

The Public Utility Commission of Texas (commission) adopts an amendment to §25.105 relating to Registration and Reporting by Power Marketers without changes to the proposed text as published in the March 17, 2000 *Texas Register* (25 TexReg 2240). The commission adopts new §25.109 relating to Registration of Power Generation Companies and Self-Generators and new §25.111 relating to Registration of Aggregators with changes to the proposed text as published in the March 17, 2000 *Texas Register* (25 TexReg 2240). Project Number 21082 has been assigned to this proceeding. The amendment and new rules are necessary to implement provisions of the Public Utility Regulatory Act (PURA) §§39.351, 39.353, 39.354, 39.3545, 39.356 and 39.357. The §25.105 amendment retains existing requirements for power marketers but eliminates requirements for exempt wholesale generators (EWGs) and qualifying facilities (QFs), in order to eliminate duplication with the proposed new requirements for power generation companies (PGCs). Section 25.109 establishes registration requirements and procedures for power generation companies, including exempt wholesale generators and qualifying facilities, that intend to sell electricity at wholesale. It also establishes registration requirements and procedures for self-generators that generate more than one megawatt of electricity but do not intend to sell electricity at wholesale. Section 25.111 establishes registration requirements and procedures for persons and public entities seeking to aggregate the loads of electricity customers.

A public hearing on the amendment and proposed sections was held at commission offices at 9:30 a.m. on April 18, 2000. Representatives from Alcoa Inc. (Alcoa), Central and South West Corporation (CSW-REP), Consumers Union, Texas Legal Services Center and Texas Ratepayers' Organization to Save Energy (collectively, Consumers), East Texas Cooperatives, Office of Public Utility Counsel (OPUC), Reliant Energy Inc. (Reliant), Southwestern Public Service Company (SPS), TXU Electric Company (TXU), and TXU and CPL Cities (TC Cities) 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 on the proposed amendment to §25.105 from Alcoa. Comments on §25.109 were received from Brazos Electric Power Cooperative, Inc. (Brazos), the City of Plano (Plano), El Paso Electric Company (EPE), SPS, Texas Industrial Energy Consumers (TIEC), TXU Power Generation Company (TXU-PGC), and reply comments from OPUC, TIEC, and TXU-PGC. The commission received comment on §25.111 from the City of Austin d/b/a Austin Energy (Austin), the Commercial Ratepayer Coalition (CRC), Consumers, CSW-REP Retail Electric Provider (CSW-REP), OPUC, Plano, SPS, TC Cities, Texas Electric Cooperatives, Inc. (TEC), and TXU Retail Electric Provider (TXU-REP). The commission also received reply comments on §25.111 from Consumers, the Cities of Denton, Greenville, and Garland (DGG Cities), OPUC, Reliant, TC Cities, Texas Industrial Energy Consumers (TIEC), and TXU-REP. Pursuant to commission staff request at

the public hearing, Austin, CSW-REP, OPUC, TC Cities, and TEC filed clarifying comments on §25.111.

§25.105. Registration and Reporting by Power Marketers

Alcoa noted that the elimination of EWGs and QFs from §25.105 creates the need for a conforming change in §25.345(i)(6), concerning the submission of generation site information, and recommended either deletion or change to the reference.

The commission agrees to a conforming change to §25.345(i)(6) relating to Recovery of Stranded Costs Through Competitive Transition Charge (CTC), and plans to address it in Project Number 21232, *Rule Changes to Conform to the Electric Restructuring Act*.

§25.109. Registration of Power Generation Companies and Self-Generators

TIEC said that it generally supports the proposed rule and believes that the rule reflects compromise by various parties as a result of the commission workshops. EPE requested new language be added to state that §25.109 does not apply to a utility that is not subject to PURA Chapter 39, pursuant to PURA §39.102(c), until the expiration of its rate freeze period.

The commission declines to make the change requested by EPE; however, it agrees that EPE is not required to register as a PGC until the expiration of its rate freeze period. Until EPE is unbundled, it will continue to own transmission and distribution facilities. As an owner of transmission and distribution facilities, EPE does not meet the definition of "power generation company" in PURA §31.002(10), and therefore it is not required to register as a PGC under this rule.

Alcoa commented that the references in subsection (a) to ownership are incomplete because the status of someone as a PGC pursuant to PURA §31.002(10) is based not on ownership of generation, but on being someone who is generating electricity. Alcoa recommended the references be changed to "owns or operates." Alcoa also recommended a new paragraph be added: "(4) Whenever ownership and operation are not in the same person, the owner and operator may elect which person shall be responsible for the registration as a PGC."

The commission declines to make the changes recommended by Alcoa. Notwithstanding the definition of "power generation company" in PURA §31.002(10), the commission believes that ownership of generation facilities is an essential characteristic of a power generation company. For example, a key safeguard against market power in a competitive market is PURA §39.154(a) which provides that a power generation company may not own and control more than 20% of the installed generation capacity located in, or capable of delivering capacity to, a power region. One of the purposes of registration is to facilitate the enforcement of PURA

§39.154(a). If the commission were to register the parties who operate generation as PGCs instead of the parties who own generation, it is conceivable that an owner could avoid the 20% limit in PURA §39.154(a).

TXU-PGC noted that the definition of "potentially marketable capacity" in PURA §39.154(d) does not contain any threshold capacity level. TXU-PGC argued that the commission should revise the one MW threshold capacity level in the self-generation registration requirement in paragraph (a)(2) so that the threshold would apply to the self-generating entity in lieu of each facility. Alternatively, TXU-PGC recommended that the meaning of "electric generating facility" in paragraph (a)(2) be clarified so that it refers to all generating units at a location. TIEC disagreed with TXU-PGC's recommendations, asserting that many large commercial and industrial companies have small generators that are used for backup or supplemental self-use; and requiring these companies to submit information on each facility would be burdensome. TIEC added that, transaction costs make it unlikely that power generated by a facility under one MW would be sold in the wholesale market.

The commission concludes that the term "generating facility" in this section should refer to all generating units at a location, whether the facility is a PGC facility or a self-generation facility. Therefore, the commission adds a definition of "generating facility" to subsection (b) consistent with the language TXU-PGC recommended. The commission's view is that registration

requirements for self-generators are not burdensome, and the companies TIEC describes would likely be self-generators, so the least burdensome registration requirements would apply.

Parties had concerns about the use of the word "person" in the rule, especially as it concerned the applicability of the rule. TEC commented that Senate Bill 7 (Act of May 21, 1999, 76th Legislature, Regular Session, chapter 405, 1999 Texas Session Law Service 2543, 2591 (Vernon) (codified as an amendment to the Public Utility Regulatory Act, Texas Utilities Code Annotated §§39.351, 39.353, 39.354, 39.3545, 39.356, and 39.357)) excludes electric cooperatives from the definition of "electric utility," "person," and "corporation." Plano noted that the proposed rule did not include a definition of "person." Brazos noted that §25.109(b) should include a definition of "person" that is consistent with PURA §11.003(14) or that §25.109(a) should exclude electric cooperatives from the application. OPUC disagreed, asserting registration by electric cooperatives is important for both safety and reliability reasons.

The commission agrees that electric cooperatives and municipal corporations are not required to register as PGCs or self-generators. Consequently, the commission adds to §25.109(b) a definition of "person" consistent with PURA §11.003(4). The commission notes, however, that electric cooperatives, municipal corporations, and other entities that own generation and offer electricity for sale in the state are subject to periodic reporting requirements pursuant to PURA §39.155(a).

Alcoa asserted that the requirement of self-generators that have more than ten MW to provide net dependable capability (NDC) ratings would impose significant engineering costs on self-generators who are not otherwise required to calculate these ratings. It recommended that self-generators should register using nameplate ratings instead of NDC. TIEC agreed with Alcoa.

SPS commented that references to "nameplate capacity" in subsection (c) should be replaced with the term "nameplate rating" since that term is defined in §25.109(b)(1). SPS also recommended deleting the word "capacity" in the title of subsection (c).

The commission agrees that a requirement for self-generators to report NDC as part of their registration could result in significant costs for self-generators that do not otherwise need to calculate NDC. The commission amends §25.109(c)(3) to allow self-generation units that are not required to provide or keep a record of NDC by the reliability council in which they operate, or by the independent organization for the power region in which they operate, to use the nameplate rating. The commission deletes the word "capacity" from paragraphs (c)(2) and (3), but retains "capacity" in the title of subsection (c) to indicate the type of ratings addressed in the subsection.

Alcoa argued that paragraphs (i)(1) and (2), which require compliance with Independent System Operator (ISO) reliability standards, are in conflict with PURA §39.151(l) with respect to a QF serving a steam host and selling power into the wholesale market. Alcoa argued it is

inappropriate to designate paragraphs (i)(1) and (2) as automatic and significant violations of PURA when they may be exempt under the statute. Alcoa recommended adding language consistent with PURA §39.151(1). TIEC endorsed Alcoa's recommendation. With regard to paragraph (i)(6), Alcoa and TXU-PGC argued that suspension or revocation of a registration, certification, or license by any state or federal authority should not automatically rise to a level that would warrant suspension or revocation of PGC registration. Alcoa recommended deleting paragraph (i)(6), although it said the commission could require a PGC to report any suspensions or revocations within a reasonable period, such as 30 or 45 days. TXU-PGC recommended revising paragraph (i)(6) so that it would refer only to suspension or revocation of an authorization to generate electricity. In reply comments, OPUC opposed the deletion of paragraph (i)(6), arguing that suspension or revocation of a license by another state or federal authority may reflect a violation of PURA if the generator in question is conducting similar activities in Texas. OPUC proposed notification within 72 hours as an appropriate compromise and said that TXU-PGC's proposed revision would be acceptable.

The commission declines to make these changes to subsection (i) because it does not intend for the actions in subsection (i)(1) through (8) to "automatically" result in suspension or revocation, nor does the language imply such automatic action. The commission will exercise discretion in suspending or revoking the registration of a PGC. With regard to PURA §39.151(l), that section precludes an independent organization from adopting reliability rules that impede any manufacturing process associated with an industrial generation facility. This section of PURA is

to be implemented by the independent organizations and need not be reflected in the registration rule. TXU-PGC's proposed revision would limit the commission's review of suspensions and revocations in other jurisdictions to those licenses that relate to the generation of electricity and, therefore, is not adopted.

In reply to various recommendations from parties for clarification changes, the commission also makes numerous non-substantive changes to the published rule.

§25.111. Registration of Aggregators

The comments reflected some confusion concerning the different types of aggregators and the application of various PURA and rule provisions to each type. The most common point of confusion is that, in the published rule, private "persons" could be "public aggregators." To reduce the possibility for confusion in the future, the commission replaces the terms "private aggregator" and "public aggregator" with "Class I" and "Class II" respectively. Because of the varying eligibility and operational restrictions on Class II aggregators in the law, Class II contains four subclasses. In general terms, Class I aggregators are private entities that aggregate private entities; Class II.A aggregators are private entities that aggregate public entities; Class II.B aggregators are political subdivision corporations, as defined in the rule, that aggregate public entities; Class II.C aggregators are municipalities or other political subdivisions that aggregate citizens who choose to participate; and Class II.D aggregators are private entities

that contract with a public entity to administrate citizen aggregation. These classifications are based on statutory provisions that describe the types of entities that may provide aggregation services and the related operational parameters.

This preamble summarizes the positions of parties in the terms they used in comments, which were those of the published rule. Parties' use of the term "public aggregator" is interpreted to include all of the kinds of aggregators now called "Class II" because that was the term used in the published rule. However, in some instances, where the context so indicated, comments referring to "public aggregators" were interpreted narrowly to indicate only Class II.B and II.C aggregators.

Similarly, the use of the term "person" may engender confusion. As defined in the rule, it includes individuals, partnerships, mutual or cooperative associations, and corporations, but excludes municipal corporations, electric cooperatives, political subdivisions, or political subdivision corporations. Therefore, provisions of the rule that apply to "persons" do not apply to those entities that are excluded from the definition, regardless of which class of aggregator is at issue.

PURA leaves much that is unspecified concerning the role of aggregators in the restructured market. The commission adopts this rule with the goal of leaving as much to market forces as possible while upholding its charge to protect the public interest. Several features of the

restructured market should be noted at the outset. First, the REP is the designated point of customer contact. As such, a relationship between the customer and the REP is mandatory in the procurement of electricity while the involvement of an aggregator as an intermediary is optional to REPs and customers. Second, a REP cannot be expected to negotiate against itself on behalf of a customer group, and this is a fundamental component of the differences between REPs and aggregators. Third, some of the activities inherent in the REPs' role resemble aggregation services or have the same effect. For example, a REP, by virtue of its market role, negotiates for the purchase of power for all of its customers in the aggregate. Further, if a REP wishes to attract a particular type of customer, it can offer the group of customers with its desired profile an improved rate and pursue them through marketing operations. The REP does not need to be a registered aggregator to tailor and market services to meet customers' needs. A REP would not be expected to organize customers to purchase electricity from another REP.

Preamble Question Number 1: The proposed rule is drafted from the perspective that aggregators negotiate with retail electric providers (REPs) on behalf of a group of electricity customers. However, similar services could be provided to customers by a consultant without direct negotiation with a REP on behalf of the customers. The commission invites comments on whether the rule draws an appropriate distinction between consultation and aggregation services.

Consumers disagreed with the question's premise and stated that the proposed rule does not assume that aggregators will negotiate entirely on behalf of customers, since the rule allows REP affiliates to register as aggregators. Consumers and OPUC commented that REP affiliates should be prohibited from becoming aggregators to avoid conflict of interest. OPUC argued that an aggregator that is associated with a REP will have a strong incentive to bring its customers to its associated REP, becoming, in effect, the REP's marketing arm.

Consumers argued that the disclosure to the customer of an aggregator's affiliation to a REP does not remove the incentive for an aggregator to favor its affiliated REP. Consumers proposed that, should the commission permit aggregator affiliates of REPs, the commission should require those aggregators to follow a strict code of conduct with their REPs, including disclosures to customers, separate books and records, and limitations on communications between the aggregator and the affiliated REP. Consumers clarified that, if affiliate relationships are not prohibited, it would seek arm's-length transactions between REPs and affiliate aggregators, as well as disclosure requirements about the affiliate relationships.

TXU-REP and Reliant objected to Consumers' suggested prohibition of aggregators affiliated with REPs. Reliant argued that the Legislature did not expressly grant the commission the authority to forbid affiliation between an aggregator and a REP in Senate Bill 7. Reliant said that it is unnecessary for the commission to infer power to prohibit affiliate relationships because it has the authority to enact rules ameliorating the potential harms described by Consumers and

OPUC. Reliant argued that an aggregator who places the interest of an affiliated REP above the interests of its own customers would lose customers, and that the rule's disclosure requirements, along with a proposal to allow customers to rescind a contract if such disclosures are not made, would adequately protect customers. TXU-REP noted that if the rule were to preclude the REPs from having aggregator affiliates, holding company systems would be forced to choose between providing either aggregation or REP services.

The commission agrees with Consumers that the published rule allowed an aggregator to represent the seller, or REP. The commission concludes that, as a matter of policy, aggregators should only represent buyers of electricity. Creating codes of conduct between affiliated aggregators and REPs to ensure that the aggregator serves only the customer's interests would be a potentially cumbersome method for ensuring that an aggregator represents the customer's interest. The commission determines that the most efficient, and least confusing, method for ensuring that an aggregator represents the customer's interest is to prohibit aggregators from representing sellers of electricity and thus from being an affiliate of a REP. Customer choice may be a confusing time for some Texas customers, and the commission concludes that customers should be assured that an aggregator represents its interests. The commission amends adopted subsection (d)(3) and (4) (proposed (c)(3) and (4)) to prohibit an aggregator from affiliating with a REP.

The commission disagrees with Reliant that the potential harm to customers that could result from the aggregator's affiliate relationship with a REP can be sufficiently ameliorated through disclosures and other customer protections. The commission determines that aggregators should only represent buyers of electricity, and not sellers, for reasons discussed above. However, the commission determines that, to fully inform customer choice, disclosures such as those mentioned by Reliant and provided for in adopted (f)(1)(A), (K), and (M) (proposed (e)(1)(A), (K), and (M)) are still necessary.

Under PURA §39.353(d), the commission makes this amendment as a condition necessary to regulate the reliability and integrity of aggregators. The commission uses the authority granted in PURA §39.353(d) to establish the condition for Class I aggregators. For Class II aggregators, the commission observes that PURA §39.354 and §39.3545 and Local Government Code §303.001 and §303.002 all imply a buyer's agent relationship for Class II aggregators. Class II.A aggregators, private persons that aggregate municipality and other political subdivision customers, are defined by PURA as "authorized by two or more municipal (or political subdivision) governing bodies to join the bodies into a single (or multiple) purchasing unit(s)...." The commission interprets the use of "authorized" in PURA §39.354 and §39.3545 to mean that the person is to be functioning as a "buyers' agent" for the authorizing municipalities and other political subdivisions. The commission also concludes that Class II.D aggregators, which are the only other types of aggregators that are not public entities and which administrate citizen aggregation programs pursuant to contracts with political subdivisions, should not be affiliated

with REPs. Therefore, the commission amends adopted subsection (d)(4)(D) (proposed (c)(4)(D)) to indicate that non-affiliation with a REP is a registration requirement for persons who are Class II.A and II.D aggregators. The commission notes, however, that the public entity clients of the persons who are Class II.A and II.D aggregators have the ultimate enforcement authority: they are free to explicitly protect their "buyers' agent" interests in their written authorizations and contracts. Adopted subsection (d)(4)(A) and (D) (proposed (c)(4)(A) and (D)) are modified to reflect this conclusion.

The commission understands that it is possible for an aggregator to be a buyer's agent and to receive its actual payment for its services from the REP. The commission concludes that customers should be aware of aggregators that form agency relationships with REPs, and amends adopted subsection (f)(1)(K) (proposed (e)(1)(K)) and subsection (i)(2) (proposed (h)(2)), accordingly. The commission also finds that adopted subsection (f)(1)(M), regarding disclosure of compensation sources, also addresses this concern.

In addition, the commission adds a new subsection (b) purpose statement. The new subsection explains the commission's finding that aggregators have a buyer's agent function in the restructured market, and that REPs are not aggregators. Subsection (b) also clarifies the rule's purpose of delineating the registration and operating requirements for aggregators in the restructured market. The inclusion of subsection (b) has changed the designation of the subsections from the published version of this section. Hereafter, the commission will reference

the adopted designations in commission comments, and the proposed designations in parties' comments.

CRC, TIEC, and CSW-REP stated that the rule accurately reflects the distinction between aggregation services and consultation services. TXU-REP, TC Cities and OPUC commented in support of the conclusion underlying the rule that aggregation hinges upon the act of negotiating purchases of electricity for a customer group. OPUC suggested that any consultant providing services similar to aggregation services is likely to be an aggregator also.

CSW-REP stated that the rule properly recognizes that not all consultant activities are activities that necessitate registration as aggregators. CSW-REP articulated a range of activities that a consultant could undertake with individual clients and without aggregating the loads of two or more electric service customers for the purpose of purchasing electricity services. CSW-REP, CRC, TXU-REP, and TC Cities indicated that aggregation services revolve around the negotiation and procurement of electricity, and are distinguishable from consultant services such as load profiling, energy audits, or advice on market opportunities.

Consumers agreed that the rule should not draw a distinction between consultation and aggregation services by listing the services that constitute each, since it is currently not possible to anticipate all the various components of aggregation services that may develop in the restructured market. Consumers maintained, however, that the rule should contain a definition

of "aggregation services" and that the definition should parallel the statutory wording to include "services relating to negotiating the purchase of electricity on behalf of two or more buyers." Consumers indicated that such a definition would not encompass a consultation service such as development of a load curve.

The commission concludes that it is not appropriate to have a definition of "aggregation services" that articulates a particular type of service, because such services will evolve in the restructured market. The commission agrees that the roles of aggregators and consultants differ when a REP is contacted for purposes of negotiating the purchase of electricity. Therefore the commission inserts clarifying language to that effect in the definition of "aggregator." With this clarification, the commission concludes that the rule draws an appropriate distinction between consultation and aggregation services.

Preamble Question Number 2: The workshop transcripts reveal that views vary widely on whether, and under what conditions, aggregators should accept monies from electricity customers. The proposed rule attempts to establish customer protection strategies without substantially constraining possibilities for compensation to aggregators for aggregation services. First, the rule prohibits private aggregators from accepting payments or prepayments for electric service, but the rule is silent on this topic with respect to public aggregators. Second, the rule imposes financial requirements only on the aggregators who are persons, and who accept payments for aggregation services.

The rule does not impose financial requirements on public entities. The rule does not dictate whether or not the aggregator is, functionally speaking, a buyer's agent, a seller's agent, or both. Instead, for customer information, the rule requires disclosure to the customers of the basis on which the aggregator will be compensated for services, such as fees from the REP, pre-paid fees from the customer, payments from the customer upon delivery of service, a combination of the above, or other methods. This requirement is applicable only to aggregators who are persons. The commission requests comment on whether the rule strikes the proper balance in allowing market forces to operate while protecting customers.

CSW and TC Cities made the overall comment that the proposed rule struck the proper balance between market forces and customer protection. Other parties' comments in response to this question clustered into three sub-issues: 1) prohibitions on most aggregators for accepting payments for electric services; 2) varying financial requirements for aggregators; and 3) an aggregator's role as either a buyer's agent or seller's agent.

TC Cities and Consumers argued that private aggregators should not accept payments for electric service, but public aggregators could receive payments for electricity, based on an interpretation of PURA §§39.353, 39.354 and 39.3545, that the former cannot take title to electricity and the latter can.

TXU-REP proposed that aggregators, whether public or private, should not be precluded from offering other competitive services, such as billing or collection services, on behalf of a REP. TXU-REP maintained that an aggregator could provide this service as an independent billing agent according to a contract with a REP and that the REP would be ultimately responsible for the proper handling of the billing transaction. TXU-REP proposed changes to proposed subsection (c)(3)(C) for clarification.

The commission agrees with the implied conclusion of Consumers and TC Cities that aggregators who cannot take title to electricity should not be allowed to directly accept payments or prepayments for electric service. They could, of course, accept payment for aggregation services. The commission concludes that aggregators who cannot take title to electricity cannot directly accept payments or prepayments for electric service. Apart from customer protection concerns, allowing aggregators to collect monies for electricity services could jeopardize arrangements for the securitization of funds, where applicable. The commission amends adopted subsection (d)(3)(D) accordingly.

The commission agrees with TXU-REP that the prohibition on direct acceptance of monies for electric service should not preclude an aggregator from contracting with a REP as an independent billing agent to provide competitive billing and collection services for the REP. The commission notes that such a contract would not necessarily be limited to the customers aggregated by the aggregator. The commission views the role of an independent billing agent as

the administrator of the billing and collection functions of a retail operation rather than as the direct recipient of payments for electric services provided by the REP. The commission is developing rules in Project Number 22255, *Rulemaking Proceeding for Customer Protection Rules for Electric Restructuring Implementing Senate Bill 7 and Senate Bill 86*, that will articulate standards for billing customers and collecting payments. The commission anticipates that standards will include identification of the REP as a seller of electricity, as the recipient of payment for service, and as the point of customer contact. The commission may adopt rules specifying the conditions for the collection of certain payments, such as the transition charges resulting from securitized funds, which may require special payment procedures and credit and security arrangements for REPs that collect such transition charges. For these reasons, the commission finds that, while adopted subsection (d)(3)(D) prohibits most aggregators from directly accepting payments for electric service, it does not prohibit the aggregator from contracting with the REP to provide billing and collection services for the REP according to terms and conditions established by the commission. Registration as an aggregator does not explicitly permit or disallow the registrant to act as an independent billing agent. The commission amends adopted subsection (d)(3)(D) to clarify that aggregators can participate in the competitive billing and collection services market as independent billing agents when, and only when, they meet any applicable conditions.

On the second topic, whether differentiation of financial requirements among aggregator types is appropriate, Consumers, TC Cities, and Plano supported the rule's construction. The rule

imposes the financial requirements specified in proposed subsection (f) on aggregators that are persons but not on aggregators that are municipalities, other political subdivisions, or political subdivision corporations (i.e., not persons). Consumers proposed that persons who are public aggregators should be required to file and update letters of authorization from the public bodies they aggregate. Plano noted that the accountability for public aggregators properly resides with elected and appointed officials of public entities.

CSW-REP proposed that public aggregators who aggregate only the loads of political subdivisions should not be subject to the rule's financial requirement because they are acting in the public interest. CSW-REP also proposed that the financial requirements should not apply to "affinity" organizations, such as university alumni associations or other not-for-profit organizations providing aggregation services to their members, or to market participants such as power marketers or REPs. Consumers replied that CSW-REP's statement implies that circumstances could occur under which the aggregator is an agent of the REP, and reiterated their position that aggregators should not be affiliated with REPs.

CRC argued that the legislature intended that private aggregators be subject to additional conditions beyond those applied to public aggregators, since PURA §39.353 prohibits selling or taking title to electricity, and requires compliance with customer protection provisions, disclosure requirements, and all marketing guidelines, and terms and conditions established by the commission concerning reliability and integrity.

The commission concurs with Consumers that it is appropriate to apply the financial requirements to all registering parties who meet the definition of a person, regardless of which type of registration they seek, assuming that they meet the other triggering criteria (intentions to collect payment in advance of service). The financial requirements help to ensure the protection of customers who are aggregated by a person. The commission concludes that this provision appropriately includes affinity organizations, because these financial requirements are necessary to protect customers when deposits or other advance payments for aggregation services are collected. The commission concludes that financial provisions are not appropriately applied to aggregators that are public entities (Class II.B and II.C) because they are subject to other measures of public accountability.

On the subject of whether the aggregator should be free to be either a buyer's agent or seller's agent, CSW-REP and TXU-REP supported the proposed rule in permitting aggregators to represent either buyers or sellers, because that should be determined in the market. CRC proposed that REPs should be permitted to act as aggregators, arguing that it would increase customer choice and is not prohibited by PURA.

CSW-REP and CRC argued that the disclosure of an aggregator's source of compensation under proposed subsection (e)(1)(M) is appropriate and adequate protection to permit customers make informed judgments. TXU-REP opposed the disclosure of the relationship to

buyers or sellers, as well as the source of an aggregator's compensation, contending that it is not reasonable to require this type of disclosure in a competitive market.

Consumers and OPUC disagreed with the notion that it is possible for aggregators to truly represent both buyers and sellers, stating that an aggregator representing a seller does not have an incentive to always find the best negotiated electric rate for the customer. Consumers argued that a proper balance between market forces and customer protection can be established only by prohibiting a direct or affiliated relationship between the aggregator and the REP. However, Consumers acknowledged that REPs could still compensate unaffiliated aggregators if that fact were disclosed to customers and if the unaffiliated aggregator were actually working on behalf of the buyers rather than choosing a REP based on the size of the compensation that he or she will receive from the REP. Consumers argued that the sole role of the aggregator is to represent buyers of electricity, whether the buyers are part of a "voluntary association" formed for the purpose of purchasing electricity together, or whether the buyers are part of an existing association that seeks to purchase electricity for its members. Consumers stated that their vision of buyers does not include a group of buyers who are gathered together on behalf of a REP by the REP's agent or affiliate, and maintained that the commission cannot assume that REP affiliates would negotiate only on behalf of customers. In addition, Consumers argued that disclosure of payments to aggregators from REPs does not resolve the conflict of interest problem. However, Consumers suggested several other "code of conduct" controls in the event that the commission chooses to allow affiliated aggregators, including separate entity

requirements, arm's length behavior, use of names similar to the REP's name, and disclosure of affiliate relationships to customers. TC Cities agreed that aggregators should disclose their agency relationships and added that all names under which the aggregator operates should also be disclosed.

This issue is integrally related to the concerns discussed in Preamble Question Number 1. The commission concludes that SB7 contemplated aggregators as buyers' agents only and that, as a matter of policy, aggregators should not be affiliates of REPs. The commission finds that customers are least likely to be confused by the aggregator's role in the marketplace if aggregators only act as the buyer's agent, and thus are not affiliates of REPs. As mentioned previously, the commission concludes that customers should be aware of aggregators that form agency relationships with REPs, and requires such disclosure in adopted subsection (f)(1)(K) and subsection (i)(2).

Preamble Question Number 3: In certain instances, statutory conditions that appear applicable to all aggregators are stated in PURA §39.353, relating to Registration of Aggregators, but are not restated in PURA §39.354 and §39.3545, which concern the registration of public aggregators. Because a person can seek registration as both a private and a public aggregator, a person could be subject to different operating constraints for public customers than private customers. The commission requests comment on the extent to which the following matters apply to all aggregators.

(a) *First, PURA §39.353 states, "A retail electric provider is not an aggregator."*

The commission interprets this sentence to mean that certificated REPs cannot also be registered as aggregators that register pursuant to that PURA provision. How should the absence of the sentence in §39.354 and §39.3545 be construed? If REPs were allowed to register as public aggregators, what would be the practical result?

Consumers, TC Cities, and Plano interpreted the absence of the statement "a retail electric provider is not an aggregator," in PURA §39.354 and §39.3545 to mean that public aggregators are allowed to sell and take title to electricity, and would therefore perform some REP functions. TC Cities argued that taking title to electricity and REPs' relationship to aggregators are related issues, and asserted that, since REPs take title to electricity, the Legislature must have intended to specifically preclude private aggregators from taking title to electricity. CRC interpreted the statement "(r)etail electric providers are not aggregators" to simply mean that a certificated REP must go through the registration process for aggregators. In that vein, CRC maintained that, if the legislature had intended for aggregators and REPs to be mutually exclusive, the language would have been stronger and more prohibitive, and PURA §39.352, relating to certification of REPs, would contain similar language.

Conversely, TXU-REP, OPUC, and CSW-REP argued that the statement "(r)etail electric providers are not aggregators" applies to all types of aggregators. TXU-REP maintained that,

because no specific statutory exception applies, the statement should apply to public aggregators, as well. OPUC stated that a REP cannot be an aggregator pursuant to PURA §39.353, a prohibition that extends to a private REP acting as a municipal aggregator or a political subdivision aggregator. CSW-REP argued that the statute is clear in prohibiting an entity from being both a REP and an aggregator. CSW-REP asserted that this principle applies to both private and public aggregators, since the functions of REPs and aggregators are dependent upon whether they may take title to electricity.

Consumers, TC Cities and CRC expressed no concern about REPs acting as aggregators for certain entities. Consumers concluded that a REP that has obtained the express authorization of a political subdivision could possibly register as a public aggregator.

CRC proposed that REPs with the "requisite expertise," after proper disclosure, should be allowed to provide aggregation services. According to CRC, the market should provide a niche to serve those customer groups that choose to use a third party to negotiate their electricity procurement, and maintained that the proposed rule may inhibit the choices available to customer groups by prohibiting REPs from acting as aggregators.

Plano and CSW-REP questioned the implications of a REP acting as an aggregator. Plano questioned whether political subdivisions can be REPs and, as such, be subject to disclosure requirements, and expressed concerns about the ability of REPs to perform aggregation services

in an unbiased, objective manner. According to CSW-REP, combining the functions of REPs and aggregators would create a variety of conflicts. CSW-REP added that the statute does not prohibit a REP from creating an aggregator affiliate that can register as both a public and private aggregator.

The commission concurs with CSW-REP that it is appropriate to distinguish the role of the aggregator from the role of the REP. The commission concludes that the aggregator's role is to negotiate with REPs on behalf of customers, whereas a REP's role is to provide electricity to customers. REPs are also intended to be a customer's primary contact point for electric service. The commission finds that the statement "(r)etail electric providers are not aggregators" was intended to set aggregators apart from REPs. It is a descriptive statement speaking to inherent differences in roles rather than a prohibition applicable to some aggregators and not others. The commission concludes that REPs may not be aggregators in any of the aggregation scenarios provided for in PURA or the Local Government Code.

Moreover, as is explained under the next question, the commission concludes that, where all REPs take title to electricity, only one type of aggregator, the political subdivision corporation, is granted authority to do so. While the commission concurs that a difference between a REP and an aggregator is the ability to take title to electricity, that is not the only, nor the most significant difference. Taking title to electricity is inherent in and fundamental to the role of the REP, but not to the role of the aggregator.

PURA §§39.353, 39.354, and 39.3545 all specify that aggregators negotiate the purchase of electricity from REPs. The commission believes that this distinction is an important one, since a REP will not negotiate with itself to purchase electricity.

(b) Second, PURA §39.353 states, "Aggregators may not take title to electricity." The commission interprets this sentence to mean that aggregators registering pursuant to this provision may not accept payment for electricity services from customers. How should the absence of this sentence in PURA §39.354 and §39.3545 be construed? If the prohibition does not apply to all aggregators, then persons who are registered as both a private and a public aggregator could be in the position of taking title to electricity for some customers, and accepting their payments, while not doing so for others. What are the implications of such a result?

TC Cities, Plano, and CRC asserted that the prohibition against taking title to electricity does not apply to public aggregators aggregating pursuant to PURA §39.354 and §39.3545, since the absence of a prohibition against taking title to electricity in those sections implies permission to take title to electricity. TC Cities also commented on Local Government Code §303.002, stating that a municipality contracting pursuant to Local Government Code §303.002(b) with a private aggregator to administer an aggregation project on behalf of municipal residents would be the only opportunity for an aggregator to take title to and accept payments for electricity.

TC Cities stated that, in that situation, the private aggregator would have to register as a public aggregator, and should have to face rigorous financial accountability and registration requirements before taking title to the electricity being aggregated.

Plano posited that the prohibition against taking title to electricity was included for private aggregators because of the significant liability issues surrounding private individuals and entities taking title to electricity.

CRC stated that the rule should not impose conditions on public aggregators that PURA did not extend to them.

OPUC stated that a private entity aggregating municipalities and political subdivisions should not be permitted to take title to electricity, but indicated that there are no limitations on public entities acting as municipal or political subdivision aggregators.

TXU-REP disputed TC Cities', Consumers', and OPUC's assertion that all public aggregators may take title to and sell electricity, since the governing provisions of PURA and the Local Government Code dictate that only public aggregators that form political subdivision corporations may take title to and sell electricity. According to TXU-REP, PURA §39.353(b) defines the generic term aggregator, a definition that prohibits taking title to or selling electricity, for PURA §39.351 through §39.358. According to TXU-REP, unless municipal aggregators

or political subdivision aggregators are specifically granted the power to sell or take title to electricity, they are forbidden from doing so by the generally applicable definition of "aggregator" in PURA §39.353(b). TXU-REP argued that a political subdivision corporation, operating pursuant to Local Government Code §303.001, is the only entity that is specifically granted the power to take title to electricity. CSW-REP maintained that the fundamental difference between a REP and an aggregator is the ability to take title to electricity, a distinction that must apply to both public and private aggregators.

DGG Cities and TC Cities argued the limitations of PURA §39.353(b) do not apply to public entities. They noted that PURA §39.353(b) defines an aggregator as a person that joins customers, while the definition of "person" in PURA §11.003(14) and (7) specifically excludes municipal corporations. DGG Cities concluded that neither PURA nor the Local Government Code prohibit a municipality acting as a political subdivision aggregator from taking title to electricity.

The commission concludes that only Local Government Code §303.001 specifically provides for political subdivision corporations to "purchase electricity," and thus take title to electricity. Local Government Code §303.002 and PURA §39.354 and §39.3545 do not contain similar provisions, while PURA §39.353 clearly prohibits aggregators from taking title to electricity. Looking first to PURA §39.354 and §39.3545, the commission observes that two categories of aggregators are addressed in each: persons who aggregate municipalities or political

subdivisions pursuant to PURA, and municipalities or political subdivisions aggregating pursuant to Local Government Code §303. Local Government Code §303.001 creates a narrow exception in authorizing political subdivision corporations to take title to electricity acquired for public use by municipalities and other political subdivisions that they aggregate. No such flexibility was built into Local Government Code §303.002, which allows municipalities and political subdivisions to aggregate on behalf of their electing private citizens. The commission finds no legal or policy reason to read such an authorization into the provision where it is not expressly stated. Under the statutory scheme, municipalities and political subdivisions may act as aggregators, not resellers, of electric power to private citizens. This statutory scheme is supportive of the commission's policy determination that REPS serve as the primary customer contact for electric service. The commission modifies adopted subsection (d)(3) and (4) to reflect this conclusion.

Preamble Question No. 4: From a customer perspective, what are the differences between aggregators and REPs? How will a customer be able to distinguish a REP from an aggregator? The commission invites comment on ways, if any, this rule should further differentiate the role of the aggregator in the market place from that of the REP.

Consumers stated that customers would not be able to distinguish a REP from an aggregator if a REP were allowed to function in both capacities, or if aggregators were allowed to affiliate with REPs, and asserted that disclosure of affiliation does not solve the problem. OPUC argued that

requiring residential and small commercial electric customers to differentiate between a REP and affiliated aggregator would be a significant and unnecessary burden to them.

TXU-REP, TC Cities, CSW-REP, and CRC described the different roles that aggregators and REPs serve. TXU-REP stated that the distinction between REPs and aggregators is that REPs sell electricity, but aggregators serve as intermediaries negotiating for the purchase of electricity from any REP by customers and fulfilling a different role in the market. TXU-REP asserted that this distinction would be lost if the position of Consumers and OPUC was adopted. TXU-REP asserted that the aggregator's identification of the REP as the seller of the electricity in any billing materials, as required by PURA §17.102(2), will ensure that the customer understands the key distinction between the aggregator and the REP.

CSW-REP and TC Cities commented that the rule has already distinguished aggregators from REPs to the extent currently possible. CSW-REP noted that customers might not easily make the distinction in a newly competitive marketplace.

The commission agrees with Consumers that customers will not be able to readily distinguish an aggregator from a REP if a REP is allowed to do both functions, as discussed earlier. The commission concludes that the rule should further differentiate the role of the aggregator in the market place from that of the REP by keeping the two roles separate among market participants and labeling the market participants accordingly: An aggregator represents buyers of electricity,

a REP is the seller of electricity, and the two shall not be affiliated. The commission concludes that this separation of roles will enable customers to determine which market participant provides each function. While the REP may contract out marketing and other services that are similar to aggregation services, aggregators are not allowed to contract with REPs in any way that makes them, in effect, a "seller's agent."

However, the commission concedes that in a fully developed and healthy competitive market, the prohibition on aggregator affiliation with REPs may no longer be necessary. The commission intends to review the necessity of this prohibition in light of one year of market experience. For this reason, the commission adds a new subsection (k) to sunset the prohibition on aggregator affiliation with REPs. The sunset is effective 18 months after the start of customer choice, allowing time for a review and rulemaking proceeding after one year of market experience.

General comments on the rule:

CRC stated that aggregation is a method for smaller electricity users to benefit from a competitive electric retail market. According to CRC, some commercial customers are successfully aggregating through organizations or associations in states that are currently in the process of opening retail electric markets. CRC noted that, in setting up an aggregation, association members will need to determine if they will act as the aggregator, or if they will hire a

consultant to negotiate with REPs on their behalf, a decision will depend on the amount of control the organization would like to keep over its aggregation process. According to CRC, if the organization's members decide to be directly involved in the negotiation process, the organization will need to register as the aggregator; if the organization decides to hire a consultant, the members will need to choose an entity registered as a private aggregator. CRC maintained that this choice may be different from group to group, and both options should be available.

The commission concludes that the rule does not preclude an organization from acting as its own aggregator, and finds that the alternate registration requirements contained in adopted subsections (f) and (g) may facilitate this option for some organizations.

Texas Legal Services Center indicated that it would be helpful to clarify in the rule that public aggregator refers to the type of entity being aggregated, instead of the entity that is performing the aggregation.

The commission implemented the "Class I" and "Class II" terminology throughout the rule to address this point.

As previously noted, the designation of subsections in the adopted rule changed from the published rule because of the addition of a new subsection (b), relating to purpose. Therefore,

the commission will reference the proposed designations in parties' comments and the adopted designations in commission comments.

Adopted Subsection (a):

TEC stated that the following sentence in §25.111(a), "An electric cooperative aggregating electric service customers outside of its certificated service area shall register with the commission" is inconsistent with the definition of "a person" in PURA §11.003, and recommended its deletion.

TXU-REP questioned the statutory authority for electric cooperatives to act as aggregators outside their own service areas. TXU-REP pointed out that PURA §41.055(11) gives the cooperative's board of directors the power to make decisions affecting the cooperative's method of conducting business, but asserted that such power is limited under Chapter 41 to serve customers within their service territory. TXU-REP argued that, once a cooperative elects to serve customers outside its territory, it becomes subject to significantly increased oversight by the commission. As a result, TXU-REP reasoned, it would be inconsistent with the provisions of PURA for the commission to permit an electric cooperative to aggregate customers outside its service area without any commission oversight. TXU-REP argued that registration is not a burdensome requirement, and that that all competitive aggregators, including electric

cooperatives aggregating customers outside their service areas, should be required to register with the commission.

TEC retorted that the issue is not by what authority cooperatives are authorized to engage in aggregation activities, but whether the commission has jurisdiction to require registration by cooperatives wishing to perform such activities. TEC pointed out that commission jurisdiction over electric cooperatives is limited by PURA §41.004, which does not provide for commission jurisdiction over the registration of electric cooperatives that aggregate the loads of their member consumers. TEC asserted that PURA contains no provision supporting commission jurisdiction over an electric cooperative aggregating load outside its service area. Finally, TEC responded that PURA Chapters 39 and 41 were consistent in that Chapter 41 pertains to electric cooperatives and Chapter 39, specifically §39.002, expressly includes provisions limiting its applicability to electric cooperatives.

The commission agrees with TEC that the definition of person in PURA §11.003 does not include electric cooperatives. Further, the commission concludes that PURA §39.002 is unambiguous: the requirements for aggregators in PURA §39.353 do not apply to electric cooperatives. Therefore, the commission deletes from adopted subsection (a) the sentence "An electric cooperative aggregating electric service customers outside of its certificated service area shall register with the commission." Correspondingly, the electric cooperative cannot then represent itself as a commission-sanctioned aggregator. In line with its policy determination that

aggregators cannot fully function as a buyer's agent while being affiliated with a REP, the commission cautions electric cooperatives who elect choice against representing themselves as being a buyer's agent for a customer group when the cooperative also functions as a REP.

The commission concludes that the provisions of PURA relating to the powers of electric cooperatives in the restructured electric market are not entirely clear. They might be construed to permit cooperatives to perform aggregation services without registering, as TEC advocates. On the other hand, these provisions might be construed as prohibiting any entity from performing such services without registering. Because cooperatives have strong connections to the communities where they operate, the commission anticipates that cooperatives are likely to be responsive to their customers and preserve their customer good will. For this reason, the commission refrains from making an interpretation of law at this time and does not object to cooperatives performing aggregation services without registering. The commission has the latitude to reconsider its decision on this matter as the market develops, and will be concerned if customers have bad experiences with cooperatives performing these services.

Proposed Subsection (b):

Consumers proposed language for subsection (b)(1) to parallel the statutory definition of aggregation in PURA §39.002. Consumers also proposed a final sentence to proposed subsection (b)(1) to clarify that, for purposes of this definition, separately metered tenants are

not a voluntary association, maintaining that such language would protect tenants' customer choice in electricity and prevent forced aggregation by landlords.

The commission concurs with Consumers that one customer negotiating for energy for its own use at multiple locations is not an aggregator and is, therefore, not required to register. However, the commission does not agree that adopted subsection (c) must be modified, since adopted subsection (a) states that the rule does not apply to this activity.

Consumers proposed a definition for Aggregation Services, to include "services relating to negotiation." TIEC opposed the definition as overly broad, since the definition could be construed to capture services provided by a consultant not involved in the negotiations.

Consistent with the discussion in Preamble Question Number 1, the commission concludes that the rule strikes the proper balance between aggregation and consultation services, and declines to adopt Consumers' language. The commission does, however, clarify the types of activities that an aggregator may be involved with in adopted subsection (c)(2).

Consumers proposed new language for proposed subsection (b)(2)(A) to clarify that aggregation services involve the purchase of electricity, as contrasted with persons acting in connection with the sale of electricity, such as a REP, REP's agent, or a broker. Consumers

also proposed language to require the disclosure of the basis for the fee or commission paid by a REP to a private aggregator.

The commission declines to adopt Consumers' proposed language for adopted subsection (c)(2)(A), and concludes that the amendment to the definition of aggregator addresses Consumers' first point. The commission further concludes that the disclosure requirement is adequately addressed in adopted subsections (f)(1)(A), (K) and (M) and (i)(2).

TXU-REP recommended amending proposed subsection (b)(2)(B)(i) and (ii) to add the concluding sentence, "A municipal aggregator that is not a political subdivision corporation may not sell or take title to electricity." Plano questioned why a definition of third party aggregators is included in a rule that does not refer to such entities again, and sought clarification.

The commission concurs with TXU-REP that the only aggregator authorized to take title to electricity is the political subdivision corporation. Rather than modify the definitions, the commission makes this clarification in adopted subsection (d). With respect to Plano's comment, the definition of third party was not included in the published rule, and thus no clarification is necessary on this point.

TEC stated that the second sentence of proposed (b)(3) is inconsistent with the definition of "person" in PURA §11.003 (which specifically excludes cooperatives) as applied to §39.353

(a) and (b), which establishes a registration requirement for aggregation services. TEC recommended replacing this sentence with the following: "Person – an individual, a partnership of two or more persons having a joint or common interest, a mutual or cooperative association, or a corporation, but not including a municipal corporation or an electric cooperative." Plano commented that it is unclear whether REPs are persons and recommended that, if REPs are included as persons, the definition should so specify.

The commission concurs with TEC, and, pursuant to the discussion of adopted subsection (a), modifies adopted (c)(3) accordingly. In reply to Plano, the commission finds that the definition of persons is inclusive of REPS, but the eligibility restrictions on persons who seek to register as aggregators prohibit REPs from registering as aggregators. The issue of REPs not being aggregators is discussed in Preamble Question Number 3a.

Plano proposed language to help distinguish suspension from revocation.

The commission finds that Plano's proposed language regarding suspension and revocation closely approximates the language of the published rule, and thus concludes that no further clarification is necessary.

Proposed Subsection (c):

TXU-REP proposed language to clarify that an aggregator should be able to offer billing or collection services, as an independent billing agent.

The commission adopts the TXU-REP recommendation with a modification to adopted subsection (d)(3)(D).

CSW-REP commented that the rule should clarify that an "affirmatively requesting citizen" must be a resident of the political subdivision and that the citizen has a verifiable arrangement with the political subdivision for that subdivision to act as the citizen's aggregator.

The commission agrees that the term "affirmatively requesting citizen" requires clarification, and changes adopted subsection (d)(4)(C) to clarify that voluntary agreements of affirmatively requesting citizens must be verifiable.

SPS proposed language for proposed subsection (c)(4)(D) and (E) to require public aggregators to comply with customer protection provisions, disclosure requirements, and marketing guidelines, as well as reliability and integrity requirements. DGG Cities refuted those comments, arguing that PURA does not require municipalities that aggregate under PURA §39.353 or §39.3545 to comply with these same provisions. DGG Cities argued that when a municipality acts as a public aggregator, it acts in the public interest and must answer to its citizenry in a manner not required of private aggregators.

CSW-REP stated that the rule should clarify the role of a citizen aggregation administrator and its relationship with the political subdivision; specifically, that the administrator is the agent of the political subdivision and will negotiate on behalf of the political subdivision with one or more REPs for the purchase of electricity, but will not take title to such electricity.

Plano maintained that a third-party administrator performing services under Local Government Code §303.002 should be required to register as a public aggregator and be subject to all regulations applicable to public aggregators.

TC Cities did not propose changes to proposed subparagraph (c)(4)(D), relating to an administrator of citizen aggregation, and commented that this subparagraph does not, and should not, address the appropriate threshold of aggregation activity that must take place before an administrator is hired. TC Cities asserted that administrators do not need to register. TC Cities argued that Local Government Code §303.002 does not limit aggregation to aggregators; requiring third party administrators to register would render "third party" meaningless, and administrators are already accountable to registered public aggregators. Finally, TC Cities offered that an administrator's role should be uniquely defined by contract and not defined in the rule.

The commission notes that adopted subsection (i)(2) requires all aggregators to comply with the commission's education, disclosure and marketing guidelines and rules, including those pertaining to customer protection, and declines to adopt SPS' proposed language.

The commission concludes that, where municipalities or political subdivisions aggregating public citizens pursuant to Local Government Code §303.002 elect to utilize outside administrators, in those instances in which the administrator meets the definition of "person," the administrator must be registered as an aggregator. This conclusion is based on the fact that this activity is the only one available to a "person" under Local Government Code §303.002, and aggregation by a "person" under Local Government Code provisions is captured by the registration mandate in PURA §39.3545. The commission has modified adopted subsection (d)(4)(D) to reflect this requirement of the law. The modification allows an exception for the administrator who is an employee of the political subdivision that is conducting citizen aggregation pursuant to Local Government Code §303.002 because the commission is satisfied the political subdivisions' public accountability systems are sufficient in that case.

Proposed Subsection (d):

CSW-REP contended that the rule created confusion regarding whether a public aggregator must meet the requirements of proposed subsections (d) and (e), and suggested that the

commission consider revising these provisions to state more specifically the requirements for public aggregators.

The commission agrees that the term "public aggregator" is confusing, since both a person and a public body can act as a public aggregator. The commission believes its adoption of the "Class I" and "Class II" terminology will help interested parties distinguish the differences between types of aggregators. The commission clarifies that adopted subsection (e) applies only to Class II.B and Class II.C aggregators, and not to persons.

OPUC stated that political subdivisions aggregating pursuant to the Local Government Code must follow the standards for local governments.

The commission concurs with OPUC, but does not find that any further revisions to the rule are necessary to reflect this fact.

Proposed Subsection (e):

In response to CSW-REP's above comments, the commission clarifies that adopted subsection (f) applies only to Class I, Class II.A, or Class II.D aggregators, and not to municipalities, other political subdivisions, or political subdivision corporations.

Consumers and TC Cities questioned the public policy reasons for allowing a single aggregator to operate under numerous names, since it would create difficulties in tracking complaints. According to TC Cities, customers should have the best possible information to ensure that agency relationships are revealed, and multiple operating names for aggregators might frustrate that effort. TC Cities proposed language that would require a registering party to provide all trade or commercial names to potential residential and commercial customers.

The commission concurs with Consumers and TC Cities that multiple trade or commercial names can be difficult to track, and can cause confusion for customers, but declines to limit aggregators to two trade or commercial names. As a remedy, the commission amends adopted subsection (f)(1)(A) to require aggregators to disclose all trade and commercial names to customers when requesting aggregation services.

CRC stated that proposed subsection (e)(1)(I) and (J) would impose additional requirements of expertise on entities registering as an aggregator and could be an obstacle for the development of aggregation by customer groups and smaller entities. According to TXU-REP, the requirement would be more appropriate for a certification process.

The commission revises adopted subsection (f)(1)(I) and (J) by adding the words "if any," and concludes that this modification addresses CRC's concerns with respect to these subparagraphs. The commission understands that some information will not be applicable to

certain registering parties; accordingly, the commission's aggregator registration form will indicate that a response of "not applicable" is an acceptable response. Concerning TXU-REP's comment, the commission finds that information about prior experience is an important component of understanding an aggregators' business practice, and concludes that such information will be helpful in evaluating aggregator registration requests. The registration process adopted in the rule requires commission action on a submitted registration request before an aggregator may conduct business. For that reason, the commission declines to delete adopted (f)(1)(I).

With respect to TXU-REP's comments concerning adopted subsection (f)(1)(J), the commission finds that the names of subsidiaries and affiliates that provide utility-related experience is an important component of understanding an aggregators' business practice, and concludes that such information will be helpful in evaluating aggregator registration requests. For that reason, the commission declines to delete adopted subsection (f)(1)(J).

TXU-REP proposed the deletion of proposed subsection (e)(1)(K), stating that the requirement would be more appropriate for a certification process. CRC expressed concern that the requirement would impose additional requirements of expertise on entities registering as an aggregator and could be an obstacle for the development of aggregation by customer groups and smaller entities. TC Cities proposed language to require disclosure of agency relationships and the nature of agency agreements with REPs.

The commission's decision to disallow affiliate relationships to REPs renders moot TXU-REP's comment, but adopted subsection (f)(1)(K) is kept in relation to agency relationships to address TC Cities' concern of informing customer choice. With respect to CRC's comments, the commission understands that some information will not be applicable to certain registering parties; accordingly, the commission's aggregator registration form will indicate that a response of "not applicable" is an acceptable response.

TXU-REP commented that the requirement to disclose sources of compensation to customers is not reasonable in a competitive market, since companies who perform an intermediary role, such as delivering customers to a REP, do not typically have to disclose the sources of their revenue in other competitive markets. TXU-REP argued that the choice to disclose such information is the aggregator's, and a customer will be able to choose whether or not to deal with an aggregator that does not disclose its source of compensation.

Consumers expressed concern with TXU-REP's statement that an aggregator affiliate of a REP should not be compelled to disclose its business arrangement with customers. Consumers maintained that an aggregator affiliate of a REP that has no obligation to disclose its business arrangement with its customers is not negotiating in good faith on behalf of its customers. In such an arrangement, according to Consumers, a customer may pay more, rather than less, for their electricity. Consumers proposed prohibiting a direct or affiliated relationship between the

aggregator and the REP, but allowing REPs to compensate aggregators (with previous disclosure to customers) would strike an appropriate balance in protecting customers. Consumers asserted that such a proposal would work much like an independent insurance agent; in such an arrangement, the agent is paid a commission by the insurer, but still maintains the fiduciary obligations to get the best deal for the customer. According to Consumers, using an aggregator to secure customers for a specific REP serves no legitimate purpose, and could be similar to third-party telemarketers working for long distance companies, a situation that led to slamming.

The commission concludes that required disclosure of the source of an aggregator's compensation to its customers is consistent with the mandate of PURA §39.101(b) and (f), which direct the commission to adopt and enforce rules to ensure that customers receive sufficient information to make an informed choice and be protected from unfair, misleading, or deceptive practices. The commission declines to delete adopted subsection (f)(1)(K).

Consumers proposed a new subparagraph to be added to proposed paragraph (e)(1) that would require a person registering as a public aggregator to file proof of authorization from the public entity, and to update the authorizations.

The commission agrees that a person aggregating a political subdivision should be authorized by that political subdivision, and adds Consumers' language as adopted subsection (f)(1)(R).

Proposed Subsection (f):

CRC maintained that prepayment by customer group members to cover expenses incurred in contemplation of aggregation services could trigger the financial requirements outlined in proposed subsection (f), and thus deter customer groups from taking advantage of aggregation. Additionally, CRC commented that expenses such as the cost of preparing load profiles should not trigger the financial requirements, and proposed language to clarify this subsection.

The commission declines to adopt CRC's language, since the commission declines to further differentiate between aggregation and consulting services, as discussed in Preamble Question Number 1. The commission does, however, clarify the role of the aggregator in adopted subsection (c)(2).

CRC proposed that the financial restriction in proposed subsection (f)(1) cover only prepayments for aggregation services, since a constraint on all types of payments could limit the methods in which a customer group could choose to pay an outside consultant for aggregation services.

The commission concurs that the rule should protect only customer deposits and advance payments for aggregation services because the protection of customer payments is not at issue where the customer makes payment upon receipt of a service.

While not proposed by any outside comments, the commission concludes that increased specificity concerning acceptable financial resources would assist new entrants in developing their options. The commission concludes that increased specificity is beneficial in that it expands the types of acceptable financial evidence that are acceptable for meeting the financial requirements of aggregators, where applicable, and it standardizes the types of financial evidence available to aggregators with those contemplated for REPs. Accordingly, the commission amends adopted subsection (g)(1)(A) – (C) to include detailed financial evidence information.

Proposed Subsection (g):

Consumers proposed language to be added to proposed section (g)(2), regarding proprietary or confidential information, which would articulate the presumption that information filed pursuant to the rule is public information. Consumers proposed language would place the burden of establishing confidentiality on the registering party.

The commission agrees that such an explanation would be helpful to new entrants and clarifies adopted subsection (h)(2) to address Consumers' concern.

CSW-REP noted that proposed subsection (g)(3)(D) is silent with respect to the consequences of commission rejection of an application, and suggested that the commission clarify the consequences of rejection and next steps for parties to undertake.

The commission adopts CSW-REP's suggestion and indicates in adopted subsection (h)(3)(D) that unacceptable registrations are rejected without prejudice to refiling.

According to TXU-REP, the commission has included requirements that are appropriate only for a certification process, and has assigned itself the power to reject an aggregator's registration. TXU-REP therefore recommended the deletion of proposed subsection (g)(3)(D), relating to commission approval or rejection of a registration request, and transferring the time period for processing a registration to proposed subsection (g)(3)(B).

The commission declines to accept TXU-REP's proposed changes to adopted subsection (h)(3)(B) and (D). The commission finds that the legislature granted authority to revoke aggregator registrations and assess administrative penalties, procedures that necessitate commission discretion to review and accept or reject registration requests.

Proposed Subsection (h):

Austin commented that municipally owned utilities would promulgate the customer protections contained in proposed subsection (h)(2) under their own authority, consistent with PURA §40.055(a)(7).

The customer protections contained in adopted subsection (i)(2) were authorized by PURA §39.101(a), (b), and (e). PURA §39.101(e) grants the commission jurisdiction over all providers of electric service in adopting and enforcing the rules necessary to protect the customer rights and entitlements granted under §39.101(a) and (b). Austin maintains that PURA §40.055(a)(7) grants the municipally owned utility the authority to promulgate the customer protections granted by §39.101(a) and (b). The commission concurs with this assessment; however, PURA §40.055 grants authority to promulgate customer right and entitlement rules only for municipally-owned utilities and not for municipalities or political subdivisions that are required to register by PURA §39.354 and §39.3545 aggregators.

The commission concludes that PURA Chapter 40 specifically applies to municipally owned utilities and not to municipalities. Nowhere in Chapter 40 is a municipally owned utility granted authority to act as an aggregator. A municipality that chooses to aggregate its public facility loads with those of other political subdivisions must abide by Local Government Code §303.001 and join with other municipalities or political subdivisions to form a political

subdivision corporation. A municipality that chooses to aggregate the loads of affirmatively requesting citizens must abide by Local Government Code §303.002. PURA §39.354(a) and (b) combine to require a municipality aggregating pursuant to Local Government Code §303 to register. The commission therefore concludes that when municipalities aggregate pursuant to either Local Government Code §303.001 or §303.002, either they, or the political subdivision corporations they belong to, must register under Chapter 39 and be subject to the customer protections of Chapter 39 that identify the customer protection provisions for aggregators.

Consumers proposed an amendment to proposed subsection (h)(4) to clarify that material changes include new or amended authorizations for persons registering as public aggregators.

The commission agrees that such information is important, and, as discussed previously, has amended adopted subsection (f) to require this type of information. With respect to adopted subsection (i)(4), the commission agrees that this type of information is a material change, but concludes that the rule need not delineate all material changes.

TXU-REP questioned whether proposed subsection (h)(7)(A), regarding the use of financial resources, could be misconstrued to require an aggregator to freeze such financial resources, and maintained that such a freeze would impose an unnecessary hardship on some aggregators and limit entry into the aggregation market. TXU-REP proposed a clarifying statement allowing

registrants to make reasonable withdrawals from a cash or equivalent account required under proposed subsection (f)(1)(B) and (C).

The commission disagrees with TXU-REP. The commission concludes that such protected funds should not be used as a source of financing by an aggregator, particularly one that is unable to raise other forms of capital, and declines to adopt TXU-REP's proposed language. The commission notes, however, that the clarification of the types of financial evidence available in adopted subsection (g) should provide aggregators with a greater choice of financial alternatives to meet their customer protection requirements without putting customers at risk.

Proposed Subsection (i):

The commission adds language to adopted subsection (j) to clarify that significant violations "include, but are not limited to" adopted subsection (j)(1) – (11).

TC Cities proposed language for proposed subsection (i)(12) that would provide for revocation for failure to disclose agency and affiliate relationships and all trade names to residential and commercial customers.

The commission concludes that adopted subsection (j)(2) and (j)(4) capture the essence of TC Cities' proposal, and therefore no change to the rule is necessary.

According to TXU-REP, proposed subsection (i)(6) should identify only the suspension or revocation of any other aggregation registration, certification, or license, since some state and federal licenses are insignificant or purely administrative, and proposed language to that effect. TXU-REP maintained that a one-time accidental or inadvertent switch of a customer's REP should not be considered a significant violation; rather, a pattern of such switches should be used as a significant violation justifying suspension or revocation.

The commission concurs with TXU-REP that some certificate revocations are not associated with providing aggregation services, but clarifies that the list of violations cited in adopted subsection (j) is not intended to be automatic cause for revocation; rather the commission will address suspension or revocation on a case-by-case basis. For this reason, the commission declines to adopt TXU-REP's language.

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.

The amendment and new sections are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2000) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise

of its powers and jurisdiction; and specifically, §39.351, which grants the commission authority to require registration of power generation companies; §39.353, which grants the commission authority to establish terms and conditions necessary for the regulation of the reliability and integrity of aggregators; §39.354 and §39.3545, which require the commission to develop registration procedures for municipal and political subdivision aggregators; §39.356, which grants the commission authority to establish terms under which the commission may suspend or revoke a power generation company's or an aggregator's registration; and §39.357, which grants the commission authority to impose an administrative penalty for violations of §39.356.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 15.023, 15.024, 39.351, 39.353, 39.354, 39.3545, 39.356, and 39.357.

§25.105. Registration and Reporting by Power Marketers.

(a) **Purpose.** This section contains the registration and reporting requirements for a person intending to do business in Texas as a power marketer.

(b) **Applicability.**

(1) A power marketer becomes subject to this section on the date that it first buys or sells electric energy at wholesale in Texas.

(2) No later than 30 days after the date it becomes subject to this section, a power marketer shall register with the commission or provide proof that it has registered with the Federal Energy Regulatory Commission (FERC) or been authorized by the FERC to sell electric energy at market-based rates.

(c) **Initial information.** Regardless of whether it has registered with the FERC, a power marketer shall:

(1) Provide its address and the name, address, telephone number, facsimile transmission number, and e-mail address of the person to whom communications should be addressed; and the names and types of businesses of the owners (with percentages of ownership).

- (2) Identify each affiliate that buys or sells electricity at wholesale in Texas; sells electricity at retail in Texas; or is an electric or municipally owned utility in Texas.
 - (3) Describe the location of any facility in Texas used to provide service.
 - (4) Provide a description of the type of service provided.
 - (5) Submit copies of all of its FERC registration information, filed with FERC subsequent to the effective date of this section.
 - (6) Submit an affidavit by an authorized person that the registrant is a power marketer.
- (d) **Material change in information.** Each power marketer shall report any material change in the information provided pursuant to this section within 30 days of the change.
- (e) **Commission list of power marketers.** The commission will maintain a list of power marketers registered in Texas.

§25.109. Registration of Power Generation Companies and Self-Generators.

- (a) **Application.**

- (1) A person that owns an electric generating facility in Texas and is either a power generation company (PGC), as defined in §25.5 of this title (relating to Definitions), or a qualifying facility (QF) as defined in §25.5 of this title, and generates electricity intended to be sold at wholesale, must register as a PGC.
 - (2) A person that owns an electric generating facility rated at one megawatt (MW) or more, but is not a PGC, must register as a self-generator. A QF that does not sell electricity or provides electricity only to the purchaser of the facility's thermal output must register as a self-generator.
 - (3) A person that owned such generating facility prior to September 1, 2000 shall register after September 1, 2000 and before January 1, 2001. A person that becomes subject to this section after September 1, 2000 must register on or before the first date of generating electricity.
- (b) **Definitions.** The following words and terms, when used in this section, shall have the following meanings, unless the context indicates otherwise.
- (1) **Generating facility** – All generating units located at, or providing power to the electricity-consuming equipment at an entire facility or location.
 - (2) **Nameplate rating** – The full-load continuous rating of a generator under specified conditions as designated by the manufacturer.
 - (3) **Net dependable capability** – The maximum load in megawatts, net of station use, which a generating unit or generating station can carry under specified

conditions for a given period of time, without exceeding approved limits of temperature and stress.

- (4) **Person** – Includes an individual, a partnership of two or more persons having a joint or common interest, a mutual or cooperative association, and a corporation, but does not include an electric cooperative.

- (c) **Capacity ratings.** For purposes of this section, the capacity of generating units shall be reported as follows:

- (1) Renewable resource generating units shall be rated at the nameplate rating;
- (2) All other generating units having a nameplate rating of ten MW or less shall be rated at the nameplate rating; and
- (3) All other generating units having a nameplate rating greater than ten MW shall be rated at the summer net dependable capability. Self-generation units that are not required to calculate net dependable capability by the reliability council in which they operate or by the independent organization for the power region in which they operate shall be rated at the nameplate rating.

- (d) **Registration requirements for self-generators.** To register as a self-generator, a person shall provide the following information:

- (1) The legal name of the registering party.

- (2) The Texas business address and principal place of business of the registering party.
 - (3) The name, title, address, telephone number, facsimile transmission number, and e-mail address of the person to whom communications relating to the self-generator should be addressed.
 - (4) For each generating facility that is located in the state, the following information:
 - (A) Name;
 - (B) Location by county, utility service area, control area, power region, and reliability council; and
 - (C) Capacity rating in megawatts.
- (e) **Registration requirements for power generation companies.** To register as a PGC, a person shall provide the following information:
- (1) The legal name of the registering party as well as any trade or commercial name(s) under which the registering party intends to operate.
 - (2) The registering party's Texas business address and principal place of business.
 - (3) The name, title, address, telephone number, facsimile transmission number, and e-mail address of the person to whom communications should be addressed.
 - (4) The names and types of business of the registering party's corporate parent companies, along with percentages of ownership.

- (5) A description of the types of services provided by the registering party that pertain to the generation of electricity.
- (6) The name and corporate relationship of each affiliate that buys and sells electricity at wholesale in Texas, sells electricity at retail in Texas, or is an electric or municipally owned utility in Texas.
- (7) For each generating facility that is located in the state, the following information:
 - (A) Name;
 - (B) Location by county, utility service area, control area, power region, and reliability council; and
 - (C) Capacity rating in megawatts.
- (8) For any application filed with the Federal Energy Regulatory Commission (FERC) after the effective date of this section, copies of any information, excluding responses to interrogatories, that was filed in connection with the FERC registration, and any order issued by the FERC pursuant thereto. Such registrations shall include, for example, determination of exempt wholesale generator (EWG) or QF status.
- (9) An affidavit by an authorized person attesting that the registering party:
 - (A) Generates electricity that is intended to be sold at wholesale;
 - (B) Does not own a transmission or distribution facility in this state other than an essential interconnecting facility, a facility not dedicated to public

use, or a facility otherwise excluded from the definition of "electric utility" under §25.5 of this title; and

(C) Does not have a certificated service area.

(f) **Registration procedures.** The following procedures apply to the registration of PGCs and self-generators.

- (1) Registration shall be made by completing the form approved by the commission, which shall be verified by oath or affirmation and signed by an owner, partner, or officer of the registering party. Registration forms may be obtained from the Central Records division of the Public Utility Commission of Texas during normal business hours, or from the commission's Internet site. Each registering party shall file its registration form with the commission's Filing Clerk in accordance with the commission's procedural rules, Chapter 22 of this title, Subchapter E (relating to Pleadings and Other Documents).
- (2) The commission staff shall review the submitted form for completeness. Within 15 business days of receipt of an incomplete form, the commission staff shall notify the registering party in writing of the deficiencies in the request. The registering party shall have ten business days from the issuance of the notification to cure the deficiencies. If the deficiencies are not cured within ten business days, the staff will notify the registering party that the registration request is rejected without prejudice.

- (3) The registering party may designate answers or documents that it believes to contain proprietary or confidential information. Information designated as proprietary or confidential will be treated in accordance with the standard protective order issued by the commission applicable to registration information for PGCs and self-generators.
- (g) **Post-registration requirements for self-generators.** Self-generators shall report any material change during the preceding year in the information provided on the registration form by February 28 of each year.
- (h) **Post-registration requirements for power generation companies.** PGCs shall report any material change in the information provided on the registration form within 45 days of the change. A material change would include, for example, a merger or consolidation with another owner of electric generation facilities that offers electricity for sale in this state. PGCs shall comply with the reporting requirements of the commission's rules implementing the Public Utility Regulatory Act (PURA) §39.155(a).
- (i) **Suspension and revocation of power generation company registration and administrative penalty.** Pursuant to PURA §39.356, registrations of PGCs pursuant to this section are subject to suspension and revocation for significant violations of PURA or rules adopted by the commission. The commission may also impose an

administrative penalty for a significant violation at its discretion. Significant violations may include the following:

- (1) Failure to comply with the reliability standards and operational criteria duly established by the independent organization that is certified by the commission;
- (2) For a PGC operating in the Electric Reliability Council of Texas (ERCOT), failure to observe all scheduling, operating, planning, reliability, and settlement policies, rules, guidelines, and procedures established by the independent system operator in ERCOT;
- (3) Providing false or misleading information to the commission;
- (4) Engaging in fraudulent, unfair, misleading, deceptive or anti-competitive practices;
- (5) A pattern of failure to meet the conditions of this section, other commission rules, regulations or orders;
- (6) Suspension or revocation of a registration, certification, or license by any state or federal authority;
- (7) Failure to operate within the applicable legal parameters established by PURA §39.351; and
- (8) Failure to respond to commission inquiries or customer complaints in a timely fashion.

§25.111. Registration of Aggregators.

- (a) **Application.** Any person, municipality, political subdivision, or political subdivision corporation that aggregates the loads of two or more electric service customers for purposes of purchasing electricity services shall register with the Public Utility Commission of Texas (commission) pursuant to this section. A single electricity customer, including a municipality or political subdivision, negotiating service in multiple locations for its own use, does not need to register with the commission.
- (b) **Purpose statement.** The role of an aggregator in the restructured electric market is to be a buyer's agent for customer groups. An entity that joins customers together as a single purchasing unit and negotiates on their behalf for the purchase of electricity service in Texas is considered an aggregator and must register pursuant to this section. In contrast, an entity that sells electricity is a retail electric provider (REP) and is subject to other commission rules. This section sets out conditions for registering and operating as an aggregator, including the condition that the aggregator, a buyer's agent, may not be affiliated with a REP or other seller's agent representing the REP.
- (c) **Definitions.** The following words and terms, when used in this section, shall have the following meanings, unless the context indicates otherwise:
 - (1) **Aggregation** – to join two or more electricity customers into a purchasing unit to negotiate the purchase of electricity by the electricity customer as part of a

voluntary association of electricity customers, provided that an electricity customer may not avoid any non-bypassable charges or fees as a result of aggregating its load.

- (2) **Aggregator** – An entity is an aggregator, as opposed to a consultant, if it conducts any activity that joins two or more customers into a purchasing unit to negotiate the purchase of electricity from retail electric providers (REPs). If an entity conducts activities only in the capacity of advisor to a customer or set of customers, without contact with REPs specific to that customer or customer group, then it is a consultant that does not need to register pursuant to this section. An aggregator that provides aggregation services to Texas electricity customers must meet one of the following definitions:

(A) **Class I aggregator** – a person joining two or more customers, other than municipalities and political subdivision corporations, into a single purchasing unit to negotiate the purchase of electricity from REPs.

(B) **Class II aggregator** – a person or municipality or other political subdivision that provides aggregation services to municipalities or other political subdivisions in the manner stated below:

- (i) A person authorized by two or more municipal governing bodies to join the bodies into a single purchasing unit to negotiate the purchase of electricity from REPs or a municipality aggregating under Local Government Code, Chapter 303.

- (ii) A person or political subdivision corporation authorized by two or more political subdivision governing bodies to join the bodies into a single purchasing unit or multiple purchasing units to negotiate the purchase of electricity from REPs for the facilities of the aggregated political subdivisions or a person or political subdivision aggregating under Local Government Code, Chapter 303.
- (3) **Person** – an individual, a partnership of two or more persons having a joint or common interest, a mutual or cooperative association, or a corporation, but not including a municipal corporation or an electric cooperative. For purposes of this section, a political subdivision or political subdivision corporation is not a person.
- (4) **Political subdivision** – a county, municipality, hospital district, or any other political subdivision receiving electric service from an entity that has implemented customer choice.
- (5) **Political subdivision corporation** – an entity consisting of two or more political subdivisions created to act as an agent, or otherwise, to negotiate the purchase of electricity for the use of the respective public facilities in accordance with Local Government Code §303.001.
- (6) **Proprietary customer information** – any information compiled by an aggregator on a customer in the normal course of aggregating electric service

that makes possible the identification of any individual customer by matching such information with the customer's name, address, account number, type or classification of service, historical electricity usage, expected patterns of use, types of facilities used in providing service, individual contract terms and conditions, price, current charges, billing records, or any other information that the customer has expressly requested not be disclosed. Information that is redacted or organized in such a way as to make it impossible to identify the customer to whom the information relates does not constitute propriety customer information.

- (7) **Revocation** – the cessation of all aggregation business operations in the state of Texas, pursuant to commission order.
- (8) **Suspension** – the cessation of all aggregation business operations in the state of Texas associated with obtaining new customers, pursuant to commission order.

(d) **Types of aggregator registrations required.**

- (1) Entities seeking to aggregate electricity customers may not provide aggregation services in the state unless they have registered with the commission. Such registration may be sought after September 1, 2000.
- (2) There are two types of registration available to aggregators. An entity seeking to aggregate under the terms and conditions set forth in the Public Utility Regulatory Act (PURA) §39.353 shall register as a "Class I aggregator." An

entity seeking to aggregate under the terms and conditions set forth in PURA §39.354 or §39.3545, or both, shall register as a "Class II aggregator." The Class II category of registration has four subclasses, A through D. The terms of eligibility and operational requirements for each type of aggregator are specified in paragraphs (3) and (4) of this subsection. The registering party must indicate the Class and subclass, if any, under which it wishes to register. If a person is eligible and wishes to perform aggregation services under more than one class of registration, it shall obtain all applicable registrations.

(3) **Registration of Class I aggregators.** A Class I aggregator may join at least two voluntary customers into a single purchasing unit to negotiate the purchase of electricity from REPs. A Class I aggregator shall:

- (A) be a person and not a REP;
- (B) not be an affiliate of a REP;
- (C) not include municipalities, political subdivisions, or political subdivision corporations among the customers of an aggregation;
- (D) not take title to electricity, and not accept any money associated with payment or prepayment for electric service, as distinguished from aggregation services, unless it does so under contract with a REP, consistent with any rules adopted by the commission relating to customer billing as an independent billing agent for a REP;

- (E) comply with the customer protection rules, disclosure requirements, and marketing guidelines of PURA and this title;
 - (F) comply with any other terms and conditions established by the commission to regulate reliability and integrity of aggregators.
- (4) **Registration of Class II aggregators.** A Class II aggregator shall not be a REP or an affiliate of a REP and shall register pursuant to at least one of the following sets of eligibility and operational requirements:
- (A) **Class II.A: Person that aggregates municipalities, political subdivisions, or both.** A person registered as a Class II.A aggregator pursuant to this subparagraph may join two or more authorizing municipal governing bodies into a single purchasing unit to negotiate the purchase of electricity from REPs, or it may join two or more authorizing political subdivision governing bodies, including municipal governing bodies, into single or multiple purchasing units to negotiate the purchase of electricity from REPs for the facilities of the aggregated political subdivisions. A person aggregating political subdivisions pursuant to this subparagraph may not take title to electricity. The authorizations shall be written and may specify the buyer's agent role of the aggregator to the extent desired by the political subdivision.
 - (B) **Class II.B: Political subdivision corporation aggregating political subdivisions.** A political subdivision corporation registered as a Class

II.B aggregator pursuant to this subparagraph may join two or more authorizing political subdivision governing bodies, including municipal governing bodies, into single or multiple purchasing units to negotiate the purchase of electricity from REPs for the facilities of the aggregated political subdivisions. A political subdivision corporation aggregating political subdivisions pursuant to this subparagraph may take title to electricity.

- (C) **Class II.C: Public body that aggregates its citizens.** A municipality or other political subdivision registered as a Class II.C aggregator pursuant to this subparagraph may negotiate for the purchase of electricity and energy services on behalf of each affirmatively requesting citizen of the municipality in accordance with Local Government Code §303.002, with the option to contract with a third party or another aggregator for the administration of the aggregation of the purchased services. An affirmatively requesting citizen is a resident of the political subdivision who voluntarily agrees to participate in the aggregation by a means that may be verified after the fact. If the Class II.C aggregator contracts for the administration function with a third party that is a person, other than its own employee, the person must be a registered Class II.D aggregator.

- (D) **Class II.D: Administrator of citizen aggregation.** A person registered as a Class II.D aggregator pursuant to this subparagraph may administer the aggregation of electricity and energy services purchased for each requesting citizen of a municipality or other political subdivision in accordance with Local Government Code §303.002 pursuant to a contract with the municipality or political subdivision. An affirmatively requesting citizen is a resident of the political subdivision who voluntarily agrees to participate in the aggregation by a means that may be verified after the fact. A Class II.D aggregator must have verifiable authorization from the political subdivision to administer its citizen aggregation program. The authorization shall be written and may include conditions on the administrator's transactions with its affiliated REP, if any, when so specified by the political subdivision. The Class II.D registration authorizes its holder to administer a citizen aggregation program on behalf of the political subdivision but does not authorize its holder to negotiate for the purchase of electricity and energy services on behalf of the citizens of the political subdivision. An administrator of citizen aggregation must register pursuant to this subparagraph when the administrator meets the definition of "person" under this section, except when the administrator is an individual employed by the political subdivision conducting citizen aggregation pursuant to Local

Government Code §303.002. A Class II.D aggregator may not take title to electricity and may not be a REP or an affiliate of a REP.

(e) **Requirements for public bodies seeking to register as Class II.B or II.C aggregators.** A municipality, other political subdivision, or political subdivision corporation seeking to register and operate as a Class II.B or Class II.C aggregator in accordance with this section shall provide the following information on a registration form approved by the commission. This subsection does not apply to registering parties who are persons, as defined in this section.

- (1) The legal name of the registering party as well as any trade or commercial name(s) under which the registering party intends to operate;
- (2) The registering party's Texas business address and principal place of business;
- (3) The names and business addresses of the registering party's principal officers;
- (4) The names of the registering party's affiliates and subsidiaries, if applicable;
- (5) Telephone number of the customer service department or the name, title and telephone number of the customer service contact person;
- (6) Name, physical business address, telephone number, fax number, and e-mail address for a regulatory contact person and for an agent for service of process, if a different person;
- (7) The types of electricity customers that the registering party intends to aggregate;
and

- (8) Any other information required of public bodies on a registration form approved by the commission.

(f) **Requirements for persons seeking to register as a Class I or Class II.A or Class II.D aggregator.** A person seeking any registration under this section shall provide evidence of competency and experience in providing the scope and nature of its proposed services by providing the information listed in either paragraph (1) or (2) of this subsection on a registration form approved by the commission. This subsection does not apply to registering parties who are municipalities, other political subdivisions, or political subdivision corporations.

(1) **Standard registration.**

- (A) The legal name(s) of the registering party. A registering party may operate under a maximum of five trade or commercial names. At the time of registration, the registering party shall provide all names to the commission and an explanation of its plan for disclosing the names to its customers;
- (B) The Texas business address and principal place of business of the registering party;
- (C) The name, title, business address, and phone number of each of the registering party's directors, officers, or partners;

- (D) Address and telephone number for the customer or member service department or the name, title and telephone number of the customer service contact person;
- (E) Name, physical business address, telephone number, fax number, and e-mail address for a Texas regulatory contact person and for an agent for service of process, if a different person;
- (F) The types of electricity customers that the registering party intends to aggregate;
- (G) Applicable information on file with the Texas Secretary of State, including, but not limited to, the registering party's endorsed certificate of incorporation certified by the Texas Secretary of State, a copy of the registering party's certificate of good standing, or other business registration on file with the Texas Secretary of State;
- (H) Disclosure of delinquency with taxing authorities in the state of Texas;
- (I) A description of prior experience, if any, of the registering party or one or more of the registering party's principals or employees in the retail electric industry or a related industry;
- (J) The names of the affiliates and subsidiaries, if any, of the registering party that provide utility-related services, such as telecommunications, electric, gas, water or cable service;

- (K) Disclosure of any affiliate or agency relationships and the nature of any affiliate or agency agreements with REPs or transmission and distribution utilities, and an explanation of plans for disclosure to customers and REPs with whom it does business, of its agency relationships with REPs;
- (L) A list of other states, if any, in which the registering party and registering party's affiliates and subsidiaries that provide utility-related services, such as telecommunications, electric, gas, water, or cable service, currently conduct or previously conducted business;
- (M) Disclosure of the registering party's known or anticipated sources of compensation for aggregation services, and an explanation of plans for disclosure to its customers of the sources of compensation for aggregation services;
- (N) Disclosure of the history of bankruptcy or liquidation proceedings of the registering party or any predecessors in interest in the three calendar years immediately preceding the registration request;
- (O) Disclosure of whether the registering party, a predecessor, an officer, director or principal has been convicted or found liable for fraud, theft or larceny, deceit, or violations of any customer protection or deceptive trade laws in any state;

- (P) A statement indicating whether the registering party is currently under investigation, either in this state or in another state or jurisdiction for violation of any customer protection law or regulation;
- (Q) The following information regarding the registering party's complaint history during the three years preceding the application:
 - (i) Any complaint history regarding the registering party, registering party's affiliates or subsidiaries that provide utility-related services, such as telecommunications, electric, gas, water, or cable service, the registering party's predecessors in interest, and principals with public utility commissions or public service commissions in other states where the registering party is doing business or has done business in the past. Relevant information shall include, but not be limited to, the number of complaints, the type of complaint, status of complaint, resolution of complaint and the number of customers in each state where complaints occurred. The Office of Customer Protection shall provide similar complaint information on file at the commission for review.
 - (ii) Any complaint history regarding the registering party, registering party's affiliates or subsidiaries that provide utility-related services, such as telecommunications, electric, gas, water or

cable service, the registering party's predecessors in interest, and principals on file with the Texas Secretary of State, Texas Comptroller's Office, Office of the Texas Attorney General, and the Attorney General in other states where the registering party is doing business.

- (R) For a person registering as a Class II.A aggregator, pending authorizations, if any, from public entities for the registering party to aggregate their loads.
 - (S) Any other information required of persons on a registration form approved by the commission.
- (2) **Alternative limited registration.** A person seeking registration pursuant to this paragraph may aggregate only customers who seek to contract for 250 kilowatts or more, per customer, of peak demand electricity. Requirements for registration under this paragraph are as follows:
- (A) The person shall provide the commission a signed, notarized affidavit stating that it possesses a written consent from each customer it wishes to serve, authorizing the person to provide aggregation services for that customer;
 - (B) The person shall complete applicable portions of the registration form other than the information prescribed in paragraph (1)(J), (K), (L), (M) and (Q) of this subsection;

(C) The person shall meet financial requirements of this section, if applicable;

(D) A person registering on the basis of this paragraph is subject to the applicable post-registration requirements of subsection (i) of this section.

(g) **Financial requirements for certain persons.** A person registering under this section who intends to take any deposits or other advance payments from electricity customers for aggregation services, as distinguished from electric services, shall demonstrate financial resources necessary to protect customers from the loss of deposits or other advance payments through fraud, business failure or other causes. Aggregation services are distinct from retail electric services. A person registered initially on the basis of not accepting customer deposits or other advance payments for aggregation services shall amend its registration with a showing to the commission that it is able to comply with the requirements of this subsection in advance of accepting deposits or other advance payments for aggregation services.

(1) **Standard financial qualifications.** The amount of required financial resources shall equal the registering person's cumulative obligations to customers arising from deposits or other advance payments for aggregation services made by customers prior to the delivery of aggregation services. A person registering

under this paragraph shall disclose its methodology for calculating required financial resources on the registration form.

(A) **Financial evidence.** A aggregator may use any of the financial instruments listed below, as well as any other financial instruments approved in advance by the commission, in order to satisfy the financial requirements established by this rule.

- (i) Cash or cash equivalent, including cashier's check or sight draft;
- (ii) A certificate of deposit with a bank or other financial institution;
- (iii) A letter of credit issued by a bank or other financial institution, irrevocable for a period of at least 15 months;
- (iv) A line of credit or other loan issued by a bank or other financial institution, including a bond in a form approved by the commission, irrevocable for a period of at least 15 months;
- (v) A loan issued by a subsidiary or affiliate of the applicant or a corporation holding controlling interest in the applicant, irrevocable for a period of at least 15 months;
- (vi) A guaranty issued by a shareholder or principal of the applicant; a subsidiary or affiliate of the applicant or a corporation holding controlling interest in the applicant irrevocable for period of at least 15 months.

- (B) **Loans or guarantees.** To the extent that it relies upon a loan or guaranty described in subparagraph (A)(v) or (vi) of this paragraph, the aggregator shall provide financial evidence sufficient to demonstrate that the lender or guarantor possesses the financial resources needed to fund the loan or guaranty.
- (C) **Unencumbered resources.** All cash and other instruments listed in subparagraph (A) of this paragraph as evidence of financial resources shall be unencumbered by pledges for collateral. These financial resources shall be subject to verification and review prior to registration of the aggregator and at any time after registration in which the aggregator relies on the cash or other financial instrument to meet the requirements under this subsection. The resources available to the aggregator must be authenticated by independent, third party documentation.
- (D) **Credit ratings.** To meet the requirements of this paragraph, a aggregator may rely upon either its own investment grade credit rating, or a bond, guaranty, or corporate commitment of an affiliate or another company, if the entity providing such security is also rated investment grade. The determination of such investment grade quality will be based on the ratings of either Standard & Poors (S&P) or Moody's Investor Services (Moody's). If the investment grade credit rating of either S&P

or Moody's is suspended or withdrawn, the REP must provide alternative financial evidence consistent with this paragraph within ten days of the credit downgrade.

- (E) **Disclosure to financial backers.** A person registering under this paragraph shall provide evidence that a copy of this rule has been provided to any party providing, either directly or indirectly, financial resources necessary to protect customers pursuant to this paragraph.
- (F) **Ongoing Responsibilities.** A person registering under this paragraph is subject to the ongoing financial requirements and other applicable post-registration requirements of subsection (i) of this section.
- (2) **Alternative financial qualifications for limited registration.** A person seeking registration pursuant to this paragraph is limited to aggregating only customers who seek to contract for 250 kilowatts or more, per customer, of peak demand electricity. Requirements for registration on this limited basis are as follows:
 - (A) The person shall provide the commission a signed, notarized affidavit indicating that it has a written consent from each customer it wishes to serve, stating that the customer is satisfied that the aggregator can provide aggregation services without establishing the cash and credit resources prescribed in paragraph (1) of this subsection.

- (B) The person shall complete portions of the registration request form other than the information prescribed in paragraph (1) of this subsection;
 - (C) A person registering on the basis of this paragraph is subject to the applicable post-registration requirements of subsection (i) of this section.
- (h) **Registration procedures.** The following procedures apply to all entities seeking to register pursuant to this section:
 - (1) A registration request shall be made on the form approved by the commission, verified by oath or affirmation, and signed by a registering party owner or partner, or an officer of the registering party. The form may be obtained from the Central Records division of the commission or from the commission's Internet site. Each registering party shall file its form to request registration with the commission's Filing Clerk in accordance with the commission's procedural rules, Chapter 22 of this title, Subchapter E (relating to Pleadings and Other Documents).
 - (2) The registering party may identify certain information or documents submitted that it believes to contain proprietary or confidential information. Registering parties may not designate the entire registration request as confidential. Information designated as proprietary or confidential will be treated in

accordance with the standard protective order issued by the commission applicable to requests to register as an aggregator. If and when a public information request is received for information designated as confidential, the registering party has the burden of establishing that information filed pursuant to this rule is proprietary or confidential.

- (3) An application shall be processed as follows:
 - (A) The registering party shall immediately inform the commission of any material change in the information provided in the registration request while the request is pending.
 - (B) The commission staff shall review the submitted form for completeness. Within 15 business days of receipt of an incomplete request, the commission staff shall notify the registering party in writing of the deficiencies in the request. The registering party shall have ten business days from the issuance of the notification to cure the deficiencies. If the deficiencies are not cured within ten business days, the staff will notify the registering party that the registration request is rejected without prejudice.
 - (C) Based upon the information provided pursuant to subsections (e), (f), and (g) of this section, the commission shall determine whether a registering party is capable of fulfilling customer protection provisions, disclosure requirements, and marketing guidelines of PURA.

(D) The commission shall determine whether to accept or reject the registration request within 60 days of the receipt of a complete application. Unacceptable registrations will be rejected without prejudice to refiling.

(i) **Post-registration requirements.**

- (1) An aggregator may not refuse to provide aggregation services or otherwise discriminate in the provision of aggregation services to any customer because of race, creed, color, national origin, ancestry, sex, marital status, source or level of income, disability, or familial status; or refuse to provide aggregation services to a customer because the customer is located in an economically distressed geographic area or qualifies for low-income affordability or energy efficiency services; or otherwise unreasonably discriminate on the basis of the geographic location of a customer.
- (2) An aggregator shall comply with the commission's education, disclosure, and marketing guidelines and rules, including those pertaining to customer protection and the filing of regular reports on customer complaints. An aggregator may not release proprietary customer information to any person unless the customer authorizes the release in a manner approved by the commission. An aggregator shall disclose to customers, when a customer requests aggregation services, all

of its trade or commercial names, any agency relationships with REPs, and its sources of compensation for the provision of aggregation services.

- (3) An aggregator shall update any changes to business name, address, or phone number within ten business days from the date of the change.
- (4) An aggregator shall notify the commission within 30 days of any material change to its registration request, or if the registrant ceases to meet any commission requirements.
- (5) An aggregator may amend its registration by providing only the information relevant to the amendment on the registration form. The amendment shall be submitted pursuant to subsection (h)(1) of this section.
- (6) An aggregator shall file an annual report with the commission on September 1 of each year on a form approved by the commission.
- (7) An aggregator that is required to demonstrate financial qualifications specified in subsection (g)(1) of this section are subject to the following ongoing conditions:
 - (A) The aggregator shall maintain records on an on-going basis for any advance payments received from customers. Financial resources required under subsection (g)(1)(A) - (C) of this section, shall be maintained at levels sufficient to demonstrate that the registrant can cover all advanced payments that are outstanding at any given time.
 - (B) The aggregator shall file a sworn affidavit demonstrating compliance with subsection (g)(1)(A) - (D) of this section within 90 days of

receiving the first payment for aggregation services before those services are rendered.

- (C) Financial obligations to customers shall be payable to them within 30 business days from the date the aggregator notifies the commission that it intends to withdraw its registration or is deemed by the commission not able to meet its current customer obligations. Customer payment obligations shall be settled before registration is withdrawn.
 - (D) Financial resources required pursuant to subsection (g)(1) of this section shall not be reduced by the aggregator without the advance approval of the commission.
 - (E) The annual update required by paragraph (6) of this subsection shall include a sworn affidavit attesting to compliance with subsection (g)(1) of this section, and an explanation of the methodology for that compliance.
 - (F) The aggregator shall maintain records on an ongoing basis of authorizations from the public entities that have authorized it to provide aggregation services.
- (8) A person that initially received its registration on the basis of not accepting payments for aggregation services, and was therefore not subject to subsection (g) of this section, shall amend its registration with a showing to the commission

that it is able to comply with the requirements of subsection (g) of this section in advance of accepting payments.

(9) Persons registered pursuant to the alternative requirements for limited registration specified in subsections (f)(2) and (g)(2) of this section shall make available to the commission the written consent of individual customers, if requested.

(10) A registered aggregator that ceases to provide aggregation services may withdraw its registration by notifying the commission 30 days prior to ceasing operations and providing proof of refund of any monies owed to customers. An aggregator that withdraws its registration is not required to comply with paragraphs (1) - (9) of this subsection, following such a withdrawal.

(11) A registration shall not be transferred without prior commission approval. The transferee shall submit an application for registration in accordance with this section. The commission shall determine whether to approve the transfer within 60 days of the receipt of a complete application submitted in accordance with subsection (h) of this section.

(j) **Suspension and revocation of registration and administrative penalty.** Pursuant to PURA §39.356, registrations granted pursuant to this section are subject to suspension and revocation for significant violations of PURA or other rules adopted by the commission. At its discretion, the commission may also impose an administrative

penalty for a significant violation. Significant violations include, but are not limited to, the following:

- (1) providing false or misleading information to the commission;
- (2) engaging in fraudulent, unfair, misleading, deceptive or anti-competitive practices;
- (3) failing to maintain the minimum level of financial resources required under subsection (g)(1) of this section, if applicable;
- (4) a pattern of failure to meet the conditions of this section, other commission rules, or orders;
- (5) bankruptcy, insolvency, or failure to meet its financial obligations on a timely basis;
- (6) suspension or revocation of a registration, certification, or license by any state or federal authority;
- (7) conviction of a felony by the registrant or a principal or officer employed by the registrant, of any crime involving fraud, theft or deceit related to the registrant's aggregation service;
- (8) failure to operate within the applicable legal parameters established by PURA §§39.353, 39.354, 39.3545, and Local Government Code Chapter 303;
- (9) failure to respond to commission inquiries or customer complaints in a timely fashion;

- (10) switching or causing to be switched the REP of a customer without first obtaining the customer's authorization; or
 - (11) billing an unauthorized charge, or causing an unauthorized charge to be billed to a customer's retail electric service bill.
- (k) **Sunset of affiliate limitation.** The provisions of this section that speak to a prohibition on aggregators from affiliating with REPs cease to be effective July 1, 2003. When this occurs, the agency disclosures required in subsections (f)(1)(K) and (i)(2) of this section shall also include a requirement to disclose any affiliate relationships between the aggregator and REPs.

This agency hereby certifies that the rules, as adopted, have 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 rule §25.105 relating to Registration and Reporting by Power Marketers is hereby adopted with no changes to the text as proposed. It is therefore ordered by the Public Utility Commission of Texas that rule §25.109 relating to Registration of Power Generation Companies and Self-Generators, and §25.111 relating to Registration of Aggregators are hereby adopted with changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE 7th DAY OF JUNE, 2000.

PUBLIC UTILITY COMMISSION OF TEXAS

Chairman Pat Wood, III

Commissioner Judy Walsh

Commissioner Brett A. Perlman