECRF shall be designed to permit the utility to recover any under-recovery of energy efficiency program costs or return any over-recovery of costs.
- (5) If a utility is recovering energy efficiency costs through base rates, the EECRF may be changed in a general rate proceeding. If a utility is not recovering energy efficiency costs through base rates, the EECRF must be adjusted in an EECRF proceeding pursuant to this section.
- (6) The commission may approve an energy charge or a monthly customer charge for the EECRF. The EECRF shall be set at a rate that will give the utility the opportunity to earn revenues equal to the sum of the utility's forecasted energy efficiency costs, net of energy efficiency costs included in base rates, the energy efficiency performance bonus amount that it earned for the prior year under subsection (h) of this section and any adjustment for past over- or under-recovery of energy efficiency revenues.

- (7) A utility that is unable to establish an EECRF due to a rate freeze may defer the costs of complying with this section and recover the deferred costs through an energy efficiency cost recovery factor on the expiration of the rate freeze period. Any deferral of costs that are not being recovered in rates shall bear interest at the utility's commission approved cost of capital from the time the costs are incurred until the commission approves an EECRF for the recovery of the costs. A utility that seeks to defer its costs shall file an application for approval of the deferral.
- (8) The EECRF for a utility that is recovering energy efficiency costs exclusively through its EECRF shall not exceed the amounts prescribed in this paragraph. If a utility is recovering energy efficiency costs through an identified amount in base rates, the sum of the base rate recovery of energy efficiency costs and the EECRF shall not exceed the amounts prescribed in this paragraph.
- (A) For residential customers for program years 2011 and 2012, \$1.30 if the EECRF is charged on a monthly basis or \$0.001 per kWh if it is charged on an energy basis, or the amount previously authorized by the commission; and
- (B) For residential customers for program years 2013 and thereafter, \$1.60 if the EECRF is charged on a monthly basis or \$0.0012 per kWh if it is charged on an energy basis, or the amount previously authorized by the commission;
- (C) For non-residential customers for program years 2011 and 2012, rates designed to recover \$0.0005 per kWh for consumption of non-residential

customer classes that are charged an EECRF or a base rate to cover energy efficiency costs; and

- (D) For non-residential customers for program year 2013 and thereafter, rates designed to recover \$0.00075 per kWh for consumption of non-residential customer classes that are charged an EECRF or a base rate to cover energy efficiency costs.
- (9) A utility's application to establish or adjust an EECRF shall include the information and schedules in any commission approved EECRF filing package. If the commission has not approved an EECRF filing package, an application to establish or adjust an EECRF shall include testimony and schedules showing the utility's forecasted energy efficiency costs, energy efficiency costs included in base rates, the Energy Efficiency Performance Bonus amount that it earned for the prior year, any adjustment for past over- or under-recovery of energy efficiency revenues, information concerning the calculation of billing determinants, information from its last base rate case concerning the allocation of energy efficiency costs to customer classes, and the following:
- (A) the incentive payments by the utility, by program; the utility's administrative costs for its energy efficiency programs for the most recent year and for the year in which the EECRF is expected to be in effect, including costs for the dissemination of information and outreach; and other major administrative costs, and the basis for the projection;
- (B) billing determinants for the most recent year and for the year in which the EECRF is expected to be in effect;

- (C) the actual revenues attributable to the EECRF for any period for which the utility seeks to adjust the EECRF for an under- or over-recovery of EECRF revenues; and
 - (D) any other information that supports the determination of the EECRF.
- (10) Upon a utility's filing of an application to establish or adjust an EECRF, the presiding officer shall set a procedural schedule that will enable the commission to issue a final order in the proceeding as follows, except where good cause supports a different procedural schedule:
- (A) within 60 days after a sufficient application was filed if no hearing is requested within 30 days of the filing of the application; or
 - (B) within 120 days after a sufficient application was filed, if a timely request for a hearing is made. If a hearing is requested, the hearing will be held no earlier than the first working day after the 45th day after a sufficient application is filed.
- (11) In any proceeding to establish or adjust an EECRF, the utility must show that:
- (A) the costs to be recovered through the EECRF are reasonable estimates of the costs necessary to provide energy efficiency programs and to meet the utility's goals under this section;
 - (B) calculations of any under- or over-recovery of EECRF revenues is consistent with this section;
 - (C) any energy efficiency performance bonus for which recovery is being sought is consistent with this section;

- (D) the costs assigned or allocated to customer classes are reasonable and consistent with this section;
 - (E) the estimate of billing determinants for the period for which the EECRF is to be in effect is reasonable; and
 - (F) any calculations or estimates of system losses and line losses used in calculating the charges are reasonable.
- (12) The scope of a proceeding to establish or adjust an EECRF is limited to the issues of whether the utility's cost estimates are reasonable, calculations of under- or over-recoveries are consistent with this section, the calculation of any energy efficiency performance bonus is consistent with this section, the assignments and allocations to the classes are appropriate, and the calculation of the EECRF is in accordance with this subsection. The commission shall make a final determination of the reasonableness of the costs and performance bonuses that the utility recovered through the EECRF.
- (13) A utility shall file an application at least every three calendar years to reconcile costs recovered through its EECRF. An application filed pursuant to this paragraph shall be separate from the annual EECRF adjustment application required by paragraph (4) of this subsection. The commission may establish a schedule and form for such applications.
- (g) **Incentive payments.** The incentive payments for each customer class shall not exceed 100% of avoided cost, as determined in accordance with this section. The incentive payments shall be set by each utility with the objective of achieving its energy and demand savings goals at the lowest reasonable cost per program. Different incentive

levels may be established for areas that have historically been underserved by the utility's energy efficiency program or for other appropriate reasons. Utilities may adjust incentive payments during the program year, but such adjustments must be clearly publicized in the materials used by the utility to set out the program rules and describe the program to participating energy efficiency service providers.

- (h) **Energy efficiency performance bonus.** A utility that exceeds its demand and energy reduction goals established in this section at a cost that does not exceed the limit established in this section shall be awarded a performance bonus. The performance bonus shall be based on the utility's energy efficiency achievements for the previous calendar year. The bonus calculation shall not include demand or energy savings that result from programs other than programs implemented under this section.
- (1) The performance bonus shall entitle the utility to receive a share of the net benefits realized in meeting its demand reduction goal established in this section.
 - (2) Net benefits shall be calculated as the sum of total avoided cost associated with the eligible programs administered by the utility minus the sum of all program costs. Total avoided costs shall be calculated in accordance with this section.
 - (3) A utility that exceeds 100% of its demand and energy reduction goals shall receive a bonus equal to 1% of the net benefits for every 2% that the demand reduction goal has been exceeded, with a maximum of 20% of the utility's program costs.
 - (4) The commission may reduce the bonus otherwise permitted under this subsection for a utility that fails to meet the goal for its under subsection (e) of this section.

- (5) In calculating net benefits to determine a performance bonus, a discount rate equal to the utility's weighted average cost of capital of the utility and an escalation rate of two percent shall be used.
 - (6) A bonus earned under this section shall not be included in the utility's revenues or net income for the purpose of establishing a utility's rates or commission assessment of its earnings.
 - (7) The amendments to this subsection adopted in 2010 are effective for any bonus requested for performance in program year 2010 or thereafter.
- (i) **Utility administration.** The cost of administration shall not exceed 15% of a utility's total program costs. The cost of research and development shall not exceed 10% of a utility's total program costs. The cumulative cost of administration and research and development shall not exceed 20% of a utility's total program costs. Any bonus awarded by the commission shall not be included in program costs for the purpose of applying these limits.
- (1) Administrative costs include all reasonable and necessary costs incurred by a utility in carrying out its responsibilities under this section, including:
 - (A) conducting informational activities designed to explain the standard offer programs and market transformation programs to energy efficiency service providers, retail electric providers, and vendors;
 - (B) providing informational programs to improve customer awareness of energy efficiency programs and measures;
 - (C) reviewing and selecting energy efficiency programs in accordance with this section;

- (D) providing regular and special reports to the commission, including reports of energy and demand savings; and
 - (E) any other activities that are necessary and appropriate for successful program implementation.
- (2) A utility shall adopt measures to foster competition among energy service providers, such as limiting the number of projects or level of incentives that a single energy service provider and its affiliates is eligible for and establishing funding set-asides for small projects.
- (3) A utility may establish funding set-asides or other program rules to foster participation in energy efficiency programs by municipalities and other governmental entities.
- (4) Electric utilities shall use standardized forms, procedures, deemed savings estimates and program templates. The electric utility shall file any standardized materials, or any change to it, with the commission at least 60 days prior to its use. In filing such materials, the utility shall provide an explanation of changes from the version of the materials that was previously used. The utility shall provide relevant documents to REPs and EESPs and work collaboratively with them when it changes program documents, to the extent that such changes are not considered in the Energy Efficiency Implementation Project described in subsection (q) of this section.
- (5) Each electric utility in an area in which customer choice is offered shall conduct programs to encourage and facilitate the participation of retail electric providers

and energy efficiency service providers in the delivery of efficiency and demand response programs, including:

- (A) Coordinating program rules, contracts, and incentives to facilitate the statewide marketing and delivery of the same or similar programs by retail electric providers;
- (B) Setting aside amounts for programs to be delivered to customers by retail electric providers and establishing program rules and schedules that will give retail electric providers sufficient time to plan, advertise, and conduct energy efficiency programs, while preserving the utility's ability to meet the goals in this section; and
- (C) Working with retail electric providers and energy efficiency service providers to evaluate the demand reductions and energy savings resulting from time-of-use prices, home-area network devices, such as in home displays, and other programs facilitated by advanced meters to determine the demand and energy savings from such programs.

- (j) **Standard offer programs.** A utility's standard offer program shall be implemented through program rules and standard offer contracts that are consistent with this section. Standard offer contracts will be available to any energy efficiency service provider that satisfies the contract requirements prescribed by the utility under this section and demonstrates that it is capable of managing energy efficiency projects under an electric utility's energy efficiency program.

- (k) **Market transformation programs.** Market transformation programs are strategic efforts, including, but not limited to, incentives and education designed to reduce market barriers for energy efficient technologies and practices. Market transformation programs may be designed to obtain energy savings or peak demand reductions beyond savings that would be achieved through compliance with existing building codes and equipment efficiency standards or standard offer programs. Utilities should cooperate with the REPs, and, where possible, leverage existing industry-recognized programs that have the potential to reduce demand and energy consumption in Texas and consider statewide administration where appropriate. Market transformation programs may operate over a period of more than one year and may demonstrate cost-effectiveness over a period longer than one year.
- (l) **Requirements for standard offer and market transformation programs.** A utility's standard offer and market transformation programs shall meet the requirements of this subsection. A utility may conduct information and advertizing campaigns to foster participation in standard offer and market transformation programs.
- (1) Standard offer and market transformation programs:
- (A) shall describe the eligible customer classes and allocate funding among the classes on an equitable basis;
 - (B) may offer standard incentive payments and specify a schedule of payments that are sufficient to meet the goals of the program, which shall be consistent with this section, or any revised payment formula adopted by the commission. The incentive payments may include both payments for energy and demand savings, as appropriate;

- (C) shall not permit the provision of any product, service, pricing benefit, or alternative terms or conditions to be conditioned upon the purchase of any other good or service from the utility, except that only customers taking transmission and distribution services from a utility can participate in its energy efficiency programs;
 - (D) shall provide for a complaint process that allows:
 - (i) an energy efficiency service provider to file a complaint with the commission against a utility; and
 - (ii) a customer to file a complaint with the utility against an energy efficiency service provider;
 - (E) may permit the use of renewable DSM and combined heat and power technologies, involving installations of ten megawatts or less; and
 - (F) may require energy efficiency service providers to provide the following:
 - (i) a description of how the value of any incentive will be passed on to customers;
 - (ii) evidence of experience and good credit rating;
 - (iii) a list of references;
 - (iv) all applicable licenses required under state law and local building codes;
 - (v) evidence of all building permits required by governing jurisdictions; and
 - (vi) evidence of all necessary insurance.
- (2) Standard offer programs:

- (A) shall require energy efficiency service providers to identify peak demand and energy savings for each project in the proposals they submit to the utility;
 - (B) shall be neutral with respect to specific technologies, equipment, or fuels. Energy efficiency projects may lead to switching from electricity to another energy source, provided that the energy efficiency project results in overall lower energy costs, lower energy consumption, and the installation of high efficiency equipment. Utilities may not pay incentives for a customer to switch from gas appliances to electric appliances except in connection with the installation of high efficiency combined heating and air conditioning systems;
 - (C) shall require that all projects result in a reduction in purchased energy consumption, or peak demand, or a reduction in energy costs for the end-use customer;
 - (D) shall encourage comprehensive projects incorporating more than one energy efficiency measure;
 - (E) shall be limited to projects that result in consistent and predictable energy or peak demand savings over an appropriate period of time based on the life of the measure; and
 - (F) may permit a utility to use poor performance, including customer complaints, as a criterion to limit or disqualify an energy efficiency service provider or its affiliate from participating in a program.
- (3) A market transformation program shall identify:

- (A) program goals;
 - (B) market barriers the program is designed to overcome;
 - (C) key intervention strategies for overcoming those barriers;
 - (D) estimated costs and projected energy and capacity savings;
 - (E) a baseline study that is appropriate in time and geographic region. In establishing a baseline, the study shall consider the level of regional implementation and enforcement of any applicable energy code;
 - (F) program implementation timeline and milestones;
 - (G) a description of how the program will achieve the transition from extensive market intervention activities toward a largely self-sustaining market;
 - (H) a method for measuring and verifying savings; and
 - (I) the period over which savings shall be considered to accrue, including a projected date by which the market will be sufficiently transformed so that the program should be discontinued.
- (4) A market transformation program shall be designed to achieve energy or peak demand savings, or both, and lasting changes in the way energy efficient goods or services are distributed, purchased, installed, or used over a defined period of time. A utility shall use fair competitive procedures to select EESPs to conduct a market transformation program, and shall include in its annual report the justification for the selection of an EESP to conduct a market transformation program on a sole-source basis.

- (5) A load-control standard-offer program shall not permit an energy efficiency service provider to receive incentives under the utility program for the same demand reduction for which it is compensated under a demand response program conducted by an independent organization, independent system operator, or regional transmission operator.
- (m) **Energy efficiency plans and reports.** Each electric utility shall file by April 1 of each year an energy efficiency plan and report, as described in this subsection. The plan and report shall be filed as a single document.
- (1) Each electric utility's energy efficiency plan and report shall describe how the utility intends to achieve the goals set forth in this section and comply with the other requirements of this section. The plan and report shall be based on calendar years. The plan and report shall propose an annual budget sufficient to reach the goals specified in this section.
- (2) Each electric utility's plan and report shall include:
- (A) the utility's total actual and weather-adjusted peak demand and actual and weather-adjusted peak demand for residential and commercial customers for the previous five years;
- (B) the demand goal calculated in accordance with this section for the current year and the following year, including documentation of the demand, weather adjustments, and the calculation of the goal;
- (C) the utility's customers' total actual and weather-adjusted energy consumption and actual and weather-adjusted energy consumption for residential and commercial customers for the previous five years;

- (D) the energy goal calculated in accordance with this section, including documentation of the energy consumption, weather adjustments, and the calculation of the goal;
- (E) a description of existing energy efficiency programs and an explanation of the extent to which these programs will be used to meet the utility's energy efficiency goals;
- (F) a description of each of the utility's energy efficiency programs that were not included in the previous year's plan, including measurement and verification plans if appropriate, and any baseline studies and research reports or analyses supporting the value of the new programs;
- (G) an estimate of the energy and peak demand savings to be obtained through each separate energy efficiency program;
- (H) a description of the customer classes targeted by the utility's energy efficiency programs, specifying the size of the hard-to-reach, residential, and commercial classes, and the methodology used for estimating the size of each customer class;
- (I) the proposed annual budget required to implement the utility's energy efficiency programs, broken out by program for each customer class, including hard-to-reach customers, and any set-asides or budget restrictions adopted or proposed in accordance with this section. The proposed budget shall detail the incentive payments and utility administrative costs, including specific items for research and information and outreach to energy efficiency service providers, and other major

administrative costs, and the basis for estimating the proposed expenditures;

- (J) a discussion of the types of informational activities the utility plans to use to encourage participation by customers, energy efficiency service providers, and retail electric providers to participate in energy efficiency programs, including the manner in which the utility will provide notice of energy efficiency programs, and any other facts that may be considered when evaluating a program;
- (K) the utility's energy goal and demand goal for the prior five years, as reported in annual energy efficiency reports filed in accordance with this section;
- (L) a comparison of projected savings (energy and demand), reported savings, and verified savings for each of the utility's energy efficiency programs for the prior two years;
- (M) a description of the results of any market transformation program, including a comparison of the baseline and actual results and any adjustments to the milestones for a market transformation program;
- (N) expenditures for the prior five years for energy and demand incentive payments and program administration, by program and customer class;
- (O) funds that were committed but not spent during the prior year, by program;

- (P) a comparison of actual and budgeted program costs, including an explanation of any increase or decreases of more than 10% in the cost of a program;
 - (Q) information relating to energy and demand savings achieved and the number of customers served by each program by customer class;
 - (R) the utility's most recent EECRF, the revenue collected through the EECRF, energy efficiency revenue collected through base rates, and the control number under which the most recent EECRF was established;
 - (S) the amount of any over- or under-recovery energy efficiency program costs whether collected through base rates or the EECRF;
 - (T) a list of any counties that in the prior year were under-served by the energy efficiency program;
 - (U) a calculation showing whether the utility qualifies for a performance bonus and the amount of any bonus; and
 - (V) a description of new or discontinued programs, including pilot programs that are planned to be continued as full programs. For programs that are to be introduced or pilot programs that are to be continued as full programs, the description shall include the budget and projected demand and energy savings.
- (n) **Review of programs.** Commission staff may initiate a proceeding to review a utility's energy efficiency programs. In addition, an interested entity may request that the commission initiate a proceeding to review a utility's energy efficiency programs.

- (o) **Inspection, measurement and verification.** Each standard offer program shall include an industry-accepted measurement and verification protocol, such as the International Performance Measurement and Verification Protocol, to measure and verify energy and peak demand savings to ensure that the goals of this section are achieved. An energy efficiency service provider shall not receive final compensation until it establishes that the work is complete and measurement and verification in accordance with the protocol verifies that the savings will be achieved. If inspection of one or more measures is a part of the protocol, an energy efficiency service provider shall not receive final compensation until the utility has conducted its inspection on the sample of measures and the inspections confirm that the work has been done.
- (1) The energy efficiency service provider is responsible for the measurement of energy and peak demand savings using the approved measurement and verification protocol, and may utilize the services of an independent third party for such purposes.
- (2) Commission-approved deemed energy and peak demand savings may be used in lieu of the energy efficiency service provider's measurement and verification, where applicable. The deemed savings approved by the commission before December 31, 2007 are continued in effect, unless superseded by commission action.
- (3) An energy efficiency service provider shall verify that the measures contracted for were installed before final payment is made to the energy efficiency service provider, by obtaining the customer's signature certifying that the measures were installed, or by other reasonably reliable means approved by the utility.

- (4) For projects involving over 30 installations, a statistically significant sample of installations will be subject to on-site inspection in accordance with the protocol for the project to verify that measures are installed and capable of performing their intended function. Inspection shall occur within 30 days of notification of measure installation.
- (5) Projects of less than 30 installations may be aggregated and a statistically significant sample of the aggregate installations will be subject to on-site inspection in accordance with the protocol for the projects to ensure that measures are installed and capable of performing their intended function. Inspection shall occur within 30 days of notification of measure installation.
- (6) The sample size for on-site inspections may be adjusted for an energy efficiency service provider under a particular contract, based on the results of prior inspections.
- (p) **Targeted energy efficiency program.** Unless funding is provided under PURA §39.903, each unbundled transmission and distribution utility shall include in its energy efficiency plan a targeted low-income energy efficiency program as described by PURA §39.903(f)(2). Savings achieved by the program shall count toward the transmission and distribution utility's energy efficiency goal. Each utility shall include a proposed funding level for the weatherization program in its energy efficiency plan.
- (q) **Energy Efficiency Implementation Project - EEIP.** The commission may use an implementation project involving input by interested persons to make recommendations to the commission with regard to best practices in standard offer programs and market

transformation programs, modifications to programs, standardized forms and procedures, deemed savings estimates, program templates, and the overall direction of the energy efficiency program established by this section. Utilities shall provide timely responses to questions posed by participants in the EEIP that are relevant to the tasks of the EEIP. The following functions may also be undertaken in the energy efficiency implementation project:

- (1) development, discussion, and review of new statewide standard offer programs;
- (2) identification, discussion, design, and review of new market transformation programs;
- (3) determination of measures for which deemed savings are appropriate and participation in the development of deemed savings estimates for those measures;
- (4) review of and recommendations on an independent measurement and verification expert's report;
- (5) review of and recommendations on incentive payment levels and their adequacy to induce the desired level of participation by energy efficiency service providers and customers;
- (6) review of and recommendations on the utility annual energy efficiency plans and reports; EEIP meetings may be scheduled by commission staff for review of the most recent historical year's utility reports, for review of proposals for changes to a utility's energy efficiency plans for a future year, and for midcourse review;
- (7) periodic reviews of the cost effectiveness methodology; and
- (8) other activities as requested by the commission.

- (r) **Retail providers.** Each utility in an area in which customer choice is offered shall conduct outreach and information programs and otherwise use its best efforts to encourage and facilitate the involvement of retail electric providers as energy efficiency service companies in the delivery of efficiency and demand response programs.
- (s) **Customer protection.** Each energy efficiency service provider that provides energy efficiency services to end-use customers under this section shall provide the disclosures and include the contractual provisions required by this subsection, except for commercial customers with a peak load exceeding 50 kW.
- (1) Clear disclosure to the customer shall be made of the following:
- (A) the customer's right to a cooling-off period of three business days, in which the contract may be canceled, if applicable under law;
 - (B) the name, telephone number, and street address of the energy efficiency services provider and any subcontractor that will be performing services at the customer's home or business;
 - (C) the fact that incentives are made available to the energy efficiency services provider through a program funded by utility customers, manufacturers or other entities and the amount of any incentives provided by the utility;
 - (D) the amount of any incentives that will be provided to the customer;
 - (E) notice of provisions that will be included in the customer's contract, including warranties;
 - (F) the fact that the energy efficiency service provider must measure and report to the utility the energy and peak demand savings from installed energy efficiency measures;

- (G) the liability insurance to cover property damage carried by the energy efficiency service provider and any subcontractor;
 - (H) the financial arrangement between the energy efficiency service provider and customer, including an explanation of the total customer payments, the total expected interest charged, all possible penalties for non-payment, and whether the customer's installment sales agreement may be sold;
 - (I) the fact that the energy efficiency service provider is not part of or endorsed by the commission or the utility; and
 - (J) a description of the complaint procedure established by the utility under this section, and toll free numbers for the Office of Customer Protection of the Public Utility Commission of Texas, and the Office of Attorney General's Consumer Protection Hotline.
- (2) The energy efficiency service provider's contract with the customer shall include:
- (A) work activities, completion dates, and the terms and conditions that protect residential customers in the event of non-performance by the energy efficiency service provider;
 - (B) provisions prohibiting the waiver of consumer protection statutes, performance warranties, false claims of energy savings and reductions in energy costs; and
 - (C) a complaint procedure to address performance issues by the energy efficiency service provider or a subcontractor.

- (3) When an energy efficiency service provider completes the installation of measures for a customer, it shall provide the customer an “All Bills Paid” affidavit to protect against claims of subcontractors.
- (t) **Grandfathered programs.** An electric utility that offered a load management standard offer programs for industrial customers prior to May 1, 2007 shall continue to make the program available, at 2007 funding and participation levels, and may include additional customers in the program to maintain these funding and participation levels. Notwithstanding subsection (c)(8) of this section, an industrial customer may be considered an eligible customer for programs that will be completed no later than December 31, 2008.
- (u) **Administrative penalty.** The commission may impose an administrative penalty or other sanction if the utility fails to meet a goal for energy efficiency under this section. Factors that may be considered in determining whether to impose a sanction for the utility’s failure to meet the goal include:
- (1) the level of demand by retail electric providers and competitive energy service providers for program incentive funds made available by the utility through its programs;
 - (2) changes in building energy codes;
 - (3) changes in government-imposed appliance or equipment efficiency standards;
 - (4) any actions taken by the utility to identify and correct any deficiencies in its energy efficiency program; and
 - (5) the utility’s effectiveness in administering its energy efficiency program.

- (v) **Effective date.** The effective date of this section is December 1, 2010.

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 §25.181 relating to Energy Efficiency Goal is hereby amended with changes to the text as proposed.

SIGNED AT AUSTIN, TEXAS on the 9th day of AUGUST 2010

PUBLIC UTILITY COMMISSION OF TEXAS

BARRY T. SMITHERMAN, CHAIRMAN

KENNETH W. ANDERSON, JR., COMMISSIONER

I respectfully dissent from the order adopting these amendments.

DONNA L. NELSON, COMMISSIONER