

PROJECT NO. 50406

**RULEMAKING TO AMEND 16 TAC § PUBLIC UTILITY COMMISSION
§25.471 § OF TEXAS**

**ORDER AMENDING §25.471
AS APPROVED AT THE MAY 14, 2020 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts amendments to 16 Texas Administrative Code (TAC) §25.471, relating to general provisions of customer protection rules with changes to the proposed text as published in the January 31, 2020 issue of the *Texas Register* (45 TexReg 681).

The amendments align the language of 16 TAC §25.471 with the requirements of Public Utility Regulatory Act (PURA) §39.3555 enacted as Senate Bill 1497 by the 86th Texas Legislature, Regular Session. The amendments also synchronize 16 TAC §25.471 with new 16 TAC §25.112, (relating to Registration of Brokers), and new 16 TAC §25.486 (relating to Customer Protections for Brokerage Services), as adopted in Project No. 49794, Rulemaking for Broker Registrations. Specifically, the amendments clarify that, where specifically stated, 16 TAC Chapter 25, Subchapter R (relating to Customer Protection Rules for Retail Electric Service) applies to brokers. The amendments also make other modifications to §25.471 to reflect new 16 TAC §§25.112 and 25.486 as well as make other minor changes. The amendments are adopted under Project No. 50406.

The commission received comments on the proposed amendments from the Alliance for Retail Markets (ARM), the Office of Public Utility Counsel (OPUC), and The Energy Professionals Association (TEPA). These comments were filed after the commission issued its proposal for

publication in Project No. 49794, but before the commission adopted a final rule in that project. Several of the filed comments in this project reference provisions of the commission's proposed language in Project No. 49794. For clarity, in this preamble, the commission will reference rule provisions from the commission's proposed new rules in Project No. 49794 as "proposed" and rule provisions from the final rules in Project No. 49794 as "adopted."

General Comments

OPUC appreciated the commission's efforts to amend 16 TAC §25.471 to clarify that the "[c]ommission's general provisions of customer protection rules apply to brokers in the same manner that the [c]ommission's general provisions of customer protection rules apply to aggregators." OPUC stated that these changes are consistent with the legislative intent of PURA §39.3555 (for consistency, commenter references to Senate Bill 1497 are summarized as referencing PURA §39.3555) and serve to provide consistency with the new sections proposed in Project No. 49794.

ARM supported the approach taken in the proposal and agreed that this additional rulemaking will facilitate the intent of PURA §39.3555 to bring brokers within the scope of the commission's general customer protection rules and help to prevent any gaps in the coverage of such provisions.

Commission Response

The commission makes no changes in response to these comments as none are requested.

The commission notes that the changes made to 16 TAC §25.471 in this project do not uniformly apply the commission’s customer protection rules to brokers “in the same manner that the [c]ommission’s general provisions of customer protection rules apply to aggregators,” as described by OPUC. The provisions of Subchapter R apply to brokers when specifically stated. Currently, brokers are specifically referenced in adopted 16 TAC §25.486. Accordingly, the provisions of adopted 16 TAC §25.486 and any other provisions of Subchapter R referenced by 16 TAC §25.486, either explicitly or implicitly, apply to brokers.

TEPA stated that, consistent with its comments in Project No. 49794, it continued to advocate for a simple and easily administered registration process as expressed in statute. TEPA argued that the registration process should apply fairly, equitably, and in a competitively neutral, non-discriminatory manner to any business acting on behalf of a retail electric customer and being compensated to help a customer choose a retail electric provider (REP), product, or service.

Commission Response

The commission makes no changes in response to this comment as the broker registration process is outside of the scope of this project.

Comments on the amendments to 16 TAC §25.471(a)

ARM agreed with and supported the addition of "brokers" to the first sentence of 16 TAC §25.471(a).

Commission Response

The commission makes no changes in response to ARM's comment as none are requested.

Comments on the amendments to 16 TAC §25.471(a)(3)

Under 16 TAC §25.471(a)(3), certain “customers” can agree to a different level of customer protections than is required under Subchapter R. ARM referenced its recommendation in Project No. 49794 that persons who receive brokerage services from a broker be referred to as “customers” rather than “clients.” ARM suggested in Project No. 50406 that if the commission declines to accept its prior recommendation, that the commission modify 16 TAC §25.471(a)(3) to also recognize the ability of certain "clients" to agree to a different level of customer protections than is required by Subchapter R of the commission's rules.

Commission Response

Adopted 16 TAC §25.486 did not replace all instances of the word “client” with “customer,” as requested by ARM. However, the commission declines to modify the language of 16 TAC §25.471(a)(3) to clarify that clients can also agree to a different level of customer protections than required by Subchapter R. This provision addresses the customer protections a person is entitled to *as a customer*, which under 16 TAC §25.471(d)(4) requires the person to be currently receiving retail electric service from a REP, and how, as a customer, it can agree to a different level of customer protections by written agreement. To the extent that a broker's client becomes a customer of a retail electric provider, this language still applies to that client with regards to its retail electric service.

Proposed 16 TAC §25.486(c) allowed certain clients to agree to a different level of customer protections related to the provision of brokerage services than is provided by that section, provided that the agreement is in writing and the broker provides the agreement to commission staff upon request. TEPA filed comments in Project No. 49794 requesting that a broker only be required to provide “relevant portions” of the agreement to the commission. In Project No. 50406, ARM referenced TEPA’s request in Project No. 49794 and recommended that if the commission granted TEPA’s request, the commission should make a similar change to 16 TAC §25.471(a)(3), which imposes a similar requirement on customer protection agreements made by customers. ARM argued that the same standard should apply to all customer-facing entities.

Commission Response

The commission declines to adopt ARM’s recommendation that the commission limit the disclosure of agreements limiting customer protections to the “relevant portions” of those agreements. Modifying the customer protection requirements that apply to contracts for retail electric service is outside of the scope of this project. Moreover, ARM’s recommendation was conditioned upon the commission adopting similar language at the request of TEPA in Project No. 49794. The commission did not adopt TEPA’s recommended language in Project No. 49794.

Under 16 TAC §25.471(a)(3), there are exceptions to the customer protection provisions that a customer can agree to modify. These sections include 16 TAC §25.495 (relating to Unauthorized Change of Retail Electric Provider), 16 TAC §25.481 (relating to Unauthorized Charges), and 16 TAC §25.485(a)-(b) (relating to Customer Access and Complaint Handling).

In Project No. 49794, ARM requested that the commission adopt a new section that prohibited unauthorized charges (commonly referred to as “cramming”) and unauthorized changes of provider (commonly referred to as “slamming”) by brokers. In Project No. 50406, ARM argued that if the commission adopted slamming and cramming prohibitions in Project No. 49794, it should add those provisions to the list of sections that a customer is not permitted to modify under 16 TAC §25.471(a)(3). ARM argued that doing so would be consistent with the current exceptions in 16 TAC §25.471(a)(3). ARM asserted that not including such a provision in 16 TAC §25.471(a)(3) could result in customers that utilize brokerage services being slammed or crammed by brokers with no recourse under the commission’s rules.

ARM further noted that, “for the same reasons,” the commission should add proposed 16 TAC §25.486(k) (relating to Customer Service and Complaint Handling) to the list of exceptions to the waiver provisions of 16 TAC §25.471(a)(3).

Commission Response

Adopted 16 TAC §25.486(h) prohibits slamming and cramming by brokers, as requested by ARM in Project No. 49794. Specifically, a broker “must not bill an unauthorized charge or cause an unauthorized charge to be billed to a customer’s retail electric service bill,” and a broker “must not switch or cause to be switched the REP of a customer without first obtaining the customer’s authorization.” However, the commission declines to add 16 TAC §25.486(h) to the list of customer protections in 16 TAC §25.471(a)(3) that a customer is not permitted to agree to modify.

Unlike the nuanced procedures established by 16 TAC §§25.481 and 25.495, adopted 16 TAC §25.486(h) is a straightforward prohibition against slamming and cramming by brokers. Accordingly, there are very few scenarios in which, for example, a client could explicitly agree in writing to allow a broker to bill charges that would be considered “unauthorized.” The large customers that are eligible to agree to a different level of customer protections under adopted 16 TAC §25.486(h) are sophisticated enough to identify these scenarios and determine if they are willing to agree to them. Moreover, some of these scenarios may be desirable for certain customers. For example, a large commercial client may wish to give a broker complete discretion over the company’s electric service decisions. If the client wishes to reduce the broker’s potential regulatory liabilities by waiving 16 TAC §25.486(h), the commission will not prevent it from doing so.

Similarly, if a sophisticated large client wishes to agree to a lower level of client access and complaint handling than is provided by adopted 16 TAC §25.486(k), the commission will not prohibit it from doing so.

Brokerage services are inherently discretionary. If a sophisticated large client opts to retain the services of a broker, the client is responsible for determining what services the broker will provide and the protections that the client expects to receive. Moreover, the client is not left without recourse, as suggested by ARM, as it is still free to pursue civil remedies if it believes the broker exceeded its authorizations under the contract.

ARM noted that under 16 TAC §25.5(13) (relating to Definitions), the term "commission" is defined as the Public Utility Commission of Texas, which PURA §12.051 defines as being "composed of the three commissioners appointed by the governor with the advice and consent of the senate." ARM argued that while the requirement to provide copies of agreements under §25.471(a)(3) has generally been interpreted to read "commission" as "commission staff," the commission's rules tend to distinguish between the two. Given the opportunity to correct for any potential confusion in this rulemaking while conforming the rule's language with its practical effect, ARM recommended replacing the term "the commission" with "commission staff."

Commission Response

The commission declines to adopt ARM's recommendation that "the commission" be replaced with "commission staff" at this time. As noted by ARM, this rule has been interpreted to require a copy of an agreement under §25.471(a)(3) to be provided to commission staff upon request. Accordingly, no change is necessary.

Comments on the amendments to 16 TAC §25.471(b)(4)

The commission's proposal modified the purpose provisions of 16 TAC §25.471(b) by amending paragraph (b)(4) as follows: the purposes of this subchapter are to "prohibit fraudulent, unfair, misleading, deceptive or anticompetitive acts and practices by aggregators, ~~and~~ REPs, and brokers in the marketing, solicitation and sale of electric service and in the administration of any terms of service for electric service."

TEPA argued that the proposed revisions to 16 TAC §25.471(b) should more clearly recognize and distinguish between the services lawfully provided by brokers and the retail electric services lawfully provided by REPs. Specifically, TEPA argued that brokers do not market, solicit, or sell retail electric services and the proposed amendments would mislead brokers, customers, and other market participants into believing brokers do engage in those activities. TEPA was also concerned that the proposed amendments imply that brokers are offering services they are legally prohibited from providing. TEPA recommended striking “brokers” from 16 TAC §25.471(b)(4) and adding a new 16 TAC §25.471(b)(5) prohibiting “fraudulent, unfair, misleading, deceptive, or anticompetitive acts and practices by brokers when providing advice or procurement services to, or acting on behalf of, a retail electric customer regarding the selection of a retail electric provider, or a product or service offered by a retail electric provider.”

Commission Response

The commission declines to remove brokers from 16 TAC §25.471(b)(4), as requested by TEPA. One purpose of Subchapter R is to protect customers from fraudulent, unfair, misleading, deceptive, or anticompetitive acts and practices relating to their electric service, whether those acts and practices are carried out by REPs, aggregators, or brokers.

The commission does not agree that this provision implies that brokers are offering services they are legally prohibited from providing. Under PURA §39.3555, a broker is prohibited from selling or taking title to electric energy, but it is not prohibited from engaging in all of the activities listed in 16 TAC §25.471(b)(4). For example, many brokers market a variety of retail electric products to their clients. Accordingly, one of the

purposes of Subchapter R is to ensure that brokers do not market these products in a manner that is fraudulent, unfair, misleading, deceptive.

The commission also does not share TEPA's concern that this language will mislead brokers, customers, or other market participants as to the role that brokers play in the market. The function of subsection (b) is to establish the purpose of Subchapter R, which is to provide individuals with appropriately robust customer protections. It does not authorize or prohibit any particular behaviors or define the specific roles of any market participant.

The commission also declines to add a new provision to 16 TAC §25.471(b) as requested by TEPA. Instead, the commission modifies 16 TAC §25.471(b)(4) to incorporate TEPA's proposed language. This makes it clear that one purpose of Subchapter R is to prohibit fraudulent, misleading, deceptive, or anticompetitive acts and practices whether they are in reference to retail electric service or brokerage services, regardless of whether the prohibited act is committed by a REP, an aggregator, or a broker.

Comments on the amendments to 16 TAC §25.471(d)

TEPA recommended that the commission adopt a stand-alone definition of "REP Agent." TEPA is concerned that REP agents, which are currently undefined in the commission's rules, actually provide services described and attributed to brokers in the proposed changes to §25.471(b)(4).

Commission Response

The commission declines to adopt a definition of REP agent, as requested by TEPA. This recommendation falls outside the scope of this project, which is to harmonize the language of 16 TAC §25.471 with PURA §39.3555 and adopted sections 16 TAC §§25.112 and 25.486.

In Project No. 49794, ARM recommended that the commission replace the term “client” throughout proposed 16 TAC §25.486 with “customer.” In Project No. 50406, ARM argued that if the commission opted to use “client” in adopted 16 TAC §25.486 instead of making ARM’s recommended modification, that the definition of “applicant” in 16 TAC §25.471 should include a reference to brokers and brokerage services. ARM is concerned that an applicant for brokerage services will fall outside of the commission’s customer protection rules.

Commission Response

The commission declines to modify the definition of applicant to include a reference to brokers and brokerage services, as requested by ARM. The term “applicant” is used throughout Subchapter R and modifying it to include a reference to brokers and brokerage services would create a number of inconsistencies with the specific customer protections for brokerage services in adopted 16 TAC §25.486.

The commission does not share ARM’s concern about the applicability of adopted 16 TAC §25.486 to potential customers of brokers. Adopted 16 TAC §25.486(b)(3) defines client as a “person who receives or solicits brokerage services from a broker.” A potential customer of a broker, as described by ARM, is a person who is soliciting brokerage services from a

broker, and therefore, is a client of that broker for purposes of the customer protection rules of 16 TAC §25.486.

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

This amendment is adopted under PURA §14.002, which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and §39.3555, which requires entities that provide brokerage services in this state to register as brokers with the commission and to comply with customer protection provisions established by the commission and Chapters 17 and 39 of PURA, and which requires the commission to adopt rules as necessary to implement the section.

Cross reference to statutes: Public Utility Regulatory Act §14.002 and §39.3555.

§25.471. General Provisions of Customer Protection Rules.

(a) **Application.** This subchapter applies to aggregators and retail electric providers (REPs).

In addition, where specifically stated, these rules apply to transmission and distribution utilities (TDUs), the registration agent, brokers and power generation companies. These rules specify when certain provisions are applicable only to some, but not all, of these providers.

- (1) Affiliated REP customer protection rules, to the extent the rules differ from those applicable to all REPs or those that apply to the provider of last resort (POLR), do not apply to the affiliated REP when serving customers outside the geographic area served by its affiliated transmission and distribution utility. The affiliated REP customer protection rules apply until the price-to-beat obligation ends in the affiliated REPs' affiliated TDU service territory.
- (2) Requirements applicable to a POLR apply to a REP only in its provision of service as a POLR.
- (3) The rules in this subchapter are minimum, mandatory requirements that must be offered to or complied with for all customers unless otherwise specified. Except for the provisions of §25.495 of this title (relating to Unauthorized Change of Retail Electric Provider), §25.481 of this title (relating to Unauthorized Charges), and §25.485(a)-(b) of this title (relating to Customer Access and Complaint Handling), a customer other than a residential or small commercial class customer, or a non-residential customer whose load is part of an aggregation in excess of 50 kilowatts, may agree to terms of service that reflect either a higher or lower level of customer protections than would otherwise apply under these rules.

Any agreements containing materially different protections from those specified in these rules must be reduced to writing and provided to the customer.

Additionally, copies of such agreements must be provided to the commission upon request.

- (4) The rules of this subchapter control over any inconsistent provisions, terms, or conditions of a REP's terms of service or other documents describing service offerings for customers in Texas.
 - (5) For purposes of this subchapter, a municipally owned utility or electric cooperative is subject to the same provisions as a REP where the municipally owned utility or electric cooperative sells retail electricity service outside its certificated service area.
- (b) **Purpose.** The purposes of this subchapter are to:
- (1) provide minimum standards for customer protection. An aggregator or REP may adopt higher standards for customer protection, provided that the prohibition on discrimination set forth in subsection (c) of this section is not violated;
 - (2) provide customer protections and disclosures established by other state and federal laws and rules including but not limited to the Fair Credit Reporting Act (15 U.S.C. §1681, et seq.) and the Truth in Lending Act (15 U.S.C. §1601, et seq.). Such protections are applicable where appropriate, whether or not it is explicitly stated in these rules;
 - (3) provide customers with sufficient information to make informed decisions about electric service in a competitive market; and

- (4) prohibit fraudulent, unfair, misleading, deceptive, or anticompetitive acts and practices by aggregators, REPs, and brokers in the marketing, solicitation and sale of electric service, in the administration of any terms of service for electric service and in providing advice or procurement services to, or acting on behalf of, a retail electric customer regarding the selection of a retail electric provider, or a product or service offered by a retail electric provider.
- (c) **Prohibition against discrimination.** This subchapter prohibits REPs from unduly refusing to provide electric service or otherwise unduly discriminating in the marketing and provision of electric service to any customer because of race, creed, color, national origin, ancestry, sex, marital status, lawful source of income, level of income, disability, familial status, location of customer in an economically distressed geographic area, or qualification for low-income or energy efficiency services.
- (d) **Definitions.** For the purposes of this subchapter the following words and terms have the following meaning, unless the context indicates otherwise:
- (1) **Applicant**--A person who applies for electric service via a move-in or switch with a REP that is not currently the person's REP of record or applies for aggregation services with an aggregator from whom the person is not currently receiving aggregation services.
- (2) **Burned Veteran**--A customer who is a military veteran who a medical doctor certifies has a significantly decreased ability to regulate body temperature because of severe burns received in combat.
- (3) **Competitive energy services**--As defined in §25.341 of this title (relating to Definitions).

- (4) **Customer**--A person who is currently receiving retail electric service from a REP in the person's own name or the name of the person's spouse, or the name of an authorized representative of a partnership, corporation, or other legal entity, including a person who is changing premises but is not changing their REP.
- (5) **Electric service**--Combination of the transmission and distribution service provided by a transmission and distribution utility, municipally owned utility, or electric cooperative, metering service provided by a TDU or a competitive metering provider, and the generation service provided to an end-use customer by a REP. This term does not include optional competitive energy services, as defined in §25.341 of this title, that are not required for the customer to obtain service from a REP.
- (6) **Energy service**--As defined in §25.223 of this title (relating to Unbundling of Energy Service).
- (7) **Enrollment**--The process of obtaining authorization and verification for a request for service that is a move-in or switch in accordance with this subchapter.
- (8) **In writing**--Written words memorialized on paper or sent electronically.
- (9) **Move-in**--A request for service to a new premise where a customer of record is initially established or to an existing premise where the customer of record changes.
- (10) **Retail electric provider (REP)**--Any entity as defined in §25.5 of this title (relating to Definitions). For purposes of this rule, a municipally owned utility or an electric cooperative is only considered a REP where it sells retail electric power and energy outside its certified service territory. An agent of the REP may

perform all or part of the REP's responsibilities pursuant to this subchapter. For purposes of this subchapter, the REP will be responsible for the actions of the agent.

- (11) **Small commercial customer**--A non-residential customer that has a peak demand of less than 50 kilowatts during any 12-month period, unless the customer's load is part of an aggregation program whose peak demand is in excess of 50 kilowatts during the same 12- month period.
- (12) **Switch**--The process by which a person changes REPs without changing premises.
- (13) **Termination of service**--The cancellation or expiration of a service agreement or contract by a REP or customer.

This agency 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 §25.471 relating to general provisions of customer protection rules is hereby adopted with changes to the text as proposed.

Signed at Austin, Texas the _____ day of May 2020.

PUBLIC UTILITY COMMISSION OF TEXAS

DEANN T. WALKER, CHAIRMAN

ARTHUR C. D'ANDREA, COMMISSIONER

SHELLY BOTKIN, COMMISSIONER