PROJECT NO. 35768

RULEMAKING RELATING TO RETAIL ELECTRIC PROVIDER DISCLOSURES TO CUSTOMERS	**§ § §**	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER ADOPTING REPEAL OF §25.475, NEW §25.475, AND AMENDMENT TO §25.476 AS APPROVED AT THE FEBRUARY 20, 2009 OPEN MEETING

The Public Utility Commission of Texas (commission) adopts the repeal of §25.475, relating to Information Disclosures to Residential and Small Commercial Customers, a new §25.475, relating to General Retail Electric Provider Requirements and Information Disclosures to Residential and Small Commercial Customers, and an amendment to §25.476, relating to Renewable and Green Energy Verification, with changes to the proposed text as published in the August 29, 2008 issue of the *Texas Register* (33TexReg7114). The rule will improve disclosures to customers for retail electric service by updating the requirements of the electricity facts label and terms of service documents and will clarify advertising and marketing responsibilities. The rules are competition rules subject to judicial review as specified in Public Utility Regulatory Act (PURA) §39.001(e). The rules are adopted under Project Number 35768.

A public hearing on the rules was held at commission offices on October 22, 2008, at 9:30 a.m. Representatives from the Alliance for Retail Markets (ARM); Reliant Energy, Inc (Reliant); Texas Energy Association of Markets (TEAM), and TXU Energy (TXU) attended the hearing and provided comments. To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

The commission received written comments from ARM; Ben Ray; Carol Guffey; Steering Committee of Cities Served by Oncor (Cities); ConocoPhilips Company (ConocoPhilips); Diane Berdes; CPL Retail Energy, LP; Direct Energy, LP and WTU Retail Energy (Direct Energy); Environmental Defense Fund (EDF); Energy Plus Company (EPC); First Choice Power (First Choice); Gateway Energy (Gateway); Gexa Energy (Gexa); Green Mountain Energy (Green Mountain); Kenneth and Virginia Kyle; Milton Bird; Office of Public Utility Counsel (OPC); Public Utility Brokers; Reliant; State Representative Jim Jackson; State Representative John Zerwas; Robin Parr; Tara Energy (Tara); TEAM; Texas Ratepayers Organization to Save Energy and Texas Legal Services Center (Texas ROSE/TLSC); Texas Industrial Energy Consumers (TIEC); and TXU.

Comment Summary:

Question 1: What information should constitute sufficient evidence that a customer has relocated as contemplated in §25.475(c)(2)(D)?

ARM asserted that a customer's move to another premise during the contract term constitutes a termination of service and proposed that a Retail Electric Provider (REP) be permitted to assess an early termination fee for the termination of service resulting from a customer's relocation.

Alternatively, ARM stated if the commission concludes that a REP may not assess an early termination penalty when a customer relocates, the customer should be required to contact the REP in advance of the move date, provide the REP documentation of the forwarding address to which the REP can send the final bill, and reasonable evidence of the customer's relocation to

avoid assessment of the fee. TEAM suggested that proof should be mirrored by that required of most public school districts which TEAM reported require a copy of the property tax assessment, an executed lease, deed of sale, and a driver's license with a matching address or a current utility bill with current matching address. TXU suggested evidence be some government document or operative legal document such as a lease or purchase closing statement with a date consistent with the move period.

Public Utility Brokers stated that including this customer protection for commercial customers exposes the REP to excessive risk and this provision should be allowed to be waived by the customer for a lower rate.

Texas ROSE/TLSC stated that customers move every day and that REPs currently have a process and part of that process is securing a forwarding address and they saw no reason why procedures should be established to govern a routine internal company transaction. OPC agreed and stated that REPs should continue their current practice of accepting evidence of a customer's relocation as it allows for flexibility on the part of both the customer and the REP and to the best of OPC's knowledge there have not been significant problems for either the REPs or customers regarding this issue.

Reliant, First Choice and Cities did not support the proposal to introduce an increased burden on customers to provide evidence that they have relocated. Cities stated that the policy basis for permitting a customer to terminate a contract for service to a location when a customer moves is

sound because different premises often have different energy requirements, and customers have their own appetite for risk price sensitivity and other needs.

Reliant challenged the notion that a customer's contract period would end when the REP receives evidence that the customer no longer lives at the subject residence. A customer may move to a new residence but still own and want electricity provided to the old residence. Instead, the contract period should end when the customer is no longer responsible for electric service at the covered premise. ARM commented that Reliant's proposal should be rejected because the assessment of the penalty is not required and the customer may want to remain in the contract with the REP at its new premises. First Choice stated the REP should also have the option of allowing a customer to keep an existing contract when moving. ARM stated that the REP should have the ability to waive an early termination fee at its discretion if the customer moves to a new location and the REP is able to provide service at the new location.

Reliant proposed that if the commission does decide to allow REPs to require evidence of relocation it be limited to a forwarding address. Reliant realized that in some cases a customer cannot provide a forwarding address and the commission should establish a process that accommodates a customer who cannot provide the required information.

Commission response

The commission notes that its current rule does not permit a termination penalty to be assessed in the event that a customer moves to a different location, regardless of whether the customer moves next door or to a different state. Permitting a REP to require the

customer to provide evidence that the customer is indeed moving is appropriate to permit the REP to protect itself if a customer were to falsely claim to be moving. The commission does not believe that it needs to specify the kind of evidence that must be provided. It also concludes that it is appropriate to permit the REP to require the customers to provide a forwarding address so that a REP may send a final bill. The commission amends the rule accordingly.

Question 2: What customer protections should be delineated in the waiver for commercial customers contemplated in the proposed §25.475(j)?

ARM, TEAM, ConocoPhilips, TIEC, Tara, TXU, Reliant, Gateway and First Choice did not support the proposed waiver in subsection (j). They argued that by statute and commission rule certain customer protections cannot be waived such as the right to choose a REP, protections from unfair, misleading and deceptive information, customer complaint provisions and unauthorized charges. First Choice, Gateway and Tara argued that no other protections need to be delineated in the agreement because commercial customers have expectations different from residential and small commercial customers when buying electric service and they are used to negotiating price, length of contract, and other terms with the retail electric provider and with other entities with which they do business. Tara also stated that business owners can solicit advice from aggregators, brokers, or counsel and are already sufficiently protected by the laws of contract. ARM stated that as a practical matter, commercial customers usually negotiate over weeks or months and when they are ready to sign the contract they want it to go into effect right away, not to wait for the rescission period. Reliant commented that the proposed subsection (j)

does not meet the requirements of PURA §39.001(d), which states that regulatory authorities, "shall adopt rules and issue orders that are both practical and limited so as to impose the least impact on competition."

ARM stated that if something were required, then citing to the commission's website should suffice. ARM and Tara argued that the waiver would be a burden and additional cost on REPs especially if existing terms of service had to be revised when a rule changed.

TXU offered that if the commission wants to address the situation of customers not appreciating the negotiated terms to which they are agreeing, the commission could require REPs to put express waivers of customer protection rights in bold font in a stand alone or boxed paragraph and require that such waivers include instructions on accessing the commission's customer protection rules. Alternatively, TXU suggested that the commission might consider raising the kilowatt (kW) level for customers to which such a requirement would apply to 75 kW or eliminating the ability to aggregate customers to reach the minimum requirement. ConocoPhilips and TIEC argued that this proposal is unnecessary for Option 1 REPs and other customers with load above one megawatt (MW).

Public Utility Brokers stated that there were certain provisions that when waived would allow the customer to get a lower price such as the requirement to provide an Electricity Facts Label (EFL), Terms of Service (TOS) and Your Rights As a Customer (YRAC) and the requirement that the contract ends if the customer moves to a different location. They recommended that a provision be added to a contract or terms of service document of any customer waiving the

customer protection rules stating that the customer has consulted with an attorney and the customer voluntarily waives its rights, if any, although they also stated that customers should not need to consult an attorney to shop for electric service.

Texas ROSE/TLSC and OPC stated that the rule should require a REP to delineate all of the rights a customer is waiving, as the only fair disclosure is a full disclosure of all rights a customer is waiving when entering into an agreement. OPC suggested REPs create a checklist of waivers and have the customer initial each specific right that the customer is waiving.

Commission response

The commission has deleted proposed §25.475(j) because it is unnecessarily burdensome given that waiver of customer protections for customers at or above 50 kW is adequately addressed by §25.471(a)(3) of this title (relating to General Provisions of Customer Protection Rules).

Question 3: Should there be a disclosure statement in the contract for the purchase of electricity by a REP from a Distributed Renewable Generation (DRG) owner or Independent School District Solar Generation Owner? If so, what specific disclosures should be required?

ARM, OPC, Reliant, First Choice and Tara did not support disclosure statements in contracts between REPs and these DRG owners. ARM added that if the commission did not wish to leave such disclosure to market incentives, it might require disclosure in the limited instance where a REP's retail product is bundled with an agreement to purchase the customer's DRG. ARM

suggested that such a plan's contract documents (especially the EFL) include the pricing and terms of purchase. Reliant suggested that REPs should be permitted to include such disclosures in their terms of service at each REP's discretion. Tara observed that a "one size fits all" DRG disclosure would not capture all the variables in such a transaction, such as scheduling, pricing and delivery for each customer.

TXU supported DRG disclosures because the distributed generation could affect load profiles. TXU commented that the disclosure would help keep track of total DRG and facilitate payments to both the generator and the Transmission and Distribution Utility (TDU). In order to meet these ends, TXU suggested that the disclosures include the type and size of the generation resource. OPC commented that a separate agreement between a REP and a DRG owner should contain enough detail for both parties to understand all the terms of sale of the generation, limitations on liability, and other standard provisions for this type of transaction.

Commission response

The commission agrees with Tara that a "one size fits all" DRG disclosure would not capture all of the variables that a customer might need to decide whether or not to purchase a product from the REP. The commission does find that the customer needs to know whether or not the REP will purchase the excess generation and the terms of the purchase. The commission agrees with OPC that these terms could be set out in a separate document rather than in the terms of service documents described in this rule. The commission also agrees that a line should be added to the EFL that describes whether the REP buys DRG.

Question 4: Should the commission allow products for residential and small commercial customers that do not have a method of determining the price from a publicly available data or otherwise independent of the retailer's proprietary knowledge? If so, can these be considered contracts because there may not be a meeting of the minds on price?

Gateway, First Choice, TEAM, Reliant, ARM, Green Mountain and Tara supported allowing products for which a method of determining price is not specified. TEAM stated that customers have the power to choose, and when customers choose a product which does not have a published formula for determining price, the customer has made an informed and conscious decision and thus, there has been a meeting of the minds and the parties have entered into a valid contract. Green Mountain argued that if a REP is required to include in its contract the specific price to be charged at all points in time during the term of the contract, or if the REP is allowed to offer a variable price product only if the price is tied to an objective index or formula or so long as the REP provides advance notice to their customer of any price changes, then REPs will be required to build into their prices a premium to cover the risk that the costs to supply the required power will increase.

ARM supported the commission's effort to improve the quality and usefulness of the information that REPs disclose to customers, yet it did not believe that the goal of improved customer disclosure should be achieved through proscribing the type of contracts the REP may or may not offer in the competitive market. ARM stated that an agreement between a REP and a customer for a variable price product reflects a meeting of the minds in that both parties agree that the

price may change at the REP's discretion without reference to an index or other publicly available criteria. ARM noted that in the context of sale of goods, TEX. BUS. & COM. CODE ANN. §2.305(a)(1) states that parties may conclude a contract for sale even if the price is open, that is, a specific price or methodology for setting a price is not settled. Under this provision, ARM pointed out, the price charged at the time of delivery of the product or service is deemed to be reasonable if nothing is said about price in the agreement between the two parties. In contrast, although a specific price or a third-party standard is not delineated in a contract for a variable price product, the contract nevertheless addresses the subject of price in stating that the price may vary at the discretion of the REP. If a contract exists when no price is agreed upon, as contemplated by TEX. BUS. & COM. CODE ANN. §2.305(a)(1), then a contract must also exist when the agreement contemplates that the REP will set the price for each billing interval pursuant a variable pricing arrangement.

Tara argued that REPs should continue to be allowed to protect proprietary pricing methodologies they develop. Tara stated that experienced and sophisticated REPs must factor a great deal of information into their pricing methodologies, *e.g.*, overhead, market prices for materials, price for supply contracts, hedging. Tara argued that if it were required to make public the proprietary formulas that it would be detrimental to the REP and to competition. TEAM agreed and stated that requiring disclosure of a trade secret formula or methodology is not only legally problematic, it does not give the customer any greater ability to ascertain how the price might change. For example, a customer who knows its price formula employs a multiplier of the Market Clearing Price for Energy (MCPE) would still have no way of predicting the price spikes in the wholesale market. Public Utility Brokers were concerned with

these positions and stated that any business would love to sell a defined amount of widgets under contract with a price that can only be determined by the seller with no logical reason and change at its whim, without notice to or acceptance by the customer. However, Public Utility Brokers argued, adopting such a rule would put Texans in harm's way and tie the customer's hands.

TXU agreed that plans that allow price increases at the discretion of the REP (outside of a contract period where a REP guarantees full or limited price protection) are important tools for the REPs to adjust pricing in response to changes in wholesale market conditions, as long as the ability for the REP to increase the price is adequately disclosed to the customer when enrolling in the plan, and as long as the customer is provided adequate advance notice when the REP decides to increase the price. However, TXU commented that, the commission should not allow plans for residential and small commercial customers that essentially allow the price for electricity to increase at the discretion of the REP without adequate advanced notice to customers of such price increases. TXU offered examples of REP disclosures that provided vague statements as to how, when and how much a price could increase. In one example, a customer contract stated, "month-to-month customers are subject to rate adjustments throughout the term of this agreement, but not more than once per billing cycle, to reflect changes in market costs and the cost of fuel used to generate electricity." Under that contact, the customer received the 9.9cents/ kWh on their first and second bills but the price increased 40 days later without advance notice, to 13.5 cents/kWh. On the customers fourth bill the price increased again to 14.7 cents/kWh and again to 16.7 cents/kWH. TXU said that it is hard to believe that customers signing up for a 9.9 cents/kWh plan would understand through the general disclaimer that their price might increase by almost 70% to 16.7 cents/kWh in just a few months. TXU did not believe that such non-

transparent pricing strategies were beneficial for customers or for the future of a successful competitive electric market. TXU argued that such actions and interpretations might not result in a meeting of the minds concerning price which is an essential element of the contract between a REP and its customer. Green Mountain stated its belief that a rule requiring advance notice of any price increases for a variable price product would provide an undue competitive advantage to companies that include a retail business and generation resources, as the generation side of such enterprises would see increased revenues during periods of upward volatility that would offset losses in the retail business.

Public Utility Brokers, Cities and Texas ROSE/TLSC were not in favor of allowing contracts for residential and small commercial customers that do not have a method of determining price. Texas ROSE/TLSC stated that the price a customer is charged is of paramount importance to customers and should not be a mystery or surprise. Texas ROSE/TLSC argued that the price should be fixed or it should be able to change based on factors known to the customer when entering into the agreement. Public Utility Brokers stated that it is imperative that a customer of any size have the ability to audit its billing for correctness, and that allowing a REP to bill for a service that is undefined, considered proprietary or vague is inconsistent with PURA §17.151. Public Utility Brokers also stated that allowing such contracts would put all customers at risk and give REPs a blank check from the customer.

Reliant stated that a meeting of the minds to establish a valid contract could be reached based on the current price of a product and the customer's knowledge of how the price could change.

Commission response

The commission does not believe that it needs to address Tara's contention that a customer's price can be a trade secret. The commission is not adopting any requirement to which that contention is relevant. The commission agrees with ARM *et al.* that there is value in a competitive market for products of all types and that providing REPs flexibility to change the price when market conditions change could result in lower prices for customers. The commission is not precluding REPs from offering products for which the price can change at the REP's discretion, but it believes that the customer information documents must clearly disclose the nature of a variable price product: (1) the REP must disclose the price that will be billed on the first month's bill and make available a recent price history for products that are variable and (2) must provide a description of how the price for the product is determined or a notice in bold print that states the price can change at the discretion of the REP.

Question 5: If the commission retains a variable price product should there be additional customer protections put in place? If so, what additional protections should the commission put in place?

ARM, Green Mountain and Gateway did not feel that additional customer protections were necessary as long as the EFL clearly and comprehensively discloses that the retail product is subject to variable pricing and how and when the price may change. First Choice and Public Utility Brokers stated that the current customer protections were enough as long as they were enforced. Reliant proposed that the current price should be easily available and the frequency of

potential price changes should be disclosed. TEAM commented that as long as no one provider has dominant market power, the competitive market will provide adequate downward pressure on this type of variable pricing. Public Utility Brokers stated that the customer should be thoroughly informed about what charges will appear and how the charges will be calculated. Texas ROSE/TLSC proposed that REPs make publicly available the price charged to the customer taking the plan over the previous 12 months. Tara supported REPs being required to identify which cost components are variable. Cities stated that if the REP offers a variable price product then the terms of service should clearly and expressly state the method by which the price can change. Green Mountain argued that customers who prefer a product that insulates them from pricing volatility and risk will choose a fixed price product or a variable product that includes a promise from the REP that it will provide 45 days advance written notice or choose a product that provides the price on its website. Green Mountain concluded that a regulatory requirement is unnecessary or inappropriate, as there may be a competitive solution to the perceived problem.

Cities expressed concern that customers are likely to choose a discretionary price plan because it offers the lowest price and the complete variability and opacity of the rate would only be evident by an examination of the contract that a layperson is likely unable to perform. In view of these risks, Cities supported a rule that would preclude these types of plans under the variable product category and to the extent that the commission chooses to permit these contracts, Cities argued that special protections for consumers should be employed such as a clear and prominent disclosure that the REP can change the price offered under the plan for any reason or no reason. TEAM disagreed and stated that it is no mystery to customers that variable rate products are

subject to price changes and the suggestions would add little transparency to the market but would add costs to those customers who voluntarily chose a variable rate product.

Reliant proposed that the current price of the product should be easily available and the frequency of potential price changes should be disclosed. OPC was not opposed to Reliant's suggestion but added that the requirement should include the percentage of potential price change be disclosed to the customer at enrollment. Gateway stated that additional customer protections are not necessary for this type of product and if the customer agrees to this type of product they are fully aware that it is variable and that it can and will change.

Direct Energy suggested that if a product with price changes limited to the REP's discretion is allowed then it could be limited in a percentage amount over the previous month's price and fully disclosed to the customer at the time of enrollment.

OPC stated that if the commission does retain a variable price product in which the price change is not known by the customer, the REP should either provide customers with prior notice or with a range for which the price could change, without which the customer's bill could potentially increase by extremely high amounts overnight. Direct Energy stated that for month-to-month contracts "the life of the contract" is indeterminate because the customer can perpetually remain on the service as the contract renews each month. So OPC's request is in direct conflict with one of the functions of a variable product, to allow a REP to respond quickly to changing market conditions that cannot be predicted. TEAM added that it is a misconception that variable rates only increase. TEAM stated that when wholesale energy prices and especially when natural gas

prices move downward, variable rates drop with them. TEAM stated the reality is that REPs experience significant volatility in the wholesale market and in the ancillary services markets and if some sort of price control is put on the retail side, there would need to be a corollary control on the wholesale side of the equation. TEAM agreed with OPC that if there is a potential range of price changes, this possibility should be included on the EFL but that the commission shouldn't mandate a limit in the extent of price changes that are permitted. OPC stated that if the commission does allow variable price products, REPs offering these products should be required to provide customers with a notice of price changes and allow them 45 days from receipt of notice to switch providers without penalty or limit the change in price each month and over the term of the agreement and disclose in the EFL the amount of change that could take place.

TXU stated that §25.475 has always allowed REPs to provide necessary pricing disclosures to customers in one of two ways: either though a "fixed" price or through the disclosure of a "variable" price plan. Although experience has exposed flaws in both of the labels, the goal has always been clear—to ensure that the customer know what the price would be before using electricity, either through the disclosure of a specific price or through the disclosure of a verifiable formula or index and thereby protecting the customer from a REP increasing the price without advanced notice to the customer which would allow the customer to make a meaningful choice as necessary. Therefore the rule has been intended to ensure that the customer would be armed with the information necessary to make timely informed decisions. Unfortunately gaps in the two definitions have surfaced and while the proposed rule makes strides to address the problems related to "fixed" price plans it appears to allow REPs to satisfy the notice requirements for variable plans through no more than general, unverifiable descriptors and leave

price increases entirely within the discretion of the REP. Thus the rule has failed to provide the customer with sufficient detail regarding how and when the price would change. As a result the market has spawned plans with prices customers pay for a short term (or might not ever pay) which are then replaced without any advanced notice by prices that the customer never meaningfully agreed to pay or had adequate opportunity to anticipate, plan for and act upon in a timely and informed manner. Accordingly, the commission should require REPs to provide 45 days notice before increasing the price of variable price plans whose prices may increase according to a method that is not based on verifiable formula that leaves price increases out of the REPs discretion. This amount of notice is the minimum to give the customer the opportunity to effectuate a switch.

ARM pointed out that TXU's proposed notice requirement might apply to all variable price products regardless of whether the price changed according to seasonal factors or the price of natural gas. ARM also assumed that the 45-day notice required by TXU was not just an informational notice but a notice of material change which would allow the customer to change REPs which ARM viewed as punitive, as it costs money to notify all customers and exposes the REP to the possibility of losing the customer. ARM reiterated its belief that variable price products have value in the competitive market that should not be compromised.

TXU proposed that if the commission does not require a 45-day advanced notice then it should prescribe that the EFL contain a disclaimer that the actual price disclosed is for the first month of service and that the actual price for electricity may increase each month. TXU argued that customers are often drawn to variable price products, not for the fact that such products are

variable but because the initial rate advertised for such product is attractively low. Direct Energy argued that when the REP, at the time of enrollment, has indicated the monthly increase, 45-day notice would seem to have little benefit and do nothing but increase REP costs, which will ultimately increase customer's prices as the REP would have to build a 45-day hedge into the price. Direct Energy also argued that month-to-month products are designed to give both the REP and the customer maximum flexibility and advance notice of a price change limits that flexibility.

Texas ROSE/TLSC proposed that several customer protections be put in place, such as a requirement to provide the formula under which the price would change that can be calculated by the customer, a requirement that a variable price product not have a minimum contract term greater than 30 days, a requirement to notify the customer of the ability to request an expedited switch whenever a notice of price change is provided to the customer and a requirement to provide the customer notice of any change in price more than 5% in any given billing period.

Commission response

The commission agrees that there is value in a competitive market for products of all types and that providing REPs flexibility to change the price when market conditions change could result in lower prices for customers. The rule that the commission is adopting emphasizes providing accurate information to customers and prominent disclosure where a product is one in which the REP has the discretion to change rates in a way that is not tied to any publicly available index. For variable price products, including those with a defined percentage variance, the commission finds that a residential customer should be provided

instructions on the bill regarding how to obtain information about the price that will apply on the next bill. Persons who are shopping for electric service should be provided with an EFL that shows the price that will apply on the first bill and for residential customers, instructions for obtaining a price history. The price history can be made available through the company's website and another source, such as a toll-free number. The commission also finds that not all customers have the risk tolerance for these types of products and should be notified that prices for variable products can change to a much higher rate and agrees with Cities that the EFL should contain a notice in bold print that states the price can change at the discretion of the REP, unless the price will increase by no more than a percentage amount from month-to-month, in which case the percentage increase shall be disclosed on the EFL.

Question 6: Is 50 kW the appropriate threshold for allowing waiver of the standard protections in the commission's rules?

ARM and Gateway contended that all non-residential customers should be allowed to waive the commission's customer protection provisions as they generally are more sophisticated and have the benefit of counsel and internal/external expertise when engaging in business transactions of any size. ARM also noted that its desire to have the rule apply only to residential customers couldn't be accomplished in the present rulemaking as it would require a change to §25.471(a)(3) and that rule is not included in the scope of this proceeding. Alternatively, ARM conceded, the commission could keep the application consistent with the current §25.475 as

there is no compelling reason for expanding the rule's scope in this manner. Tara suggested the size be lowered to 25 kW.

Reliant, TXU, First Choice and TEAM supported keeping the standard at 50 kW. Reliant stated that the marketplace has been operating under the 50 kW threshold for allowing waiver of customer protections since the market opened. Although several parties filed comments on the strawman to this rule suggesting that the current threshold is not appropriate, Reliant maintained that there is no evidence that the current threshold is not appropriate and supported maintaining the current 50 kW threshold. TXU agreed, stating that customers below the 50 kW threshold are commercial strip center tenants and those above the threshold are typically stand alone restaurants and other businesses that are generally sophisticated enough to engage in negotiating an innovative electricity contract. First Choice also supported the current definition for small commercial customer and recommended that a small commercial customer with a demand in excess of 50 kW should not be required to affirmatively waive the commission's customer protections. TEAM stated that nothing in the rule should prohibit commercial customers at 50 kW or below from waiving the requirements of this rule, as these customers are large enough and sophisticated enough to negotiate and contract for electric service.

TXU offered, if the commission has seen examples of commercial customers with somewhat more load than 50kW who have been potentially harmed by waiving customer protection rules without appreciably understanding the meaning of such waiver, TXU Energy could support increasing the threshold to 75 kW and/or requiring the waiver to be more obvious and requiring REPs to expressly indicate to customers how they may access the customer protection rules.

Public Utility Brokers stated that it is ludicrous to assume that just because a customer's usage exceeds 50 kW that their education about deregulation is any better than that of a residential customer. Public Utility Brokers stated that it has met with industrial customers that did not know what ancillary services were, let alone how they impacted their energy bill.

OPC argued that the threshold should be set at a level higher than 50 kW as customers with as little demand as 50 kW most likely do not have the resources to spend on contract negotiations with a REP. OPC also noted that the establishment of a Power-to-Choose type web site for small commercial customers would be useful.

Commission response

The commission agrees with Reliant, TXU, First Choice and TEAM that the commission's current 50 kW standard is appropriate for the waiver of customer protections, as it has not seen undue harm resulting from the current standards.

General comments

Direct Energy argued that the problems faced in the summer of 2008 were not primarily caused by issues being addressed in this rulemaking and does not believe that making wholesale changes to §25.475 is necessary nor does it warrant the cost of implementation that REPs would bear and the re-learning costs that customers would face. Direct Energy recommended that the commission focus on its current review of the financial and technical requirements for REP

certification as that would ensure reasonable standards so that consumers will be able to trust that REPs will be motivated and capable of providing service.

Public Utility Brokers urged the commission to understand the important role it plays in overseeing the deregulated market to ensure that the bargaining strength of customer and REPs are relatively balanced. Public Utility Brokers stated that this proceeding should focus on improving the protections of customer and not serve as a vehicle to allow REPs to ask for and obtain more lax rules.

Commission response

There were a number of problems that arose in 2008. One of them was that customers were on contracts that they did not understand or that were not clear. Some of these customers believed that they had fixed-price products but learned that their REPs regarded them as variable-price products. When wholesale prices rose abruptly and the REPs increased their rates, the customers' expectations were frustrated. While these were not new issues, they became acute, because of the wholesale-market price increases. This rulemaking was undertaken to address a variety of issues in the competitive market, and lack of clarity in customers' terms of service is one of them. This lack of clarity has been seen in provisions that are buried in Terms of Service documents, uncertainty as to when contracts begin and expire, uncertainty as to what happens at the end of a contract term, and others. The commission agrees with Direct Energy that attention should be given to the REP certification and Provider of Last Resort rules as well, but the issue of clear disclosure of important terms of service is important and is addressed in this rule.

Cities noted that in procuring retail electric service customers are presented with an array of often complex retail offerings described in different ways by different REPs and qualified by dense contractual language that the layperson has little chance of fully deciphering.

Commission response

The commission agrees that contract terms have been confusing in the past and intends for this rule to address these issues by having an EFL document that highlights terms of service that are important to customers.

Subsection (a)

ConocoPhilips and TIEC commented that the rule should not apply to Option 2 REPs or to Option 1 REPs marketing to customers that are one MW or above. ConocoPhilips stated that Option 2 REPs do not use mass marketing and the types of products and contractual terms in the proposed rule do not make sense for a large customer like ConocoPhilips, which is serving its own load. TIEC stated that industrial customers have highly specified electrical needs that necessitate flexibility and ingenuity in contracting. ARM and Reliant agreed with ConocoPhilips and TIEC but stated that this rule should not apply to commercial customers under one MW either and argued that the rule should apply only to residential customers and in the alternative to small commercial customers.

Commission response

The commission agrees with TIEC and ConocoPhilips that this rule should not apply to Option 2 REPs or customers with a load over one MW. The commission clarifies that the rule applies to REPs serving residential and small commercial customers.

ARM, Tara, TEAM, Reliant and Gateway argued that three months is not enough time to conform contracts and arrange business processes to meet the requirements of the rule, and the compliance timeline should be extended to six months at a minimum. Tara argued that three months is not enough for an entire industry of similar businesses to completely revise their product lines and education and re-train their relevant sales, marketing and service personnel, revise standard contracts and forms, reconfigure templates, databases, software and revise promotional and educational materials, let alone educate customers. Reliant stated that it is unclear whether the proposed subsection (a) requires automatic renewals to meet the new requirements before the end of the existing contract. Reliant stated that new requirements related to automatic renewals should apply relatively soon and to the extent that contracts must be revised to conform to the new automatic renewal provisions they should be changed within the same six month implementation period. Reliant stated that all contracts entered into after December 31, 2008 should comply with the new requirements. TXU suggested an exception be made to make it clear that the exception applies for plans longer than 31 days. TXU also argued that there would be little benefit to updating contracts a REP is no longer offering and proposed to make clear that the contract documents for such plans are exempted from the application of the proposed rule.

Commission response

The commission agrees with Reliant that new contracts should comply with the new rules as soon as possible but realizes that REPs will need some time to prepare new contract documents. The commission agrees with ARM *et al.* that more than three months is needed to conform contracts with the new rule. Therefore, the commission extends the time from three months to five months.

The commission clarifies the application of the rule to existing contracts; the rule will provide REPs up to five months to conform contracts and product documents with the requirements adopted in this rule. As additional clarification, the commission adds language to specify that if a term contract is in effect on the date that this rule becomes effective, then no later than five months after the effective date, a REP is required to begin providing customers with notice of expiration as required by subsection (e) of the rule as adopted.

Cities stated that when choosing a REP, a residential or small commercial consumer must rely on information conveyed by the REP and the accuracy of the information is critical to the protection of consumers. Customers must have assurance that the retail electric product that they have been promised is actually the product that is delivered.

Texas ROSE/TLSC proposed that REPs and aggregators be responsible for the accuracy of all representations made by their employees and contractors. OPC suggested that REPs and aggregators be responsible for *truthful* representations to customers and prospective customers.

TXU suggested that the applicability provisions be modified to make clear that the rule applies with equal force even if someone other than a REP or aggregator makes the representation on behalf of the REP or aggregator.

TXU suggested that the phrase "or other means" is too broad and the purpose of the rule would be met if the rule is made applicable to representations made through advertising or marketing of any kind.

Commission response

The commission agrees with Cities and OPC that REPs should be held responsible for making truthful representations and that customers should receive what they were promised. This section is intended to hold the REP accountable for all representations, with the presumption that if the representation is not truthful, there may be negative consequences. The commission also agrees with TXU and Texas ROSE/TLSC that the REP is responsible for representations made by employees or other agents of the REP and clarifies the rule accordingly. The commission agrees with TXU that marketing should be included but does not change or omit the phrase "or other means" as it is intentionally broad to capture all ways that representations can be made. This provision has been moved to subsection (i).

TXU stated that the law generally distinguishes between "products" and "services" particularly for the purposes of liability and it is not clear that the electricity products addressed by the proposed rule are "products" as that term is used in the law. TXU suggested avoiding the term

product and replacing it with plan. ARM stated that this was far from solved in Texas but did not object to changing the term to plan.

Commission response

The commission believes that this change is unnecessary, because the commission's categorization of electricity plans as a product or service would not affect a REP's liability to a customer.

Subsection (b)(1)--Affirmative consent

ARM recommended that the proposed definition of affirmative consent be revised to require the re-enrollment of a customer using the process outlined by ARM in proposed subsection (f)(5) and the elimination of the reference to §25.474 as the process proposed in subsection (f)(5) is better suited to the re-enrollment of a customer. The additional proposed language should not be included if references to enroll and enrollment are not also used in proposed subsection (f)(5). TEAM stated that this definition was unnecessary since the only place it is used is in subsection (f).

Commission response

The commission believes that this definition is unnecessary and has deleted it.

Subsection (b)(2)--Automatic renewal

Reliant proposed a modification to clarify that automatic renewals do not require a material change notice. ARM recommended that a revision be made so that it is clear that the customer

does not need to provide affirmative consent prior to the end of the contract term as long as the contract includes an automatic renewal provision to which the customer has already agreed.

Commission response

The commission concludes that renewal without affirmative consent is limited to the default renewal month-to-month contract presented to the customer in the notice of contract expiration. Therefore, a definition of "automatic renewal" is unnecessary. Notice is important at the end of the initial term of a term plan, because the customer may want to shop for other service options.

Subsection (b)(5)--Contract period

ARM recommended for uniform usage that the defined term "contract period" be changed to "contract term" and to clarify the distinction between this definition and the one ARM proposed for "contract expiration."

Commission response

The commission agrees with ARM that "contract period" should be renamed "contract term," but the definition will still be the time period the contract is in effect. The commission adds a definition of contract expiration to further clarify.

Subsection (b)(6)--Guaranteed fixed price product

Reliant, Direct Energy, and Green Mountain supported the elimination of the product types, but if the commission decides to keep the product types, they suggested deleting the guaranteed

fixed price product. Texas ROSE/TLSC supported eliminating this product, suggesting that the rule recognize only two products: fixed and variable products. Gexa suggested changing the guaranteed fixed price product to a fixed price charge and requiring all charges to be listed as fixed or variable. OPC stated that the only product that should be allowed to be called "fixed" should be fixed even if TDU charges and ERCOT fees change; in its view a product with a price that is subject to change, no matter what the change is based upon, is variable. TXU argued that this product should be allowed to vary based upon seasonal or usage block factors. Direct Energy suggested if the commission retained this product that definition be changed to "guaranteed price product" and be used only if the commission is able to ensure that customers have recourse to collateral that provides full compensation through an appropriate financial instrument provided by the REP that is offering the product; otherwise the guarantee the customer receives is not guaranteed and it is likely that this promise will not be kept.

First Choice supported returning to the proposed definition of guaranteed fixed price product, before the August 13, 2008 staff memo, asserting that the new definition effectively imposes price caps on REPs that are inconsistent with the competitive market.

Commission response

The commission finds that the definition of the "fixed rate" products does not preclude a REP from offering a product such as the proposed guaranteed fixed price product. Therefore, designating guaranteed fixed as a separate product is unnecessary.

Subsection (b)(6)--Indexed product

TEAM proposed that variations in ancillary service costs be included in the definition of indexed product, arguing that even though they are not publicly available, they significantly affect the cost of wholesale power. TEAM proposed to change the definition of "publicly available" to verifiable, as those numbers would be available through ERCOT and customers would be assured that the charges were beyond the REP's control. Texas ROSE/TLSC supported eliminating this product and having only two products: fixed and variable products. OPC proposed to eliminate this product, concluding that any charge that is not fixed is variable. Cities argued that indexed is really a subset of variable and should be combined into the variable definition to reduce opportunities for confusion.

Direct Energy argued that indexed products are much less customer friendly than a bandwidth product where the REP discloses how much the price can change during a billing period. Direct Energy pointed out that today's POLR price is an index and customers were disappointed with the notice and operation of that structure, and customers on indexed pricing plans may experience significant price volatility because of the nature of the product. TEAM agreed with Direct Energy that disclosure of the formula doesn't give the customer any greater ability to ascertain how their price might change. It pointed out that a customer last summer on an MCPE product would have experienced price spikes from the wholesale market, whereas a customer under a typical variable product would likely not have seen the same volatility in their price.

Commission response

The commission disagrees with TEAM that ancillary services or any other charge that cannot be verified by the customer should be included in an indexed product. Under TEAM's proposal, a customer would have no ability to verify that the ancillary services portion was calculated and charged to the customer correctly. The commission disagrees with OPC and Cities that this product should be eliminated because it is variable. The purpose of these classifications is to assist customers by giving them a shorthand description of a plan that will facilitate comparing it to other similar plans. The commission concludes that the idea of an indexed price is one that has a logical meaning in the competitive energy market and can be readily understood by customers.

Subsection (b)(8)--Limited fixed price product

First Choice opposed changing this definition. Direct Energy stated that the definition of "limited," meaning having only mediocre talent or range of ability, implies that the product is weak or of lesser value than other products. It concluded that the label would do more to damage a product's marketability than it would to help customers understand their real choices. TXU and Reliant argued that this product should be allowed to vary based upon seasonal or usage block factors. Direct Energy argued that seasonal factors amount to price changes and therefore, should not be included in this category. TEAM stated that this concept could serve to confuse customers. Direct Energy also stated that it had identified no competitive disadvantage to placing these seasonal products in the variable category.

TXU proposed to eliminate the reference to "TDU recurring charges" and argued that the definition should just refer to "recurring charges." TXU also suggested changing the name of this product to help eliminate potential customer confusion about the fact that there may be some variation, although TXU could not suggest a better name. TEAM suggested it be made clear that "federal, state and local laws" includes statutes or ordinances passed by any authorized entity including ERCOT protocols and commission rules. Direct Energy, ARM, Texas ROSE/TLSC suggested combining both types of fixed products into one product, termed fixed price product and allowing changes in the rates that result from TDU charges, ERCOT and Texas Regional Entity (TRE) fees and charges resulting from laws that impose new fees or costs on the REP. Reliant stated that the important factor in a fixed contract is not whether the price is fixed but whether the price is known and that the term "billing period" should be eliminated. Texas ROSE/TLSC proposed to clarify that the term of a fixed product must be disclosed and not change throughout the term of the contract. Green Mountain supported Reliant's proposed definition of fixed price product. Tara argued that the definition indicates a concession that some cost components can be fixed without causing confusion but the proposed rule arbitrarily bars REPs from marketing products that offer to fix different price components. Direct Energy also did not like the term "limited," as it felt that it could be misconstrued as having less price commitment than many variable products. Cities supported this product and its distinction from the guaranteed fixed price product and viewed as a positive change that certain products that REPs have marketed as fixed price plans must now be presented as variable.

TEAM argued that REPs should be able to use the term fixed for some but not all components of the bill and that the rules should require adequate disclosure of the prices, terms and conditions

of the product to customers by requiring the REP to disclose which if any of the components of a bill are fixed.

Commission response

The commission is eliminating the definition of the "limited fixed" price product. The definition of "fixed rate product" does not preclude a REP from offering a product such as that described by the proposed guaranteed fixed price definition. With respect to the "fixed rate" product, the commission is adopting a definition that limits this product to products with a term of at least three months, rather than at least six months. The commission also clarifies that for the fixed rate product, ERCOT fees include fees approved by the commission and charged to loads, such as the ERCOT administrative fee and nodal fee (should it be charged to loads in the future). Under this definition, ERCOT fees would not include ancillary services, losses or unaccounted for energy charges or TRE penalties.

Subsection (b)(8)--Price

Gateway argued that price should not include TDU charges. Reliant proposed to exclude applicable taxes. Tara suggested the price definition should be revised to clarify that each product's price will vary according to the energy used. ARM agreed with Tara and Reliant and proposed a new definition of price.

Commission response

The commission disagrees with Gateway that the definition of price should exclude TDU charges, as some REPs may choose to offer a bundled product that includes some or all TDU charges. This should be reflected on the EFL so that customers can make better-informed comparisons. The commission does not agree with Tara's suggestion; the term "price" is defined, in part, to provide a description for calculation of prices in an EFL, and this calculation typically includes both energy-related costs and costs that are not energy-related. The commission agrees with Reliant's comment that price should exclude applicable taxes and clarifies the definition of price by excluding state and local sales taxes and miscellaneous gross receipts taxes. The commission notes that state miscellaneous gross receipts tax is imposed on companies making local sales of electricity within an incorporated city or town having a population more than 1,000, and the rate varies depending on the population of the city where the meter is located. Because this tax is related to the specific location of the customer's meter, it is appropriate to exclude it from the general averaged kWh price. The customer should be able to make apples to apples comparisons of prices excluding taxes. The commission also deletes, "but may exclude non-recurring charges" from the definition to avoid any confusion that such charges or credits may also be included in the price calculation.

Subsection (b)(9)--Recurring charge

TXU expressed concern about the definition of recurring charge, contending that collapsing all of the charges that appear in three or more billing periods, even the charges that are outside of a REP's control, seems to be at odds with two public policy goals. First, collapsing all of the

charges has the effect of camouflaging them, instead of giving customers more information regarding what they are really paying for. Thus, the use of recurring charges provides less information and less transparency. Second, the collapsing of charges into the per kWh charge has the effect of increasing the per kWh price that customers and critics alike look to as a measure of the success or failure of the competitive market. Artificially and unnecessarily increasing the apparent price of energy in the price per kWh would seem to mislead customers into thinking that the price is higher. From a practical point of view the proposed definition is also troubling for two reasons. First, although the language is not entirely clear, a particular charge could change from a non-recurring charge to a recurring charge or vice-versa by virtue of changes in the expectations regarding that charge and the number of times it appears on the customer's bill. Second, lack of clarity in the concept could result in REPs differentially treating charges as recurring. This would prevent an apples to apples comparison of prices. TXU proposes clarifying the definition of "recurring charge" to ensure that REPs understand which specific charges should be treated as recurring and, thus reflected in the total average price for electricity that must be disclosed in the EFL and monthly customer bills. For example, TXU stated that it is unclear whether the ERCOT System Administration Fee, TRE Fee, Public Utility Commission assessment, and Gross Receipts Tax Reimbursements are considered recurring charges that must be included in the total average price per kWh on a customer's EFL and bills, or whether they may merely be identified to customers in the EFL or TOS and then billed as line items on the bill and not included in the total average price/kWh. Currently REPs are treating these fees and assessments differently which is preventing customers from making an apples to apples price comparison. Accordingly, TXU suggested that if there are specific assessments and

fees the commission desires not to include in the total average price per kWh on the EFL, then the commission should exclude them from the definition of recurring charges.

First Choice commented that the definition of recurring charge should specifically excludes sales taxes, any special charge for underground service or similar charges only applicable in a portion of a TDU service area and any reimbursement of Public Utility assessment fee or gross receipts tax, since REPs have no control over such charges or credits. Reliant disagreed that these charges should not be considered recurring. Reliant did agree that taxes, gross receipts taxes and PUC assessment should not be included in the recurring charges that are used to determine the average prices on the EFL. Therefore Reliant recommended revising the definition of price to recognize that while some charges might be recurring, they should not be included in the calculation of the average price on the EFL or invoice. OPC proposed that the charges be listed separately on the customer's bill and to strike the requirement that charges that appear in three billing periods be included in the definition.

Reliant proposed a minor modification of recurring charge that recognizes that most customers do not purchase electric service on a calendar year basis and proposed to change calendar year to 12-month billing period. ARM agreed with TXU's and Reliant's changes.

Commission response

The commission agrees that to achieve an apples to apples comparison among all service plans, including the same charges in the calculation is important. It is also important that the customer see all of the charges, excluding state and local sales taxes, in the price per

kWh. The recurring charges that must be included in the total average price per kWh on a customer's EFL and bills shall include, as stated in the definition in subsection (b)(9), all charges that appear on a customer's bill in every billing period or appear in three or more billing periods in a twelve-month period. In response to TXU's comments, the commission concludes that the PUC Assessment, ERCOT System Administration Fee and TRE fee are examples of recurring charges that must be included in the price per kWh on the customer's EFL and bills. The state miscellaneous gross receipts tax may be broken out and billed separately, in addition to state and local sales taxes. Beyond obtaining an accurate comparison among plans, the commission concludes that customers should be able to use the EFL to confirm the accuracy of the first bill under a new variable or fixed rate plan. In addition, if the customer's initial bill reflects kWh consumption approximately equal to the consumption levels displayed on the EFL, the customer should be able to compare the "total average price for electric service" on the EFL and the "average price you paid for electric service" this month on the customer's first bill, and the numbers should be a reasonable match. The commission does not make any changes to the definition of recurring charges, other than to replace "calendar year" with "12-month period." The commission agrees with Reliant that 12-month period is better than calendar year and changes the definition accordingly.

Subsection (b)(11)--Variable price product

Direct Energy, Texas ROSE/TLSC, Cities, Reliant and Green Mountain proposed to combine the proposed indexed and variable price products into one product labeled "variable" if the commission required product labels. TXU expressed concern over the "Wild West" product, in

which the REP maintains sole discretion to effectuate a price increase and is not required to provide notice to its customer with respect to such increase. TXU proposed that the definition be changed to require a 45-day advanced notice of price changes. Reliant and ARM disagreed with TXUs proposal, as stated in their response to question 5. Gexa preferred to change the definition to variable charge and to require that each charge be listed on the EFL and identified as "fixed" or "variable." Direct Energy disagreed with Gexa's approached and termed it a step backward from competitive markets and stated that it does not add anything particularly useful to the customer. First Choice suggested that this definition should require that products that fail to contain a disclosed and variable price change trigger should not have a term longer than 31 days. Reliant proposed that the price in the variable price product be required to be available to the customer through a toll-free number, online account access, the REP's website or any other communication method agreed to between the REP and the customer. Green Mountain preferred that the frequency of the potential price changes be disclosed to the customer. Direct Energy proposed to clarify that the pricing of this product could change at the discretion of the REP. Tara agreed that under this proposal a customer who cannot afford guaranteed or limited fixed price products would be relegated to products that can vary entirely, because the fixing of a range of other cost components is prevented by the proposed rule.

Commission response

The commission agrees that there is some value in a competitive market for products that provide REPs flexibility to change the price when market conditions change, as this kind of product could result in lower prices for customers. The commission agrees with Reliant and chooses to allow products for which the price can change by a method not able to be

determined by the customer, if it is accompanied by a clear disclosure of the nature of the product. The commission concludes that the current price for the product and its recent price history must be available to a customer or shopper on the company's website and through a toll-free number. In addition, the EFL must disclose how the rate would change or contain a notice in bold print that states the price can change at the discretion of the REP.

Proposed new definitions:

Contract expiration--

ARM proposed a definition to avoid confusion about the meaning of contract expiration versus the end of the contract term. The new definition proposed by ARM is intended to clarify that the term "contract expiration" refers to the limited circumstance in which a contract for retail electric service has expired or is no longer in effect per the terms of the contract. Under §25.488 of this title (relating to Procedures for a Premise with No Service Agreement), the customer may be subject to disconnection of retail electric service when a contract expires or is no longer in effect, unless the customer enters into a new contract for retail electric service. ARM proposed a definition to clarify that contract expiration does not occur if the contract is subject to an automatic renewal provision. Reliant agreed with the concept that ARM proposed but did not support an outcome that would result in REPs being required to issue a contract expiration notice each month. Reliant did not believe there was a difference between renewal and extension as used in ARM's proposed definition and suggested removing the term "extension" from the proposed definition. ARM agreed that it was confusing and submitted a second proposed clarifying definition.

Commission response

The commission disagrees with ARM that "contract expiration" refers to the limited circumstances in which a contract for retail electric service expires or is no longer in effect, in accordance with the terms of the contract. The commission adds a definition of contract expiration as subsection (b)(3) to clarify the commission's intent that contract expiration refers to the time when the initial term of a term contract ends.

Material change--

Texas ROSE/TLSC proposed a definition of material change that would include an increase of 5% or more in the price of a variable price product, any change in the formula or method of determining the price of a variable price product, any change in the term of a variable price product, any change in the frequency with which bills are issued, adding or increasing charges that may be imposed on the customer by the REP or any change in ownership of the REP. ARM agreed that changes in the term or pricing methodology of a product may fall within the scope of a material change but did not believe the other examples listed by Texas ROSE/TSLC are properly within the scope of the term. In particular, ARM did not agree that a price increase for a variable product should be included. ARM also believes that its changes proposed under subsection (e) make Texas ROSE/TLSC's proposed definition unnecessary.

Commission response

The commission believes that no changes to price (other than certain price changes that are clearly disclosed) or length of term can be made to a term contract; however, changes to

other provisions are permissible with proper notice. The commission further clarifies that changes to the term length require affirmative consent. Therefore, the commission finds that a material change definition is not needed.

Pricing methodology--

Tara stated that if the intent of the rule is to require detailed, potentially trade-secret pricing formulas, Tara disagrees with the concept and believes its pricing formulas should be protected. If the intent of the proposed rule is to require disclosure of pricing categories but not underlying trade secret formulas then the definition should be modified accordingly.

ARM proposed to add a definition of pricing methodology as it noted that the terms "price" and "pricing methodology" in the proposed rule were not interchangeable. ARM suggested the definition be, "the method used by a REP for establishing and changing the price of a retail electric product which may be indexed, formulaic, or at the REPs discretion."

Commission response

The commission is adopting a rule that no longer contains the term "pricing methodology" so the proposed definition would no longer be useful.

Term contract--

TXU noted that "term contract" is not defined although TDU assumed it meant contracts longer than 31 days. TXU suggested that it would be clearer if the commission described term contracts in this way.

Commission response

The commission agrees with TXU and amends the rule to include a definition for "term contract" as subsection (b)(10).

Subsection (c)(1)(A)

ARM commented that the list of prohibited activities was actually a list of prohibited communications and proposed to modify the rule accordingly. TXU stated that if the commission allows the price of variable price plans to be increased without advanced notice to customers, then this section should be modified to include a requirement that marketing and enrollment materials for variable price plans include a stronger, more obvious disclaimer that the price for such plans may increase without notice. ARM disagreed with this proposal. OPC and Texas ROSE/TLSC agreed. Texas ROSE/TLSC stated that in order to minimize customer confusion, "fixed" should mean "fixed" and all other pricing plans that can change for any reason should be categorized as "variable." Gexa proposed changes consistent with its view that all charges should be listed and identified as variable or fixed and that failing to disclose a fixed commodity charge should be a prohibited activity.

Commission response

The commission agrees with ARM that the list of prohibited activities is actually a list of prohibited communications and modifies subsection (c)(1)(A) accordingly. The commission agrees with TXU, OPC and Texas ROSE/TLSC that variable price plans without advance notice of price increases should include a stronger disclaimer. Therefore, the commission

adopts a requirement that the EFL for a variable price product contain an obvious disclaimer that the price may change at the discretion of the REP, unless the price will increase by no more than a percentage amount from month-to-month, in which case the percentage increase shall be disclosed on the EFL.

Tara stated that this language raises several important questions. Tara noted that this proposal no longer refers to federal or state law and questioned whether this means that a REP could be penalized for statements that may be regarded as misleading or anti-competitive but not to the extent they violate any state law. Tara also wondered whether the REP could be fined if a customer stated that the "oral communications" provided by a customer service representative was unclear. Tara wondered what the legal standard or threshold of evidence would be in such a case.

Commission response

The commission notes that PURA is a state law that contains the prohibition against unfair and misleading practices. The rule includes some examples of unfair and misleading practices, but other examples may arise, depending on the circumstances. The commission could seek administrative penalties for misleading practices, whether this rule is adopted or not. Tara's procedural questions do not represent a comment on the proposed rule and require no response.

Subsection (c)(1)(A)(i)

OPC argued that using the word "guaranteed" to market a product that doesn't meet the definition of a guaranteed fixed price product should be a prohibited activity.

Commission response

The commission has eliminated "guaranteed fixed" as a product type.

Subsection (c)(1)(A)(ii)

ARM proposed that this clause be modified to distinguish between retail service in Texas and outside of Texas. Reliant was concerned that this provision was ambiguous and provided two examples that it sought clarification on whether the proposed rule would prohibit particular conduct. One example advertised the lengthy history of a REP's parent company by a REP that became a subsidiary of another organization after its REP certification was issued and an advertising claim by a REP that touted industry experience from a company with roots that date back over 100 years. TXU disagreed that the advertisements cited by Reliant would and should be prohibited by the commission's customer protection rules. TXU argued that a REP should be permitted to make truthful claims regarding its business operations, company philosophies, community involvement and a host of other things that customers may want to know about, such as accurate information about a REP's corporate history of providing electric service or a corporate history having established roots in the great state of Texas. TXU stated these could be valuable in helping a customer make an informed decision about the marketplace. However, TXU did contend that making false statements should not be allowed.

Commission response

The commission concludes that the ARM suggestion is not necessary and that the proposed provision was clear. To the extent that Reliant is suggesting that provisions should be adopted relating to accurate marketing claims describing the history of a REP and its parent, it has not provided sufficient justification that it would be appropriate.

Subsection (c)(1)(A)(iii)

TXU noted that this section is written to apply to affiliate REPs which would only apply until the price to beat obligation has ended and, more importantly, that there is no reason that any REP should be allowed to falsely claim that receiving service from any REP will provide a customer with better service from the TDU. Reliant disagreed that there were no longer affiliated REPs as there are still some REPs who are affiliated with TDUs and the business relationship did not disappear with the ending of the price to beat. Reliant stated it was appropriate to maintain a specific provision in the rules as a REP affiliated with a TDU should always be prohibited from indicating that its affiliation will result in better service from the affiliated TDU.

Commission response

The commission agrees that no REP should be allowed to claim that receiving service from any REP will provide the customer better service from the TDU and amends the rule to eliminate the term "affiliate" and the reference to "affiliation."

Subsection (c)(1)(B)

ARM, TEAM, TXU, First Choice and Reliant argued that this proposal would lead to lengthy contracts that customers would be unlikely to read and additional costs that were unnecessary. TXU noted that this requirement might prevent REPs from citing to rule language, as the YRAC could potentially require the REP to cite 10 different commission rules requiring 23 additional pages of text. Therefore, TXU proposed that the REP be able to provide a summary of the cited laws. ARM disagreed and stated that any attempt to summarize provisions would be problematic. ARM proposed that the commission allow the REP to provide an internet link to the rule on the commission's website or other internet address that will provide the customer with the complete and current text of the rule, as providing a hard copy to the customer would waste paper and conflict with the 250 word limitation in subsection (c)(2)(A). Reliant proposed that the information could be provided upon request if the commission deemed the information necessary. First Choice agreed that providing a citation to the particular law or providing a rule summary should be adequate. OPC appreciated this requirement and proposed that the rule also require laws to be listed rather than just commission rules. In reply comments, OPC took note of the concerns and agreed that a reference to the commission's website where the rule can be found would be appropriate. OPC alternatively discussed that the REP could agree to provide a copy of the rule or law upon a customer's request.

Commission response

The commission agrees with ARM that any attempt to provide a summary of a commission rule could lead to potential problems. The commission has amended this provision to allow a REP to provide an internet address or link to the actual rule text.

Reliant opined that requiring REPs to include their certified name in advertisements, online and websites increases REP costs without an associated benefit to the market or consumer. Reliant noted that since the commission issues each REP a unique certification number, that providing that number on communication should provide the consumer enough information to identify the REP with the commission.

Commission response

The commission agrees with Reliant that including the certification number provides enough information for the customer to identify the REP and to find the certificated name if necessary.

Subsection (c)(1)(C)

ARM suggested deleting the first sentence of subsection (c)(1)(C), as the REP's obligation to provide the TOS, EFL and YRAC to a customer after enrollment is already comprehensively covered in §25.474. Also, ARM proposed to delete the reference to small commercial customers as it believes that the rule should only apply to residential customers. Reliant cautioned that this should be considered in light of the determination on applicability but, regardless, the obligation to provide an EFL when a material change is made should be limited to residential and small commercial customers.

Commission response

The commission sees no harm in including the obligation to provide the TOS, EFL and YRAC to a customer in this rule, in addition to §25.474. Consistent with its discussion in question 6, the commission concludes that this rule should apply to small commercial customers but makes some requirements applicable only to residential customers or contracts.

TXU argued that a customer should not be allowed to request unlimited free copies of the TOS, YRAC and EFL as this could be expensive for the REP and suggested the rule parallel §25.479, which allows a customer to have copies once in a 12-month period at no charge. OPC recommended that additional copies be made available for a small fee and/or REPs should not be required to provide copies upon a customer's request if the documents are available on an accessible website. Reliant saw minimal value in charging customers for the documents, particularly given the probability that the situation will arise infrequently and recommended TXU's proposed change not be accepted.

Commission response

The commission agrees with Reliant that there is minimal value in charging customers for the documents and makes no changes to the rule.

Subsection (c)(1)(D)

ARM, First Choice and Reliant noted that REPs are currently required to retain a copy of each version of the TOS, EFL and YRAC for two years. The benefits of requiring a REP to keep the documents for four years is far outweighed by the additional costs and burdens that REPs will

bear to comply with the expanded document retention requirement, and ARM, First Choice and Reliant contended that the two year document retention period in the current rule is sufficient. ARM also proposed to delete the reference to when the "contract period ends" as the starting point for the retention period. A more appropriate reference point would be the date upon which any such document is no longer in effect for any customer.

Commission response

The commission notes that the statute of limitations for contract disputes is four years and concludes that the REPs should be required to keep the documentation until the statute of limitations expires.

Subsection (c)(1)(E)

ARM and Reliant argued that the proposed requirement in subsection (c)(1)(E) to retain the methodology to calculate the average price is unnecessary given that §25.471(b)(1)(A) already mandates that a REP retain records sufficient to verify compliance with the requirements of any applicable rules. They proposed deleting this subsection. Reliant noted that in order for the calculation to be verified for small commercial products, the commission must establish a load profile for the small commercial customers.

Commission response

Since the commission has changed the rule to eliminate the requirement to calculate a price average over the course of a year, the requirement to keep these records is unnecessary. The commission agrees with Reliant that a load factor is necessary to calculate the small

commercial customer average price, and amends the pricing disclosure on the EFL accordingly.

Subsection (c)(1)(F)

ARM and TEAM stated that the filing of non-residential contracts raises confidentiality issues since terms of those contracts are often confidential. ARM and Reliant recommended deletion of the requirement to file quarterly copies of the TOS and EFL for each retail electric product as it is burdensome and unnecessary. ARM stated that the customer may obtain the documents upon request, the general public can get it on the commission's Electric Choice website and the commission has access to such documents today pursuant to the current rule which requires a REP to furnish a copy of the TOS to the commission upon request. ARM recommended restating the current rule requirements. Reliant recommended stating that the TOS and EFL are subject to review by the commission and shall be furnished to the commission or its staff upon request. TXU recommended that the purpose could be met and unnecessary burden avoided if the rule were limited to plans currently being offered to new customers and plans that, even if they are not being offered to new customers, have changed since the previous filing of the TOS and EFL for those plans. First Choice stated that the variable product would be determined by a proprietary formula and should not be publicly disclosed.

Reliant proposed a new subsection to clarify that all documents and notices provided pursuant to this section be e-mailed to customers unless the specific requirements provide otherwise.

Commission response

The commission agrees with ARM and TEAM that the contracts do not need to be filed but should be available to the commission upon request.

Subsection (c)(2)(A)

ARM proposed to eliminate the 250 word paragraph limit as ARM felt it was arbitrary. ARM and Reliant also proposed to delete the requirement to include the text of referenced laws. Texas ROSE/TLSC fully supported this provision and added that the materials should be in a font no smaller than 10 point and that the phrase "unless otherwise permitted by the commission" be deleted.

Commission response

The commission does not agree to eliminate the 250 word paragraph limit. The commission sees a need to have contracts that customers can understand, and it is difficult for customers to find important terms buried in lengthy paragraphs. The commission is permitting the text of laws and rules to be provided through a web address. The commission agrees with Texas ROSE/TLSC that there is no reason that contract documents should be in a font smaller than 10 point and changes the rule accordingly.

Subsection (c)(2)(B)

ARM, First Choice, Reliant and TXU suggested subsection (c)(2)(B) be deleted given that §25.473 already addresses requirements regarding the availability and provision of contract documents in English and Spanish. Reliant is concerned that this section could be interpreted to

mean that documents must be provided in English and Spanish to every customer rather than in the preferred language the customer requested at enrollment.

Commission response

The commission agrees that §25.473 of this title (relating to Non-English Language Requirements), adequately covers this requirement and, in an effort to alleviate potential confusion, removes it from this rule.

Subsection (c)(2)(C)

ARM suggested re-wording subsection (c)(2)(C) to clarify the intent. TXU suggested clarifying that this provision refers to the power to choose website rather than the commission's website. Texas ROSE/TLSC and OPC supported a requirement for all REPS to post documents on the commission website, as it gives the commission an opportunity to review the documents and provides a more comprehensive tool to customers who use the Internet as a primary resource for investigating their options and gaining access to information from providers and would help make the market more transparent to everyone. OPC argued that the only REPS who do not post materials to the power to choose website are ones that are trying to fly under the radar and operate out of a post office box and the Greensheet. ARM responded that what OPC and Texas ROSE fail to understand is that the current postings on the power to choose reflect only a portion of the residential retail electric product offerings available in the market today and this would create administrative difficulties for the commission to administer and would strain the REP as well. ARM noted that it would be problematic to mandate non-residential REPs to post their

products on the commission sponsored website given that many are customized and contain competitively sensitive information that cannot be publicly disclosed.

Commission response

The commission agrees that it would be easier to monitor REPs if all offers were posted on the commission's power to choose website but declines to accept Texas ROSE/TLSC and OPCs suggestion that all REPs be required to post offers on the website. The commission recognizes that there are legitimate reasons why some REPs do not wish to be listed on the commission's Power to Choose website, such as a desire to grow slowly in order to avoid high collateral requests from suppliers and ERCOT. The commission is not mandating that all providers post their offers on the site. The commission is adopting a modification to make it clear that the web site that the rule refers to is its customer education web site, www.powertochoose.com.

Subsection (c)(2)(D)

ARM proposed that subsection (c)(2)(D) be revised to permit a REP to assess an early termination fee for the termination of service resulting from a customer's relocation. Reliant and Cities did not support the proposal to introduce an increased burden on consumers to provide evidence that they have relocated. Reliant also proposed to clarify that the exemption from charges co-incident to relocation is limited to termination penalties imposed by REPs, and does not apply to fees charged by the TDU, such as a move-out charge. Cities were concerned that the proposed rule language caused contracts to be terminated early for a customer who provided early notification and Cities provided suggested language to address it.

Commission response

Consistent with the discussion in response to question 1, the commission is amending the rule to permit a REP to require customers to provide evidence of the relocation and a forwarding address. It is also adopting the clarification suggested by Reliant that this provision is intended to relieve the customer from paying an early termination penalty. The commission also deletes the sentence that addressed when the contract terminates. The commission understands that the contract terminates only if the customer notifies the REP that the customer will no longer occupy the premise and upon the TDU's performance of a move-out transaction.

Subsection (c)(2)(E)

TEAM stated that the implementation of the proposed rule would stifle market creativity, as REPs would no longer have the freedom to create new and innovative products that are responsive to the needs and desires of customers, but would be limited to four narrowly-defined pricing buckets and would lead to mislabeled products and confusion in the marketplace. TEAM stated that many products would fall into the variable bucket by default if they could be offered at all, the unintended consequence of which would be that disparate product offerings would be labeled the same. TEAM requested that the proposed pricing buckets be permissive and not mandatory, where REPs could use the pricing buckets as models, having the freedom to design products in response to requests but without the stifling requirement that every product fit within one of the four limited pricing buckets.

ARM and Green Mountain did not support the mandatory classification of all retail electric products into one of the four specified products types. Green Mountain urged the commission to adopt an approach that improves disclosures related to products that customers are signing up for today and that is flexible enough to foster and allow innovation and enhanced customer choices and benefits that will come with new products features and plans. An officially-sanctioned regulatory system fosters a misleading impression that there are only four types of products available in the market and may cause customers to overlook the other disclosures and assume that all products in the category are the same and therefore the price would be the only thing left to compare.

Direct Energy commented that keeping the current definitions of "fixed" and "variable" was appropriate. Tara noted that under this draft a REP is prohibited from describing components of the rate as fixed unless it fixes all components. Texas ROSE/TLSC preferred only two categories, fixed and variable, as dividing products into further categories would be a distinction without differences for most customers.

Reliant stated that the proposed product definitions are too complex and could lead to customer confusion and restrict innovation of products that might not fit squarely into one of the definitions. Direct Energy pointed out that this section requires a contract to be for only one type of product, and there are products under contract in the market that have the characteristics of more than one product type. For example, a fixed price product may convert to a variable product upon the end of the fixed price term. Direct Energy argued that the commission should

allow a REP to continue offering innovative products by permitting a contract to identify more than one product type.

TEAM feared that the pricing buckets could stifle high tech product development with advanced metering, as products have ability to offer cost savings to the customer but would fall into the variable pricing bucket. Public Utility Brokers responded that while it agrees that there could be product innovations from advanced metering they will have nothing to do with the demand for fixed or variable products and allowing uncertainty in to the meaning of common sense terms will compound confusion and turn advanced metering into another tool that can be used to confuse customers.

Commission response

The commission disagrees with TEAM that having categories of products will stifle creativity in the market. The commission believes it is important for customers to understand the type of product they are purchasing. The commission believes the best way to achieve this desired outcome is to have categories for different types of products and descriptors that provide information that customers will find helpful in evaluating plans they are purchasing. Additionally, the commission believes it is necessary to define each type of product so that REPs have a uniform classification system for products. One of the ways that customers are expected to use these terms is to screen products, so that they can focus on the type of product that they believe is appropriate for them, and having clear definitions for a small number of contract types should improve the usefulness of EFLs in performing this screening function.

The commission concludes that three categories are appropriate: fixed rate, indexed and variable. Although the commission agrees that some predictable products will fit into the variable category, it believes that it will be helpful for the customer to realize that the prices for products they purchase may vary over the life of the contract. This is not always negative and the details of the product can be more fully explained by the REP in the EFL and TOS.

Reliant opined that the proposed language could be subject to interpretation as to whether the contract would specify the product name or the product type. Reliant assumed it meant that the product type should be provided and proposed changes in accordance with that.

Commission response

The commission has modified this provision to make it clear that the EFL must disclose the product type.

Gateway recommended that the TOS and YRAC are documents that could include various types of products within them, since having several different documents becomes difficult to maintain.

Commission response

The commission agrees that a REP can use the same TOS and YRAC documents for multiple products but does not believe the rule requires an amendment to clarify this point.

Subsection (c)(2)(F)

Reliant and ARM requested that the rule track PURA §17.008(e) in its entirety. Texas ROSE/TLSC expressed concern about permitting REPs to use a credit score, credit history or utility payment data as a basis for determining price in a contract that exceeds 12 months. They argued that electricity is an essential service and customers with low-income and poor payment histories should not be subjected to arbitrarily high prices because of their credit situation. Therefore, Texas ROSE/TLSC recommended the commission establish a maximum contract period of 12 months in place of a minimum contract period of six months. ARM disagreed with the proposed changes as this unnecessarily restricts availability of retail offerings to customers similar to the product categories set in the proposed rule.

Commission response

The commission notes that this section of the rule is based on PURA §17.008(e) and agrees with Reliant that the rule should track PURA §17.008(e) in its entirety and makes the change to the rule. The commission does not make the changes suggested by Texas ROSE/TLSC but believes that the rule should reflect the legislative policy, which permits the use of these credit assessment tools for longer-term plans.

Subsection (c)(2)(G)

ARM and Reliant argued that subsection (c)(2)(G) elevates one element of contract law above another depending on the nature of the dispute. ARM suggested instead that the rule state that any dispute is subject to rules of contract interpretation. Tara agreed and stated that language is unfairly prejudicial to the REP in the case where contracts are negotiated with small business

customers who may have aggregators, brokers or other experts negotiating on their behalf. Tara opined that it is aggregators, not REPs, who should be primarily responsible, because often ambiguities are introduced into the contract because an aggregator has insisted on problematic language.

Commission response

The commission disagrees with ARM, Reliant and Tara that this language is unfairly prejudicial to the REP. Contracts for residential and possibly many small commercial customers have little or no room for the customer to negotiate or change the contract. Therefore, since the REP has unilateral control over the contract, any ambiguity should be construed in favor of the customer.

Subsection (c)(2)(H)

Tara stated that subsection (c)(2)(H) was unnecessary as REPs are already required to comply with contracts. Cities strongly supported this statement being in the rule. Cities suggested adding a clarification noting that failure to do so is adequate grounds for a customer to file a complaint with the commission. Cities noted that one REP has asserted that violations of the contract (in this instance, charges inconsistent with the contract) are contract disputes that must be left to the courts to adjudicate. Cities noted that in individual complaint cases the commission has already expressly repudiated that position and expressed the view that the commission may resolve disputes involving a REP's non-compliance with its contract with the customer. ARM opined that Cities' proposed language bootstraps the commission with the jurisdiction and authority over customer complaints about contracts for retail service. ARM opposed the addition

of Cities' language, arguing that it is meaningless as a matter of law, given that PURA and not the commission's rules is the source for the agency's jurisdiction and authority over such complaints.

Commission response

The commission concludes that requiring a REP to comply with its contracts is consistent with its authority under PURA §17.004. This section provides that customers are entitled to "protection from fraudulent, unfair, misleading [or] deceptive practices," and authorizes the commission to adopt and enforce rules that are necessary and appropriate to carry out the section. Section 25.485 of this title (relating to Customer Access and Complaint Handling) permits customers to file complaints against a REP or aggregator, and the commission concludes that it is not necessary to repeat this right in this rule. Accordingly, it is retaining the requirement that a REP comply with its contracts but is not including the right to file a complaint in this rule.

Subsection (c)(2)(I)

ARM and Reliant proposed the addition of a new subsection that addresses the means by which the REP may provide any written notice to the customer that is required under the proposed rule to provide flexibility such as inserting a note on the customer's bill, including a separate note with the customer's bill, or providing a notice in an envelope separate from the bill or in an e-mail if the customer has agreed to receive any such notices at a designated e-mail address. OPC stated that it is not clear how this proposal would be compatible with subsection (e), as this timeline might not correspond with the customer's billing cycle. If the commission does accept

the new language, then OPC urged the REP provide notice for two billing cycles prior to the change.

Commission response

The commission has detailed the types of notices allowed, where notice is required, in other provisions of the rule. A general provision on notice to customers, as in Reliant and ARM's suggestion, is more likely to confuse than clarify the rule. The commission notes that §25.471(d)(7) of this title defines "in writing" to include an electronic transmission of written words. Therefore, the commission clarifies that unless stated otherwise, "written notice" can be sent electronically.

Subsection (c)(3)(A)

TXU opined that subsections (c)(3)(A) and (B) appear to impose the same appropriate requirements upon guaranteed fixed and limited fixed price plans and suggested combining these sections to avoid redundancy and the possibility of conflicting interpretation arising from the slightly different language. Direct Energy proposed that this subsection be revised to clarify that the prohibition only applies to the fixed price commitment period.

Commission response

The commission substantially modifies subsection (c)(3) consistent with changes made to subsection (e).

First Choice commented that the variable price product should not have a term that exceeds 31 days in duration, as a variable price product by its very nature is unpredictable. Tara argued that the prohibitions in section (c) preclude REPs from offering lower prices in exchange for lower risks. Tara commented that REPs have to build catastrophic events such as hurricanes and spikes in gas prices into their contracts because they are not able to seek permission from the customer to modify terms, which means the consumer will either pay a higher cost on a day-to-day basis or sign up with a REP with a lower offer and be dumped to the POLR at an even higher cost if the risk becomes reality. Tara stated that the proposed rule would result in fewer products available to customers, as it will force customers into products that are intended to provide more certainty at a higher price or that offer lower initial prices with a greater risk to a REPs business if catastrophic costs are not priced at inception.

Commission response

The commission agrees that the rule should require all variable contracts for residential customers to have a term of 31 days or less. The commission does not agree with Tara's assertions that subsection (c) prohibits REPs from offering lower prices in exchange for lower risks.

Subsection (c)(3)(B) and (C)

Reliant proposed to delete subsection (c)(3)(B), consistent with its proposed deletion of the limited fixed price product. TXU argued that the differences in REPs' ability to effectuate a price change in connection with an indexed plan versus a variable price plan warrant the notice periods for each plan to be treated differently; indexed plans should not require 45-day notice,

because any price changes to an indexed plan would be due to changes in the values of the publicly available elements that are inputted into a pre-defined pricing formula. Consequently, at all times during the billing cycle the customer has the ability to calculate the price for electricity, in stark contrast to customers on a variable price plan, where price changes are due to a "method" whose elements are controlled and known only by the REP. Accordingly, TXU suggested dividing this category into two subsections. Cities stated that "pricing methodology" was not relevant to guaranteed fixed price or limited fixed price contracts (where only TDU and TRE or other pass-through charges are permitted to change) and requested that it be removed from these sections.

ARM commented that given the nature of variable price and index price products, the 45-day notice requirement for material changes is not required for a price change for a variable or indexed product as long as the EFL has disclosed to the customer how and when the price may change and, to the extent there is confusion about whether price and pricing methodology are the same, ARM offered clarifying language. Reliant proposed to add language that would clarify that products with contract periods longer than 31 days would be covered by this section but contracts with periods of 31 days or shorter would require affirmative consent to change the length of the contract. It also proposed to allow a 45-day notice to be used to change a price or the pricing methodology when the contract is month-to-month. Direct Energy disagreed with this proposal, opposing a notice requirement. TXU agreed that indexed prices should not require a price change notice but proposed a clarification to ensure that this section does not inadvertently authorize a REP to extend a customer's contract through the use of 45-days notice. OPC stated that if a REP has the latitude to change the price at will, then the REP should either

provide 45-days notice to allow the customer to shop for a different product or the REP should disclose to the customer at the time of registration the maximum amount the price may increase on a monthly basis as well as the maximum price increase over the life of the contract. Cities argued and OPC agreed that it should not be permissible to change the length of the contract in a month-to-month contract as it puts the customer at risk for being bound to a REP for a particular term when the customer believed that he was on a month-to-month product. They noted that a customer might have selected the REP's offering because it was a month-to-month product, especially given that the customer might not have received or understood what the proposed change means for his electric service. ARM disagreed with OPC's proposal and argued that the material change notice requirement should not apply to a price change for a variable product that is consistent with the product's EFL. ARM stated that price changes for a variable price product should not be restricted unless the REP and customer voluntarily agree to restrictions and their agreement is reflected in the contract for retail electric service.

Commission response

The commission concludes that three products are appropriate: fixed rate, indexed and variable price. The commission determines that specific EFL disclosures are required for the indexed and variable price products to alert the customer that the price can change. The commission requires price history for residential variable price products. The commission requires residential variable price products to be only month-to-month and prohibits termination fees on month-to-month contracts. The commission requires the bill to provide residential customers with instructions for how to obtain information about the price that will apply on the next bill for variable price products. With all these

requirements, the commission does not believe it is necessary to require a notice of a price change where the product documents disclose that the price may change and how it may change. These requirements represent a balance between the latitude that is appropriate to foster the development of new products by REPs and the need for customer tools in assessing these products, such as simple product descriptions that can be used on EFLs and the commission's customer education web site and the need for current price information for customers on variable price products.

Subsection (c)(3)(D)

Texas Rose/TLSC supported the proposed subsection (c)(3)(D) and would ultimately support a rule that would prohibit the charging of early termination fees, to permit consumers to freely switch REPs when more favorable prices and terms become available. ARM stated that it is fully supportive of the customer's ability to switch REPs in the exercise of customer choice, but terminating service with a REP prior to the end of the contract term has financial implications for the REP and, therefore, REPs should continue to be allowed to include early termination fees in their contracts as a means of protecting themselves financially.

Gateway opposed the language relating to using an estimated end date as the basis for charging an early termination fee. Gateway stated that all early termination fees should be based on actual end dates. For example, a REP may make a good faith estimate of a start date of 10/01/08 and an end date of 9/30/09 respectively. Due to a processing problem at the TDU the actual start date and end date are 12/01/08 and 11/30/09 respectively. According to the way the rule is written, if a customer cancelled on 10/01/09, the customer would incur no early termination fee even

though the REPs contract was through 11/30/09. This puts the REP at an additional risk of exposure to changing market prices.

Commission response

The commission disagrees with Gateway that early termination fees should be based solely on actual end dates. When customers sign contracts for other products or services it is clear when the contract begins and when the contract ends. In the case of retail electric service, both the starting date of the contract and the end date have not been known to the customer in many instances. Coupled with the fact that it might currently take 45 days to switch to another provider at the end of a term, customers end up confused and frustrated and may either be afraid to switch providers for fear of a termination penalty, or be stuck with a large termination penalty because they couldn't time the switch precisely. The commission does understand the need for termination penalties especially under a long term contract when the REP has purchased supply for the customer. However, as the contract draws to a close, this risk becomes less because the period for which the REP has purchased supply or otherwise hedged the obligation to supply the customer is shorter. In addition, it appears that REPs do not hedge 100% of their customer obligations, for a variety of reasons. The commission believes that the customer should not bear the responsibility for uncertainty about the termination date that arises from action of the REP in providing an estimated date that is not the actual end date or the TDU in executing a switch or meter read earlier or later than expected. The commission concludes that a customer's obligation to pay a termination fee should end 14 days prior to the contract end date provided by the REP. The commission concludes that the customer should have a

short grace period prior to the termination date that the REP has communicated to the customer in which to switch without penalty. Recognizing that the REP is likely to have made supply or hedging arrangements to supply the customer that may be frustrated if the customer switches to another supplier early, the commission is adopting a rule with this shorter grace period.

Subsection (c)(4)(A)

ARM and Reliant suggested this subsection (c)(4)(A) be deleted given that §25.473 already addresses requirements regarding call center agents being able to communicate with customers in English and Spanish and any other language used to advertise to the customer.

Commission response

The commission agrees with Reliant and ARM that this is already covered in §25.473 and amends the rule accordingly.

Subsection (c)(4)(B)

ARM proposed to delete the reference to commercial customers in subsection (c)(4)(B), arguing that the rule should only apply to residential customers. It also argued that this provision should be revised to reflect that the REP is not required to post EFLs for electric products that are customized for a small commercial customer, if the commission determines the rule should apply to commercial customers. Reliant commented that there are other types of service where customer eligibility may need to be determined especially as meter technology continues to advance and that REPs should have the ability to ask if the customer has an advanced meter.

TXU requested that a customer's street address should be required so that the REP can determine which TDU serves the customer or whether a customer is a new or existing customer of the REP. ARM did not oppose TXU's suggestions to allow input of other information by the customer but that urged that entering the address should be optional rather than mandatory.

Commission response

The commission agrees with ARM that subsection (c)(4) should exclude commercial customers. The commission disagrees with TXU that a customer should be required to enter its address. It is important that customers, especially residential customers, be able to shop anonymously for electric service, and therefore addresses should not be required. REPs may ask questions to tailor specific products for the customer if the customer voluntarily offers the information, but the questions should not require the customer to enter personal information such as name, address or telephone number to get information on a REP's products. The commission clarifies that this requirement is for residential customers.

Subsection (d)

TXU, Reliant, ARM and Direct Energy proposed that if a REP's phone number and/or Internet address are included on an advertisement, then these should not be required in the disclaimer statement. ARM commented that this subsection should apply only to residential customers or, if the commission applies the rule to both residential and small commercial customers, it should specifically state "small commercial" customers.

OPC proposed that inquiries from advertisements should be directed to the power to choose website rather than to individual REPs. ARM disagreed with this proposal.

Commission response

The commission agrees that if the information is included in the advertisement it need not be repeated in the disclosure statement. Subsection (a) of the rule makes this section applicable to small commercial customers whose load is less than one MW. It concludes that it is appropriate for the advertising provisions to have the same applicability. Marketing and advertising claims would still be subject to the general provisions of PURA that prohibit misleading practices.

Subsection (d)(1)

ARM, Reliant and Direct Energy proposed that REPs be required to provide only an EFL, rather than all contract documents, in response to an inquiry from a customer that responds to an advertisement.

Commission response

Information other than an EFL may be required for a customer to fully evaluate a REP's service offering, because the EFL is typically a high-level summary description of the contract. Therefore, the commission modifies the provision to require a REP, upon request, to provide the commission with contract documents and other information used to substantiate comparisons in the advertisement.

Subsection (d)(2)

Reliant proposed that REPs provide information that would substantiate comparisons made in advertisements to the commission or staff upon request, rather than provide the substantiation to the public.

Commission response

The commission agrees with Reliant and changes the rule accordingly.

Subsection (d)(3)

ARM, Reliant, Direct Energy and First Choice shared the view that it would be impractical in the context of billboards to require that a REP's certificate number be included on outdoor advertising. These commenters suggested that REPs provide either a phone number and/or an internet address. First Choice pointed out that requiring this level of detail could pose a safety hazard. ARM proposed to delete the requirement that a REP's certified name be included on outdoor advertising.

Commission response

The commission believes that outdoor advertising should contain the REP's certified name and REP number and that they should be readable at audience level. These are important items the customer needs to research the claim made in the advertising.

ARM commented that the meaning of the term "material change" as currently used in §25.475(e) and in the proposed subsection (e) is so vague and ambiguous that it is not reasonable to expect

REPs to uniformly interpret and apply the term. ARM recommended that subsection (e) be revised to specify that the term "material change" includes price changes, changes in pricing methodology, changes in contract term and changes in early cancellation fees. Reliant proposed changes to subsection (e) to align the section with Reliant's proposed definition of fixed and variable price products. Texas ROSE/TLSC proposed that this section require REPs to provide notice of price changes in excess of 5% in any given month to customers with variable price contracts. If the price can change without notice, then this must be clearly conveyed to the customer and not hidden in a paragraph of the TOS. Texas ROSE/TLSC opined that the language in the proposed rule allows a REP to permit a customer to waive the materiality of a price change in the terms of the contract, and they recommended that this provision be deleted. At a minimum, they stated that the rule should require that the first sentence of any contract that includes a waiver of notice of price change should begin with the following sentence in all capital letters and a 12 point font, "Under this contract the price you are charged for electricity may increase and (insert name of REP) will not provide you notice of the increase." In addition, they argued that this waiver should be included in any recordings or documentation of a customer's switch.

TXU and ARM suggested that a subsection be added to require that material change notices advise the customers that it may take 45 days for the customer to switch providers and noted that it was consistent with subsection (f)(2)(D), which requires the notice for renewal notices. Reliant agreed with the proposed change. OPC proposed to delete the variable product from subsection (e), as a REP should provide 45-day notice prior to changing the price of a variable

rate product when a range of possible price changes are not stated on the EFL. ARM opposed these changes consistent with their discussion in questions 4 and 5.

Texas ROSE/TLSC argued that price is always material and urged the commission to uphold this principle in this rule.

Commission response

The commission believes there should be no change in the pricing commitments or term length during a contract term of a fixed product. The commission restructures this subsection consistent with the changes it is making to the various product types. The commission is not adopting a price threshold like the one that TLSC/Texas Rose proposed. Any price change must be consistent with the description of the product that was provided to the customer on enrollment. The purpose of these changes is to ensure that customers get the benefit of their bargain when they enroll for a product.

Subsection (e)(1)(A)

ARM urged the commission to provide greater clarity as to how a material change must be identified in the REP's material change notice to a customer. ARM proposed to delete the specific ways the written notice is provided and instead clarify that a customer is entitled to a full 45 days to terminate the contract without penalty if the customer finds the change unacceptable.

Commission response

The commission disagrees with ARM's proposed ways to notify the customer. The rule is specific in the ways that notice can be provided and the commission finds those methods acceptable and declines to amend the rule as suggested by ARM.

Subsection (e)(1)(B)

ARM proposed to add a definition of "conspicuously." Reliant disagreed with this proposed change, as it could place an unneeded restriction on REPs and the commission's "clear and conspicuous" requirement is adequate.

Commission response

The commission does not believe that a definition of "conspicuously" is necessary.

Subsection (e)(1)(C)

ARM proposed to add specificity to this subsection (e)(1)(C) to require the specific provisions in the contract that address the material change.

Commission response

The commission has substantially reduced the scope of the provision on contract changes, and the provision addressed by ARM has been deleted.

Subsection (e)(1)(D)

ARM proposed that the material change notice point out whether the customer may be subject to an early termination penalty and if so, the amount of the penalty. Reliant noted that the proposed section presents the customer with two choices when presented with material changes: accept the change or terminate the contract. Reliant stated that there could be other choices such as the customer could call the REP to find another product. Therefore, Reliant suggested altering this section to delete the reference to termination of the contract. ARM proposed to collapse subsections (e)(1)(D) and (e)(1)(E) and to note that the customer has the full 45 days to enroll in another product offered by the REP, to switch to another REP or to take other actions prior to the implementation of the material change.

Commission response

The commission modifies the required notice to specifically inform customers that it can take up to ten days to switch providers. The customer may be free to sign up on another product with the REP, and the REP is not prohibited from providing information on other plans in the notice.

Subsection (e)(1)(E)

First Choice stated that there were several instances where 45-day notices are better than 60 because 60 days may be too early and customers may forget to take action, 60 days is beyond the 45-day switch period so the expiration of the customer's price plan will not be coordinated with the switch away request and may expose the customer to termination penalties, and setting the

price 60 days in advance may not give customers the full benefit of getting the lowest offers due to REPs being unable to make attractive offers this far in advance.

Commission response

The commission makes the notice period 14 days which should help address the concerns of First Choice.

In subsection (e)(2) Gexa proposed to succinctly state under what conditions a REP is not required to send notice to the customer, namely, for a change that benefits the customer or a pricing change that reflects charges resulting from the action of a federal, state, or local governmental or quasi-governmental entity. Reliant also suggested a clarification in subsection (e)(2).

Commission response

The commission has modified this subsection to make it clear that notice is not required for a change that benefits the customer and to clarify the other circumstances in which a notice is required, consistent with Reliant and Gexa's suggestions.

Subsection (e)(3)

OPC proposed a new subsection (e)(3) stating that notice shall be required for changes to services provided by the REP such as bill payment methods, bonus or reward programs or special offers. ARM disagreed with OPC that a rewards program is material and argued that

OPC confuses the concept of notice with the concept of material change notice and asked that OPC's change not be adopted.

Commission response

The commission agrees with OPC that rewards programs and affinity miles may be important to customers. Therefore, the commission agrees to allow changes in terms and conditions of term contracts that may include these programs, but requires the REP to send notice that would allow the customer the right to terminate a term contract if the changes are not acceptable to the customer.

Subsection (f)

TXU suggested that subsection (f) be revised to clarify that it does not apply to contracts that automatically renew. ARM commented that the term "written" should be included in the prefatory language to describe the notice of termination consistent with subsection (f)(2). Reliant provided modifications to require the expiration notice unless an automatic renewal provides that the customer's price will stay the same or the customer has affirmatively accepted a contract for service at the end of its contract.

Commission response

The commission concludes that when the initial term of a term contract expires, the REP should provide notice of the expiration of the contract, so that the customer has the opportunity to consider other options, even if the price would not change through the

default renewal month-to-month contract presented to the customer in the notice of contract expiration.

ARM disagreed with the 60-day notice requirement for contract expiration, arguing that 45 days notice would be sufficient for this purpose. TEAM stated that the reminder notice is unnecessary and predicted that this particular proposal could become operationally burdensome because identifying a window for every contracted customer is difficult and likely to require a manual process and will require constant mailings from REPs in turn requiring constant manpower and outpouring of costs. TEAM also argued that the commission should not be in a position of deciding the appropriate window for notifying a customer of their potential to negotiate a new term, for example, a customer who has a five-year contract might want six months notice, while a customer on a three-month contract would be getting the prescribed notice in about the middle of their contract. Reliant proposed that notice be sent at least 45 days but no more than 60 days prior to the end of contract expiration rather than 60-75 days in advance. ARM agreed in reply comments.

ARM argued that written notice should not be required when the customer's retail electric service is automatically renewed or extended upon reaching the end of an initial term and that the customer may wrongly believe that retail electric service is ending upon the end of the initial term. Reliant stated that it is unclear whether a contract with an automatic renewal clause would be subject to the requirement to issue a contract expiration notice.

Texas ROSE/TLSC supported the requirement that REPs send customers a notice of contract expirations and stated that many customers have contacted the commission asking for this provision. Texas ROSE/TLSC stated that expecting customers to remember when their contract expires is unrealistic if not impossible, given that the proposed rule would allow REPs to give an estimate of the contract end date. Customers should be able to protect themselves from changes in price and service by having a reasonable window of opportunity before their contract terminates to switch without a penalty as the proposed rule allows. Customers who are not given any renewal offers should not be punished by having to transition to month-to-month service before being able to switch without penalty.

First Choice asked the commission to consider the convenience and benefits customers would garner by permitting a procedure whereby the contract would automatically renew without affirmative consent. First Choice also requested clarification of whether the TOS must state a renewal price, or whether the TOS can incorporate by reference a default product type, current price of that product and a statement that the "then current" market pricing will be used to price the default service, as market conditions will not allow REPs to define a specific price that will apply to a future automatic renewal.

Ben Ray of Ben M. Ray Investments stated that he was a consumer who had been exploited by the application of exorbitant electric rates without notification upon the end of a contract and urged the commission to take action to prevent the continuation of these acts as his situation has left him with very little confidence in the integrity of the REPs.

TEAM argued that requiring a contract expiration notice in addition to the information already provided to the customer in the enrollment process is excessive. TEAM argued that the customer signed a contract and thus knows the terms of that contract specifically when service started and when service ends. TEAM further argued that the notice should not be mandatory because this is a service which REPs can use to differentiate themselves in the market. OPC disagreed with the assumption that people will remember the date they enrolled in a particular electric service product. Public Utility Brokers stated that REPs having trouble predicting the end date of a contract could state the date as "the next meter read after X." Public Utility Brokers suggested putting this statement on each invoice.

Representative Zerwas asked that the commission provide an explanation of how a switch can occur without the customer incurring termination penalties. Representative Zerwas had a constituent with a postgraduate education who could not figure out how to time a switch of providers to transition smoothly from one provider to another. Representative Zerwas also requested the REPs be required to provide immediate feedback to new customers or applicants informing the customer of the anticipated date of the switch, any fees associated with the switch and confirming the rates and termination date of the contract. Representative Jackson asked the commission to consider mandating that REPs notify customers at least 30 days from the date the contract is set to expire.

M.E. and Lois Campbell stated that customers need to know when their contract is up so that they can re-negotiate a fair contract. Robin Parr stated that there should be notice of rate

increase and a way to call and agree or some other way to accept a contract other than disconnection when a contract is expiring.

Commission response

The commission and legislators have heard many complaints about contract expiration and automatic renewal provisions. The commission's proposal was a response to the many negative experiences and harm to customers resulting from REP practices under current rules. The commission's objective in the proposed rule and in adopting the rule is to establish minimum standards for notifying customers of the termination of their contract, so that they can shop for a new contract with the same or a different REP. One of the problems with the existing practices is that customers have been exposed to termination fees for switching to a different REP prior to the expiration of the original contract, but they have had difficulties in determining when the original contract expires. The bottom line is that the existing rules and REP practices under the rules have resulted in significant customer dissatisfaction and the belief by some that the commission has not met its obligation to protect customers from unfair and misleading practices. In adopting this rule, the commission seeks to improve REPs' performance with respect to contract expiration issues by establishing minimum standards.

The proposed rule included three features to improve customers' treatment with respect to the completion of a contract term. These contract completion features are: (1) the requirement that the REP provide notice to the customers of the expiration of a contract; (2) the prohibition against collecting an early termination fee during the 60 days following

this notice; and (3) proration. The commission modifies the second requirement to provide a 14-day grace period at the end of contract term in which the customer can be switched without penalty. The commission eliminates the proration requirement in favor of the 14-day grace period.

Customers have the right to be informed when a contract is expiring. It is important for the customer to know what the rate will be and what EFL the customer will be served under if the customer takes no action. Even if the customer was provided the information upon enrollment, the customer may have misplaced it and it should be provided again so that the customer has resources available to make an informed decision. Therefore, the commission determines that the renewal notice should be sent 14 days prior but no more than 45 days in advance of a contract renewal.

Subsection (f)(1)(A)

ARM proposed to eliminate the requirement of a prominent message on the outside of the envelope.

Commission response

The commission retains this requirement, in order to alert the customer to the importance of the notice and also permits an alternative method of compliance, under which the REP must provide the approximate date or billing cycle and month that the existing contract will expire on the last three bills rendered prior to the expiration of the contract.

Subsection (f)(1)(B)

ARM proposed that subsection (f)(1)(B) be modified to allow the REP to alternatively provide the month or billing cycle in which the contract will expire rather than an approximate date, to permit the REP to use the same template for a letter, bill message or e-mail message that is sent as part of a batch communications to customers whose contracts for retail electric service are expiring in the same month.

Commission response

The commission agrees that a REP could provide the billing cycle and month rather than the estimated day for contract expiration. That would allow the customer to notify its potential new REP of the billing cycle and month, which would likely be the only information needed by the new REP.

Subsection (f)(1)(C)

ARM and TEAM noted that proposed subsection (f)(1)(C) requires the written notice of a contract expiration to include a statement that no termination penalty shall apply for a 60-day period from the date the notice is sent to the customer. In essence, ARM and TEAM stated, the proposed subsection gives the customer permission to terminate the contract during the last two months of the contract term without penalty. The elimination is at odds with proposed subsection (f)(4) which requires a proration if the customer terminates service during a specified period in the contract term. ARM, opposed both of these ideas, as the notice of contract expiration pursuant to proposed subsection (f) should not encourage customers to terminate service prior to the end of the contract period. As drafted, subsection (f)(1)(C) modifies the term

of the contract and the amount of the termination fee. Upon signing up a customer, a REP must presume that the customer will take service from it for the duration of the contract period, and an early termination will undermine that. As a result, a REP that procured power entered into hedging arrangements based on the presumption that the customer will take service through the end of the contract term stands to be harmed and the REP cannot mitigate the financial consequences it faces when early termination occurs. Additionally, ARM stated that termination of service prior to the expiration of a contract is not necessary for purposes of timing a switch to another REP. ARM argued that a customer can enter into a contract for future retail electric service from another REP during the time it is taking such service from its current REP and therefore there is no need to terminate an existing service contract prior to the end of the contract term. Therefore, ARM concluded that the contract penalty should apply in full unless otherwise provided for in the contract and this subsection should be deleted from the rule.

TEAM, TXU, Green Mountain and Reliant opposed the proration proposal. Reliant stated that this provision is contrary to PURA §39.001(d) in that it is not "limited so as to impose the least impact on competition." TXU stated that the termination penalty serves two purposes: to help protect the REP against costs associated with procuring power to serve the contract and to help fend off other REP's attempts to lure customers away prior to the end of the contract term. TXU also argued that some REPs already prorate early termination penalties providing a competitive solution to the perceived problem. TEAM requested clarification to ensure that REPs are not exposed to the costs of losing a customer for whom power is already purchased. OPC did not find any of these arguments persuasive, as a REP is constantly adding new customers and losing customers and its customer base is never fixed at a particular number of customers for a

significant period of time. Therefore, a REP's purchasing strategy must account for fluctuations in customer base, and allowing a customer to pay a reduced fee proportionate to the time left on his contract would not harm the REP. Texas ROSE/TLSC preferred that early termination penalties be prohibited but supported the concept of proration, because a customer's liability for paying an early termination fee should decrease as the customer's length of service with the REP increases.

Reliant stated that this provision would materially change the contract and that the commission's intent was to have this apply to the new contract that goes into effect rather than the contract that is expiring and should be moved to subsection (f)(2).

ARM did not support increasing the period of time in which an early termination penalty does not apply if the customer terminates service from 45 to 60 days. This allows the termination penalty to not apply even if the customer takes action after the 45 days and it would increase the burden to the REPs who already have systems programmed to 45 days. TXU and ARM suggested that the customer be advised of whether a termination penalty applies since the customer may not remember. Reliant opposed that suggestion as it felt the concept was covered in that the customer is told that no termination penalty shall apply for 60 days and the proposal to change it to state whether a penalty applies appears to conflict.

TXU proposed changes to conform to its comments that customers who are not subject to a termination penalty receive notice of that fact.

Texas ROSE/TLSC stated that the main purpose of giving customers this notice is to inform them that they may be subject to a price change when their term contract is expiring and given that switches normally take 45 days to become effective, requiring 60 days notice is reasonable as this essentially gives the customer a 10-12 day window to submit a switch request assuming the customer receives the notice in 3-5 calendar days. A 45-day notice period would result in many, if not most, customers getting caught in a month-to-month trap.

ARM contended that subsection (f)(2) should be revised to clarify that the customer has the full 45 days to take action to either accept any renewal offer or decline and switch to another provider.

Reliant suggested modification to the number of days from 60 to 15 and to begin counting the 15 days from when the new contract terms go into effect, Reliant contended that this was equivalent to the proposed 60-day prohibition because 45 days will have passed before any new terms go into effect and the prohibition on a termination penalty should not apply if the customer affirmatively consents to enroll in a new product. ARM did not agree and stated that regardless of whether the prohibition against the application of an early termination fee aims to incent a customer with an expiring contract to act or to serve as an antidote to buyer's remorse, it should not be adopted.

Commission response

The proposals relating to proration and the prohibition of collecting an early termination fee prior to the expiration of a contract were intended to improve customers' treatment

relating to the completion of a contract term. The commission believes that prorating the fee has merit, because the REP's costs of obtaining supply for a customer or hedging a customer contract should be roughly correlated to the length of the contract. Thus, as the contract nears its agreed termination, the REP's benefit from buying power for or hedging its contract with the customer has, for the most part, been realized. However, the commission concludes that proration and the prohibition against the collection of an early termination fee in the last 14 days of a contract term serve the same purpose, and the commission is not adopting the proration proposal. The commission is adopting, with a modification, the prohibition against the collection of an early termination fee. The purpose of this measure is to give the customer a period prior to the expiration of a contract to shop for a new energy plan to replace the one that is expiring, without the threat of a termination fee if the transfer to another REP occurs prior to the expiration of the contract. The 14-day period is based on providing the customer a grace period in recognition of the fact that the exact meter read date is unknown.

The commission also modifies the time period for sending the contract expiration notice to be 14-45 days in advance of the contract expiration.

The commission does not agree with Reliant's proposed change. As discussed above, the commission concludes that the customer should have time to shop and switch providers following receipt of the notice, without incurring a termination fee in the last 14 days of their contract since it is unclear when a switch would be completed.

Robin Parr stated that she was unsure that disconnecting service because a customer does not sign a new contract is a good practice. Reliant was opposed to the disconnection of customers at the end of a contract period as it would not be good for the competitive market to have commission rules that allow REPs to disconnect customers at contract expiration simply because the customer does not take affirmative action. Reliant cited PURA §39.101 which states that customers have a right to choose their retail electric provider and to have that choice honored and that the customer's chosen provider will not be changed without the customer's informed consent. There are many reasons the customer might not have received the contract expiration notice, such as, postal service delivery issue or military service, and it is not appropriate to penalize customers who are paying their bills. Reliant did not believe that customers generally expect that their service can be disconnected because they do not take affirmative action. This is not what happens with phone or cable service. OPC, Cities and Texas ROSE/TLSC were also opposed. ARM opposed both of these modifications on the grounds that neither mandatory disconnection nor mandatory non-disconnection is the preferable option. Both options are extremes and the REP should have the option to take the appropriate action when the customer's contract expires. Cities were not comfortable with the prospect of a customer being charged a high rate on a variable month-to-month contract but preferred customers being switched to a variable rate to avoid disconnection of service upon contract expiration as long as the customer is able to cancel the service at any time with no cancellation penalties.

Commission response

The commission agrees with Reliant and Robin Parr that disconnection is not appropriate for a customer who is paying the bill. Therefore, the commission determines that in the

contract expiration notice, the REP should inform the customer that if the customer fails to take action, they will be placed on a month-to-month plan with no termination penalties. The notice should include the TOS (if different from the customer's current TOS) and EFL associated with the product that will apply if the customer takes no action.

Subsection (f)(3)

Direct Energy supported the allowance of products that provide for an initial term with a fixed price, followed by a transition to a post-initial term month-to-month variable product with no cancellation fee if the customer agreed at the time of initial enrollment. ARM and Direct Energy proposed revisions to this section consistent with its belief that no additional written notices of contract expiration or renewal should be required. In the event that the commission does adopt a written notice requirement, ARM requested that the written notice be provided to the customer in the final month of the initial term of the contract and should state that the contract term is ending but that the customer's service will automatically renew or extend upon the end of the term. The written notice should be allowed to be a bill notice or email as proposed by ARM and if the contract terms were disclosed to the customer at enrollment during the initial term, the REP should only need to inform the customer that the fixed price term is ending in the billing cycle and that the variable price arrangement as agreed to at the time of initial enrollment would begin. OPC disagreed with ARM and noted that notice of contract expiration in subsection (f) requires separate written notice, and OPC was pleased with the requirement.

Commission response

The commission disagrees with Direct Energy and ARM that no additional notice would be required, because the commission believes it is important at the end of a term, when the contract is expiring, that the customer be given notice and opportunity to switch. The customer may not remember for the terms of a product that was contracted for six months or even years before. The customer deserves the opportunity to be reminded of the expiration and to take action at that time.

Direct Energy stated that if a customer enrolls in a product that includes a fixed price for the first 12 months and on month 13 reverts to a month-to-month variable product with the same price as the fixed rate for the first month then there should be no additional notice required by the REP, and if the commission does believe notice should be required it should be allowed to be provided on the bill or with the bill during the last month of the contract.

Commission response

The commission does not believe a line item on the last bill is enough notice, and that the customer needs to have sufficient information to decide whether to shop for a new service plan and to evaluate the terms of the next portion of the contract, even if under the default renewal product, the price is the same. Market conditions may have changed so that plans that are more favorable to the customer are available, and the customer should have notice and opportunity to switch products or providers.

Reliant stated the term "permitted by this section" was vague, and it could not be expected to comply with such a vague and open ended provision. Reliant suggested deleting the provision and instead referring to subsection (g)(7).

Commission response

The commission has eliminated the automatic renewal concept and has replaced it with required contract expiration notice.

Subsection (f)(5)

Reliant proposed to delete this subsection (f)(5), because it is redundant and it is impossible to determine a start date until the customer signs and returns the agreement.

Commission response

The commission disagrees with Reliant that the REP will not be able to state the start date. For a re-enrollment, the REP should be able to use the date that the original contract ends as the start date of the new contract. The commission makes no changes to the rule in response to Reliant's argument.

TEAM proposed that the letter of authorization be replaced with "written consent form" because the letter of authorization connotes the enrollment process described in §25.474. ARM proposed revisions to this subsection. ARM commented that this proposed subsection employs the concepts of enroll and re-enroll. It is unclear whether the proposed rule intends to distinguish the two concepts.

The commission agrees with TEAM that the letter of authorization can be replaced with "written consent form." When a customer initially enrolls with a REP under the provisions of §25.474, that is the initial enrollment. If a customer enrolls in any product with the same REP after that initial enrollment, the re-enrollment procedures provided in subsection (e)(2) of the rule as adopted may be followed. The commission does not agree with ARM's conclusion that the provision is unclear because it uses both "enrollment" and "re-enrollment."

Subsection (f)(5)(E)

ARM noted there is some risk to provide a precise enroll or re-enrollment date in the event the utility does not read the customer's meter as scheduled.

The commission agrees that the REP may not know the exact date the customer will be re-enrolled due to TDU meter reading schedules, and the commission amends the rule to allow for an estimated re-enrollment date.

Subsection (f)(5)(G)

ARM suggested the language regarding customer account access is not germane to the situation where the customer is already enrolled with the REP.

Commission response

The commission agrees and deletes subsection (f)(5)(G).

Subsection (g)(1)

Direct Energy proposed making subsections (g)(1), (h)(1) and (i)(7) consistent and recommended including certification number as part of subsection (g)(1). Texas ROSE/TLSC asked that if a customer is required to have a certain type of equipment for the plan, then it should be specified in the terms of service. ARM did not oppose the suggestion and proposed language to accommodate the suggestion.

Commission response

The commission agrees with the proposal of Texas ROSE/TLSC and has made the changes suggested by Direct Energy.

Subsection (g)(2)(A)

Reliant, First Choice and Gateway opposed the requirement in subsection (g)(2)(A). Reliant interpreted this to require notice of the specific dollar amount a TDU might charge in performing a move-in or switch, and stated that it isn't practical and REPs do not have control over when such charges change. Because a customer can choose among various options, it would be impossible to include a specific dollar figure. Instead, the rule should allow a REP to describe the potential charges that a TDU might assess for these services. Gateway stated that the problem lies within a REP's ability to maintain an all encompassing database of TDU fees. Gateway recommended that a provision be added to refer customers to their TDU website or contract their TDU for any non-recurring charges that may be imposed by the TDU and billed by the REP. OPC disagreed and stated that the TOS should be a complete description of the

agreement between the customer and the REP, in contrast to the EFL which should provide customers a full description of the main components of the agreement in an easily understood format.

Commission response

Recognizing that the charges in question may originate from the TDU, and may change over time, the commission modifies the terms of service requirements to allow REPs to describe the non-recurring charges.

Subsection (g)(2)(C)

In connection with subsection (g)(2(C), Reliant argued that termination penalties are limited to specific products and that subsection (g)(4)(B) provides customers with sufficient notice that the termination penalty may apply and disclosure of the level of the termination penalty should occur in the EFL, pursuant to proposed subsection (h)(4). ARM agreed and stated the revision should also identify the non-recurring charges as those over which the REP has no control and which may be charged by the REP.

Commission response

The commission agrees with Reliant that termination penalties are addressed in published subsection (g)(4)(B), which is subsection (f)(4(B) of the rule as adopted, and need not also be disclosed in the pricing and payment arrangement requirements for the TOS. The commission does not agree with the suggestion from ARM. The charges in question may

originate from the TDU, but it is within the REP's discretion whether, when, and how to pass these charges through to their customers.

Subsection (g)(2)(E)

Texas ROSE/TLSC stated that low-income energy efficiency programs that the REP provides should be included in the TOS.

Commission response

The commission agrees with Texas ROSE/TLSC and makes changes to the TOS contents to include low income energy efficiency programs.

Subsection (g)(4)(C)

Reliant proposed changes consistent with its opposition to requiring customers to submit evidence of relocation. Gateway proposed changes consistent with its view that the contract terminates if the customer moves outside an area served by the REP or out of the state of Texas.

Commission response

The commission does not agree with Gateway that the contract terminates only if the customer moves to an area the REP does not serve. The commission finds that even if the customer moves next door, it may have different electric needs at the new premises; for example, it may move to a home with an advanced meter and wish to take advantage of a demand response program the current REP does not offer, or it may move to a house from an apartment. In these circumstances, the customer should not be limited by a contract for

a residence or commercial space that may have very different electric needs. This section does not require a REP to demand proof that a customer is moving, but it permits a REP to do so, and requires notice if the REP does require it.

Subsection (g)(5)

Reliant proposed revisions to subsection (g)(5) consistent with the prohibition on discrimination in §25.471 and PURA §39.101(c) and §17.004(a)(4).

Commission response

The commission is not adopting this recommendation.

Subsection (g)(7)

Reliant stated its understanding that penalties as described in the proposed subsection would include any fee that the REP might charge a customer who decides to stop taking service from the REP and the commission should clarify whether administrative or other fees that could be charged at the end of a customer relationship would be considered termination penalties. Reliant also proposed to strike the term renewal pricing because it is not clear what would be required above the EFL.

Commission response

Fees charged to a customer at the end of the customer relationship or at the end of a contract are considered termination penalties and are addressed in published subsection (g)(4)(B) and need not be addressed elsewhere in the TOS requirements.

ARM stated that the requirements in subsection (g)(7) are problematic for several reasons. First, references to "the price during the renewal term" or "the month-to-month renewal price" are not consistent with the possibility that REPs will offer variable price or index price products in the automatic renewal period. The references to price fail to take into account the possibility there may be no single price for a retail product subject to variable pricing or indexed pricing, given the possibility of changes in price for such products. If the term price is used in the context of an average price, the computation would be impossible because the REP cannot gauge how long the customer will take service on a month-to-month basis. At best, the REP would only be able to presume that the customer will take such service for at least one month which is at odds with the concept of calculating an average price. ARM contended that unless the REP committed to charge a non-variable price product in the automatic renewal it would be difficult for the REP at the time of initial enrollment to disclose a specific price for month-to-month product subject to variable or indexed pricing. Consequently at the time of initial enrollment if the REP cannot disclose the price with certainty it should disclose this information prior to the end of the contract term in accordance with the proposal in (f)(3) which is less than 30 days prior to the end of the contract term. OPC understands ARM's concern and suggested that at the time the contract is entered into, an example of the renewal product be provided rather than a specific price and that should have limits as to how much the contract could change and a limit on a monthly basis.

Commission response

The commission agrees with ARM that average price should not be used in the EFL for these products and has amended subsection (h)(2) (now (g)(2)) to describe the price disclosures for a variable product and indexed product to be included on the EFL.

Subsection (g)(7)

EPC recommended that this section clarify that this rule does not apply to month-to-month variable price products that are otherwise compliant with the newly proposed regulations.

Commission response

The commission will clarify that this provision, relating to contract expiration, applies to term contracts.

Subsection (h)(1)

Reliant opposed the inclusion of the REP's certified name and contact information in the EFL, arguing that the certificate number is sufficient to identify a REP and that contact information is available in the TOS document.

Commission response

The commission disagrees with Reliant that the REPs certified name and contact information should not be included on the EFL. Many customers have only an EFL when comparing offers and they need to know the REP's contract information and it should be included all documentation for easy reference for the customer.

Subsection (h)(2)

Gateway Power commented that, particularly in the case of variable price products, the listing of the average price per kilowatt-hour for various usage levels required under the proposed rule may be misleading to customers, and recommended that the average price levels be removed from the Electricity Facts Label (EFL). TEAM opposed the requirement that the EFL include the average price per kilowatt hour for various usage levels. According to TEAM, the price for limited-fixed and variable price products vary based on factors that are beyond the control of the REP, such as TDU charges, ancillary service charges, and unaccounted for energy charges. As such, TEAM argued that the prices shown in the EFL would be only rough estimates that could be misleading to customers. TEAM recommended that, instead of estimated average prices, additional questions and answers should be added to the EFL, including: 1) What components of my price can change without notice?, and, 2) Are there any limits to how much the price can change without notice?

Commission response

The commission agrees with Gateway and TEAM that the EFL should not include average prices for variable price products with a term longer than one month. The "average rate" should be the charge that will apply on the first bill and changes the rule accordingly.

OPC made two specific recommendations regarding the EFL. First, OPC stated that the language of §25.475(h)(2)(E) regarding promotional rates was too permissive, and that REPs should be required to list promotional rates below the average rate by changing the word "may" in the third

sentence of the paragraph to "shall." Second, OPC is concerned that permitting REPs to include other fees in the TOS document could be misleading to customers, and argued that the phrase "a full listing of fees" should be deleted from the "Other Key Terms and Questions" section of the EFL. In addition, OPC recommended that the phrase "or give direct location in TOS" be deleted from the answer to the question "What other fees may I be charged?" in the "Disclosure Chart" section of the EFL, and that examples of such other fees be listed in the EFL template. OPC preferred charges to be itemized rather than bundled into the overall price per kWh.

Commission response

The commission will remove the promotional language provision from the EFL section consistent with its determination that the EFL for a variable price product will contain the price that will apply on the first bill only, which may or may not be a promotional rate. However, the EFL must provide information on how the price can change from the rate listed. Non-recurring fees are required to be either described or itemized in the TOS document and described in the EFL.

Reliant proposed changes to subsection (h)(2) to conform this subsection to proposals it made concerning the definitions of fixed and variable priced services, and additionally questioned whether 2,500 kilowatt hours was a reasonable usage level for residential customers since using the commission's load profile a 2,500 kW customer in Oncor's territory for August would be profiled to use 3,535 kW. Instead, Reliant proposed that the 2,500 kilowatt usage level be replaced with a 2,000 kilowatt hour usage level and that an additional usage level of 1,000 kilowatt hours be added to the "Electricity Price" section of the EFL. Reliant argued that,

because the REP is required to estimate the average per-kilowatt hour price, the work "estimated" should be inserted before the phrase "price for each specified kWh usage over the term of the contract" in §25.475(h)(2)(E). Reliant also proposed that the last sentence of that subsection be deleted or clarified, as Reliant believes that it could be read to impose a cap for variable price products. TXU proposed that two additional usage tiers be added to the EFL, at 1,000 kWh and 2,000 kWh, arguing that the additional information would better enable customers to judge the average cost of electricity at their particular usage level. In reply comments, Reliant and ARM opposed TXU's proposal to increase the number of usage tiers shown on the EFL. Reliant argued that there is not sufficient space on the EFL to show five usage tiers, and that a usage level of 2,500 kWh is not representative for most customers.

Like OPC, Reliant proposed that the term "may" should be changed to "shall" in the sentence regarding the listing of promotional rates. Reliant suggested that the fee disclosures required by subsection (h)(3)(B) be limited to fees that are assessed by the REP, excluding fees that may be assessed by the TDU. Regarding the renewable energy disclosures required by subsection (h)(5), Reliant proposed that the rules regarding calculation of renewable energy disclosures should be included in this subsection rather than in §25.476, and proposed corresponding changes to that rule.

Commission response

The commission agrees with Reliant that 2,500 should be replaced with 2,000 and agrees with TXU that 1,000 should be reinstated.

Consistent with its position that the mandatory product categories in the proposed rule should not be adopted, ARM proposed that these categories be deleted from the EFL. ARM stated that the calculation of an average price over the term of the contract for variable price products is difficult if not impossible to perform, and ultimately could be misleading to customers, because the price may vary according to factors that cannot be predicted by the REP. ARM proposed instead that for variable price products, the price shown in the EFL should be the price that will be in effect for the first month of the contract, together with a notification to the customer of how and when the price may change during the term of the contract. Consistent with its position that the disclosure requirements of the proposed rule should be limited to residential customers, ARM proposed that references to small commercial customers be deleted from subsection (h)(2) and from the EFL. CPL Retail Energy, Direct Energy, and WTU Retail Energy concurred with the comments of ARM regarding subsection (h) of the proposed rule. Reliant opposed ARM's proposal that, for variable price products, the price for the first month's bill be shown, arguing that the price for a given product may change during the time period of up to 45 days that it may take to accomplish a switch. As an alternative, Reliant proposed that the EFL show the price currently in effect for the product, and that the EFL disclose the frequency of price changes, any limitation on the amount of price increases, and information regarding how the customer can obtain the current price.

Commission response

The commission agrees that the average price calculation is difficult and has replaced this with Reliant's suggestion to show the price for the current month for a variable product. However, the commission disagrees with Reliant that the price the customer receives

during the first month of service should be the variable price in effect at the time of the customer switch. In order to avoid questions about false advertising and customer misunderstandings, the commission determines that the EFL for a variable product should contain a statement that this is the price that will be applied during the first billing cycle, that the price may change, and information on where to locate the historical prices for the product.

Green Mountain opposed the four categories of pricing plans in the proposed rule, and suggested that the EFL should simply contain a clear description of the characteristics of the product's pricing plan, including whether the prices shown in the EFL are for a period of time or as of one point in time, whether the prices are subject to change, if the prices are not subject to change, over what time period they will not change and whether there are any exceptions that might permit prices to change, if the prices are subject to change, a description of any factors that may result in such a change, whether and how customers will be notified of any price change, whether any change in price is subject to a formula or whether it is discretionary on the part of the REP, and what prices will apply upon expiration of the contract.

Commission response

The commission disagrees with Green Mountain that the categories of pricing should be removed from the EFL. As discussed above, the categories should help customers who are shopping focus on the kinds of service plans they prefer.

Green Mountain also opposes the elimination of the fuel mix and emissions information from the EFL. In reply comments, Reliant responded to Green Mountain's position opposing the elimination of fuel mix and emissions data by arguing that the underlying calculations do not produce reliable results and that performing the calculations annually is costly to REPs. Gateway also supported removing the fuel mix and emissions disclosures from the EFL. Texas ROSE and TLSC opposed the removal of information regarding fuel sources from the EFL, arguing that Texas is the number one state for carbon dioxide emissions, and is among the top five producers of nitrogen oxides, sulfur oxides, and mercury and this information is important for consumers in making a choice among electricity providers. Environmental Defense Fund and Public Citizen also opposed the elimination of information regarding fuel sources from the EFL.

Commission response

The commission agrees with Green Mountain and EDF that customers care about fuel mix and how electricity is produced. The commission also agrees with Reliant that the underlying calculations for the fuel mix calculations do not produce accurate results and therefore do not present accurate information to the customer. Unless the customer has purchased a renewable product, it is not likely that the fuel mix portion of the EFL will look different from any other product, as most REPs default to the "system mix" which is the average for the state of Texas, because they are not able to verify the origin of electricity purchased for their customers. Because of the uncertainty of the inputs, the commission agrees not to include the emissions and waste information on the EFL but will include the renewable content. Additionally, the commission eliminates subsection (k) as

the commission agrees with Reliant that a separate document containing the emissions and waste information is not necessary.

Subsection (h)(3)

Texas ROSE/TLSC recommended that the disclosure of fees required by subsection (h)(3) be limited to fees assessed by the REP, that are not fees passed through from the TDU to the customer. Texas ROSE and TLSC proposed that additional information be included in the EFL to inform customers as to the viability of the REP and the potential volatility of prices for that REP, including the percentage of power purchased on the spot market, how deposits and prepayments are held, the number of years the REP has been in business, and complete disclosure of all fees that may be charged in the EFL.

Commission response

The commission agrees with Texas ROSE/TLSC regarding fees in proposed subsection (h)(3) (subsection (g)(3)(B) of the adopted rule) being limited to fees assessed by the REP. The commission does not agree with Texas ROSE/TLSC regarding including information on the EFL to include spot market purchases, how deposits and prepayments are held and the number of years the REP has been in business. The REP's practice with respect to the percentage of power purchased on the spot market may vary, so that it would be difficult for a REP to include the information accurately on the EFL. The way in which deposits and prepayments are held are prescribed by §25.107 of this title (relating to Certification of Retail Electric Providers (REPs)), and there is no need to restate that on the EFL. Finally, the number of years a REP has been in business may be a criterion that the REP will urge

customers to consider in making choices of a retail provider, but the commission does not believe that it is so important that it should be a mandatory disclosure on the EFL. The commission declines to make those changes.

Subsection (h)(4)

Representative Zerwas asked the commission to consider requiring REPs to provide information to prospective switching customers regarding standard switch dates, fees for an out-of-cycle switch and the ability to select a standard switch and switch providers without additional fees.

Commission response

The commission has opened a separate proceeding to expedite the switching process, without charge to the customer, and is adopting a requirement that REPs provide customers a notice of the termination of the contract from 14 to 45 days prior to the termination of a contract. Information about the contract expiration notice will also be required in the TOS. This expedited switching process, if adopted, and the notice of contract expiration should permit customers to avoid or minimize their exposure to surprise terms in a default renewal contract. The commission expects that these changes will address Representative Zerwas's concerns.

Gexa Energy contended that the format of the EFL should not be mandated by the proposed rule, but that the required contents of the EFL be strictly defined by requiring that a table be included in the EFL that lists each charge that may appear on the customer's bill, the entity responsible for setting the charge, the current amount of each charge, the unit of measure for which the charge is

applicable, and whether the charge is fixed, variable, or indexed. In reply comments, CPL, Direct Energy, and WTU opposed Gexa's proposal to disaggregate the components of the customer's bill, arguing that the customer is interested in the total price paid for electric service, and that Gexa's proposed disaggregation would impose unnecessary administrative costs on REPs.

Commission response

The commission believes that for customers to make apples to apples comparisons between products the format of the EFL should be identical between REPs and does not make changes in response to Gexa's suggestion. Changing how price is displayed would also require educating customers to the new format and is likely to engender confusion.

TXU recommended that the phrase "using the commission-approved load profile" be deleted from subsection (h)(2)(B)(i), arguing that the resulting figure has been confusing to customers that do not understand that the price is an average over a 12-month period, and that, with the increasing adoption of smart meters and granular time-of-day pricing, load profiles will no longer be necessary. Instead, TXU stated that the REP should simply calculate the price at each of the assumed usage levels based on the prices contained in the terms of service. TXU noted that many rate plans for small business customers include demand charges, and proposed that the disclosures required in subsection (h)(2)(B)(ii) assume a demand of 20 kW. TXU proposed that the last sentence of subsection (h)(2)(C)(ii) be moved to a new subsection (h)(2)(C)(iii), to clarify that its terms are applicable both to products sold separately and products sold as part of a bundle. Finally, TXU noted that the requirements relating to promotional rates currently are

included only in subsection (h)(2)(E), relating to variable price and indexed products, but also should be included in subsection (h)(2)(D), relating to fixed price products. ARM concurred with TXU's objections to the use of load profiles in calculating average prices.

Commission response

The commission agrees that the use of the load profile is no longer necessary and removes this requirement from the rule.

M.E. and Lois Campbell stated that customers need to pay fair prices for electricity with no surprises.

Commission response

The commission agrees and intends for the disclosures in the EFL to make the products clearer to customers.

Subsection (i)

First Choice Power and Reliant proposed to clarify that the right of rescission applies only to new customers who have switched REPs and does not apply to move in transactions. OPC suggested the YRAC document cover the energy efficiency programs run by the transmission providers. Texas ROSE and TLSC agreed. Texas ROSE and TSLC proposed that the YRAC cover any energy efficiency programs sponsored by the REP.

Reliant Energy suggested removing contact information, including mailing address, Internet address, toll-free telephone number and hours of operation from the YRAC. Reliant stated that contact information is available on the TOS and the need for duplication has not been demonstrated. Additionally, Reliant suggested using the REP certification number instead of the REP's certified name, as the REP certification number is an efficient method of identification a REP.

Texas ROSE and TLSC suggested that the YRAC include information on financial and energy assistance programs for residential customers. ARM did not oppose the YRAC changes proposed by Texas ROSE and TLSC. The only caveat that ARM proposed is that the information requirement be met through the use of "toll-free numbers, website addresses or other reasonable means in the YRAC."

Commission response

The commission has added financial and energy assistance topics to the YRAC. The commission also concludes that basic REP identification information should be included in the TOS and YRAC. These are meant to be documents that a customer may retain during the term of a contract and may need to consult to get answers to questions about the contract, so the information should be on both documents.

Direct Energy proposed to delete subsection (i)(6)(D) since the same basic information is covered in subsection (g)(4)(A)(i). Direct Energy argued that subsection (g)(4)(A)(i) specifies

that the rescission applies to switch requests while subsection (i)(6)(D) uses "new customer" that could be construed to cover move-in customers.

Commission response

The commission agrees with Direct Energy that this section should be deleted and amends the rule accordingly.

Subsection (j)

As noted in the discussion of question 2, ARM, TEAM, ConocoPhilips, TIEC, Tara, TXU, Reliant, Gateway and First Choice did not support the proposed waiver in subsection (j). Texas ROSE and TLSC supported the waiver.

Commission response

For reasons addressed in question 2 the commission removes proposed subsection (j) from the rule.

Section 25.475(k) and 25.476 Fuel Mix and Emissions Disclosure

EDF opposed the deletion of emissions and fuel mix disclosure from the EFL and relegating it to a new, separate document. EDF insisted that the provisions related to the statutory requirement on environmental impact disclosure currently in force. Quoting a NREL review, EDF insisted that Texas customers are equally concerned about the price of their power and how it is produced and likened the EFL to the nutrition label on food products. EDF disagreed with Reliant's suggestion to eliminate the requirement to provide fuel mix and emissions information to

customers, even as part of a separate document that would be available only upon request and argued that the current EFL disclosure minimizes the administrative burdens imposed on REPs in developing product-specific disclosures.

Texas ROSE/TLSC agreed with EDF that Texas consumers are interested in the environmental impact of their electricity choices and argued that fuel mix is an important component not only of emissions but of price and price stability. Texas ROSE/TLSC favored retaining fuel mix and emission disclosures in the EFL to enable customers to consider these factors in their purchasing decisions without having to do additional research.

Green Mountain concurred with EDF that the EFL fuel mix and emissions disclosure content and format be kept the same. It maintained that the current EFL provides a valuable education benefit regardless of whether customers are interested in renewable energy or environmental issues and therefore should not be modified or moved to an optional disclosure document available only upon request. If the commission did not agree to keep the fuel mix disclosures on the EFL as they are today, Green Mountain suggested an alternative approach that would give REPs that offer an electricity product with an unspecified or unauthenticated fuel mix the option to either provide an EFL that complies with the EFL fuel mix and emission disclosure requirements under the existing rule or provide an EFL with an abbreviated generic fuel mix and emissions disclosure that states that the fuel mix for the product is unspecified, provides information about the Texas average fuel mix, and provides information about the emissions and waste associated with the generation of electricity using the state average fuel mix.

Reliant stated that removing the fuel mix and emissions disclosure from the EFL does not solve the problem as it would not address the fact that the underlying calculations do not produce accurate, product-specific information. Reliant stressed that this effect is a result of a number of factors, including the fact that the data is usually that of an entire generation company's portfolio rather than unit-specific data. Reliant argued that REPs often rely on the statewide average because they buy from third parties and the actual source of the generation cannot be verified. Reliant recommended that the fuel mix and emissions disclosures be removed altogether. It stated that creating a fuel mix and emissions disclosure as a separate document from the EFL and available on demand would create even more burden on REPs and increase costs without providing accurate data and would therefore bring little value to the customer. Reliant proposed that all information in §25.476 related to calculating the renewable energy and fuel mix and emissions disclosure be removed and only the statewide average renewable energy produced be calculated. If the disclosures are kept, Reliant requested clarification that the yearly fuel mix and emissions disclosure is to be used for products introduced in the applicable year and REPs are not required to include the revised data into documents for existing products that are no longer available to new customers, but under which customers continue to be served.

OPC stated that the comments of Green Mountain, EDF and Public Citizen, and Texas ROSE regarding the fuel mix and emissions disclosure were persuasive and recommended that the fuel mix and emission disclosure be included in the EFL in some way.

Direct Energy recommended that subsection (f)(8) be deleted, as it refers to affiliated REPs' disclosures for price to beat products, which are no longer applicable in the market.

Commission response

The commission agrees with Green Mountain and EDF that customers care about fuel mix and how electricity is produced. The commission also agrees with Reliant that the underlying calculations for the fuel mix calculations do not produce accurate results and therefore do not present accurate information to the customer. Unless the customer has purchased a renewable product, it is not likely that fuel mix portion of the EFL will look different from any other product, as most REPs default to the "system mix" or average for the state of Texas, because they are not able to verify where the electricity purchased for their customers originates. Given the fact that the system mix is not really meaningful, the commission agrees not to include the emissions and waste information on the EFL. The rule will require disclosure of the renewable content of a product and the system average renewable content. Additionally, the commission eliminates subsection (k) as the commission agrees with Reliant that a separate document containing the emissions and waste information is not necessary.

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

This repeal, amendment and new section are adopted under the Public Utility Regulatory Act (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, PURA §39.101(a)(5) which

entitles a customer to be protected from discrimination on the basis of race, color, sex, nationality, religion, or marital status; PURA §39.101(b)(5) which entitles a customer to receive sufficient information to make an informed choice of provider; PURA §39.101(b)(6) which entitles a customer to be protected from unfair, misleading, or deceptive practices.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 14.052, 17.004(a)(1), 39.101(a)(5), 39.101(b)(5), 39.101(b)(6).

§25.475. General Retail Electric Provider Requirements and Information Disclosures to Residential and Small Commercial Customers

(a) **Applicability.** The requirements of this section apply to retail electric providers (REPs) and aggregators, when specifically stated, in connection with the provision of service and marketing to residential and small commercial customers. Not later than five months after the effective date of this section, REPs shall conform all electricity products and contract documents to the requirements of this section. If a term contract is in effect on the date that this section becomes effective, the REP is required only to provide the notice of expiration required by subsection (e) of this section beginning no later than five months from the effective date of this section if the contract is still in effect at that time and is not otherwise required to conform such contracts.

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

(1) **Contract** -- The Terms of Service document (TOS), the Electricity Facts Label (EFL), Your Rights as a Customer document (YRAC), and the documentation of enrollment pursuant to §25.474 of this title (relating to Selection of Retail Electric Provider).

(2) **Contract documents** -- The TOS, EFL and YRAC.

(3) **Contract expiration** -- The time when the initial term contract is completed. A new contract is initiated when the customer begins receiving service pursuant to the new EFL.

(4) **Contract term** -- The time period the contract is in effect.

(5) **Fixed rate product** -- A retail electric product with a term of at least three months for which the price (including recurring charges) for each billing period of the contract term is the same throughout the contract term, except that the price may vary from the disclosed amount solely to reflect actual changes in the Transmission and Distribution Utility (TDU) charges, changes to the Electric Reliability Council of Texas (ERCOT) or Texas Regional Entity administrative fees charged to loads or changes resulting from federal, state or local laws that impose new or modified fees or costs on a REP that are beyond the REP's control.

(6) **Indexed product** -- A retail electric product for which the price, including recurring charges, can vary according to a pre-defined pricing formula that is based on publicly available indices or information and is disclosed to the customer, and to reflect actual changes in TDU charges, changes to the ERCOT or Texas Regional Entity administrative fees charged to loads or changes resulting from federal, state or local laws or regulatory actions that impose new or modified fees or costs on a REP that are beyond the REPs control. An indexed product may be for a term of three months or more, or may be a month-to-month contract.

(7) **Month-to-month contract --** A contract with a term of 31 days or less. A month-to-month contract may not contain a termination fee or penalty.

(8) **Price** -- The cost for a retail electric product that includes all recurring charges excluding state and local sales taxes, and reimbursement for the state miscellaneous gross receipts tax.

(9) **Recurring charge** -- A charge for a retail electric product that is expected to appear on a customer's bill in every billing period or appear in three or more

billing periods in a twelve month period. A charge is not considered recurring if it will be billed by the TDU and passed on to the customer and will either not be applied to all customers of that class within the TDU territory, or cannot be known until the customer enrolls or requests a specific service.

(10) **Term contract** -- a contract with a term in excess of 31 days.

(11) **Variable price product** -- A retail product for which price may vary according to a method determined by the REP, including a product for which the price, can increase no more than a defined percentage as indexed to the customer's previous billing month's price. For residential customers, a variable price product can be only a month-to-month contract.

(c) **General Retail Electric Provider requirements.**

(1) **General Disclosure Requirements.**

(A) All written, electronic, and oral communications, including advertising, websites, direct marketing materials, billing statements, TOSs, EFLs and YRACs distributed by a REP or aggregator shall be clear and not misleading, fraudulent, unfair, deceptive, or anti-competitive. Prohibited communications include, but are not limited to:

(i) Using the term or terms "fixed" to market a product that does not meet the definition of a fixed rate product.

(ii) Suggesting, implying, or otherwise leading someone to believe that a REP or aggregator has been providing retail electric service prior

to the time the REP or aggregator was certified or registered by the commission.

(iii) Suggesting, implying or otherwise leading someone to believe that receiving retail electric service from a REP will provide a customer with better quality of service from the TDU.

(iv) Falsely suggesting, implying or otherwise leading someone to believe that a person is a representative of a TDU or any REP or aggregator.

(v) Falsely suggesting, implying or otherwise leading someone to believe that a contract has benefits for a period of time longer than the initial contract term.

(B) Written and electronic communications shall not refer to laws, including commission rules without providing a link or website address where the text of those rules are available. All printed advertisements, electronic advertising over the Internet, and websites, shall include the REP's certified name or commission authorized business name, or the aggregator's registered name, and the number of the certification or registration.

(C) The TOS, EFL, and YRAC shall be provided to each customer upon enrollment. Each document shall be provided to the customer whenever a change is made to the specific document and upon a customer's request, at any time free of charge.

(D) A REP shall retain a copy of each version of the TOS, EFL, and YRAC during the time the plan is in effect for a customer and for four years after the contract ceases to be in effect for any customer. REPs shall provide such documents at the request of the commission or its staff.

(2) **General contracting requirements.**

(A) A TOS, EFL, and YRAC shall be complete, shall be written in language that is clear, plain and easily understood, and shall be printed in paragraphs of no more than 250 words in a font no smaller than 10 point. References to laws including commission rules in these documents shall include a link or internet address to the full text of the law.

(B) All contract documents shall be available to the commission to post on its customer education website (if the REP chooses to post offers to the website).

(C) A contract is limited to service to a customer at a location specified in the contract. If the customer moves from the location, the customer is under no obligation to continue the contract at another location. The REP may require a customer to provide evidence that it is moving. There shall be no early termination fee assessed to the customer as a result of the customer's relocation if the customer provides a forwarding address and, if required, reasonable evidence that the customer no longer occupies the location specified in the contract

(D) A TOS and EFL shall disclose the type of product being described, using one of the following terms: fixed rate product, indexed product or a variable price product.

(E) A REP shall not use a credit score, a credit history, or utility payment data as the basis for determining the price for electric service for a product with a contract term of 12 months or less for an existing residential customer or in response to an applicant's request to become a residential customer.

(F) In any dispute between a customer and a REP concerning the terms of a contract, any vagueness, obscurity, or ambiguity in the contract will be construed in favor of the customer.

(G) For a variable price product, the REP shall disclose on the REP's website and through a toll-free number the current price and, for residential customers, one year price history, or history for the life of the product, if it has been offered less than one year. A REP shall not rename a product in order to avoid disclosure of price history. The EFL of a variable price product or indexed product shall include a notice of how the current price and, if applicable, historical price information may be obtained.

(H) A REP shall comply with its contracts.

(3) **Specific contract requirements.**

(A) The contract term shall be conspicuously disclosed.

(B) The start and end dates of the contract shall be available to the customer upon request. The start and end dates may be estimated if the REP cannot determine these dates. After the start date is known, the end date may be

estimated consistent with the TDU meter reading schedule for the customer during the month of expiration.

(4) **Website requirements.**

(A) Each REP that offers residential retail electric products for enrollment on its website shall prominently display the EFL for any products offered without a person having to enter any personal information other than zip code and information that allows determination of the type of offer the consumer wishes to review. Person-specific information shall not be required.

(B) The EFL for each product shall be printable in no more than a two page format. The EFL, TOS, and YRAC for any products offered for enrollment on the website shall be available for viewing or downloading.

(d) **Changes in contract and price and notice of changes.** A REP may make changes to the terms and conditions of a contract or to the price of a product as provided for in this section. Changes in term (length) of a contract require the customer to enter into a new contract and may not be made by providing the notice described in subparagraph (d)(3) of this subsection.

(1) **Contract changes other than price**.

(A) A REP may not change the price (other than as allowed by paragraph (2) of this subsection) or contract term of a term contract for a retail electric product, during its term; but may change any other provision of the contract, with notice under subsection (d)(3) of this section.

(B) A REP may not change the terms and conditions of a month-to-month product, indexed or variable price products, unless it provides notice under subsection (d)(3) of this section.

(2) **Price changes.**

(A) A REP may only change the price of a fixed rate product, an indexed product, or a variable product consistent with the definitions in this section and according to the product's EFL. Such price changes do not require notice under subsection (d)(3) of this section.

(B) Following an allowed price change to a fixed rate product, each bill issued for the remainder of the contract term shall either show the price changes on one or more separate line items, or shall include a conspicuous notice stating that the amount billed includes price changes allowed by rules of the Public Utility Commission.

(C) Each residential bill for a variable price product shall include a statement informing the customer how to obtain information about the price that will apply on the next bill.

(3) **Notice of changes to terms and conditions.** A REP must provide written notice to its customers at least 14 days in advance of the date that the change in the contract will be applied to the customer's bill or take effect. Notice is not required for a change that benefits the customer.

(4) **Contents of the notice to change terms and conditions**. The notice shall:

(A) be provided in or with the customer's bill or in a separate document;

(B) include the following statement, “Important notice regarding changes to your contract” clearly and conspicuously in the notice;

(C) identify the change and the specific contract provisions that address the change;

(D) clearly specify what actions the customer needs to take if the customer does not accept the proposed changes to the contract;

(E) state in bold lettering that if the new terms are not acceptable to the customer, the customer may terminate the contract and no termination penalty shall apply for 14 days from the date that the notice is sent to the customer but may apply if action is taken after the 14 days have expired. No such statement is required if the customer would not be subject to a termination penalty under any circumstances; and

(F) state in bold lettering that establishing service with another REP may take up to seven business days.

(e) **Contract expiration and renewal offers.** The REP shall send a written notice of contract expiration at least 14 days prior to the date of contract expiration but no more than 45 days in advance of expiration. Nothing in this section shall preclude a REP from offering a new contract to the customer at any other time during the contract term.

(1) **Contract Expiration.**

(A) If a customer takes no action in response to a notice of contract expiration for the continued receipt of retail electric service upon the contract’s

expiration, the REP shall serve the customer pursuant to a default renewal product that is a month-to-month product.

(B) Written notice of contract expiration shall be provided in or with the customer's bill, or in a separate document.

(i) If the notice is provided in or with the customer's bill, the REP must either:

(I) include a statement on the outside of the billing envelope that states, "Contract Expiration Notice;" or

(II) provide on the last three bills the approximate date or the billing cycle and month that the existing contract will expire. This notice shall be conspicuous (either by font or color) and in a location close to the "amount due." In this case the bill rendered 14-45 days before the contract expires shall contain the notice of contract expiration requirements in subparagraph (C) of this paragraph.

(ii) If notice is provided in a separate document, a statement shall be included on the outside of the envelope or in the subject line of the e-mail (if customer has agreed to receive official documents by e-mail) that states, "Contract Expiration Notice;"

(C) A written notice of contract expiration (whether with the bill or in a separate envelope) shall set out:

(i) The approximate date or the billing cycle and month the existing contract will expire;

(ii) A statement in bold lettering no smaller than 12 point font that no termination penalty shall apply 14 days prior to the date stated as the expiration date in the notice. No such statement is required if the customer would not be subject to a termination penalty under any circumstances.

(iii) A description of any renewal offers the REP chooses to make available to the customer and the location of the TOS and EFL for each of those products and a description of actions the customer needs to take to continue to receive service from the REP under the terms of any of the described renewal offers and the deadline by which actions must be taken.

(iv) A copy of the EFL for the default renewal product if the customer takes no action.

(v) A statement that if the customer takes no action, service to the customer will continue pursuant to the EFL for the default renewal product that shall be included as part of the notice of contract expiration. The TOS for the default renewal product shall be included as part of the notice, unless the TOS applicable to the customer's existing service also applies to the default renewal product.

(vi) A statement that the default service is month-to month and may be cancelled at any time with no fee.

(2) **Affirmative consent.** A customer that is currently receiving service from a REP may be re-enrolled with the REP for service with the same product under which the customer is currently receiving service, or a different product, by conducting an enrollment pursuant to §25.474 of this title or by obtaining the customer's consent in a recording, electronic document, or written letter of authorization consistent with the requirements of this subsection. Affirmative consent is not required when a REP serves the customer under a default renewal product pursuant to paragraph (1) of this subsection. Each recording, electronic document, or written consent form must:

(A) Indicate the customer's name, billing address, service address, ESI ID;

(B) Indicate the identification number of the TOS and EFL under which the customer will be served;

(C) Indicate if the customer has received, or when the customer will receive copies of the TOS, EFL and YRAC;

(D) Indicate the price(s) which the customer is agreeing to pay;

(E) Indicate the date or estimated date of the re-enrollment, the contract term, and the estimated start and end dates of contract term;

(F) Affirmatively inquire whether the customer has decided to enroll for service with the product, and contain the customer's affirmative response; and

(G) Be entirely in plain, easily understood language, in the language that the customer has chosen for communications.

(f) **Terms of service document**. The following information shall be conspicuously contained in the TOS:

(1) **Identity and contact information**. The REP's certified name and business name (dba) (if applicable), mailing address, e-mail and Internet address (if applicable), certification number, and a toll-free telephone number (with hours of operation and time-zone reference).

(2) **Pricing and payment arrangements.**

(A) Description of the amount of any routine non-recurring charges resulting from a move-in or switch that may be charged to the customer, including but not limited to an out-of-cycle meter read, and connection or reconnection fees;

(B) For small commercial customers, a description of the demand charge and how it will be applied, if applicable;

(C) An itemization, including name and cost, of any non-recurring charges for services that may be imposed on the customer for the retail electric product, including an application fee, charges for default in payment or late payment, and returned checks charges;

(D) A description of any collection fees or costs that may be assessed to the customer by the REP and that cannot be quantified in the TOS; and

(E) A description of payment arrangements and bill payment assistance programs and low income energy efficiency programs offered by the REP.

(3) **Deposits.** If the REP requires deposits from its customers:

(A) a description of the conditions that will trigger a request for a deposit;

(B) the maximum amount of the deposit or the manner in which the deposit amount will be determined;

(C) a statement that interest will be paid on the deposit at the rate approved by the commission, and the conditions under which the customer may obtain a refund of a deposit;

(D) an explanation of the conditions under which a customer may establish satisfactory credit pursuant to §25.478 of this title (relating to Credit Requirements and Deposits);

(E) the right of a customer or applicant who qualifies for the rate reduction program to pay a required deposit that exceeds $50 in two equal installments pursuant to §25.478 of this title; and

(F) if applicable, the customer's right to post a letter of guarantee in lieu of a deposit pursuant to §25.478(i) of this title.

(4) **Rescission, Termination and Disconnection.**

(A) In a conspicuous and separate paragraph or box:

(i) A description of the right of a customer, for switch requests, to rescind service without fee or penalty of any kind within three federal business days after receiving the TOS, pursuant to §25.474 of this title; and

(ii) Detailed instructions for rescinding service, including the telephone number and, if available, facsimile number or e-mail address that the customer may use to rescind service.

(B) A statement as to how service can be terminated and any penalties that may apply;

(C) A statement of customer's ability to terminate service without penalty if customer moves to another premises and provides evidence that it is moving, if required, and a forwarding address; and

(D) If the REP has disconnection authority, pursuant to §25.483 of this title (relating to Disconnection of Service), a statement that the REP may order disconnection of the customer for non-payment.

(5) **Antidiscrimination.** A statement informing the customer that the REP cannot deny service or require a prepayment or deposit for service based on a customer's race, creed, color, national origin, ancestry, sex, marital status, lawful source of income, level of income, disability, familial status, location of a customer in a economically distressed geographic area, or qualification for low income or energy efficiency services. For residential customers, a statement informing the customer that the REP cannot use a credit score, a credit history, or utility payment data as the basis for determining the price for electric service for a product with a contract term of 12 months or less.

(6) **Other terms.** Any other material terms and conditions, including exclusions, reservations, limitations of liability, or special equipment requirements, that are a part of the contract for the retail electric product.

(7) **Contract expiration notice.** For a term contract, the TOS shall contain a statement informing the customer that a contract expiration notice will be sent at least 14 days prior to the end of the initial contract term. The TOS shall also state

that if the customer fails to take action to ensure the continued receipt of retail electric service upon the contract's expiration, the customer will continue to be served by the REP automatically pursuant to a default renewal product, which shall be a month-to-month product

(8) A statement describing the conditions under which the contract can change and the notice that will be provided if there is a change.

(9) **Version number.** A REP shall assign an identification number to each version of its TOS, and shall publish the number on the terms of service document.

(g) **Electricity Facts Label.** The EFL shall be unique for each product offered and shall include the information required in this subsection. Nothing in this subsection precludes a REP from charging a price that is less than its EFL would otherwise provide.

(1) **Identity and contact information**. The REP's certified name and business name (dba) (if applicable), mailing address, e-mail and Internet address (if applicable), certification number, and a toll-free telephone number (with hours of operation and time-zone reference).

(2) **Pricing disclosures.** Pricing information shall be disclosed by a REP in an EFL. The EFL shall state specifically whether the product is a fixed rate, variable price or indexed product.

(A) For a fixed rate product, the EFL shall provide the total average price for electric service reflecting all recurring charges, excluding state and local sales taxes, and reimbursement for the state miscellaneous gross receipts tax, to the customer.

(B) For an indexed product, the EFL shall provide sample prices for electric service reflecting all recurring charges, excluding state and local sales taxes, and reimbursement for the state miscellaneous gross receipts tax, resulting from a reasonable range of values for the inputs to the pre-defined pricing formula.

(C) For a variable price product, the EFL shall provide the total average price for electric service for the first billing cycle reflecting all recurring charges, excluding state and local sales taxes, and reimbursement for the state miscellaneous gross receipts tax, to the customer.

(D) The total average price for electric service shall be expressed in cents per kilowatt hour, rounded to the nearest one-tenth of one cent for the following usage levels:

(i) For residential customers, 500, 1,000 and 2,000 kilowatt hours per month; and

(ii) For small commercial customers, 1,500, 2,500, and 3,500 kilowatt hours per month. If demand charges apply assume a 30 percent load factor.

(E) If a REP combines the charges for retail electric service with charges for any other product, the REP shall:

(i) If the electric product is sold separately from the other products, disclose the total price for electric service separately from other products; and

(ii) If the REP does not permit a customer to purchase the electric product without purchasing the other products or services, state the total charges for all products and services as the price of the total electric service. If the product has a one-time cost up front, for the purposes of the average price calculation, the cost of the product may be figured in over a 12-month period with 1/12 of the cost being attributed to a single month.

(F) The following shall be included on the EFL for specific product types:

(i) For indexed products, the formula used to determine an indexed product, including a website and phone number customers may contact to determine the current price;

(ii) For a variable price product that increases no more than a defined percentage as indexed to the customer's previous billing month's price, a notice in bold type no smaller than 12 point font: "This price is the price that will be applied during your first billing cycle; this price may increase by no more than {insert percentage} percent from month-to-month." For residential customers, the following additional statement is required: "Please review the historical price of this product available at {insert specific website address and toll-free telephone number}."

(iii) For all other variable price products, a notice in bold type no smaller than 12 point font: "This price is the price that will be applied during your first billing cycle; this price may change in

subsequent months at the sole discretion of {insert REP name}. For residential customers, the following additional statement is required: "Please review the historical price of this product available at {insert specific website address and toll-free telephone number}."

(3) **Fee Disclosures.**

(A) If customers may be subject to a special charge for underground service or any similar charge that applies only in a part of the TDU service area, the EFL shall include a statement in the electricity price section that some customers will be subject to a special charge that is not included in the total average price for electric service and shall disclose how the customer can determine the price and applicability of the special charge.

(B) A listing of all fees assessed by the REP that may be charged to the customer and whether the fee is included in the recurring charges.

(4) **Term Disclosure.** EFL shall include disclosure of the length of term, minimum service term, if any, and early termination penalties, if any.

(5) **Renewable Energy Disclosures.** The EFL shall include the percentage of renewable energy of the electricity product and the percentage of renewable energy of the statewide average generation mix.

(6) **Format of Electricity Facts Label.** REPs must use the following format for the EFL with the pricing chart and disclosure chart shown. The additional language is for illustrative purposes. It does not include all reporting requirements as outlined above. Such subsections should be referred to for determination of the

required reporting items on the EFL. Each EFL shall be printed in type no smaller than ten points in size, unless a different size is specified in this section, and shall be formatted as shown in this paragraph:

Electricity Facts Label (EFL)

{Name of REP}, {Name of Product}, {Service area *(if applicable)*},
{Date}

Average Monthly Use	500kWh	1,000kWh	2,000kWh
Average price per kWh	{x.x}¢	{x.x}¢	{x.x}¢
For POLR use: Minimum price per kilowatt-hour.	{x.x}¢	{x.x}¢	{x.x}¢

{If applicable} On-peak {season or time}:{xxx}
{If applicable} Average on-peak price per kilowatt-hour: {x.x}¢
{If applicable} Average off-peak price per kilowatt-hour: {x.x}¢
{If applicable} Potential surcharges corresponding to the given electric service.

Electricity price

{If variable that does not change within a defined percentage} This price is the price that will be applied during your first billing cycle; this price may change in subsequent months at the sole discretion of {insert REP name}. **{If residential}** Please review the historical price of this product available at {insert website address and toll-free number}.

{If variable that changes within a defined percentage} This price is the price that will be applied during your first billing cycle; this price may increase by no more than {insert percentage} percent from month-to-month. **{If residential}** Please review the historical price of this product available at {insert website address and toll-free number}.

Other KeyTerms and questions	*See Terms of Service statement for a full listing of fees, deposit policy, and other terms.*	
Disclosure Chart	Type of Product	(fixed rate indexed or variable)
	Contract Term	(number of months)
	Do I have a termination fee or any fees associated with terminating service?	(yes/no) (if yes, how much)
	Can my price change during contract period?	(yes/no)
	If my price can change, how will it change, and by how much?	(formula/description of the way the price will vary and how much it can change)
	What other fees may I be charged?	(List, or give direct location in TOS.)
	Is this a pre-pay or pay in advance product	(yes/no)
	Does the REP purchase excess distributed renewable generation?	(yes/no)
	Renewable Content	(This product is x% renewable)
	The statewide average for renewable content is	(% of statewide average for renewable content)
	Contact info, certification number, version number	

Type used in this format
Title: 12 point
Headings: 12 point boldface
Body: 10 point

(7) **Version number.** A REP shall assign an identification number to each version of its EFL, and shall publish the number on the EFL.

(h) **Your Rights as a Customer disclosure.** The information set out in this section shall be included in a REP's "Your Rights as a Customer" document, to summarize the standard customer protections provided by this subchapter or additional protections provided by the REP.

(1) A YRAC document shall be consistent with the TOS for the retail product.

(2) The YRAC document shall inform the customer of the REP's complaint resolution policy pursuant to §25.485 of this title (relating to Customer Access and Complaint Handling) and payment arrangements and deferred payment policies pursuant to §25.480 of this title (relating to Bill Payment and Adjustments).

(3) The YRAC document shall inform the customer of the REP's procedures for reporting outages and the steps necessary to have service restored or reconnected after an involuntary suspension or disconnection.

(4) The YRAC document shall inform the customer of the customer's right to have the meter tested pursuant to §25.124 of this title (relating to Meter Testing), or in accordance with the tariffs of a transmission and distribution utility, a municipally owned utility, or an electric cooperative, as applicable, and the REP's ability in all cases to make that request on behalf of the customer by a standard electronic market transaction, and the customer's right to be instructed on how to read the meter, if applicable.

(5) The YRAC document shall inform the customer of the availability of:

(A) Financial and energy assistance programs for residential customers;

(B) Any special services such as readers or notices in Braille or TTY;

(C) Special policies or programs available to residential customers with physical disabilities, including residential customers who have a critical need for electric service to maintain life support systems; and

(D) Discounts for qualified low-income residential customers.

(6) The YRAC document shall inform the customer of the following customer rights and protections:

(A) Unauthorized switch protections applicable under §25.495 of this title (relating to Unauthorized Change of Retail Electric Provider);

(B) The customer's right to dispute unauthorized charges on the customer's bill as set forth in §25.481 of this title (relating to Unauthorized Charges);

(C) Protections relating to disconnection of service pursuant to §25.483 of this title;

(E) Non-English language requirements pursuant to §25.473 of this title (relating to Non-English Language Requirements);

(F) Availability of a Do Not Call List pursuant to §25.484 of this title (relating to Electric No-Call List) and §26.37 of this title (relating to Texas No-Call List); and

(G) Privacy rights regarding customer proprietary information as provided by §25.472 of this title (relating to Privacy of Customer Information).

(7) **Identity and contact information**. The REP's certified name and business name (dba), certification number, mailing address, e-mail and Internet address (if applicable), and a toll-free telephone number (with hours of operation and time-zone reference) at which the customer may obtain information concerning the product.

(i) **Advertising claims.** If a REP or aggregator advertises or markets the specific benefits of a particular electric product, the REP or aggregator shall provide the name of the electric

product offered in the advertising or marketing materials to the commission or its staff, upon request. All advertisements and marketing materials distributed by or on behalf of a REP or aggregator shall comply with this section. REPs and aggregators are responsible for representations to customers and prospective customers by employees or other agents of the REP concerning retail electric service that are made through advertising, marketing or other means.

(1) **Print advertisements.** Print advertisements and marketing materials, including direct mail solicitations that make any claims regarding price, savings, or environmental quality for an electricity product of the REP compared to a product offered by another REP shall include the EFL of the REP making the claim. In lieu of including an EFL, the following statement shall be provided: "You can obtain important standardized information that will allow you to compare this product with other offers. Contact (name, telephone number, and Internet address (if available) of the REP)." If the REPs phone number or website address is included on the advertisement, such phone number or website address is not required in the disclaimer statement. Upon request, a REP shall provide to the commission the contract documents relating to a product being advertised and any information used to develop or substantiate comparisons made in the advertisement.

(2) **Television, radio, and internet advertisements.** A REP shall include the following statement in any television, Internet, or radio advertisement that makes a specific claim about price, savings, or environmental quality for an electricity product of the REP compared to a product offered by another REP: "You can

obtain important standardized information that will allow you to compare this product with other offers. Contact (name, telephone number and website (if available) of the REP).” If the REPs phone number or website address is included on the advertisement, such phone number or website address is not required in the disclaimer statement. This statement is not required for general statements regarding savings or environmental quality, but shall be provided if a specific price is included in the advertisement, or if a specific statement about savings or environmental quality compared to another REP is made. Upon request, a REP shall provide to the commission the contract documents relating to a product being advertised and any information used to develop or substantiate comparisons made in the advertisement.

(3) **Outdoor advertisements.** A REP shall include, in a font size and format that is legible to the intended audience, its certified name or commission authorized business name, certification number, telephone number and Internet address (if available).

(4) **Renewable energy claims.** A REP shall authenticate its sales of renewable energy in accordance with §25.476 of this title (relating to Renewable and Green Energy Verification). If a REP relies on supply contracts to authenticate its sales of renewable energy, it shall file a report with the commission, not later than March 15 of each year demonstrating its compliance with this paragraph and §25.476 of this title.

§25.476. Renewable and Green Energy Verification .

(a) **Purpose.** The purpose of this section is to establish the procedures by which retail electric providers (REPs) calculate and compose their renewable content pursuant to §25.475 of this title (relating to General Retail Electric Provider Requirements and Information Disclosures to Residential and Small Commercial Customers) and to establish guidelines and verification for claims of "green" products.

(b) **Application.**

(1) This section applies to all REPs. Additionally, some of the reporting requirements established in this section apply to the registration agent and to all owners of generation assets as defined in subsection (c) of this section.

(2) Nothing in this section shall be construed as protecting a REP against prosecution under deceptive trade practices statutes.

(3) In accordance with the Public Utility Regulatory Act (PURA) §39.001(b)(4), the commission and the registration agent will ensure the confidentiality of competitively sensitive information, reported to the commission or the registration agent under this section.

(c) **Definitions.** The definitions set forth in §25.471(d) of this title (relating to General Provisions of Customer Protection Rules) apply to this section. In addition, the following words and terms, when used in this section, shall have the following meanings unless the context indicates otherwise:

(1) **Default scorecard** -- The estimated fuel mix and environmental impact of all electricity in Texas that is not authenticated by retiring renewable energy credits (RECs).

(2) **Generation owner** -- A power generation company, river authority, municipally owned utility, electric cooperative, or any other entity that owns electric generating facilities in the state of Texas.

(3) **Generator scorecard** -- The aggregated fuel mix and environmental impact of all generating facilities located in Texas that are owned by the same generation owner.

(4) **New product** -- An electricity product during the first year it is marketed to customers.

(5) **Renewable energy credit offset (REC offset) --** A non-tradable allowance as defined and created by §25.173 of this title (relating to Goal for Renewable Energy). For the purposes of this section, a REC offset authenticates the renewable attributes, but not the quantity, of generation produced by its associated facility.

(d) **Marketing standards for "green" and "renewable" electricity products.**

(1) A REP may market an electricity product as "green" if:

(A) All of the product's fuel mix is renewable energy as defined in PURA §39.904(d), Texas natural gas as specified in PURA §39.904(d)(2), or a combination thereof, and

(B) All statements representing the product as "green," if not containing 100% renewable energy, as defined in PURA §39.904(d), include a footnote, parenthetical note, or other obvious disclaimer that "A 'green' product may include Texas natural gas and renewable energy.

(2) A REP may market an electricity product as "renewable" or label an electricity product on the EFL as "renewable" only if:

(A) All of the product's fuel mix is renewable energy as defined in PURA §39.904(d); or

(B) All statements representing the product as "renewable" use the format "x% renewable," where "x" is the product's renewable energy fuel mix percentage.

(3) If a REP makes marketing claims about a product's "green" content on the basis of its use of natural gas as a fuel, the REP must include with the report required under subsection (f)(1) of this section proof that the natural gas used to generate the electricity was produced in Texas.

(e) **Compilation of scorecard data.**

(1) The registration agent shall create and maintain a database of generator scorecards reflecting each generation owner's company-wide fuel mix and environmental impact data based on generating facilities located in Texas.

(2) Each generation owner's fuel mix and environmental impact data for the preceding calendar year shall be published on the registration agent's Internet web site by April 1 of each year and shall state:

(A) the percentage of MWhs generated from each of the following fuel sources: coal and lignite, natural gas, nuclear, renewable energy, and other sources; and

(B) the MWh-weighted average annual emissions rates in pounds per 1,000 kWh for the aggregate generation sources of the generation owner for carbon dioxide, nitrogen oxides, particulates, sulfur dioxide, and spent nuclear fuel produced (with spent nuclear fuel annualized using standard industry conversion factors).

(3) Not later than March 1 of each year, each generation owner shall report to the registration agent the following data for the preceding calendar year: net generation in MWh from each of its generating units in Texas; the type of fuel used by each of its generating units in Texas; and the MWh-weighted average annual emissions rate, on an aggregate basis for all of its generating units in Texas (in pounds per 1,000 kWh) for carbon dioxide, nitrogen oxides, particulates, sulfur dioxide, and nuclear waste. For purposes of calculating its average emissions rates, each generation owner shall rely upon emissions data that it submits to the United States Environmental Protection Agency (EPA), the Texas Commission on Environmental Quality (TCEQ), or the best available data if the generation owner does not submit pertinent data to the EPA or TCEQ. A generation owner shall not be required to submit information to the registration agent regarding the net generation of its generating units located within the Electric Reliability Council of Texas (ERCOT) region if, upon request, the

registration agent advises the owner of generation assets that it already has such information available from its polled settlement meter data.

(4) Not later than April 1 of each year, the registration agent shall calculate and publish on its Internet website a state average fuel mix, statewide system average emission rates for each type of emission, and a default scorecard to account for all electric generation in the state that is not authenticated as defined in subsection (c)(1) of this section.

(A) The default fuel mix shall be the percentage of total MWh of generation not authenticated that has been obtained from each fuel type.

(B) Default emission rates for each type of emission shall be calculated by dividing total pounds of emissions or waste by total MWh, using data only for generation not authenticated.

(f) **Calculating renewable generation and authenticating "green" claims.**

(1) Not later than March 15 of each year, each REP shall report to the registration agent attestations from power generators that the natural gas used to generate electricity supplied to the REP was produced in Texas, if during the preceding calendar year and the current calendar year the REP markets "green" electricity on the basis of that power.

(2) For power purchased from sources outside of Texas, a supply contract between a REP and the owner of a generating facility may be used to authenticate the fuel mix for electricity generated at that facility and sold at retail in Texas.

(A) The contract must identify a specific generating facility from which the REP has obtained electricity that it sold to retail customers in Texas during the preceding calendar year.

(B) A REP that intends to rely upon a supply contract with an out-of-state generator to authenticate fuel mix shall submit a report to the registration agent for the specified generating facility no later than March 1 of each year that reports the facility's annual fuel mix.

(3) For the purposes of EFL disclosures, the retirement of RECs shall be the only method of authenticating generation for which a REC has been issued under §25.173 of this title. The retirement of a REC shall be equivalent to one megawatt-hour of generation from renewable resources. The use of RECs to authenticate the use of renewable fuels must be consistent with REC account information maintained by the Renewable Energy Credits Trading Program Administrator. A REC offset may be used to authenticate the renewable attributes of the current MWh output from its associated supply contract.

(4) In determining the renewable content percentages to be disclosed on the EFL for a product pursuant to §25.475 of this title, the REP shall rely upon the following sources of information: the Texas State Average Fuel Mix published by the registration agent under subsection (e) of this section; retired RECs; and actual energy production during the calendar year from resources that are awarded REC offsets by the REC program administrator. The REP may also rely on power purchased from sources outside of Texas, if it has a supply contract with the

owner of a generating facility and submits a report to the registration agent concerning the fuel mix of the facility, in accordance with this section.

(5) If a REP offers multiple electricity products that differ with regard to renewable energy content the REP:

(A) may apply any supply contract to the calculation of any product EFL as long as the sum of MWh applied does not exceed the MWh acquired under the contract; and

(B) may apply any number of RECs to the calculation of any product EFL as long as:

(i) the number of RECs applied to all product EFLs is consistent with the number of RECs the retailer has retired with the REC Trading Program Administrator, and

(ii) the number of RECs applied to each product EFL results in a renewable energy content for each product that is equal to or greater than a benchmark to be calculated from data maintained by the REC Trading Program Administrator. The benchmark shall be defined on an annual basis as:

SRR / TS,

where

SRR = the statewide REC requirement, in MWh, as calculated by the REC Trading Program Administrator for the compliance period

coinciding with the EFL, and

TS = total MWh sales for all REPs to Texas customers during the compliance period coinciding with the EFL.

(6) Any REP may anticipate the renewable content of a new product. The EFL shall state that the renewable content is an estimate that will be verified.

(g) **Fuel Mix for Renewable Energy.**

(1) The fuel mix percentage for renewable energy shall be disclosed on the EFL for the product pursuant to §25.475 of this title. The percentage used shall be rounded to the nearest whole number.

(2) **Renewable energy claims.** A REP may authenticate its sales of renewable energy by requesting that the program administrator of the renewable energy credits trading program established pursuant to §25.173(d) of this title retire a renewable energy credit for each megawatt-hour of renewable energy sold to its customers.

(h) **Annual update.** Each REP shall update its EFL for each of its currently offered products or products offered during the preceding calendar year no later than July 1 of each year, so that the EFL displays the renewable energy percentages determined pursuant to this section and reported to the registration agent for that product for generation purchased during the preceding calendar year.

(i) **Compliance and enforcement.**

(1) Upon request from the commission staff, a REP shall provide a detailed explanation or accounting of the means by which it has authenticated any renewable or "green" energy claims in an EFL or any information used for marketing a product.

(2) The commission shall coordinate its enforcement efforts regarding the prosecution of fraudulent, misleading, deceptive, and anticompetitive business practices with the Office of the Attorney General, Consumer Protection Division in order to ensure consistent treatment of specific alleged violations.

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 the repeal of §25.475, new §25.475 and §25.476 are hereby adopted with changes to the text as proposed.

SIGNED AT AUSTIN, TEXAS on the 24th day of FEBRUARY 2009.

PUBLIC UTILITY COMMISSION OF TEXAS

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BARRY T. SMITHERMAN, CHAIRMAN

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DONNA L. NELSON, COMMISSIONER

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KENNETH W. ANDERSON, JR., COMMISSIONER

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