

PROJECT NO. 35767

**RULEMAKING RELATING TO § PUBLIC UTILITY COMMISSION
CERTIFICATION OF RETAIL §
ELECTRIC PROVIDERS § OF TEXAS**

**PROPOSAL FOR PUBLICATION OF REPEAL OF §25.107 AND NEW §25.107
AS APPROVED AT THE OCTOBER 23, 2008 OPEN MEETING**

The Public Utility Commission of Texas (commission) proposes the repeal of §25.107, relating to Certification of Retail Electric Providers, and proposes new §25.107, relating to Certification of Retail Electric Providers. The proposed repeal and new rule will strengthen the certification requirements for retail electric providers (REPs) in order to better protect customers, transmission and distribution utilities (TDUs), and other REPs from the insolvency of REPs and other harmful conditions and activities of REPs. The repealed rule and new rule are competition rules subject to judicial review as specified in Public Utility Regulatory Act (PURA) §39.001(e). Project Number 35767 is assigned to this proceeding.

Mr. Neal Frederick, Financial Analyst, Rate Regulation Division, has determined that for each of the first five years the new rule is in effect, the enforcement and administration of the rule will not have fiscal implications or a foreseeable impact on the costs or revenues of state or local governments as a result of enforcing or administering the new section.

Mr. Frederick has also determined that for each of the first five years the rule is in effect the public benefits anticipated as a result of enforcing the rule will substantially outweigh any costs on persons required to comply with the rule. One of the rule's primary benefits is a reduced likelihood that a REP will become insolvent, which ultimately results in economic

loss to other REPs, TDUs, and customers. One or more REPs defaulted on their obligations to the Electric Reliability Council of Texas (ERCOT) in 2003, 2005, 2007, and 2008, and the customers of those REPs had to be transferred to other REPs. Such defaults impose substantial costs on ERCOT, customers, and other market participants. Customers incur financial costs arising from the loss of deposits paid to the defaulting REP. Customers also lose the benefit of the bargain they reached with the defaulting REP and may pay higher prices for electricity under provider of last resort (POLR) or market rates. In addition, ERCOT, REPs serving as POLRs, and TDUs incur administrative costs to execute a mass transition of the customers of the defaulting REP. TDUs also have financial losses arising from unpaid charges for delivery services provided to the defaulting REP. Finally, a REP default results in costs associated with unaccounted-for-energy (UFE) that are charged by ERCOT to the remaining REPs on a load-ratio basis.

Based on information gathered from market participants and other sources, Mr. Frederick estimates that defaults by six REPs in 2005 resulted in approximately \$7 million in losses arising from UFE costs to REPs and unpaid delivery charges to TDUs. This amount does not include the costs resulting from lost customer deposits, higher prices to customers for electricity under POLR or market prices, the administrative costs associated with the mass transition of customers, and unpaid charges from ERCOT, which Mr. Frederick was unable to quantify but which he believes are substantial. Five REPs defaulted in 2008. Based on an analysis similar to the analysis for 2005, Mr. Frederick estimates that the losses from UFE costs and unpaid TDU charges arising from four of those defaults totaled approximately

\$4.4 million. In addition, approximately 26,000 customers were affected by three of those defaults.

The overall health and vibrancy of the retail market may also be damaged by REP defaults. Potential market entrants with strong credit may choose not to participate due to the risk caused by the financial instability of other market participants. Customers may also lose confidence in the health of certain REPs, or the competitive market in general, which could lead to a flight to a small number of financially strong REPs. The rule reduces these risks by requiring existing REPs and market entrants to have the minimum financial and technical qualifications necessary to prudently manage a REP.

The rule can be considered as not having an economic cost to persons required to comply with this rule because the rule sets forth minimum requirements necessary to operate a REP prudently. These minimum standards are similar to the state's minimum requirements for automobile liability insurance.

To the extent that the rule does impose economic costs to persons required to comply with the rule, they would likely include additional capital costs and the costs of acquiring additional services or personnel to prepare financial statements and provide risk management services. The estimated one-time cost necessary to meet the capital requirements of the rule ranges from \$0 (for REPs that already comply) to \$2.2 million. Based on experience gained by the commission since retail competition began in 2001, however, the commission has concluded that the public benefits anticipated as a result of

enforcing this rule substantially outweigh the probable economic costs to persons required to comply.

As indicated above, because the rule sets forth minimum requirements necessary to operate a REP prudently, it can be considered to have no economic costs to, and no adverse effect on, persons required to comply with the rule. Nevertheless, Mr. Frederick has prepared an economic impact statement and regulatory flexibility analysis pursuant to Texas Government Code §2006.002. The commission has issued certificates to approximately 130 REPs. Approximately 30 of the 130 REPs (21%) are small or micro businesses. About half of the small and micro businesses are not currently serving customers. The small and micro businesses that are serving customers represent about \$25 million in combined annual revenues and about 0.53% of annual ERCOT load. Mr. Frederick estimates that five REPs that qualify as small or micro businesses defaulted in 2008.

To the extent that the rule can be considered to have an adverse impact on REPs that qualify as small or micro businesses, the impact may depend on the ability of the small or micro business to obtain additional capital. Some of the small or micro businesses may not have the financial ability to maintain REP certification under the rule. To reduce these potential impacts on REPs, including small and micro businesses, the rule provides a period of time for REPs to establish compliance with the new financial requirements.

The commission considered alternatives to the rule such as adopting different financial standards for small and micro businesses or exempting small and micro businesses from

some of the requirements. Based on experience gained by the commission since retail competition began in 2001, however, the commission concluded that these alternatives would jeopardize the public benefits of the rule arising from improved REP credit quality standards, stronger protections for customer deposits and TDU charges, better and more frequent financial reporting, and stronger managerial experience requirements. The commission has determined that the benefits accruing to the public from applying the rule to small and micro businesses will substantially outweigh any adverse economic impacts on small and micro businesses.

Mr. Frederick has also determined that for each year of the first five years the rule is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rulemaking, if requested pursuant to the APA, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on Tuesday, December 30, 2008, beginning at 1:30 p.m. The request for a public hearing must be received within 30 days after publication of the rule.

Initial comments on the rule may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 31 days after publication. Reply comments may be submitted within 45

days after publication. Sixteen copies of comments on the rule are required to be filed pursuant to §22.71(c) of this title. Comments should be organized in a manner consistent with the organization of the rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the rule. The commission will consider the costs and benefits in deciding whether to adopt the rule. All comments should refer to Project Number 35767.

Additionally, the commission solicits comments on the following questions regarding the protection of customer deposits in the event of a REP failure, including bankruptcy:

1. How can the commission protect customer deposits from a REP bankruptcy while still allowing the REP access to the deposits to cover nonpayment? Please provide specific language for a letter of credit, escrow agreement, or other instrument that would accomplish this purpose.
2. How should such a program be administered? For example, should the REP use its bank to hold and disburse customer deposits or should some other third party be used?
3. What mechanism would provide the most cost-effective means of protecting customer deposits in the event of a REP failure, including bankruptcy?
4. Given the current instability in the financial markets and the substantial differences in the collateral required for an (f)(1)(A) REP versus an (f)(1)(B) REP, does the rule adequately address what happens if a REP suddenly moves from one category to another as a result of a credit downgrade?

5. Will our POLR and/or disclosure rules obviate the need for certain provisions of this rule? If so, please discuss the provisions and the impact that the other rules will have on the competitive market, REPs, and their customers.
6. General rate case principles require TDUs to prove that an expense is reasonable and necessary, in order to recover it. Is any additional language required in subsection (f)(3)(C) to make it clear what the TDU must prove in a rate case to obtain cost recovery of a regulatory asset related to REP bad debt?
7. Does PURA give the commission the authority to pre-approve the transfer of a REP certificate?

The repeal and new rule are proposed under PURA, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2008), which requires the commission to adopt rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §39.352, which requires the commission to certify a person as a REP if the person demonstrates, among other things, the financial and technical resources to provide continuous and reliable electric service, the managerial and technical ability to supply electricity at retail in accordance with customer contracts, and the resources needed to meet customer protection requirements and which requires a person applying for certification as a REP to comply with all customer protection provisions, disclosure requirements, and marketing guidelines established by the commission and PURA; PURA §17.004, which authorizes the commission to adopt and enforce rules concerning REPs that protect customers against fraudulent, unfair, misleading, deceptive, or anticompetitive practices and that impose minimum service standards relating to customer deposits and termination of service; PURA

§§17.051-17.053, which authorize the commission to adopt rules for REPs concerning certification, changes in ownership and control, customer service and protection, and reports; and PURA §39.101, which authorizes the commission to adopt and enforce rules that ensure retail customer protections that entitle a customer: to safe, reliable, and reasonably priced electricity, to other information or protections necessary to ensure high-quality service to customers including protections relating to customer deposits and quality of service, and to be protected from unfair, misleading, or deceptive practices, and which requires the commission to ensure that its customer protection rules provide at least the same level of customer protection against potential abuses and the same quality of service that existed on December 31, 1999.

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

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

(a) **Applicability.** This section applies to all persons who provide or seek to provide electric service to retail customers in an area in which customer choice is in effect and to retail customers participating in a customer choice pilot project authorized by the commission. This section does not apply to the state, political subdivisions of the state, electric cooperatives or municipal corporations, or to electric utilities providing service in an area where customer choice is not in effect. An electric cooperative or municipally owned utility participating in customer choice may offer electric energy and related services at unregulated prices directly to retail customers who have customer choice without obtaining certification as a REP.

(1) A person must obtain a certificate pursuant to this subsection before purchasing, taking title to, or reselling electricity in order to provide retail electric service.

(2) A person who does not purchase, take title to, or resell electricity in order to provide electric service to a retail customer is not a REP and may perform a service for a REP without obtaining a certificate pursuant to this section.

(3) A REP that outsources retail electric functions remains responsible under commission rules for those functions.

(4) A REP may not own or operate generation assets.

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

- (1) Continuous and reliable electric service – Retail electric service provided by a REP that is consistent with the customer’s terms and conditions of service and uninterrupted by unlawful or unjustified action or inaction of the REP.
- (2) Customer – Any entity who has applied for, has been accepted for, or is receiving retail electric service from a REP for use on an end-use basis.
- (3) Default – As defined in a transmission and distribution utility (TDU) tariff for retail delivery service, Electric Reliability Council of Texas (ERCOT) qualified scheduling entity (QSE) agreement, or ERCOT load serving entity (LSE) agreement.
- (4) Guarantor – A parent company or shareholder providing a guaranty agreement or corporate commitment or a financial institution providing a credit support agreement pursuant to this section.
- (5) Investment Grade credit rating – A long-term unsecured credit rating of at least “Baa3” from Moody’s Investors’ Service, or “BBB-“ from Standard & Poor’s or Fitch, or a comparable rating from any other nationally recognized rating agency.
- (6) Liquid capital – Cash or cash equivalents, including cash that is readily available through a credit facility.
- (7) Permanent employee – An individual that a REP intends to employ for at least six months starting from the time in question. A consultant is not a permanent employee.
- (8) 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 or a municipal corporation.

(9) Principal – a person or a member of a group of persons that has significant control of the person in question.

(10) Retail electric provider – A person that sells electric energy to retail customers in this state. As provided in Public Utility Regulatory Act (PURA) §39.353(b), a REP is not an aggregator.

(11) Sanction – A finding in a commission final order that a REP violated PURA, a commission rule, or other law within the commission’s jurisdiction.

(12) Tangible net worth – Total shareholder’s equity less goodwill and other intangible assets.

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

(1) A person applying for certification as a REP must demonstrate its capability of complying with this section. A person who operates as a REP or who receives a certificate under this section shall maintain compliance with this section.

(2) An application for certification shall be made on a form approved by the commission, verified by oath or affirmation, and signed by an applicant’s principal.

(3) Except where good cause exists to extend the time for review, the presiding officer shall issue an order finding whether an application is deficient or complete within 20 days of filing. Deficient applications, including those

without necessary supporting documentation, will be rejected without prejudice to the applicant's right to reapply.

(4) While an application for a certificate is pending, an applicant shall inform the commission of any material change in the information provided in the application within ten days of any such change.

(5) Except where good cause exists to extend the time for review, the commission shall enter an order approving, rejecting, or approving with modifications, an application within 90 days of the filing of the application.

(d) **REP certification requirements.** A person seeking certification under this section may apply to provide services under paragraph (1) or (2) of this subsection, and shall designate its election in the application.

(1) **Option 1.** This option is for a REP whose service offerings will be limited by geographic service area.

(A) An applicant must designate one of the following categories as its geographic service area:

(i) The geographic area of the entire state of Texas;

(ii) A specific geographic area (indicating the zip codes applicable to that area);

(iii) The service area of specific TDUs, TDUs or specific municipal utilities or electric cooperatives in which competition is offered; or

(iv) The geographic area of ERCOT or other independent organization to the extent it is within Texas.

(B) A REP with a geographic service area is subject to all subsections of this section, including those pertaining to basic, financial, technical and managerial, customer protection, and reporting and changing certification requirements.

(C) The commission shall grant a certificate to an applicant proposing to provide retail electric service to a geographic service area in Texas if it demonstrates that it meets the requirements of this section.

(D) The commission shall deny an application if the configuration of the proposed geographic area would discriminate in the provision of electric service to any customer because of race, creed, color, national origin, ancestry, sex, marital status, lawful source of income, disability, or familial status; because the customer is located in an economically distressed geographic area or qualifies for low income affordability or energy efficiency services; or because of any other basis prohibited by law.

(2) **Option 2.** This option is for a REP whose service offerings will be limited to specific customers. A REP may offer service to specific customers, each of whom contracts for one megawatt or more of capacity. The applicant shall be certified as a REP only for purposes of serving the specified customers. The commission shall grant a certificate under this paragraph if the applicant demonstrates that it meets the requirements of this paragraph.

(A) A person seeking certification under this paragraph must file with the commission a signed, notarized affidavit from each customer, with

whom it has contracted to provide one megawatt or more of capacity.

The affidavit must state that the customer is satisfied that the REP meets the standards prescribed by PURA §39.352 (b)(1)-(3) and (c).

(B) The following subsections apply to REPs certified pursuant to this paragraph:

(i) Subsection (e) of this section, relating to basic requirements;

(ii) Subsection (f)(5) of this section, relating to billing and collection of transition charges; and

(iii) Subsection (i) of this section, relating to requirements for reporting and changing certification.

(e) **Basic requirements.**

(1) **Names on certificates.** All retail electric service shall be provided in the names under which the certificate was granted. If the applicant is a corporation, the commission shall issue the certificate in the corporate name of the applicant.

(A) No more than five assumed names may be authorized for use by any one REP at one time.

(B) Business names shall not be deceptive, misleading, vague, otherwise contrary to §25.272 of this title (relating to Code of Conduct for Electric Utilities and Their Affiliates), or duplicative of a name previously approved for use by a REP certificate holder.

(C) If the commission determines that any requested name does not meet the requirements of subparagraph (B) of this paragraph, it shall notify

the applicant that the requested name shall not be used by the REP.

An application shall be dismissed if an applicant does not provide at least one suitable name.

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

(f) **Financial requirements.**

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

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

(i) an investment-grade credit rating; or

(ii) tangible net worth greater than or equal to \$100 million, a minimum current ratio (current assets divided by current

liabilities) of 1.0, and a debt to total capitalization ratio not greater than 0.60.

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

(i) liquid capital not less than \$3 million;

(ii) liquid capital not less than \$2 million, provided that the REP has continuously served retail customers in the Texas retail market without sanction or default for at least two years, or

(iii) liquid capital not less than \$1 million, provided that the REP has continuously served retail customers in the Texas retail market without sanction or default for at least three years.

(C) A REP that obtained certification pursuant to this section before the effective date of this new rule and does not meet the requirements of either subparagraph (A) or subparagraph (B) of this paragraph may continue to operate as a REP until six months after the effective date of this new rule. The REP shall notify the commission no later than six months after the effective date of this new rule that it cannot satisfy the financial requirements of either subparagraph (A) or subparagraph (B) of this paragraph and cease operations pursuant to subsection (i)(7) of this section no later than 12 months after the effective date of this new rule. The REP shall meet all of the requirements of this section, other than subsections (f)(1)(A) and (B)

of this section, and shall meet the requirements of subsection (f)(1) of repealed §25.107(f)(1) of this title (relating to Certification of Retail Electric Providers (REPs)) as it existed six months after the effective date of this new rule.

(2) Protection of customer deposits.

(A) A REP certified pursuant to paragraph (1)(A) of this subsection shall keep customer deposits in a restricted cash account or an escrow account, or provide an irrevocable stand-by letter of credit in an amount sufficient to cover 100% of the REPs outstanding customer deposits and advance payments at all times.

(B) A REP certified pursuant to paragraph (1)(B) of this subsection shall keep customer deposits in an escrow account or provide an irrevocable stand-by letter of credit in an amount sufficient to cover 100% of the REP's outstanding customer deposits and advance payments at all times.

(3) Protection of TDU financial integrity.

(A) A TDU shall not require a deposit from a REP certified pursuant to paragraph (1)(A) of this subsection except to secure the payment of transition charges as provided in §25.108 of this title (relating to Financial Standards for Retail Electric Providers Regarding Billing and Collection of Transition Charges).

(B) A TDU may require a REP certified pursuant to paragraph (1)(B) of this subsection to provide security for payments of amounts billed. The size of the deposit, type of security, and other factors shall be prescribed by the TDU's tariff for retail delivery service.

(C) A TDU shall create a regulatory asset for bad debt expenses, net of collateral posted pursuant to subparagraph (B) of this paragraph, resulting from a REP's default on its obligation to pay delivery charges to the TDU.

(4) Financial documentation. Investment-grade credit ratings shall be documented by reports of a credit reporting agency.

(A) Tangible net worth shall be documented by audited financial statements for the most recent completed calendar or fiscal year, and unaudited financial statements for the most recent completed quarter. Audited financial statements shall include the accompanying notes and the independent auditor's report. Unaudited financial statements shall include the accompanying notes and the accountant's report

stating that the unaudited financial statements have been prepared in accordance with generally accepted accounting principles.

(B) Liquid capital shall be documented by providing financial statements pursuant to subparagraph (A) of this paragraph, or independent third party documentation of a REP's cash and equivalents, revolving credit facilities, or lines of credit, net of any pledges for collateral.

(C) Restricted cash accounts shall be documented by an account statement that clearly identifies the financial institution that manages the account and the account holder, and that clearly states that the account is a customer deposit account.

(D) Escrow accounts shall be documented by the current account statement and the escrow account agreement, which shall be executed using a standard form agreement approved by the commission.

(E) If a REP chooses to provide an irrevocable stand-by letter of credit to protect customer deposits, the irrevocable stand-by letter of credit must be issued by a financial institution rated "A3" or better by Moody's Investors' Service or "A-" or better by Standard & Poor's or Fitch, or with a comparable rating from any other nationally recognized rating agency. The REP shall use the standard form irrevocable stand-by letter of credit approved by the commission. The irrevocable stand-by letter of credit must permit the commission's executive director to draw on the irrevocable stand-by letter of credit at such time that a mass transition of the REP's customers is carried

out by ERCOT or any time thereafter, and permit a draw to be made in part or in full.

(F) A REP may rely on a guaranty agreement or corporate commitment from a parent company or shareholder holding a controlling interest in the REP, provided that the parent company or shareholder holding a controlling interest satisfies the capital requirements of subsection (f)(1) of this section. The REP shall use the standard form guaranty agreement approved by the commission. A REP may rely on a credit support agreement from a financial institution with a long-term unsecured credit rating of “A3” or better from Moody’s Investors’ Service or “A-” or better from Standard and Poor’s or Fitch, or comparable rating agency, provided that the agreement irrevocably and unconditionally guarantees the payment of the REP’s obligations to customers and TDUs.

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

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

(1) Technical and managerial resource requirements include:

- (A) Capability to comply with all applicable scheduling, operating, planning, reliability, customer registration, and settlement policies, protocols, guidelines, procedures, and other rules established by ERCOT or other applicable independent organization including any independent organization requirements for 24-hour coordination with control centers for scheduling changes, reserve implementation, curtailment orders, interruption plan implementation, and telephone number, fax number, e-mail address, and postal address where the REP's staff can be directly reached at all times.
- (B) Capability to comply with the registration and certification requirements of ERCOT or other applicable independent organization and its system rules, or contracts for services with entities registered with or certified by ERCOT or other applicable independent organization.
- (C) Financial capability to purchase ancillary services as may be required by ERCOT or other applicable independent organization.
- (D) Compliance with all renewable energy portfolio standards in accordance with §25.173 of this title (relating to Goal for Renewable Energy).
- (E) Principals or permanent employees in managerial positions whose combined experience in the competitive retail electric industry or competitive gas industry equals or exceeds 15 years. An individual

that was a principal of a REP that had a default shall not be considered for purposes of satisfying this requirement.

- (F) At least one principal or permanent employee who has five years of experience in commodity risk management of a substantial energy portfolio. Alternatively, the REP may provide documentation demonstrating that the REP has entered into a contract for a term not less than two years with a provider of commodity risk management services that has been providing such services for a substantial energy portfolio for at least five years. A substantial energy portfolio means managing electricity or gas market risks with a minimum value of at least \$100,000.
- (G) Adequate staffing and employee training to meet all service level commitments.
- (H) The capability and effective procedures to be the primary point of contact for retail electric customers for distribution system service in accordance with applicable commission rules, including procedures for relaying outage reports to the TDU on a 24-hour basis.
- (I) A customer service plan that describes how the REP complies with the commission's customer protection and anti-discrimination rules.
- (2) An applicant shall include the following in its initial application for REP certification:

(A) Prior experience of one or more of the applicant's principals or permanent employees in the competitive retail electric industry or competitive gas industry;

(B) Any complaint history, disciplinary record and compliance record during the 36 months immediately prior to the filing of the application regarding the applicant, the applicant's affiliates that provide utility services such as telecommunications, electric, gas, water, or cable service; the applicant's predecessors in interest, and the applicant's principals with any federal agency including the U.S. Securities and Exchange Commission, any self-regulated organization at which the applicant has conducted sales of stocks or other financial transactions, state public utility commissions, attorney general offices, or other regulatory agencies in states where the applicant is doing business or has conducted business in the past including state securities boards, the Texas Secretary of State, Texas Comptroller's Office, and Office of the Texas Attorney General. Relevant information shall include the type of complaint, status of complaint, resolution of complaint, and the number of customers in each state where complaints occurred. The commission may also consider any complaint information on file at the commission;

(C) A summary of any history of insolvency, bankruptcy, dissolution, merger, or acquisition of the applicant or any predecessors in interest during the 36 months immediately preceding the application;

(D) A statement indicating whether the applicant, the applicant's predecessors in interest, or the applicant's principals are currently under investigation or have been penalized by an attorney general or any state or federal regulatory agency for violation of any deceptive trade or consumer protection laws or regulations;

(E) Disclosure of whether the applicant, the applicant's predecessors in interest, or applicant's principals have been convicted or found liable for fraud, theft, larceny, deceit, or violations of any customer protection or deceptive trade laws in any state;

(F) An affidavit stating that the applicant will register with or be certified by ERCOT or other applicable independent organization and will comply with the technical and managerial requirements of this subsection; or that entities with whom the applicant has a contractual relationship are registered with or certified by the independent organization and will comply with all system rules established by the independent organization; and

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

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

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

(1) A REP shall notify the commission within 15 days of any change in its business address, telephone numbers, authorized contacts, or other contact information.

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

(3) A REP shall apply to amend its certification within ten days of a material change to the information provided as the basis for the commission's approval of the certification application. A REP may seek prior approval of a material change, including a change in control, by filing the amendment application before the occurrence of the material change. The transfer of a REP certificate is a material change.

(4) A REP shall notify the commission within three days of its violation of subsection (f)(1)(A) or (f)(1)(B) of this section. The commission staff may initiate a proceeding to address the violation.

(5) A REP shall file an annual report by April 1 each year reporting information for the preceding calendar year. A REP's first annual report is due in the year following the calendar year in which it is awarded a certificate regardless of whether the REP is serving customers. The annual report shall include the following information:

- (A) Any changes in addresses, telephone numbers, authorized contacts, and other information necessary for contacting the certificate holder.
 - (B) For an Option 1 REP, identification of areas where the REP is providing retail electric service to customers in Texas compiled by zip code.
 - (C) Audited financial statements for the most recent completed calendar or fiscal year with accompanying footnotes and the independent auditor's report, and all documentation required by subsection (f)(4) of this section to demonstrate ongoing compliance with the financial requirements of subsection (f) of this section, including the amount of customer deposits and the balance of an account in which customer deposits are held.
 - (D) A list of aggregators with whom the REP has conducted business in the reporting period, and the commission registration number for each aggregator.
 - (E) A sworn affidavit that the certificate holder is not in material violation of any of the requirements of its certificate.
 - (F) Changes in ownership, management, experience, and personnel relied on for certification.
- (6) A REP shall file unaudited financial statements with accompanying footnotes and the review report or compilation letter from an independent auditor not later than 45 days after the close of the REP's fiscal quarter.

- (7) A REP shall not cease operations as a REP without prior notice of at least 45 days to the commission, to each of the REP's customers to whom the REP is providing service on the planned date of cessation of operations, and to other affected persons, including the applicable independent organization, TDUs, electric cooperatives, municipally owned utilities, generation suppliers, and providers of last resort. The REP shall file with the commission proof of refund of any monies owed to customers. Upon the effective cessation date, a REP's certificate will be suspended. A REP must demonstrate compliance with certification requirements in order for the commission to reinstate the certificate. The commission may revoke a suspended certificate if it determines that the REP does not meet certification requirements.
- (8) If a REP files a petition in bankruptcy, is the subject of an involuntary bankruptcy proceeding, or in any other manner becomes insolvent, it shall notify the commission within three days of this event and shall provide the commission a summary of the nature of the matter. The commission shall have the right to proceed against any financial resources that the REP relied on in obtaining its certificate, to satisfy unpaid obligations to customers or administrative penalties.
- (9) All applications, reports, and notifications to the commission required by this section shall be filed with the commission's Filing Clerk in accordance with the commission's Procedural Rules, Chapter 22, Subchapter E, of this title (relating to Pleadings and other Documents).

(10) A REP shall respond within three days to any commission staff request for additional information to confirm continued compliance with this section.

(j) **Suspension and revocation.** A certificate granted pursuant to this section is subject to amendment, suspension, or revocation by the commission for a significant violation of PURA, commission rules, or rules adopted by an independent organization. A suspension of a REP certificate requires the cessation of all REP activities in the state of Texas associated with obtaining new customers. A revocation of a REP certificate requires the cessation of all REP activities in the state of Texas, pursuant to commission order. The commission may also impose an administrative penalty on a person for a significant violation of PURA, commission rules, or rules adopted by an independent organization. The commission staff or any affected person may bring a complaint seeking to amend, suspend, or revoke a REP's certificate. Significant violations include the following:

(1) Providing false or misleading information to the commission;

(2) Engaging in fraudulent, unfair, misleading, deceptive, or anticompetitive practices, or unlawful discrimination;

(3) Switching, or causing to be switched, the retail electric provider for a customer without first obtaining the customer's permission;

(4) Billing an unauthorized charge, or causing an unauthorized charge to be billed, to a customer's retail electric service bill;

(5) Failure to maintain continuous and reliable electric service to customers pursuant to this section;

- (6) Failure to maintain financial resources in accordance with subsection (f) of this section;
- (7) Bankruptcy, insolvency, or the inability to meet financial obligations on a reasonable and timely basis;
- (8) Failure to timely remit payment for invoiced charges to an independent organization;
- (9) Failure to observe any applicable scheduling, operating, planning, reliability, and settlement policies, protocols, guidelines, procedures, and other rules established by the independent organization;
- (10) A pattern of not responding to commission inquiries or customer complaints in a timely fashion;
- (11) Suspension or revocation of a registration, certification, or license by any state or federal authority;
- (12) Conviction of a felony by the certificate holder or principal employed by the certificate holder, or any crime involving fraud, theft, or deceit related to the certificate holder's service;
- (13) Not providing retail electric service to customers within 24 months of the certificate being granted by the commission;
- (14) Failure to serve as a provider of last resort if required to do so by the commission;
- (15) Providing retail electric service in an area in which customer choice is in effect without obtaining a certificate under this section; and

(16) Other significant violations, including the failure or a pattern of failures to meet the requirements of this section or other commission rules or orders.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

**ISSUED IN AUSTIN, TEXAS ON THE 24th DAY OF OCTOBER 2008 BY THE
PUBLIC UTILITY COMMISSION OF TEXAS
ADRIANA A. GONZALES**

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