PROJECT NO. 49794

RULEMAKING FOR BROKER REGISTRATIONS	**§**	**PUBLIC UTILITY COMMISSION**
	§	
	§	**OF TEXAS**

ORDER ADOPTING NEW §§25.112 and 25.486
AS APPROVED AT THE MAY 1, 2020 OPEN MEETING

The Public Utility Commission of Texas (commission) adopts new 16 Texas Administrative Code (TAC) §25.112, relating to registration of brokers, and new 16 TAC §25.486, relating to customer protections for brokerage services with changes to the proposed text as published in the November 29, 2019 issue of the *Texas Register* (44 TexReg 7274). These rules will implement the requirements of Public Utility Regulatory Act (PURA) §39.3555 enacted as Senate Bill 1497 by the 86th Texas Legislature, Regular Session, and effective on September 1, 2019. These new sections are adopted under Project Number 49794.

The commission received comments on the proposed new sections from John Turala; Bottom Line Energy; Electricity Ratings, LLC; Oncor Electric Delivery Company LLC; Office of Public Utility Counsel (OPUC); Energy Ogre; RES Nation LLC; Alliance for Retail Markets (ARM); J. Pollock, Inc; Power Wizard, LLC; Texas Energy Association for Marketers (TEAM); Calpine Retail; The Energy Professionals Association (TEPA); and Brasovan Group LLC. The commission received reply comments on the proposed new sections from Energy Ogre; Enel X North America Inc; Power Wizard; CenterPoint Energy, Inc.; ARM; TEAM; AEP Energy, Inc.; OPUC; Calpine Retail; TEPA, and Patriot Energy Group, Inc and EMEX, LLC (collectively, EMEX/Patriot).

General Application of Aggregator Requirements to Brokers

OPUC, ARM, and Calpine each argued that the legislative intent behind PURA §39.3555 (for consistency, commenter references to Senate Bill 1497 are summarized as referencing PURA §39.3555) is for the commission to regulate brokers in a similar fashion as it regulates aggregators. Each of these three commenters pointed to the *2019 Scope of Competition Report in Electric Markets in Texas: Report to the 86th Legislature*, in which the commission recommended that "the Legislature require retail electric brokers to register with the Commission in a manner similar to retail electric aggregators to ensure that customers who use a retail electric broker have adequate customer protections." ARM and OPUC each also referenced versions of the author's statement of intent for PURA §39.3555, which each described the bill as creating the same registration standard for brokers as currently applies to aggregators.

With regard to broker registration requirements, OPUC argued that the legislative history indicates that the commission should apply the same registration requirements to brokers as currently apply to aggregators. ARM, on the other hand, pointed to additional legislative intent that was read into the record by State Representatives Tan Parker and Jim Murphy that indicated that registration should require only basic information about brokers and not require disclosure of any of their "secret sauce" with regard to how they operate their business. ARM interpreted the legislative history of PURA §39.3555 as evidencing the Legislature's intent to treat "brokers 'the same' as aggregators for customer protection purposes while minimizing any administrative or financial burden associated with registration."

In reply comments, TEPA argued that the application of aggregator requirements to brokers is not provided for by the preexisting provisions of PURA or the new provisions contained in PURA §39.3555. TEPA further argues that PURA §39.001 provides the commission with specific directives including that "electric services and their prices should be determined by customer choices and the normal forces of competition" as provided by PURA §39.001(a); that regulatory authorities may not make rules or issue orders regulating competitive electric services, prices, or competitors or restricting or conditioning competition" as provided by PURA §39.001(c); and that regulatory authorities must "order competitive rather than regulatory methods…to the greatest extent feasible" as provided by PURA §39.001(d).

TEPA argued that PURA clearly intends that brokers be regulated differently than aggregators. TEPA points to a number of differences between PURA §39.3555 and the "more extensive provisions for aggregators enacted in the original provisions of Chapter 39." TEPA also noted that PURA §§39.353 (a), (b), (d), (e), (g), (h); and 39.3535, 39.354, 39.3545, 39.356, and 39.357 all apply to aggregators and not brokers, providing more evidence in support of treating the two entity types differently.

Commission Response

The adopted rules are intended to provide a straightforward registration process together with the customer protections that are appropriate for brokers. The adopted rules are necessarily informed by the commission's experience with other competitive entities, such as aggregators, but the provisions in these rules are tailored to the provision of brokerage services and the requirements of PURA §39.3555. The commission declines to make

changes based upon these general comments. The commission will respond to specific requests to adopt rules for brokers that are similar to rules that currently apply to aggregators in the appropriate sections below.

General Comments on 16 TAC §25.112

Comments Addressing Interim Registration

Beginning August 8, 2019, the commission accepted interim registrations from brokers to implement the new registration requirement pending development of a new rule. Brokers that submitted completed interim registration forms were assigned an interim registration number. ARM and TEAM each recommended that the commission require brokers with interim registrations to reregister using the commission's new registration form by July 1, 2020. TEAM and ARM further recommended that brokers with interim registrations be allowed to continue providing brokerage services until September 1, 2020, with the caveat that operating under an interim registration during this period does not constitute an exemption from the commission's customer protection rules. OPUC agreed that brokers with interim registrations should be required to reregister.

Commission Response

The commission declines to require brokers with interim registrations to reregister because doing so would impose an unnecessary burden on brokers and commission staff. The registration requirements included in new 16 TAC §25.112 are not materially different from the requirements that were in place when the interim registrations occurred. Upon final adoption of new 16 TAC §25.112, all brokers with interim registrations will be

considered fully registered, and commission staff will update commission records to indicate such. Accordingly, the commission also declines to add language clarifying that the commission's customer protection rules apply to brokers with interim registrations, because these brokers will be fully registered upon final adoption of this rule. Moreover, the commission's customer protection rules apply to all brokers, regardless of their registration status.

Comments on 16 TAC §25.112(a)

Reliance on Broker Registration Number

ARM requested that retail electric providers (REPs) be allowed to rely upon a broker's provision of its broker registration number as evidence of registration. ARM argued such a process would be less burdensome than requiring the REP to check the list on the commission's website to confirm a broker's registration status. TEAM and Calpine Retail supported this request in reply comments.

OPUC opposed this request in reply comments. OPUC argued the broker registration number alone would not allow the REP to determine if the registration has been suspended, withdrawn, or expired. OPUC suggested, as an alternative to maintaining the proposed language, that if the commission decided to allow REPs to rely upon the registration number provided by the broker to verify the broker's registration status, that the commission require REPs to rely upon the publicly available list of registered brokers posted on the commission's website and the broker registration number provided to the REP by the broker.

In reply comments, TEPA argued that REPs are permitted to require broker registrations numbers in their agreements with brokers. It also asserted that it could not cite any possible prohibition of this practice, finding no provision in PURA §39.3555 that provides the commission a statutory basis to regulate discretionary competitive agreements between REPs and brokers.

Commission Response

The commission declines to modify the rule to allow REPs to rely solely upon a registration number provided by a broker to determine that broker's registration status. While relying on the broker's representation might be less burdensome on REPs, the commission agrees with OPUC that this approach would not ensure that the broker's registration is valid. REPs are not required to use the list provided by the commission. The list is intended to assist REPs in complying with the statutory prohibition against knowingly providing bids and offers to unregistered brokers. The commission also agrees with TEPA that nothing in this rule prohibits a REP from requiring a broker to provide its registration number before agreeing to provide that broker with bids or offers.

Replace "bids and offers" with "prices for retail electric products or services"

Under 16 TAC §25.112(a), a REP must not knowingly provide bids or offers to a person who provides brokerage services in this state for compensation or other consideration and is not registered as a broker. Power Wizard suggested that the words "bids and offers" be replaced with "prices for retail electric products or services" to more accurately reflect interactions between REPs and retail electric brokers. TEAM opposed Power Wizard's proposal, stating that

existing language tracks the statute. TEAM also noted that the use of those terms would introduce confusion because 16 TAC §§25.474 (relating to Selection of Retail Electric Provider) and 25.475 (relating to General Retail Electric Provider Requirements and Information Disclosures to Residential and Small Commercial Customers) already impose obligations on REPs regarding retail electric products and services.

Commission Response

The commission declines to replace "bids and offers" with "prices for retail electric products or services," as suggested by Power Wizard. The commission agrees with TEAM that "bids and offers" tracks the language of the statute. PURA §39.3555 defines brokerage services very broadly, which reflects the diverse array of interactions among brokers, clients, and REPs. Power Wizard's proposed change would narrow the scope of REP and broker interactions that are subject to the statutory requirement for REPs to do business only with registered brokers.

Brasovan asserted that some registered brokers might attempt to contract with unregistered third-party contractors to skirt the requirements of this section. Brasovan suggested that either the commission require any individual that is not an employee of a registered company or sole proprietor to register, or the commission require the registered entity through which the pricing was obtained be fully liable for any agents that work through them.

Commission Response

The commission agrees with Brasovan that a registered broker cannot avoid the commission's rules by contracting with a third party. If a registered broker outsources any component of the provision of brokerage services to a subcontractor, agent, or any other entity, the broker remains accountable under applicable laws and commission rules for any activity conducted on its behalf by the third-party entity. The commission adds language to clarify this point.

Broker responsibility for subcontractors or agents

Comments made regarding broker responsibility for subcontractor or agents were raised in response to rule sections other than 16 TAC §25.112. Specifically, ARM recommended adding a provision to proposed 16 TAC §25.486(d) holding a broker responsible for its representations to customers and applicants by employees or other agents of the broker concerning brokerage or retail electric service that are made through advertising, marketing, or other means. TEAM supported this proposal in reply comments.

Commission Response

The commission generally agrees with ARM's comments but finds that the recommended provision is more appropriately added to 16 TAC §25.112(a) and has amended that rule accordingly.

Comments on 16 TAC §25.112(b)

J. Pollock requested that the commission adopt a definition of "consulting services" and clarify that consulting services are not brokerage services. J. Pollock argued that there is a fundamental

difference between brokers and consultants. A broker, according to J. Pollock, is a person or firm who arranges transactions between a buyer and a seller for a commission paid when the deal is executed. By contrast, a consultant focuses on meeting the client's needs and collects a fee that is independent of the client's electricity usage or the details of the client's retail electric contract. J. Pollock further argued that defining brokers to include consultants would have the unintended consequence of requiring legal counsel that reviews contract terms and conditions to register as a broker. J. Pollock requested that if the commission adopts the proposal for publication, it clarify that legal advisors must register as brokers.

In reply comments, Calpine Retail agreed that the commission should consider adopting a definition of consulting services and stated that consulting services are clearly different from brokerage services.

TEAM, TEPA, ARM, and Power Wizard opposed adding a definition of consulting services. These parties argued that excluding consulting services from the definition of brokerage services would be inconsistent with the plain language of PURA §39.3555, which defines brokerage services broadly to include persons who provide "advice or procurement services to…a retail electric customer regarding the selection of a [REP], or the products or services offered by a [REP]". ARM indicated that J. Pollock's proposal would create a loophole, allowing persons providing brokerage services to avoid registering as brokers and complying with the customer protection requirements of PURA and the commission's rules. Power Wizard explained that legal advice related to the terms and conditions of a contract for the purchase of retail electric

service is easily distinguishable from providing advice or procurement services regarding the selection of a REP.

Commission Response

The commission declines to include a definition of "consulting services." The commission agrees that adopting a definition of consulting services would exclude from the registration requirement consultants who are engaging in activities within the statutory definition of "brokerage services." Doing so would be inconsistent with the plain language of PURA §39.3555. The Legislature's inclusion of the term "advice" makes it clear that brokers are not limited to persons or firms who arrange transactions between buyers and sellers for a commission when a deal is executed, as suggested by J. Pollock. The commission agrees with Power Wizard that other types of advice, such as legal, financial, regulatory, or energy management, are distinguishable from advice regarding the selection of a retail electric product, service, or provider.

Comments on 16 TAC §25.112(b)(2)

TEPA suggested that the definition of brokerage services specify that the services must be offered for compensation or other consideration to prevent friendly advice from neighbors being construed as brokerage services. TEAM opposed this suggestion in reply comments. TEAM argued that this was not in line with the statutory definition of brokerage services and could create unintended regulatory gaps.

Commission Response

The commission declines to change the definition of brokerage services in response to these comments. The commission agrees with TEAM that deviating from the statutory definition of brokerage services could create unintended regulatory gaps. The requirement to register with the commission and many of the other provisions of 16 TAC §§25.112 and 25.486 do not apply unless the broker is receiving some form of compensation or is entering into a written agreement with a client. To address the few remaining scenarios in which an interaction between neighbors could be construed under the statute as the provision of brokerage services, the commission will rely on enforcement discretion to avoid unintended enforcement outcomes.

Comments on 16 TAC §25.112(c)

Type of Customer Registration Requirement

ARM commented that registrants should be required to state the types of customers to whom they intend to provide brokerage services. ARM argued this is required to achieve consistency with the interim form. In reply comments, ARM noted that this information would assist commission staff in their review of a registration application from a potential broker. TEAM supported this in its reply because it is not overly burdensome, is required of other market participants, and may be helpful to the commission in better understanding each broker's role in the marketplace.

TEPA opposed requiring registrants to specify the types of customers to whom the registrant intends to provide brokerage services. TEPA argued that the type of customers a broker serves may change after its initial registration, requiring frequent updates.

Commission Response

The commission declines to require a registrant to specify the types of customers to whom it intends to provide brokerage services. Doing so is not necessary to evaluate broker registration applications. The commission will update the registration form, as necessary, to resolve any inconsistencies with the rules.

Affiliate Disclosure Registration Requirement

TEAM, ARM, TEPA and OPUC each proposed a requirement that brokers disclose certain affiliates as part of the registration process. Power Wizard also indicated, in reply comments, that it supported affiliate disclosure when potentially useful or beneficial to customers.

TEPA recommended that affiliate relationships between brokers and REPs should be required to be disclosed as part of the broker registration process. TEPA argued that the premise of broker registration is that consumers need transparent, reliable information about various market participants to make an informed decision about competitive choices for electricity. TEPA continued that if the consumer is not provided accurate and complete information, consumer confidence will be undermined, and the value of brokerage services will be diminished in the marketplace.

TEAM suggested requiring brokers to provide the names of both the affiliates and subsidiaries of the registering party who are registered or certified by the commission. ARM suggested a similar disclosure requirement, advocating for the disclosure of relationships with all customer-

facing competitive entities. ARM asked that the name of any REP, aggregator, electric utility, or other broker that is an affiliate of the broker be included.

Power Wizard opposed TEAM's initial suggestion in reply comments, arguing that many entities that must register with the commission, such as registered power generators or certified renewable energy credit generators, are unlikely to be relevant to retail electric consumers. Power Wizard suggested limiting disclosure to those affiliates that are public facing entities. Calpine Retail supported ARM's proposal in reply comments. In reply comments, ARM and TEAM submitted a harmonized proposal requiring disclosure of the name of any REP, aggregator, electric utility, or other broker that is an affiliate or subsidiary of the registrant.

OPUC proposed adding affiliate disclosure requirements by applying the aggregator affiliate disclosure requirements of 16 TAC §§25.111(f)(1)(J)-(L) (relating to Registration of Aggregators) to brokers. Under these provisions, a registrant would be required to disclose: 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); 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 to disclose its agency relationships with REPs to customers and REPs with whom it does business; and, a list of other states, if any, in which the registering party and registering party's affiliates and subsidiaries that provide utility-related services currently conduct or previously conducted business. In reply comments, OPUC indicated that it preferred broader disclosure requirements but also supported the proposals of TEAM and ARM.

TEAM noted in reply comments that requiring disclosure of some items recommended by OPUC would impose additional burdens on brokers with limited benefit toward achieving transparency and preventing customer confusion. Specifically, TEAM questioned the value of requiring the disclosure of affiliates that provide utility-related services like cable service or requiring explanations of a broker's plans to disclose its affiliate relationships to customers. TEAM also noted, however, that OPUC's proposed subsections would not impose an anomalous burden on brokers, as they replicate existing registration requirements for aggregators. ARM opposed OPUC's recommendation regarding the disclosure of agency relationships with REPs, arguing that brokers are never agents of REPs and so a disclosure of agency agreements would always yield a null result.

Commission Response

The commission declines to require affiliate disclosure as part of the registration process, as requested by TEAM, ARM, TEPA, and OPUC. Commission staff does not need information about a registrant's affiliates to process its registration application because there are no prohibitions against these affiliations. If commission staff needs this information as part of an investigation or complaint proceeding, commission staff can request it at that time.

The commission intends for broker registration to be a simple process. While clients may benefit from transparency regarding potential conflicts of interest between brokers and

other regulated entities, this can be accomplished without requiring disclosure at the time of registration.

Clients will have access to some affiliate information as part of the mandatory disclosures a broker must make prior to the initiation of brokerage services under 16 TAC §25.486, the specifics of which are described as part of the commission's response to comments filed concerning that section. This access provides clients with relevant affiliate information that is up to date when the client is faced with the decision of whether to work with a particular broker. Moreover, if a client is interested in a broker's other affiliates, or any other information, it can request that information from the broker.

OPUC's Requested Registration Disclosures

OPUC described the registration requirements in the proposed rule as collecting only the names and contact information of entities providing brokerage services to residential and small commercial customers. OPUC urged that more information should be required in the broker registration process, because these entities will directly engage with consumers in offering their brokerage services. OPUC recommended that the commission strengthen the customer protections in the proposed rule to conform with the intent of PURA §39.3555. OPUC continued that applying the same registration requirements as currently apply to aggregators would be appropriate. Specifically, OPUC advocated for the application of 16 TAC §§25.111(f)(1)(H)-(Q) to brokers. OPUC's suggestions regarding 16 TAC §§25.111(f)(1)(J)-(L) are addressed separately above in the context of adding affiliate disclosure requirements to the registration requirements.

The specific requirements recommended by OPUC address delinquency with taxing authorities; prior retail electric experience; anticipated sources of compensation and the broker's plan for disclosing that compensation to customers; history of bankruptcy; prior convictions of an officer, director or principal; known active customer protection investigations; and complaint history.

In reply comments, TEAM stated generally that it was not opposed to OPUC's proposed additions, which would require several disclosures related to protecting customers and protecting against fraud. TEAM also generally supported the concept of compensation disclosure requirements. It argued that any compensation disclosure required during registration should complement the compensation disclosure required to a broker's clients in 16 TAC §25.486(f).

TEPA, Enel X, and Power Wizard each opposed OPUC's broad application of aggregator rules to the broker registration process. TEPA argued that no provisions of law have been identified to support these suggestions. Enel X submitted that the proposed rule strikes a good balance on the amount of information brokers are required to submit with their applications. Enel X opposed suggestions by OPUC and others to increase the regulatory burden of the application process, finding OPUC's suggestions more in line with full licensing, rather than mere registration. Power Wizard argued that the fact that consumers engage directly with brokers does not alone necessitate the additional disclosures, as OPUC argued. The disclosure requirements in the proposed rule demonstrate the commission's recognition of the different levels of risk that consumers face when engaging the services of a REP, an aggregator, or a broker, and the

proposed rule provides an appropriate level of disclosure in light of the lower level of consumer risk associated with the use of brokerage services by consumers.

Commission Response

The commission declines to adopt disclosure requirements for brokers similar to those found in 16 TAC §§25.111(f)(1)(H), (I), and (M)-(Q). The commission agrees with Enel X and Power Wizard that the additional disclosures requested by OPUC would be overly burdensome for registrants. None of the information that any of the suggested provisions would produce is required for commission staff to evaluate a broker registration application. If the commission staff needs any of this information in the future to assess whether a broker has violated a commission rule, it can request the information at that time.

Comments on 16 TAC §25.112(c)(1)

Increased Database Functionality

TEPA requested the commission expand the search function of the database to allow for "doing business as" (commonly referred to as "dba") searches. Alternatively, it suggested the commission could require a streamlined registration or sub-registration for all allowable names used by the broker to market or offer brokerage services.

Commission Response

The commission declines to include language related to the search function of the broker database. Putting specific database requirements into rules may limit commission staff's

ability to make improvements or necessary modifications to the database in the future without amending the rule.

With regard to the suggestion that the commission require sub-registration for all allowable names used by the broker to market or offer brokerage services, registrants are required to provide all business names of the registrant, limited to five business names. The commission interprets business names to include any assumed names that a broker uses when conducting its business.

Broker Naming Restrictions; Utility Cobranding

TEAM, ARM, OPUC, and Power Wizard argued that the rules should prohibit cobranding with a transmission and distribution utility (TDU), including its affiliates. TEAM highlighted that the commission has prevented REPs from cobranding with a TDU and that this prohibition has been upheld by the Third Circuit Court of Appeals. TEAM was concerned that cobranding would suggest a broker can improve the service a client receives from its TDU affiliate and lead to the subsidization of a competitive affiliate by a regulated entity. ARM recommended language prohibiting broker names from being, among other things, contrary to 16 TAC §25.272 (relating to Code of Conduct for Electric Utilities and Their Affiliates). TEAM and ARM harmonized their proposals in reply comments and suggested that business names may not be duplicative in whole or in part of the brand or business name of a TDU.

In reply comments, OPUC and Power Wizard both agreed with preventing TDU cobranding on the grounds that such a practice would be confusing or misleading, deceptive, or duplicative.

Enel X requested a clarification be made that only TDUs located "in this state" are of concern. Enel X argued that it does not raise the same policy concerns when a broker is part of a corporate family that owns transmission assets outside of Texas.

CenterPoint Energy and AEP Energy opposed including a prohibition on brokers cobranding with TDUs. CenterPoint Energy argued that utility affiliate branding restrictions do not apply to aggregators and, moreover, go beyond the language of PURA §39.3555. These naming restrictions would significantly disrupt the lawful business activities of competitive entities that have provided brokerage services for years. CenterPoint Energy used the example of TrueCost, a web-based platform, which has been associated with the CenterPoint Energy name and brand since 2012. CenterPoint Energy argued that cobranding does not harm customers, undermine customer confidence in shopping for electricity, or cause undue customer confusion. Additionally, CenterPoint Energy cited Docket No. 40636, *Petition for Declaratory Ruling Regarding CenterPoint Energy Houston Electric, LLC Joint Advertising With a Competitive Affiliate*, as evidence the issue has already been litigated. In that matter, the commission found insufficient evidentiary support for the claims made by TEAM or ARM.

AEP Energy argued that a prohibition on cobranding was unnecessary, citing numerous statutory protections that apply to broker registrants and their use of names. PURA §39.157(d)(6) prohibits a utility from conducting joint advertising or promotional activities with a competitive affiliate (such as a broker) that may favor the competitive affiliate. AEP Energy highlighted that ARM acknowledged in initial comments that this language had already been used by the commission to deny a utility-affiliated REP certification to sell electric service to residential

customers in Docket No. 39509, *Application of AEP Texas Commercial & Industrial Retail Limited Partnership for Amendment to a Retail Electric Provider Certification*. AEP Energy noted that though this was a fact-specific decision, the commission pointed out that neither PURA nor commission rules categorically prohibited a utility and its competitive affiliates from sharing the same or similar names. The broker rule should, similarly, not set out a blanket restriction. AEP Energy argued that there is nothing about the nature of brokerage services to distinguish them from these other affiliates. Additionally, AEP Energy pointed to PURA §§17.004(a)(1) and 39.101(b)(6), which already protect customers from unfair, misleading, or deceptive practices. AEP Energy further argued that the proposed rules 16 TAC §§25.486(d)(1) and 25.112(g)(2) also protect customers from fraudulent communications and make these offenses significant violations.

AEP Energy also made policy arguments against the limitation of business names in this context. AEP Energy believes that a customer using brokerage services is more sophisticated, better understands how the market works, and is unlikely to be misled or confused about who is providing the service. Further, AEP Energy stated its intention to offer brokerage services only to commercial and industrial customers. In these contexts, AEP Energy believed the concerns raised by TEAM and ARM are inapplicable, and that the commission implicitly recognized this difference when it denied certification to a utility-affiliated REP to sell electric service to residential customers based on this purported confusion but continued to allow the REP to sell electric service to commercial and industrial customers.

Commission Response

The commission declines to add a provision prohibiting a broker from cobranding with a TDU, as requested by ARM and TEAM. The commission agrees with AEP Energy that neither PURA nor commission rules prohibit a utility and its competitive affiliates from sharing the same or similar names. The relationship between brokers and TDUs does not justify adopting a different approach. Power Wizard's and OPUC's concern about customer confusion is addressed by the prohibition on misleading, fraudulent, unfair, deceptive, or anti-competitive communications in 16 TAC §25.486(d). TEAM's concern that cobranding would lead to cross-subsidization between a TDU and a competitive affiliate is addressed by the restrictions on joint marketing contained in 16 TAC §25.272. Ultimately, a blanket prohibition on cobranding between a utility and a broker is not necessary to provide adequate customer protections for clients receiving brokerage services.

Broker Naming Restrictions; Deceptive, Misleading, Vague, or Duplicative

TEAM and ARM supported a prohibition on branding that is misleading, deceptive or duplicative with an existing REP, broker, or aggregator. The risk of confusion regarding the business name or brand of a broker is greater because brokers will now be able to identify themselves as officially registered with the commission. TEAM argued that secretary of state review is insufficient and only verifies whether names are distinguishable from other registered names.

TEAM suggested language prohibiting business names that are deceptive, misleading, vague, or duplicative of a name previously approved for use by another broker, aggregator, or REP not

affiliated with the registrant. ARM presented similar language, and in reply, the two groups harmonized their proposals and suggested language limiting the registrant to five business names that are not deceptive, misleading, vague, or otherwise contrary to 16 TAC §25.272 or duplicative of a name previously approved for use by a REP, aggregator, or another broker that is not affiliated with the registrant.

Commission Response

The commission declines to include a provision in the adopted rule that expressly prohibits broker names that are misleading, deceptive or duplicative of other registered entities because it is unnecessary. The broker industry has been functioning for more than a decade and the commission is aware of only a few anecdotal examples of brokers attempting to use misleading names.

Brokers and consultants exist in many industries that do not have naming restrictions beyond secretary of state registration. REPs that are concerned with their intellectual property being violated have other remedies available. Similarly, if a broker is misleading customers through the use of branding, the prohibited communications provisions of 16 TAC §25.486 would apply.

Broker Naming Restrictions; PowerToChoose.org

TEAM commented that the rules should prevent broker names or web addresses from being duplicative with PowerToChoose.org. It suggested language requiring that business names and

web addresses may not be deceptive, misleading, vague, or duplicative of the PowerToChoose.org website.

ARM replied that some of TEAM's language is duplicative of the general prohibition in the proposed rule against misleading, fraudulent, unfair, deceptive, or anti-competitive communications. Further, PURA protects customers from misleading and deceptive conduct and the REP and aggregator rules include this.

Commission Response

The commission declines to add language prohibiting names that are duplicative of PowerToChoose.org. The commission agrees with ARM's observations that misleading branding is already prohibited under 16 TAC §25.486. Further, the commission maintains an active trademark on the phrase "Power to Choose" and will defend it as necessary.

Comments on 16 TAC §25.112(c)(2)

ARM suggested that the registrant should be also required to provide its website address on its registration application. ARM argued that this would be of practical value and not overly burdensome. TEAM agreed with this recommendation in reply comments. TEAM pointed out that a requirement to provide a website address would align with its proposal that websites should not be deceptive, misleading, or largely duplicative of PowerToChoose.org.

Commission Response

The commission declines to require a registrant to provide its website address as part of its application. The commission does not agree with TEAM and ARM that the practical value of requiring a registrant to provide, and subsequently keep up to date, a website is enough to justify the requirement.

Comments on 16 TAC §25.112(c)(7)

ARM recommended that, for clarity, the commission should modify the required elements of the affidavit to specify that the registrant will comply with "all applicable laws and the commission's rules."

Commission Response

The commission declines to modify the affidavit, as requested by ARM. To receive a broker registration, a broker must affirm that it understands and will comply with all applicable laws and rules. Applicants must affirm their intent to follow all applicable law and rules, not just those within the jurisdiction of the commission to enforce.

Comments on 16 TAC §25.112(d)(2)

TEPA and TEAM each filed comments arguing that the basic information on the registration form does not warrant treatment as proprietary or confidential and recommended removing proposed §25.112(d)(2), which allowed a registrant to designate information on its registration as proprietary or confidential.

Commission Response

The commission agrees that the basic information required on the broker registration form does not warrant treatment as proprietary or confidential and removes proposed §25.112(d)(2) from the adopted rule.

Comments on 16 TAC §25.112(d)(4)(A)

TEPA suggested that the number of days that a registrant has to cure deficiencies in its application be increased from ten to 15, as it is possible that the notification would not reach the registrant within ten days by regular mail. In the alternative, TEPA recommended that the commission be required to provide the notification using email or registered mail. TEPA argues that a short cure window could be harmful to small brokers who are not technically savvy.

TEAM and ARM opposed TEPA's proposed change in reply comments. TEAM argued that affording registrants ten days to cure deficiencies is consistent with the commission's registration requirements for other entities. ARM pointed out that the rule provides ten working days, giving registrants more time to cure deficiencies than suggested by TEPA.

Commission Response

The commission declines to increase the number of days a registrant has to cure deficiencies in its application or change the notification requirements. The broker registration requirements do not necessitate that registrants be allowed more time to cure deficiencies than is afforded other commission-registered entities. Moreover, the rule clarifies that a deficient application is rejected without prejudice, allowing the registrant to reapply without penalty.

Comments on 16 TAC §25.112(e)

OPUC supported the three-year expiration and renewal provisions to ensure customers have access to an accurate broker list.

TEAM and ARM each argued in favor of replacing the renewal requirement with an update requirement. TEAM recommended that a broker should be required to submit an online update to its registration information or verify that the information on file remains current every three years. TEAM further recommended that if a broker fails to update or affirm its registration at least every three years, the commission may remove the broker from the list on the commission's website. In reply comments, ARM argued that failure to timely update or verify the information on file with the commission should result in revocation of the broker's registration in addition to removal from the list posted on the commission's website. ARM argues that a mandatory revocation would best incentivize brokers to keep their registrations up to date. ARM also argued that because PURA §39.3555(g) requires that a determination on an application for registration as a broker be made within 60 days, that a registrant be required to submit the update or renewal information no earlier than 60 days prior to the expiration of its registration rather than 90. In reply comments, TEAM and ARM each suggested language synchronizing these proposals.

TEPA, J. Pollock and EMEX/Patriot argued that the commission should remove the registration renewal requirement. These parties argued that PURA §39.3555 does not provide a renewal requirement and that there is no precedent for requiring a retail market entity to re-register with

the commission. EMEX/Patriot contended in reply comments that the legislative intent of PURA §39.3555 was not to impose new or more restrictive requirements on brokers than are present for aggregators. J. Pollock argued that there was no compelling policy reason to require registration renewals and that it would be a drain on staff resources to process these renewal applications. J. Pollock also pointed out that the commission has the authority to revoke registrations if necessary. TEPA suggested that if this requirement remained in the rule, brokers receive a notification prior to the deadline for registration renewal, that a broker be allowed to renew at any point prior to the expiration of its registration, and the commission sunset this provision after the first three-year renewal period. TEPA further requested that the commission address what happens if a broker renews its registration after the 90-day window.

Commission Response

The commission agrees with OPUC it is important to ensure that the commission's broker list remains up to date. While PURA §39.3555 does not expressly authorize registration requirements beyond an initial registration, as EMEX/Patriot argued, it does instruct the commission to adopt rules as necessary to implement its provisions. Maintaining an accurate list of brokers currently doing business in the state is a sufficient reason to require periodic registration updates. Moreover, J. Pollock's arguments that processing registration renewals would overburden the commission's resources and that the commission can always revoke a broker's registration do not accurately reflect the relative burdens these two activities put on the commission's resources. A full revocation proceeding is significantly more involved and time consuming than processing a registration renewal or update.

The commission has replaced the registration renewal requirement with a requirement that a broker update its registration information at least once every three years. The commission has also added language to the registration amendment requirement of 16 TAC §25.112(f) to consider a registration amendment to be a registration update. These changes will ensure that the commission's records remain up to date while reducing the frequency with which a broker is required to update its registration.

The commission declines to add specific notification requirements, as requested by TEPA. It is a broker's responsibility to keep its registration up to date. The adopted rule requires a broker to update its registration at least 90 days prior to expiration. This 90-day window will provide commission staff an opportunity to contact brokers who have failed to timely update their registrations, as commission resources allow.

The commission also declines to sunset this provision, as requested by TEPA, as there is no future date at which the commission's list of registered brokers will no longer need to be up to date.

Comments on 16 TAC §25.112(g)

ARM and Calpine Retail requested three additions to the list of significant violations in proposed 16 TAC §25.112(g) based on the significant violations applicable to REPs [16 TAC §§25.107 (related to Certification of Retail Electric Providers)] and aggregators in (§25.111). These violations would include bankruptcy or insolvency, or failure to meet its financial obligations in

a timely manner; suspension or revocation of a registration, certification, or license by any state or federal authority; and 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 brokerage service. ARM argued that these additions would align with the statutory guidance to apply the same customer protections to brokers as aggregators. Calpine Retail argued that it could see no reason why these provisions would apply to REPs and aggregators, but not brokers. In reply comments, TEAM supported the addition of these provisions, but noted that even if they were not included in the final rule, the commission could still enforce based on them, because it is a nonexclusive list.

In reply comments, OPUC characterizes ARM's and Calpine Retail's suggestion as a requirement to disclose the conviction of a felony, and then goes on to argue that this requirement does not go far enough. OPUC contended that the commission should require the disclosure of felonies, fraud and other serious violations, regardless of whether these violations relate to the broker's brokerage services. The commission should require ample and necessary information to determine whether a person should be deemed qualified to enter a customer's home or business to provide brokerage services. Furthermore, OPUC concludes, customers have the right to this information when deciding whether to do business with a broker.

Commission Response

The commission declines to add significant violations to the list, as requested by ARM and Calpine Retail. The suggested additions do not align with requirements included in the customer protection rules that apply to brokers, so they are inappropriate for inclusion on

a list of significant violations. The commission does, however, agree with TEAM's observation that this is a nonexclusive list. Moreover, the absence of a violation from this list should not be interpreted as evidence that it is not a significant violation or that it cannot serve as grounds for revocation or suspension. The purpose of this list is to highlight examples of significant violations that the commission views as clear cut and instructive for the type of entity involved.

The commission does not agree with ARM's assertion that there is no difference between brokers and other competitive entities with regard to these significant violations. Brokers are not essential for obtaining electric service. Moreover, a broker does not have the same financial responsibilities as a REP or an aggregator that collects deposits, and it does not have the ability to apply switch holds or request disconnections. Ultimately, the commission will determine if a rule violation is significant based upon the facts and circumstances involved.

The commission interprets OPUC's reply comments on this section as a reassertion of its position regarding the disclosures required under 16 TAC §25.112(c). The commission has already addressed this position.

Comments on 16 TAC §25.112(g)(6)

Authorizing Broker Fees on Retail Electric Bills

Calpine Retail requested clarification as to whether a broker can authorize the amount of the broker fee that will be embedded in the energy charge billed by the REP to the customer.

Calpine Retail further developed this request in its reply, explaining that the typical arrangement between a REP and a broker is for the REP to bill all charges to the customer, including the broker fee. Because it is a violation for REPs to bill unauthorized charges, Calpine Retail believes it is important for REPs to know whether a broker is allowed to authorize these charges.

Commission Response

The commission finds that no changes are necessary based upon Calpine Retail's comments. The person who can authorize a broker's fee to be included on a retail electric customer's bill depends upon the fee arrangement. If the broker compensation is included as part of the energy charge to which the customer agreed, then no explicit customer authorization is required. In this regard, the broker fee is no different than marketing or any other cost that is embedded into the price of electric service offered by the REP. If, however, the broker's fee appears as a separate charge on a REP's bill, 16 TAC §25.481(b)(2) (relating to Unauthorized Charges) applies. Under this provision, a customer must clearly and explicitly consent to obtaining a product or service offered and to having the associated charges appear on the customer's electric bill.

Significant Violations; Unauthorized Charges

TEPA and RES Nation argued that billing an unauthorized charge or causing an unauthorized charge to be billed to a customer's retail electric service bill should be removed from the list of significant violations. TEPA stated that brokers do not have control over what charges are contained on the bill the customer receives from the REP so brokers should not be held accountable for a REP billing mistake. TEPA appreciated that unauthorized charges are possible

but is not aware of a specific circumstance where brokers, in the normal course of business, would be responsible for this activity. TEPA is concerned that this provision may make brokers de facto parties to REP billing errors and disputes. RES Nation noted that it could have its registration suspended or revoked for "unauthorized billing" despite not billing customers in the first place.

TEAM disagreed with TEPA's and RES Nation's concerns over paragraph (g)(6) and advocated for it to remain intact. TEAM found the concerns misplaced because brokers have control over the violations set forth in the rule through directly billing clients (or non-clients) brokerage service fees, and by *causing* unauthorized charges to be billed by the REP. As proposed by the commission, the rule captures only "causing" behavior. TEAM provided the examples of when a broker misrepresents to a REP the amount of fee that the broker is entitled to receive from a client, or when a broker fails to make required disclosures about compensation to a client who then files a complaint concerning unexpected increases in their retail electric service bill. TEAM also commented that although RES Nation may not directly bill its clients, direct billing scenarios do exist. Subsection (g)(6) could capture a direct billing situation where a client agrees to a flat fee with a broker who subsequently sends the client a bill for a higher fee than agreed. Subsection (g)(6) remains relevant and necessary for such scenarios.

Commission Response

The commission declines to remove "billing an unauthorized charge or causing an unauthorized charge to be billed to a customer's retail electric service bill" from the list of significant violations as requested by TEPA and RES Nation. PURA §17.004(a)(1)

provides all buyers of retail electric services protection from being billed for services that were not authorized. The commission considers billing an unauthorized charge or causing an unauthorized charge to be billed to a customer's retail electric account a significant violation, regardless of the type of entity responsible.

With regard to the concerns addressed by TEPA and RES Nation, the commission agrees that a broker should not be held accountable for a REP billing mistake or a charge for which it was not responsible. Whether a broker is the cause of an unauthorized charge appearing on a customer's retail electric bill will, in many instances, be a fact specific inquiry. The commission does not agree that this provision should not apply to brokers. The commission agrees with TEAM that this provision covers scenarios where a broker directly bills a client for the provision of brokerage services. The commission also recognizes that the broker industry employs a wide array of business models, some of which may allow a broker to cause a charge to appear on a customer's bill. The commission's intent is to make it clear that if a broker causes an unauthorized charge to appear on a customer's bill, it risks revocation or suspension, in addition to an administrative penalty.

General Comments on 16 TAC §25.486

Replacing "on paper or electronically" with "in writing"

TEAM suggested that references to "on paper or electronically" should be replaced with "in writing" as defined in 16 TAC §25.471 (relating to General Provisions of Customer Protection Rules) to provide consistency across the commission's customer protection rules.

Commission Response:

The commission agrees that using the defined term "in writing" would provide consistency across the commission's customer protection rules and makes the recommended change.

Replacing "client" with "customer"

ARM recommended striking the definition of "client" and replacing "client" with "customer" throughout 16 TAC §25.486 to maintain consistency with other sections of the commission's customer protection rules. Calpine Retail and OPUC supported this proposal in reply comments. In reply comments, ARM further argued that the term "client" would create a subcategory of customer that is specific to brokers, and such a subcategory is not necessary because a customer of a broker fits within the existing definition as a person currently receiving electric service from a REP. ARM also suggested amending the definitions of "customer" and "applicant" in 16 TAC §25.471 to include brokers in Project No. 50406.

Commission Response

The commission declines to strike the definition of "client" and replace all instances of "client" throughout this section with "customer," as requested by ARM. Under 16 TAC §25.471(d)(4), a customer is a person who is currently receiving retail electric service from a REP. The commission disagrees with ARM that "client," as defined in this section, would be a subcategory of "customer." While there is some overlap, neither of these terms subsumes the other. Not all customers are receiving or soliciting brokerage services from a broker, nor are all clients currently receiving retail electric service from a REP.

Because ARM applied its suggestion to replace "client" with "customer" to each of its recommended changes, the commission considered the merits of each recommended change in the context of the related comment.

The commission also declines to make changes in response to ARM's recommendations regarding amendments to 16 TAC §25.471 because changes to that rule are not included in the scope of this project.

Prohibitions on Unauthorized Charges and Unauthorized Changes in REP

ARM, TEAM, and OPUC supported the addition of a new subsection in 16 TAC §25.486 to align with the slamming and cramming violations that are included on the significant violations list contained in 16 TAC §25.112. Specifically, ARM recommended language requiring that a broker must not bill an unauthorized charge or cause an unauthorized charge to be billed to a customer's retail electric service bill and that a broker must not switch or cause to be switched the REP of a customer without first obtaining the customer's authorization. OPUC and TEAM supported ARM's recommendations in reply comments.

Commission Response

The commission agrees with ARM that the prohibitions against unauthorized charges and unauthorized changes in provider listed on the significant violation list of 16 TAC §25.112(g) should have corresponding provisions in the customer protection rules. The commission has added 16 TAC §25.486(h), which contains ARM's recommended language.

Comments on 16 TAC §25.486(a)

ARM recommended the addition of a disclaimer sentence to clarify that nothing in this section is intended to supersede, infringe upon, limit, or otherwise reduce customer protections, disclosure requirements, and marketing guidelines otherwise established by PURA Chapters 17 and 39 or by the commission's rules. In reply comments, TEAM stated that this proposal would promote clarity and customer protections.

Commission Response

The commission declines to add the disclaimer language recommended by ARM. As a matter of law, commission rules cannot supersede, infringe upon, limit, or otherwise reduce the customer protections established by statute. If an issue arises with conflicting sections of the commission's rules, it will be resolved using the appropriate rules of construction.

Comments on 16 TAC §25.486(b)

Proposed Definition of "REP agent"

TEPA suggested adding a definition of "REP agent." TEPA argued that this would help customers understand the differences between a broker or agent that represents the consumer and an agent of the REP that is part of the sales force employed by a REP to exclusively market and sell the product and services of that REP. Calpine Retail supported this suggestion in reply comments. Calpine Retail submits that REP agents are subcontractors of the REP that have entered into an agreement to sell or promote the REP's products and services. In this subcontracting relationship, the REP is responsible for the REP agent's compliance with the commission's customer protection rules.

In reply comments, ARM opposed the addition of a definition of REP agent. ARM argued that it might cause confusion to have different types of agents defined in this portion of the rule. ARM further argued that defining REP agent here is outside of the scope of a rulemaking that is focused on brokers. ARM continued that the definition would not be helpful, because REP agents are already governed by 16 TAC §§25.107(a)(3) and 25.472(b)(1)(B)(i) (relating to Privacy of Customer Information). Finally, ARM contended that brokers are not acting as agents of a REP, because REPs do not exercise control over brokers.

Commission Response

The commission declines to add a definition of "REP agent" as recommended by TEPA. Under 16 TAC §25.107(a)(3), a REP remains accountable under applicable laws and commission rules for all activities conducted on its behalf by any subcontractor, agent, or any other entity. The REP's accountability is not limited to agents or subcontractors. Introducing a definition of REP agent in this project could have the unintended consequence of narrowing or creating confusion as to the scope of a REP's responsibility for the activities conducted on its behalf. Any proposals that would alter a REP's responsibilities, except as they relate to brokers and brokerage services, is outside of the scope of this project.

Proposed Definition of "transaction broker"

Power Wizard suggested the commission include a definition of "transaction broker," referring to brokers that are not an agent of either party in a transaction. Power Wizard argued that

customers would benefit from disclosure and transparency regarding agency obligations of brokers that are not client agents. In reply comments, ARM argued that this definition is not necessary and is a tautology because it is duplicative of the definition of "broker" already included in the proposed rule. ARM continued that this term is not referenced anywhere else in the proposed rule.

Commission Response

The commission agrees with ARM that Power Wizard's recommendation to adopt a definition of "transaction broker" is unnecessary. The term transaction broker is not used anywhere in this rule, and the commission is not imposing any unique requirements on the group Power Wizard describes as transaction brokers.

Comments on 16 TAC §25.486(b)(3)

Definition of "client"

ARM recommended modifying the definition of "client" by replacing "person" with "retail customer" as an alternative to its prior recommendation of striking the term client from this section. ARM argued that if one broker solicits services from another broker on behalf of a customer, the first broker could then be considered a "client." In reply comments, TEAM and ARM presented a synchronized proposal, recommending replacing "person" with "applicant or customer."

Commission Response

The commission declines to modify the definition of client by replacing "person" with "retail customer" or "applicant or customer," because these proposals would narrow the definition. A person who is not receiving retail electric service and has not yet applied for retail electric service can still be a client. For example, a young adult who is establishing electric service for the first time or a business planning to open its first location in this state are neither applicants nor customers.

With regard to the hypothetical presented by ARM of one broker soliciting brokerage services from another broker on behalf of a client, the commission agrees that the first broker would be a client of the second broker for purposes of this rule. However, because the second broker would not be collecting the proprietary client information of the first broker or providing the first broker with brokerage services, only a limited number of the provisions of this section would apply.

Soliciting Brokerage Services

Energy Ogre asked for clarification on what constitutes "soliciting" services. It questions whether an individual who visits a broker's website and submits their name and email for further information but never proceeds any further be considered one who solicits services and therefore falls under the category of a client. Energy Ogre recommended that a residential customer becomes a "client" when one enters into a contract with a broker.

Commission Response

The commission declines to modify the definition of "client," as requested by Energy Ogre, such that a residential customer becomes a client only upon entering into a contract with a broker. Brokers employ a diverse array of business models, many of which do not require a client to enter into a contract or provide the broker with any compensation. The commission defines "client" broadly to ensure that the customer protection provisions apply across all brokerage service models.

With regard to what constitutes soliciting brokerage services, the commission interprets this phrase broadly and according to its common usage. A person is soliciting brokerage services from a broker if it is interacting with a broker, either directly or indirectly through the broker's website or marketing materials, in an attempt to obtain brokerage services or to evaluate whether to obtain brokerage services from that broker. In Energy Ogre's hypothetical, the individual who submits their name and email on a broker's website is a client of that broker for the purposes of this section. This designation triggers the proprietary client information requirements of 16 TAC §25.486(j) and requires the broker to treat the information provided by the client accordingly. It does not, however, trigger many of the other provisions of this section, because the broker has not yet initiated the provision of brokerage services.

Comments on 16 TAC §25.486(b)(4)

Client Agent Entities

Bottom Line Energy asked for clarification on what type of entities "client agent" referenced. Bottom Line Energy requested clarity on whether this was intended to refer to an authorized

agent within an organization or a broker who charges a fee and sets up a contract to shop for REP services on behalf of the organization.

Commission Response

A client agent is a broker that, as part of the brokerage services it provides, is authorized to act as the client's agent for the purpose of selection of, enrollment for, or contract execution of a product or service offered by a retail electric provider. The precise level of authority that a client agent is granted is determined by the terms of the written agreement between the broker and the client. An authorized agent within a client's organization, as described by Bottom Line Energy, is not a client agent.

Account Maintenance

Energy Ogre argued that the definition of "client agent" should be expanded to include the ongoing maintenance of the residential client's electric account as that is a much needed and desired service the client agent provides to residential customers. ARM opposed this expansion in reply comments. ARM argued that the maintenance and administration of a customer's account is the REP's responsibility. ARM further argued that a similar proposal was included in House Bill 2212, which was not voted out of the State Affairs committee.

Commission Response

The commission declines to expand the definition of "client agent" to include account maintenance as requested by Energy Ogre. The ongoing maintenance of a residential client's electric account is not a brokerage service as that term is defined in this section. If

a broker provides additional services other than brokerage services to a client, such as bill payment services or energy efficiency consulting, those services are not addressed by this rule unless the provision of those services is intermingled with brokerage services such that a broker's compliance with these rules cannot be determined without evaluating those services as well.

Non-Broker Client Agents

Calpine Retail requested that the definition of "client agent" include entities other than brokers that have the legal right and authority to act on behalf of a client regarding the selection of, enrollment for, or contract execution of a product or service offered by a REP, including electric service.

Commission Response

The commission declines to expand the definition of "client agent" to include entities other than brokers as requested by Calpine Retail. If an entity other than a broker has the legal right and authority to act on behalf of a retail electric customer or applicant, the rights and responsibilities of that entity regarding that customer or applicant are governed by the laws that created the applicable agency relationship. Agency relationships that do not involve brokers are outside of the scope of this rule.

Comments on 16 TAC §25.486(b)(5)

In response to the proposed definition of "proprietary client information," TEPA argued that electricity brokers, in the normal course of business, do not disclose client information to third

parties without authorization from their client. TEPA stated that they oppose "unnecessary disclosure requirements," particularly when the potential exists for such information to be released publicly through the Open Records Act, to which state agencies are subject.

Commission Response

The commission declines to make changes based on TEPA's comments. The definition of "proprietary client information" does not create any disclosure requirements.

ARM reasserted its general suggestion that "client" be replaced with "customer" for consistency throughout the commission's customer protection rules. In reply comments, TEAM recommended expanding the section to refer to a "client or retail electric customer" to protect more information and make it clear that the specified information is proprietary even if it concerns retail electric customers that are not the broker's client.

Commission Response

The commission also declines to replace "client" with "customer," as recommended by ARM, because this would remove protections from clients that are not yet customers. The commission agrees with TEAM that including the term "retail electric customer" in addition to "client" will protect more proprietary information and makes the recommended change.

Comments on 16 TAC §25.486(c)

Under proposed 16 TAC §25.486(c), a client other than a residential or small commercial class customer or applicant, or a non-residential customer or applicant whose load is part of an aggregation in excess of 50 kilowatts, may agree, in writing, to a different level of protections than is required by this section. This agreement must be provided to the customer and provided to commission staff upon request.

TEAM suggested that proposed 16 TAC §25.486(c) should be modified to match 16 TAC §25.471, which applies to the entire subchapter and allows certain customers and applicants to agree to terms of service that, subject to certain listed exceptions, reflect either a higher or lower level of customer protections than would otherwise apply under 16 TAC Subchapter R (relating to Customer Protection Rules for Retail Electric Service). TEAM also recommended that REPs should be provided a copy of the written agreement between the broker and the client in which the client agrees to receive a lower level of customer protections from the broker. In reply comments, Calpine Retail agreed that a copy of the agreement should also be provided to the customer's REP. ARM found this subsection duplicative of the waiver provisions in 16 TAC §25.471. Furthermore, ARM argued, repetition in 16 TAC §25.486 may imply that the remaining provisions of 16 TAC §25.471(a)(3) do not apply generally to 16 TAC Subchapter R, which could result in unintended regulatory uncertainty. Accordingly, ARM recommended deletion of this section or alternatively replacing "client" with "customer." In reply comments, TEAM agreed with ARM's initial comment that subsection (c) could be deleted with modification to 16 TAC §25.471 to include brokers in the scope of some aspects of that rule.

EMEX/Patriot disagreed that proposed 16 TAC §25.486(c) is duplicative of 16 TAC §25.471 on the grounds that 16 TAC §25.471 applies to REPs, not brokers.

EMEX/Patriot also disagreed that the customer protection agreements required under this subsection should be provided to REPs, stating that no rationale has been provided for why brokers should have to reveal provisions of their business relationships regarding customer protections with REPs. Enel X also opposed requiring brokers to share customer protection agreements with REPs, who are not regulators. Enel X argued that only the commission has that authority. Sharing market sensitive and proprietary information with REPs would violate the customer's right to confidentiality of its arrangement with the broker. Finally, Enel X noted that there is no need to share this agreement with the REP because the customer's agreement with their broker has no bearing on the relationship between the REP and the customer.

TEPA recommended clarifying that brokers need to disclose only the relevant portions of contracts that contain voluntary alternation of customer protection provisions. To require disclosure of the full agreement would be violative of the requirements to protect "proprietary client information" as defined in 16 TAC §25.486(b)(5) of the proposed rule. The rule should not require a broker to provide entire contract agreements or other information unnecessary for a specific identified purpose or not authorized by the broker's client. In reply comments, TEAM agreed with TEPA that the disclosure could be limited to the relevant portions of the contract.

In reply comments, ARM reiterated its belief that this subsection is duplicative of 16 TAC §25.471 and should be struck. ARM argued that if it is not struck, the agreement at issue is

inherently relevant in its entirety and the commission should require disclosure of the full contract to the REP.

Commission Response

The commission does not agree that 16 TAC §25.486(c) is duplicative of the waiver provisions contained in 16 TAC §25.471(a)(3), which provide certain customers with the ability to waive, with certain exceptions, the customer protections in Subchapter R. The language in 16 TAC §25.486(c) has a much narrower focus, in that it allows certain clients of brokers to agree to a different level of customer protections related to the provision of brokerage services than is provided in 16 TAC §25.486. A client that agrees to a different level of customer protections related to the provision of brokerage services does not, by virtue of that agreement, waive any other customer protections they are entitled to under Subchapter R. The commission has added language to clarify this point.

The commission declines to add language requiring a broker to provide to a client's REP a copy of a written agreement, or a relevant portion of an agreement, entered into under this subsection. The commission agrees with Enel X that such agreements might contain sensitive or proprietary information a REP is not entitled to, and that the agreements do not necessarily have any bearing on the relationship between the client and their REP. If a REP believes that it needs access to such agreements, it can obtain them through private agreement with the parties involved.

Comments on 16 TAC §25.486(d)

ARM recommended including a provision holding a broker responsible for its representations to customers and applicants by employees or other agents of the broker concerning brokerage or retail electric service that are made through advertising, marketing, or other means. TEAM supported this proposal in reply comments.

Commission Response

The commission declines to include a requirement holding a broker responsible for its representations as requested by ARM, as it is unnecessary. All broker communications are required to be clear and not misleading, fraudulent, unfair, deceptive, or anti-competitive under 16 TAC §25.486. However, the commission agrees with ARM that a broker is responsible for the actions of its employees or other agents. As previously noted, the commission added language to 16 TAC §25.112(a) to clarify this responsibility.

Comments on 16 TAC §25.486(d)(1)

ARM, TEAM, and OPUC recommended adding three additional prohibited communications to the nonexclusive list in 16 TAC §25.486(d)(1). First, ARM recommended prohibiting the use of the term "fixed" to market a product that does not meet the definition of a fixed rate product. ARM argued that this prohibition already applies to REPs and aggregators under 16 TAC §25.475(c)(1)(A). ARM also noted that the commission has already received a formal complaint involving this topic (*see* Docket No. 43337, *Complaint of Syed Enterprises Inc. Against AP Gas & Electric LLC*). Second, ARM recommended prohibiting falsely stating or suggesting that pricing or contract terms are offered by a REP if they are not so offered. ARM pointed to a pending formal complaint involving this issue as well (*see* Docket No. 46951, *Complaint of*

Romtex Enterprises, Inc). Last, ARM recommended prohibiting falsely suggesting, implying, or otherwise leading someone to believe that a contract has benefits for a period of time longer than the initial contract term, which is also applicable to REPs and aggregators under 16 TAC §25.475(c)(1)(A). TEAM supported ARM's recommendations in reply comments. OPUC also supported ARM's recommendations and stated that it is very important and necessary that customers understand the terms of the agreement that they are entering into and it is unacceptable for customers to be given false or misleading information about contract terms.

Commission Response:

The commission declines to add additional items to the list of examples of prohibited communications, because these additions are unnecessary on a nonexclusive list. The core requirement of this subsection is that broker communications must be clear and not misleading, fraudulent, unfair, deceptive, or anti-competitive. Each of the activities described by ARM are unambiguous violations of the general prohibition.

Comments on 16 TAC §25.486(d)(1)(A)

ARM and TEAM suggested changes to the prohibition against leading a client to believe that receiving brokerage services will provide a customer with more reliable service from a TDU. First, these parties argued that "better quality service" should be used instead of "more reliable service" because reliability has a narrow meaning in the electric industry and this change would align this provision with 16 TAC §25.475(c)(1)(A)(iii), applicable to REPs and aggregators. Second, they argued that brokers should also be prohibited from representing that receiving

brokerage services will provide a customer with better quality service from a REP, because REPs provide the same quality of service to all similarly situated customers.

ARM further recommended replacing "client" with "someone" in this provision to ensure that brokers are not permitted to mislead potential as well as current customers.

Commission Response

The commission declines to replace "more reliable service" with "better quality service" as requested by ARM and TEAM. The commission agrees that more reliable service has a specific meaning in the utility industry, and this meaning aligns with the commission's intended prohibition. A broker cannot represent to a client that brokerage services can provide the client with fewer outages or otherwise affect the continuity or adequacy of that client's electric service, because these claims are necessarily false. A retail electric customer's choice of REP or broker has no effect on the reliability of electric service. A broker may offer a wide array of consulting services and expanding this provision with a broad phrase such as "quality of service" might prevent a broker from engaging in otherwise legitimate business activities. The general prohibition against misleading, fraudulent, unfair, deceptive, or anti-competitive representations is sufficient to prevent brokers from making false representations in this area.

The commission also declines to expand the language of this prohibition to representations about the quality of service provided by REPs. REPs and brokers are each customer-facing entities that employ widely different practices in areas such as pricing, customer

service, and complaint handling. Unlike with a TDU, it is not inherently misleading for a broker to represent that it can help pair a client with a REP that best suits its particular preferences or that it has the ability to work with certain REPs to obtain better quality of service for a client. However, to the extent that a broker is making false claims about the quality of service provided by a particular REP, the general prohibition against misleading, fraudulent, unfair, deceptive, or anti-competitive communications applies.

The commission also declines to replace "client" with "someone" in this section as requested by ARM, because it is unnecessary. Client is defined to include a person that solicits brokerage services. This ensures that a person that ARM describes as a potential customer is also protected by the language of this section.

Comments on 16 TAC §25.486(d)(1)(C)

Regarding the prohibition against a broker falsely suggesting that brokerage services are being provided without compensation, TEPA noted that its code of conduct already prohibits this conduct. Brasovan supported retaining this requirement but suggested that it be reframed as a prohibition against falsely stating or suggesting that the brokerage services are being provided at no cost to the customer, whether paid for directly or indirectly by the customer.

Commission Response

The commission declines to make changes based upon these comments. TEPA's code of conduct is not a sufficient substitute for a commission rule. The commission cannot rely

upon an individual organization to fulfill the commission's statutory obligation to provide customer protections to the recipients of brokerage services in Texas.

The commission also declines to reframe the prohibition against falsely stating or suggesting that brokerage services are being provided without compensation in terms of costs, directly or indirectly, borne by the customer as suggested by Brasovan. Whether a broker is receiving compensation is a much more straightforward and enforceable standard than whether those services are being provided at no cost to the client. In many instances, a retail electric customer represented by a broker is offered the same rate as a retail electric customer who is not represented by a broker. If the broker in this scenario receives compensation from the REP when the client enrolled, it is not clear if the client incurred any indirect costs. It is, however, clear the broker received compensation for providing brokerage services.

Comments on 16 TAC §25.486(d)(1)(D)

Brasovan requested clarification on whether "falsely claiming to be the client agent of a customer" refers to a broker falsely claiming to the REP that it is working as an agent of the customer or falsely claiming to the customer that it is working as an agent to the customer and, therefore, only in the customer's best interest. Brasovan suggested that both of these activities should be prohibited.

Commission Response

As proposed, this prohibition referred to a broker falsely claiming to be a client agent of a customer as that term is defined in 16 TAC §25.486(b)(4). This communication is prohibited whether the communication is directed at the customer, a REP, or any other person. No changes are required to address Brasovan's suggestion.

However, the commission does expand 16 TAC §25.486(d)(1)(D) to prohibit falsely claiming to be a client agent of a "customer or applicant." Under 16 TAC §25.471(d)(1), a person who is applying for retail electric service is defined as an applicant. Brokers are also prohibited from falsely claiming to be the client agent of a person who is applying for retail electric service.

Comments on 16 TAC §25.486(d)(2)

This section requires a broker to include its registered name on all printed advertisements, electronic advertising over the Internet, and websites. ARM and Power Wizard recommended that brokers also be required to include their registration number on these communications. ARM argued that this would not be burdensome, would help customers verify a broker's registration status, and is consistent with the aggregator requirements. TEAM supported this addition in reply comments.

Commission Response

The commission declines to require brokers to include their registration number on all marketing materials. The commission does not agree that a customer will be unable to verify a broker's registration status with the broker's registered name. Moreover, many

brokers have been in operation for many years, and requiring the inclusion of a recently assigned registration number would require a broker to replace all of its existing marketing materials to comply with the rule.

Comments on 16 TAC §25.486(e)

ARM argued that PURA §39.3555 specifically invokes the applicability of Chapter 17 of PURA to brokers and that PURA §17.004(a)(3) requires certain information to be made available in English, Spanish, and other languages as determined by the commission. ARM continued that the broker rules should include provisions similar to those in effect for aggregators to give effect to this provision. Specifically, ARM recommended that brokers be required to provide the terms of service documents required by this subchapter and information concerning the availability of electric discount programs to the client in English, Spanish, or the language used to market the broker's products and services, as designated by the customer. TEAM and OPUC supported this recommendation in their respective reply comments. OPUC agreed with ARM's statutory analysis and explained that this would provide additional and necessary customer protection safeguards that will enable customers to understand all aspects of the terms of services being offered by the broker.

ARM also requested the inclusion of a provision stating that if a broker markets a REP's services in a language that the REP is unable to support, the broker will be responsible for assisting the customer with translation services and the REP will not be held responsible for supporting that language under this subchapter. TEAM supported this request in reply.

TEPA replied generally to the comments filed by ARM and OPUC that the services for which a broker may be held accountable must necessarily be services that a broker offers and may legally offer retail electric customers rather than for services for which a broker is not legally authorized to provide under new and existing laws.

Commission Response

The commission declines to expand the requirements of this subsection, as requested by ARM, TEAM, and OPUC. Terms of service documents are REP-created documents that are relevant to the relationship between REPs and customers. As such, requirements related to these documents fall outside of the scope of this rulemaking.

The commission also declines to require brokers to provide translation services if they market a REP's services to a client in a language that the REP cannot support. Requiring a broker to provide ongoing translation services is overly burdensome.

The commission modifies the language of 16 TAC §25.486(e) by replacing the word "provide" with "offer." This modification is intended to allow brokers and clients to agree to a different language for communications, so long as the client has the option of receiving information in the language that was used to market the broker's services to the client.

Comments on 16 TAC §25.486(f)

Regarding the disclosures a broker is required to provide a client prior to the initiation of brokerage services, TEPA noted that its members have strong policy objections to "this type of

business practice regulation" being applied to the fully competitive discretionary services offered by brokers.

Commission Response:

PURA §39.3555(e) explicitly requires a person that registers as a broker with the commission to comply with disclosure requirements established by the commission and PURA, Chapters 17 and 39. The disclosure requirements the commission is applying to the broker community are not overly burdensome and are necessary to provide clients with enough information to make informed decisions regarding the selection of a broker.

Grandfathering Clause for Existing Clients

TEPA requested that the commission include a grandfathering clause to allow brokers to provide the required disclosures to existing clients at the renewal of an existing broker-client agreement. TEAM supported TEPA's proposal in reply comments and recommended the commission also require brokers to provide the required disclosures concurrently with the client's renewal of brokerage services.

Commission Response

The commission declines to include a grandfathering clause as none is necessary. These disclosures are required prior to the *initiation* of brokerage services, but the requirement does not apply to brokerage services that were initiated prior to the adoption of these rules. However, the commission agrees that these customers should receive these disclosures upon the renewal of those services. The commission adds language to clarify this requirement

and to require the broker to provide these disclosures when there is a material change in the services provided or in the terms and conditions of the services provided.

Disclosure of Broker Type

Power Wizard suggested that the commission require a broker to disclose whether the broker is acting as a client agent, a transaction broker, or as an agent of the REP. Power Wizard argued that broker clients would benefit from a direct disclosure of which parties to the retail electric transaction, if any, the broker owes a duty of loyalty, or other fiduciary responsibility.

Commission Response

The commission declines to add language requiring a broker to disclose whether they are acting as a client agent, a transaction broker, or as an agent of the REP as none is necessary. A broker acting as a client agent is subject to specific disclosure requirements under 16 TAC §25.486(g), and the commission is not adopting "transaction broker" or "REP agent" as defined terms.

Comments on 16 TAC §25.486(f)(3)

TEPA supported the proposed requirement that brokers must disclose their relationships with REPs to individual customers. It argued this would provide customers with the transparent and reliable information needed to make informed decisions about market participants. TEPA contended that customer confidence is necessary to preserve the value of brokers in the marketplace.

ARM, TEAM, and Calpine Retail advocated for expanding the affiliate disclosure requirement beyond REP affiliations. ARM recommended disclosure of all customer-facing affiliated entities and suggested language adding aggregators or other brokers that are affiliates of the broker. Calpine Retail supported ARM's position, arguing that the commission should require disclosure of these affiliate relationships, establish a code of conduct for REP-affiliated brokers, or both. Calpine Retail asserted that over the past year, several REPs have either started or purchased brokers, which presents a clear conflict of interest. Calpine Retail viewed this disclosure as especially important because there are no requirements for REP-affiliated brokers to provide written contracts to customers with a description of services provided or other relevant information. TEAM also supported ARM's position in reply but thought the language should capture other market-related affiliations by adding wording to include any affiliate of the broker who is registered or certified by the commission.

Commission Response

The commission declines to expand the affiliate disclosure requirements to include entities other than REPs. The role of a broker in the market is to assist its clients in the selection of a REP or product. A broker affiliated with a REP could present a conflict of interest, because the broker would have a direct financial incentive to persuade its clients to enroll with its affiliate. Brokers' relationships with other market entities do not present the same inherent risk so a mandatory disclosure requirement is not necessary. However, if an interested client requests information on a broker's other affiliates, a broker is prohibited from misleading or deceiving the client under 16 TAC §25.486(d). If the broker elects not to disclose the requested information, the client can choose not to make use of its services.

Comments on 16 TAC §25.486(f)(5)

ARM suggested removing the modifier "if applicable" from the requirement to disclose the duration of the agreement to provide brokerage services. ARM stated that all agreements, even one-time agreements, will have a duration, and the customer will benefit from having clarity regarding the duration of the agreement.

Commission Response

The commission declines to remove "if applicable," as requested by ARM. Brokerage services can include elements that do not have a meaningful duration. For instance, the service offered by an online shopping site that allows a client to generate a list of retail products that meet certain criteria does not have a meaningful duration.

Comments on 16 TAC §25.486(f)(6)

TEPA opposed the inclusion of any broker compensation requirements. It also argued that the method and amount of compensation is proprietary, and requiring disclosure is anti-competitive and will force the commoditization of brokerage services. TEPA further asserted that requiring compensation disclosure goes beyond the oversight extended to the commission by PURA §39.3555 and requested that the commission refrain from asserting any form of regulatory oversight or restrictions on the rates or prices of brokers. In reply comments, TEPA noted that the TEPA code of conduct requires brokers to disclose their fee upon request by the customer and stated that TEPA does not oppose that type of requirement.

Energy Ogre, Power Wizard, John Turala, ARM, and Brasovan supported the compensation disclosure requirement as proposed. Energy Ogre argued that the requirement is both reasonable and consistent with other types of required disclosures in the industry. Energy Ogre further argued that the compensation a broker receives, and from whom, is vital information to a residential customer. However, Energy Ogre indicated that a distinction could be made on the need for disclosure of compensation in a commercial setting versus a residential setting. John Turala argued that disclosure is important for transparency purposes. Brasovan suggested that brokers should also have to disclose how much compensation they receive from a REP. Brasovan further recommended that REPs should have to guarantee this compensation in their contracts. ARM specified that it valued transparency and that it is not asking for the rates of brokers to be regulated beyond disclosure requirements.

Electricity Ratings and RES Nation supported fee disclosure only in circumstances where the broker is directly compensated by the client. Electricity Ratings argued this approach would avoid confusion as to whether compensation received by brokers from third party sources relates to brokerage services or other unrelated services the broker provides. RES Nation also argued that this will maintain the privacy of business relationships in the competitive marketplace.

In reply comments, TEAM argued that the position taken by RES Nation and Electricity Ratings opens the door to manipulation and circumvention of the rule. TEAM asserts that a broker seeking to avoid disclosure obligations may argue that a fee charged to a client as part of the energy charge on the customer bill provided by the REP is indirect, alleviating the broker's disclosure obligation. TEAM recommended that the details to be disclosed include the amount

the client will pay or how the compensation will be calculated, and how the compensation will be billed to the client. TEAM argued that brokers bill a number of different ways, and customers need to know where to look to evaluate whether they are being appropriately billed for brokerage services.

Commission Response

The commission disagrees with TEPA that compensation disclosure is inherently anti-competitive and would force the commoditization of brokerage services. Nearly every competitive industry has transparent pricing. The commission also disagrees with TEPA's contention that compensation disclosure goes beyond the oversight extended to the commission by PURA §39.3555. The plain text of PURA §39.3555 requires a broker to "comply with…disclosure requirements…established by the commission."

Prior to the initiation of brokerage services, a broker is required to provide its client a description of how the broker will be compensated for providing brokerage services and by whom. This level of mandatory disclosure coupled with the prohibition against unauthorized charges of 16 TAC §25.486(h) provides clients with adequate customer protections in this area. Accordingly, the commission removes the language from proposed 16 TAC §25.486(f)(6) that required a broker to disclose the details of compensation provided directly by the client.

The commission declines to adopt the recommendation of Brasovan that brokers be required to disclose the amount of compensation that they receive from REPs. The

knowledge that a broker is being compensated by a REP is enough to alert a client to possible conflicts of interest while respecting the proprietary practices of brokers. The commission notes that there is no rule against a broker disclosing the full details of its compensation, nor is there a rule against a client requesting those details.

The commission also declines to require REPs to guarantee a broker's compensation in their contracts, as requested by Brasovan. If a broker desires to have its compensation guaranteed by a REP, it can negotiate for that term with the REP.

Comments on 16 TAC §25.486(f)(7)

TEPA argued that requiring a broker to disclose how a client can terminate the agreement to provide brokerage services is overly prescriptive and asserted that the matter of contract termination by the client should be left to the representation agreement between the broker and client. It further argued that termination is covered in such agreements and should not be subject to additional disclosure requirements. OPUC disagreed, arguing that customers should have the right to know how to terminate a brokerage services agreement. ARM also opposed TEPA's position, arguing that this requirement is relevant and not overly burdensome.

Commission Response

The commission declines to make changes in response to these comments as none are necessary. The commission agrees with OPUC and ARM that requiring a broker to disclose how a client can terminate an agreement to provide brokerage services is essential information for the client and not overly burdensome for the broker. The required

disclosures can be provided to the client as a part of the representation agreement, prior to the initiation of brokerage services.

Calpine Retail commented that generally there is no agreement between a broker and a customer unless the broker directly bills the customer via a separate invoice. They explained that broker fees are typically included in the REP bill, so the commission needs to provide guidance on how REPs should respond to requests by customers wanting to terminate their arrangement with the broker. Calpine Retail also noted that the commission should revise the rule to require brokers to notify REPs how to handle such termination.

Commission Response

With regard to Calpine Retail's request for clarity on how a REP should proceed if a customer who wishes to terminate its relationship with the broker contacts the REP, it is the commission's intent that this situation be addressed by the parties through private agreement.

Comments on 16 TAC §25.486(f)(8)

TEPA argued that requiring a broker to disclose early termination fees is overly prescriptive and should be left to the representation agreement between the broker and its client. ARM argued in reply comments that this requirement is relevant and not overly burdensome so should be included in the final rule.

Commission Response

The commission declines to make changes in response to these comments as none are necessary. The existence of a termination fee is a critical piece of information. The commission agrees with ARM that this requirement is not overly burdensome. The required disclosures can be provided to the client as a part of the representation agreement, prior to the initiation of brokerage services.

Comments on 16 TAC §25.486(g)

Comments related to whether REPs are required to accept client agent submitted enrollments

Energy Ogre and Power Wizard argued that REPs should be required to accept customer enrollments submitted by client agents on behalf of their clients. Energy Ogre argued that REPs use a variety of tactics, such as enrollment delays and Internet Protocol address blocking, to delay or prevent enrollments by client agents. Energy Ogre represented that it is always upfront with the terms of agent authorization with its clients and its clients knowingly and willing enter into an agreement with Energy Ogre. Energy Ogre continued that as the market evolves and becomes more complicated, it will be increasingly important for a broker like Energy Ogre to have the authority to act on behalf of its residential customers. Energy Ogre advocated for a commission review and approval process for broker agency agreements.

Power Wizard proposed, in reply comments, that "the Commission require REPs to accept all customer enrollments that are complete, including all customer information that is required to process the enrollment, and are accompanied by a simple confirmation from the enrolling client agent that they have obtained authority from the retail electric customer using the Commission approved form text." The combination of a completed enrollment, which includes information

that can only be obtained with the assistance of the retail electric customer, and verification of agent authority on a commission-approved form text, which the commission can request from the broker at any time, should be all that is necessary for a customer to utilize the services of a client agent and enroll with a REP.

In reply comments, EMEX/Patriot argued that any disputes between individual client agents and REPs regarding agency agreements should be resolved commercially or through agency law. EMEX/Patriot asserted that it has used agency agreements for nearly 20 years in almost every restructured electric market and has not experienced even one instance of a REP refusing to accept its agreement, which it provides to REPs with all its executed client contracts. EMEX/Patriot argued that if specific brokers have encountered problems with REPs accepting their agreements, "it is not likely because REPs are being arbitrary in their standards." EMEX/Patriot argued that the value that brokers bring to the table is that they have strong relationships with their clients and are trusted by REPs.

TEAM and ARM each argued that REPs should not be required to accept a broker's representation that it has legal authority to execute an enrollment for a customer. ARM argued that this violates a bedrock principle of a free and competitive market that buyers and sellers come together willingly. Similarly, TEAM argued that in the competitive marketplace a service provider should not be forced to be in the position of accepting another company's determinations of who the service provider's customers might be, or the terms of the contract with those customers. TEAM recommended the commission include language that a REP is

only required to accept a broker's representation of agency authority if the broker has a statutorily-recognized durable power of attorney.

ARM, EMEX/Patriot, Energy Ogre, and Power Wizard filed reply comments opposing TEAM's proposed durable power of attorney language. ARM argued that REPs should be able to decide what evidence of agency authority they will accept because REPs are liable under the customer protection rules for unauthorized enrollments. ARM also worried that requiring "a REP to accept certain types of purported evidence may put a REP in a position where it is required by one rule to violate another rule."

EMEX/Patriot, Energy Ogre, and Power Wizard each argued that a durable power of attorney is unnecessary. EMEX/Patriot asserted that the requirement would be unique to this jurisdiction. Energy Ogre and Power Wizard contended that requiring a durable power of attorney would set an impractical standard and goes against the goals of bolstering customer protections and maintaining a healthy and robust marketplace. These parties also pointed out that a durable power of attorney is used to convey broad and sweeping power to an agent. A client agent is not making potentially lifesaving medical decisions or executing an estate for a deceased or incapacitated person. Other agents, such as insurance and real estate agents, are not required to have a durable power of attorney.

In reply comments, ARM and TEAM suggested language clarifying that a REP is not obligated to accept a third-party's representation or evidence that it has legal authority to execute enrollment for the customer.

Commission Response

The commission declines to include language governing under what circumstances a REP must accept a broker's representation that it has agency authority to act on a client's behalf or that requires a REP to accept an enrollment submitted by a client agent. The commission agrees with EMEX/Patriot that these issues should be resolved commercially and through agency law. The commission does not intend to alter or adjudicate any claims of agency authority that may exist under areas of law that are not within the commission's jurisdiction.

With regard to Energy Ogre's arguments about the tactics that REPs use to prevent the enrollment of applicants that are represented by client agents, the commission agrees with ARM and TEAM that a fundamental principle of competitive markets is that buyers and sellers come together willingly. As long as it abides by the discrimination prohibitions of PURA and 16 TAC §25.471(c), and any other applicable laws, a REP is not prohibited from refusing to provide electric service to the clients of client agents.

While the commission will not prohibit REPs from verifying the agency authority of client agents before enrolling a client as a customer, the commission adopts the following language to reduce the compliance risk for REPs and facilitate quicker enrollments of this type: "For purposes of complying with the requirements §25.474, a REP may rely upon the representations made by a client agent provided that the client agent is registered with the commission and provides evidence of agency authority."

Comments Related to a Standardized Agency Authorization Process

Energy Ogre proposed that each broker create its own version of the client agent agreement to allow for individuality and creativity. After being submitted to and approved by the commission, the form could contain the words "this form approved by the PUC." Energy Ogre argued that having over one thousand different forms would lead to confusion for all parties involved, but that commission approval would mitigate that confusion.

Bottom Line Energy and Energy Ogre each requested that the commission adopt a standard client agency agreement. Bottom Line Energy argued that a standard one-page form would be simple and give a client a general understanding of how the agency relationship would work. Energy Ogre supported a standard form as an alternative to its proposal of commission-approved forms. In reply comments, Power Wizard supported the commission adopting standardized form text.

TEAM argued in reply that the commission does not need to become involved in the private party contractual matters between competitive market entities and opposed all of the standardized form proposals.

TEPA, ARM, and EMEX/Patriot all filed reply comments opposing the adoption of a standard form. TEPA argued that a standardized form is not provided for by PURA §39.3555 and the legislature did not adopt other legislation with similar language. TEPA also requested that if the commission did adopt a standardized form, that it only apply to residential customers. EMEX/Patriot asserted that no other jurisdiction requires a specific form for such agreements for

client agents and that disagreements between competitive entities should be resolved commercially or under agency law.

Commission Response

The commission declines to add a provision creating a commission review and approval process for broker agency agreements. The commission also declines to create a standard agency authorization form. The commission agrees that it should not interfere with contractual matters of private parties more than is necessary to provide recipients of brokerage services with adequate customer protections. Additionally, individually preapproving a separate broker agency agreement for each broker would be a drain on the commission's resources. Conversely, a standardized form would limit the ability of brokers and clients to negotiate specific terms tailored to the intended relationship between the two parties. The commission also notes that mandatory REP contract documents, such as the Terms of Service document, the Your Rights as a Customer document, and the Electricity Facts Label, do not have commission-approved forms, despite the commission having a greater level of authority over REPs than brokers.

Comments Related to Mandatory Indemnification

TEAM proposed that client agents be required to indemnify the REP against any future complaints, actions, and harm resulting from any and all claims that the enrollment was not authorized or verified or that the broker did not have authority to act as the client's agent. In reply comments, TEAM and ARM each submitted a modified version of this proposal that would

allow REPs to require a broker that acts as a client agent to provide the indemnification described above.

In reply comments, EMEX/Patriot and Power Wizard opposed the proposal that client agents be required to indemnify REPs. EMEX/Patriot argued that REPs and brokers are sophisticated commercial actors and are equipped to establish fair terms for dealing with such situations in the commercial agreements between one another, as is the practice today. Power Wizard added that if brokers falsely claim to have agency authority, the commission has authority to pursue enforcement actions against the person responsible for the unauthorized enrollment. The commission will not pursue an enforcement action against a REP if the broker is solely responsible.

Commission Response

The commission declines to include language requiring that client agents provide REPs with indemnity as suggested by TEAM. The commission agrees with EMEX/Patriot that REPs and brokers can establish fair terms through private contract. For purposes of complying with the requirements of 16 TAC §25.474, 16 TAC §25.486(g)(4) allows a REP to rely upon the representations made by a client agent provided that the client agent is registered with the commission and provides evidence of agency authority. If desired, REPs and brokers may negotiate for further indemnification by private agreement.

Comments of 16 TAC §25.486(g)(2)(E)

ARM suggested that the commission specify that the customer data referenced in this provision includes the customer's proprietary customer information. This will require a client agent to inform the client how its proprietary customer information will be used, protected, and retained by the broker and disposed of at the conclusion of the agency relationship. TEAM and ARM included language that incorporated this suggestion in the synchronized language in reply comments.

Commission Response

The commission agrees with ARM that this is a useful clarification. The commission adds language to this provision clarifying that the customer data referenced in this provision includes the client's proprietary client information.

Comments on 16 TAC §25.486(g)(3)

ARM supported language in the proposal that requires a client agent to provide evidence of its agency authority upon the request of a REP with which the broker seeks to enroll its client. ARM requested that the commission also require a client agent to provide notice to the customer's REP of record when a broker's agency authority changes or is revoked by the customer. TEAM and ARM presented synchronized language in reply comments that incorporated this recommendation.

Power Wizard requested the commission strike the requirement that brokers provide evidence of agency authority to a REP with which the broker seeks to enroll the client. Power Wizard argued that delegating the verification of the client agent to REPs is unnecessary and opens the door to

potential anti-competitive abuses and discrimination by REPs against customers who use concierge services and other shopping tools to make better shopping decisions. Power Wizard noted that the proposed rule was silent with regard to both the reasons such evidence is required and the rules that govern the actions a REP must take after evidence of agent authority has been provided.

In reply comments, Power Wizard argued that 16 TAC §§25.112 and 25.486 provide the commission with sufficient oversight authority to distinguish rule violations by brokers from rule violations by REPs, as well as providing enforcement authority to hold brokers accountable for rule violations. If a broker misrepresented its client agent authority, the broker would be subject to a possible enforcement action by the commission. Power Wizard further argues that these new powers eliminate the need for REPs to police broker representations regarding client agent authority, thereby also eliminating any need for REPs to receive notice regarding changes to a client agent's authority.

ARM filed reply comments opposing Power Wizard's proposal. ARM noted that although brokers will now have some responsibility related to customer complaints, the REP has financial and regulatory responsibility for the unauthorized enrollment of a customer. ARM asserted that a party dealing with an agent has an obligation to ascertain not only the validity of the agent's authority but also the extent. As applied here, a REP needs to know whether a broker has agency authority with respect to a customer and the scope of that authority. In the context of a broker, ARM argued, apparent authority is not sufficient. ARM distinguished this from a situation where a REP may reasonably assume that an officer of a company is authorized to execute a

retail electric contract on behalf of the company. If the broker did not have the agency to bind a customer to a contract, that contract would be invalid, but the REP would likely have already incurred costs (such as hedging, TDU charges, and wholesale settlements) that may not be recoupable.

Commission Response

The commission declines to require client agents to notify a client's REP of record when their agency authority changes or is terminated. The rule requires brokers to provide evidence of their agency authority to a REP at the time the broker seeks to enroll the client so that the REP can avoid fraudulent enrollments. However, the rule does not prohibit REPs and brokers from agreeing to additional notifications.

The commission also declines to strike the requirement that brokers provide evidence of agency authority upon the request of REPs with which the broker seeks to enroll a client. The commission does not agree with Power Wizard's contention that the commission's ability to pursue enforcement actions against fraudulent claims of agency authority eliminates the role that a REP plays in protecting the integrity of its enrollment process. The commission agrees with ARM that REPs have financial and regulatory responsibility for unauthorized enrollments and need to have the ability to verify the authority of agents with which they do business. REPs are also in the best position to prevent unauthorized switches before they occur.

The commission disagrees with Power Wizard's assertion that allowing REPs to verify the agency authority of a client agent opens the door to anti-competitive abuses by REPs.

Comments on 16 TAC §25.486(h)

Proposed 16 TAC §25.486(h) authorized a broker to enter into an agreement with a REP to assume all or part of the REP's enrollment responsibilities without creating an agency relationship with that REP. TEPA, ARM, and Power Wizard each filed comments indicating that the roles of the different entities envisioned by this section needed to be clarified. ARM believed that the phrasing of proposed subsection (h) may lead to confusion over which entities can enroll customers and act as an agent. ARM also expressed concerns with any proposal that would mandate that REPs enroll customers represented by a broker or client agent.

TEAM argued that performing actions on behalf of a REP does not comport with the definition of brokerage services, and entities that are doing so currently are already under the commission's jurisdiction as an agent of the REP. ARM and Power Wizard argued that brokers are not REP agents. TEAM, ARM, and Power Wizard agreed that REPs should not be held accountable for broker actions outside of an agency relationship. ARM argued that while REPs may enter into agreements with brokers to accept customers enrolled by the brokers, the existence of such an agreement does not create an agency relationship between the REP and broker, and therefore, brokers should be required to comply with 16 TAC §25.474 both as a matter of practice and as a means to give effect to the text and written legislative intent of PURA §39.3555. Power Wizard agreed that brokers are not REP agents, but clarified that brokers were not necessarily client agents either. To avoid confusion regarding liability and fiduciary responsibilities, Power

Wizard argued these brokers should be recognized as independent agents who represent their own interests, and the commission should hold them, and not REPs accountable for any violation of the commission's customer protection rules.

TEPA argued that the proposed "broker enrollment" provisions are unnecessary, because commission rules already provide authority for entities such as brokers to provide “retail electric functions” without specific authorization in the commission’s rules or a contract with a REP. In making this claim, TEPA relied upon 16 TAC §25.107(a)(2), which establishes that 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," and 16 TAC §25.107(a)(3), which clarifies that when a REP contractually outsources a service for which a REP certificate is not required (i.e. services referred to in the rule as "retail electric functions"), it remains responsible "under Commission rules for those functions and remains accountable to applicable laws and Commission rules for all activities conducted on its behalf by any subcontractor, agent, or any other entity." TEPA also noted that no provisions identified in statute or in 16 TAC §25.107 require an outsourced retail electric function be provided through a contract with the REP.

TEAM, ARM, and TEPA each requested that the commission strike proposed subsection (h) entirely, but each also recommended language as an alternative. TEAM proposed clarifying that a broker in this situation must also comply with 16 TAC §25.474 and all its advertising claims must comply with 16 TAC §25.475(i). In reply, ARM indicated that TEAM’s clarification would be helpful, but preferred its recommendation to incorporate 16 TAC §25.475(i) into

proposed 16 TAC §25.486(d) to be more consistent with the rule provisions that apply to aggregators and REPs. In initial comments, ARM recommended modifying this subsection to allow brokers to conduct customer enrollments under 16 TAC §25.474 and to require that an agreement between a REP and a broker under this subsection must be memorialized on paper or electronically and provided to the commission upon request. In reply comments, ARM and TEAM each presented a synchronized proposal that required a broker that is not an agent of a REP under 16 TAC §25.471(d)(10) that conducts all or part of a customer enrollment must do so in compliance with the requirements of 16 TAC §25.474. They further recommended that a REP may, but is not required to, accept such enrollments, and any agreement between a REP and a broker under this subsection must be memorialized on paper or electronically and provided to the commission upon request.

TEPA recommended the commission adopt a definition of "enrollment services" as the process of obtaining authorization and verification for a request for service that is a move-in or switch in accordance with 16 TAC §25.471. TEPA also recommended a definition for a "client enrollment agent" be referenced in this section, and added to the definitions section of the rule to help consumers distinguish between: (a) brokers who may simply be "brokers"; (b) brokers who act in an agency relationship with a customer; and (c) and brokers who have entered into an agreement with a REP to enroll customers or applicants under the terms specified in this new proposed section.

Commission Response

Proposed 16 TAC §25.486(h) was intended to provide requirements for ongoing businesses that perform enrollment services without an express agency relationship with a REP. However, the commission agrees with comments suggesting that the proposed language would further confuse the role of different entities with regard to customer enrollments. The commission also agrees with TEPA that 16 TAC §25.107(a)(2) allows a broker to conduct enrollment activities as a "service for a REP." Moreover, 16 TAC §25.107(a)(3) makes it clear that under current law a REP can outsource retail electric functions to a "subcontractor, agent, or any other entity." Accordingly, the commission agrees that brokers that conduct enrollment activities are not required to have an agency relationship with a REP. Because the commission's intended purpose for this section is already provided for under current law, the commission removes proposed 16 TAC §25.486(h) from the rule. The commission also declines to adopt any of the alternate language recommended by the commenters as it is unnecessary.

However, the commission disagrees that REPs are not accountable for enrollment activities conducted by brokers on their behalf. Under 16 TAC §25.107(a)(3), "[a] REP that outsources retail electric functions…remains accountable to applicable law and commission rules for all activities conducted on its behalf by any subcontractor, agent or any other entity." To the extent that a broker assumes any of the duties of a REP with regard to the enrollment process, the REP will be accountable under the rules for all activities conducted on its behalf by that broker.

With regard to the concerns of TEAM and ARM, a REP is not required to accept an enrollment conducted by a broker. It is the intention of the commission that REPs remain accountable for enrollments under 16 TAC §25.474, and REPs and brokers continue to address these issues through private agreement, as necessary.

Comments on 16 TAC §25.486(i)

TEPA argued it would be appropriate to include the modifier "unduly" in this section to conform the broker discrimination prohibitions to those applicable to REPs and aggregators. TEAM indicated that it maintains its support of this section, unmodified, but does not oppose the addition of "unduly."

Commission Response

The commission agrees that inclusion of the term "unduly" is appropriate and would align 16 TAC §25.486(i) with the discrimination prohibitions that apply to REPs and aggregators. The commission makes the recommended change.

Comments on 16 TAC §25.486(j)(1)

Oncor recommended that the commission include an additional provision in this subsection modeled after 16 TAC §25.472(b)(3), which allows a REP to request a customer or applicant's monthly usage from a TDU. This would require that, upon receiving authorization from a client, a broker must request from the TDU the monthly usage of the client's premise for the previous 12 months, and the TDU, upon receipt of a written request or other proof of authorization, must

provide the requested information to the requesting broker no later than three business days after the request for proof of authorization is submitted.

Oncor explained that all four TDUs in Texas's competitive retail market have implemented automated historical usage portals. Using Oncor's REP portal, a REP that affirms it has authorization from its customers may request up to 250 ESI IDs at a time and receive the historical usage within minutes. However, because brokers are not subject to the provisions of 16 TAC §25.472(b)(3), the portal used by brokers requires them to attach a copy of the customers' signed letter of authorization rather than allow the broker to simply affirm they have authorization, as the REPs are allowed to do. Oncor also explained that in 2018, Oncor fulfilled requests for more than 360,000 ESI IDs through their automated portals, and at that volume, all process improvements are meaningful. Power Wizard supported Oncor's proposal in reply comments.

ARM filed reply comments opposing Oncor's proposed language. ARM noted that no commission rule governs how Oncor manages its portal and PURA §39.3555 does not address TDUs' provision of historical usage data to brokers. For these reasons, ARM argued that this proposal is outside the scope of this rulemaking. ARM further argued that, if anything, this should be a permissive requirement, not mandatory as Oncor proposed. ARM also argued that even though brokers are now within commission's jurisdiction, broker comments throughout this rulemaking indicate that they do not wish to be included within the full scope of the commission's customer protection rules related to retail electric service. This runs contrary to Oncor's argument in support of not requiring evidence of authority. ARM recommended that it

is appropriate to continue to require that brokers submit proof of authorization from a customer to obtain that customer's historical usage data.

Commission Response

The commission declines to include a provision modeled after 16 TAC §25.472(b)(3) as requested by Oncor. The commission agrees with ARM that broker registration applications are not subject to the same level of review as REP licensing applications, nor are brokers subject to the authorization and verification requirements of 16 TAC §25.474 when enlisting clients. The commission will not mandate the release of proprietary client information by a public utility to brokers because it is not clear that the utility has the ability to verify whether the customer has authorized the release of the information.

Comments on 16 TAC §25.486(j)(1)

Verifiable Authorization to Release Customer Information

ARM requested that the commission require a broker to obtain the customer's verifiable authorization by means of one of the methods authorized in 16 TAC §25.474 prior to releasing customer information. ARM argued that this would track the language of 16 TAC §25.472(b)(1) and prevent a double standard with REPs and aggregators. TEAM supported this recommendation in reply comments.

Commission Response

The commission declines to modify 16 TAC §25.486(j) to require brokers to obtain verifiable authorization by means of one of the methods authorized in 16 TAC §25.474

prior to releasing proprietary client information. Brokers are not otherwise required to use these methods when obtaining client authorization, and it would be burdensome to require such use in this context. The commission retains the requirement that brokers obtain authorization to release proprietary client information in writing. The commission notes that under 16 TAC §25.486(k)(1)(A), brokers must maintain records to verify compliance with this requirement.

Release of Customer Information to Agents, Vendors, Partners, or Affiliates

ARM recommended adding language that would track the requirements of 16 TAC §25.472(b)(1)(B), which would provide an additional exception to the prohibition against releasing proprietary client information to agents, vendors partners, or affiliates of the broker and impose requirements related to that exception. TEAM supported ARM's suggested additions in reply comments.

Commission Response

The commission declines to adopt the additional provisions suggested by ARM related to the release of proprietary client information to an agent, vendor, partner, or affiliate of the broker. Brokers and their clients can, by private agreement and consistent with the requirements of this section, determine for what purposes the broker may release the client's proprietary client information and to whom.

Comments on 16 TAC §25.486(j)(1)(B)

TEPA urged the commission to remove proposed 16 TAC §25.486(j)(1)(B), which would allow brokers to release proprietary client information to OPUC, upon request under PURA §39.101(d). This provision of PURA requires a REP, power generation company, aggregator, or other entity that provides retail electric service to submit reports to the commission and OPUC annually and on request relating to the person's compliance with PURA §39.101. TEPA objected to granting OPUC the right to require brokers to provide confidential and proprietary information about retail electric services without customer approval. TEPA continued that brokers are not subject to the statutory provisions that establish these reporting requirements, and that using this mechanism to assert this authority for OPUC is inappropriate and inconsistent with the competitive, discretionary nature of the services offered by brokers to retail electric customers. TEPA requested that if this provision remains, it should apply only to services for residential and small commercial customers. TEPA also opposed requiring brokers to file annual reports with the commission.

In reply, OPUC argued that under PURA Chapter 13, OPUC is the independent office responsible for representing the interests of residential and small commercial consumers and is statutorily responsible for maintaining a system to promptly and efficiently act on complaints that are filed with OPUC that it has the authority to resolve. OPUC contends that it should have access to all information that is necessary to protect residential and small commercial customer interests, including proprietary customer information possessed by brokers. ARM argued in reply comments that brokers should be required to file these annual reports. ARM stated that while brokers are not specifically included on the list of entities that are statutorily required to

file these reports, PURA §39.3555 specifically invokes the customer protections found in Chapters 17 and 39.

Commission Response

The commission strikes proposed 16 TAC §25.486(j)(1)(B) in response to TEPA's comments. The commission agrees with ARM that the broad language of PURA §39.3555 would allow the commission to require brokers to file annual reports and disclose proprietary customer information contained in those reports to OPUC. However, at the current time, the commission believes that requiring brokers to file an annual report would be overly burdensome to a market segment that has just come under the commission's jurisdiction.

The commission agrees that OPUC should have all the information that it needs to address residential and small commercial complaints. However, OPUC can obtain authorization from a complainant to obtain that complainant's proprietary client information as needed.

Comments on 16 TAC §25.486(j)(1)(C)

TEAM recommended that the commission modify proposed 16 TAC §25.486(j)(1)(C) to clarify that brokers can also release proprietary client information to REPs or TDUs as necessary to solicit bids under terms approved by the commission.

Commission Response:

The commission declines to permit brokers to release proprietary client information to REPs or TDUs for purposes of soliciting bids without the express authorization of the client, as suggested by TEAM. Instead, the commission removes proposed 16 TAC §25.486(j)(1)(C) from the rule. It is the intent of the commission that clients authorize any release of their proprietary client information by a broker. The removal of this provision should not place an additional burden on brokers, because a broker is not prohibited from obtaining client authorization through a general release that describes, with precision, the circumstances in which a broker can release the client's proprietary client information. The commission also notes that 16 TAC 25.486(d) applies to any communications describing how a client's proprietary client information will be used must be clear and not misleading, fraudulent, unfair, deceptive, or anti-competitive.

Comments on 16 TAC §25.486(j)(2)

Sale of Client-Specific Information

TEAM, ARM, and OPUC recommended that the commission prohibit the sale of client-specific information under any circumstances. TEAM argued that REPs are not allowed to sell customer-specific information and recommended language prohibiting the sale of proprietary client information. ARM recommended language prohibiting the sale of customer-specific information. In addition to recommending the prohibition on the sale of client information in reply comments, OPUC also supported the proposed rule language prohibiting the sale of customer-specific information without a customer's permission.

Commission Response

The commission declines to include a prohibition on the sale of client-specific information as requested by TEAM, ARM, and OPUC. Retail electric customers in deregulated areas of the state must interact with a REP to receive electric service. If REPs were permitted to sell customer-specific information, there would be a risk that requesting authorization to allow this sale would become an industry standard, preventing a customer from obtaining electric service without agreeing to allow the sale of their information. Conversely, customers are not required to use brokers to obtain retail electric service. If a client elects to engage a broker and authorize the broker to sell their information, the commission will not prevent the client from doing so.

Sale of Clients Upon Broker Market Exit

RES Nation requested clarification that, when exiting the market, selling clients to another broker is not a violation of this rule. In reply comments, TEAM and ARM each opposed this suggestion. TEAM argued that this is unnecessary in the context of brokers. Because customers are not required to obtain brokerage services, there is no need for the commission to facilitate the transfer of clients to another broker and no reason why a broker should be able to sell customer-specific information to another broker under any circumstance. ARM argued that if a broker is exiting the market, it would make sense to sell the broker entity, not the individual customer's proprietary data. Furthermore, ARM continued, no such exception exists for aggregators exiting the market**.**

Commission Response

In response to RES Nation's request for clarification on whether, when exiting the market, selling clients to another broker is a violation of the rule, the commission clarifies that the same requirements apply in the context of a market exit as would apply otherwise. With regard to the sale of proprietary client information, a broker must first obtain consent from the client in writing. The commission also notes that any transfer of a client to a different broker would trigger the required disclosure requirements of 16 TAC §25.486(f) and the requirements of 16 TAC §25.486(g) if the broker is a client agent.

The commission agrees with TEAM that brokerage services are not essential, and the commission does not need to provide a process for the transfer of clients upon a broker market exit. However, the commission will not prohibit brokers and clients from including terms in their private agreements that provide for this outcome, so long as the terms are consistent with PURA and the commission's rules.

Comments on 16 TAC §25.486(k)

ARM recommended restyling this subsection from "customer service" to "customer access" for consistency with 16 TAC §25.485.

Commission Response

The commission agrees that ARM's proposed edit would provide consistency with 16 TAC §25.485. The commission restyles this subsection "Client Access and Complaint Handling."

Comments on 16 TAC §25.486(k)(1)

Access to Customer Service Representatives

Electricity Ratings argued that brokers generally do not have access to client bills or the ability to terminate REP services unless the broker is a client agent. Accordingly, Electricity Ratings requested that the commission modify this provision to only require client agents to provide customer access to customer service representatives to discuss bills and the termination of REP service. Electricity Ratings also requested the commission clarify that brokers who are not client agents are only required to provide client access to customer service representatives to discuss termination of service agreements with the broker.

TEPA filed reply comments in support of Electricity Ratings's proposed modifications regarding the termination of brokerage service agreements. However, in reference to Electricity Ratings's proposal that only client agents must provide client access to discuss bills and the termination of REP service, TEPA pointed out that no provisions exist in PURA §39.3555 that provide the basis for distinguishing treatment for different types of registered brokers. Accordingly, TEPA opposed the suggested addition of new language intended to authorize limited and specific actions for which a broker not need a grant of authority in the rules.

Commission Response

The commission agrees with Electricity Ratings that brokers should be required to provide clients access to customer service representatives to discuss the termination of agreements to provide brokerage services. The commission makes the recommended change.

The commission declines to adopt the client agent related language that Electricity Ratings recommends. Instead, the commission adds broader language requiring a broker to provide reasonable access to its service representatives to discuss charges on bills or any other aspect of the brokerage services provided to the client by the broker.

Complaints Submitted to Broker

TEAM stated that it is unclear when the broker must inform the client of the commission's complaint process. It suggested adding it to the initial disclosures to the client and to any communication regarding an unresolved complaint brought to the broker by a client.

Commission Response

The commission declines to adopt TEAM's recommendation that a broker be required to provide information regarding the commission's informal complaint resolution process as part of the initial disclosures and as a part of every communication with a client with a pending complaint, as this could be burdensome if the broker and client have multiple communications regarding a complaint. Instead, the commission adds a requirement that the broker provide information to the client regarding the commission's informal complaint resolution process within 21 days of receiving the complaint.

ARM recommended adding a deadline of 21 days for a broker to investigate client complaints and advise the complainant of the results.

Commission Response

The commission declines to require a broker to complete its own internal complaint investigation process within 21 days, as recommended by ARM. The requirement for brokers to provide the complainant with information regarding the commission's informal complaint resolution process within 14 days provides sufficient customer protections.

Comments on 16 TAC §25.486(k)(3)

ARM recommends that the commission replace "may not" with "must not" to clarify that a broker must not use a written or verbal agreement with a client to impair the right of a residential or small commercial customer to file a complaint.

Commission Response

The commission agrees with ARM that a broker must not use a written or verbal agreement with a client to impair the right of a residential or small commercial customer to file a complaint and makes the recommended change.

Debt Collection During Pendency of an Informal Complaint

ARM suggested adding an additional provision prohibiting debt collection or reporting to a credit agency during the pendency of an informal complaint. TEAM supported this proposal in reply comments and argued that this proposal complements proposed 16 TAC §25.112(g), which lists unauthorized charges as a significant violation.

Commission Response

The commission has added a provision prohibiting the initiation of collection activities, including a report of a customer's delinquency to a credit reporting agency, with respect to the disputed portion of the bill, during the pendency of an informal complaint. Under 16 TAC §22.272(d), commission staff must attempt to informally resolve all complaints within 35 days, making this a sensible customer protection relative to the minor burden it imposes on brokers.

Comments on 16 TAC §25.486(k)(3)(B)

ARM pointed out that some of the information required by this subsection may not be available if a complaint is initiated against an unregistered broker or before a customer receives an electric service identifier. ARM recommended the commission add "if any" to 16 TAC §§25.486(k)(3)(B)(iii) and (v).

Commission Response

The commission declines to make changes based upon this comment. Under 16 TAC §25.486(k)(3)(B), a complaint should include the listed information *as applicable*. If a broker does not have a registration number or a customer does not yet have an electric service identifier, then these pieces of information are not applicable. Moreover, the purpose of this list is to assist commission staff in processing complaints as efficiently as possible. Commission staff endeavors to process each informal complaint it receives, even if the complainant cannot provide each of the listed items.

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

These new sections are adopted under the section 14.002 of the Public Utility Regulatory Act, Tex. Util. Code §14.002 (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and §39.3555, which requires entities that provide brokerage services in this state to register as brokers with the commission and to comply with customer protection provisions established by the commission and Chapters 17 and 39 of PURA and which requires the commission to adopt rules as necessary to implement the section.

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

§25.112 Registration of Brokers.

(a) Registration required. A person must not provide brokerage services, including brokerage services offered online, in this state for compensation or other consideration unless the person is registered with the commission as a broker. A broker is responsible for all activities conducted on its behalf by any subcontractor or agent. A retail electric provider (REP) is not permitted to register as a broker and must not knowingly provide bids or offers to a person who provides brokerage services in this state for compensation or other consideration and is not registered as a broker. A REP may rely on the publicly available list of registered brokers posted on the commission's website to determine whether a broker is registered with the commission.

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

(1) **Broker** -- A person that provides brokerage services.

(2) **Brokerage services** -- Providing advice or procurement services to, or acting on behalf of, a retail electric customer regarding the selection of a REP, or a product or service offered by a REP.

(c) Requirements for a person seeking to register as a broker. A person seeking to register under this section must provide the information listed in this subsection.

(1) All business names of the registrant limited to five business names;

(2) The mailing address, telephone number, and email address of the principal place of business of the registrant;

(3) The name, title, business mailing address, telephone number, and email address for the registrant's commission contact person;

(4) The name, title, business mailing address, telephone number, and email address of the registrant's customer service contact person;

(5) The name, title, business mailing address, telephone number, and email address of the registrant's commission complaint contact person;

(6) The form of business being registered (e.g., corporation, partnership, or sole proprietor); and

(7) An affidavit from the owner, partner, or officer of the registrant affirming that the registrant is authorized to do business in Texas under all applicable laws and is in good standing with the Texas Secretary of State; that all statements made in the application are true, correct, and complete; that any material changes in the information will be provided in a timely manner; and that the registrant understands and will comply with all applicable law and rules.

(d) **Registration procedures.** The following procedures apply to a person seeking to register as a broker:

(1) A registration application must be made on the form approved by the commission, verified by notarized oath or affirmation, and signed by an owner, partner, or officer of the registrant. The form may be obtained from the central records division of the commission or from the commission's Internet site. Each registrant must file its registration application form with the commission's filing clerk in accordance with the commission's procedural rules.

(2) The registrant must promptly inform the commission of any material change in the information provided in the registration application while the application is being processed.

(3) An application will be processed as follows:

(A) Commission staff will review the submitted form for completeness. Within 20 working days of receipt of an application, the commission staff will notify the registrant by mail or e-mail of any deficiencies in the application. The registrant will have ten working days from the issuance of the notification to cure the deficiencies. If the deficiencies are not cured within ten working days, commission staff will notify the registrant that the registration application is rejected without prejudice.

(B) Commission staff will determine whether to accept or reject the application within 60 days of the receipt of a complete application.

(C) An applicant may contest commission staff's rejection of its application by filing a petition for formal review of the registration application in accordance with the commission's procedural rules. The registrant has the burden of proof to establish that its application meets the requirements of PURA and commission rules.

(e) **Registration Update.** Unless updated, a broker registration expires three years after the date of the assignment of a broker registration number or the registration's most recent update. Each registrant must submit the information required to update its registration with the commission not less than 90 days prior to the expiration date of the current registration. An expired registration is no longer valid, and the broker will be removed from the broker list on the commission's website.

(f) **Registration Amendment.** A broker must amend its registration to reflect any changes in the information previously submitted, including business name, mailing address, email

address, or telephone number within 30 calendar days from the date of the change. This amendment is an update under (e) of this section.

(g) **Suspension and Revocation of Registration and Administrative Penalty.** The commission may impose an administrative penalty for violations of PURA or commission rules. The commission may also suspend or revoke a broker's registration for significant violations of PURA or commission rules. 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) a pattern of failure to meet the requirements of PURA, commission rules, or commission orders;

(4) failure to respond to commission inquiries or customer complaints in a timely fashion;

(5) switching or causing to be switched the REP of a customer without first obtaining the customer's authorization; or

(6) billing an unauthorized charge or causing an unauthorized charge to be billed to a customer's retail electric service bill.

§25.486 Customer Protections for Brokerage Services

(a) **Applicability.** This section applies to all brokers.

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

(1) **Broker** -- As defined in §25.112 of this title (relating to Registration of Brokers).

(2) **Brokerage services** -- As defined in §25.112 of this title.

(3) **Client** -- A person who receives or solicits brokerage services from a broker.

(4) **Client agent** -- A broker who has the legal right and authority to act on behalf of a client regarding the selection of, enrollment for, or contract execution of a product or service offered by a retail electric provider (REP), including electric service.

(5) **Proprietary client information** -- Any information that is compiled by a broker on a client or retail electric customer that makes possible the identification of any individual client or retail electric customer by matching such information with the client's or customer's name, address, retail electric account number, type or classification of retail electric service, historical electricity usage, expected patterns of use, types of facilities used in providing service, individual retail electric or brokerage services contract terms and conditions, price, current charges, billing records, or any information that the client or 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 client or customer to whom the information relates does not constitute proprietary client information.

(c) **Voluntary Alteration of Customer Protections**. A client other than a residential or small commercial class customer or applicant, or a non-residential customer or applicant whose load is part of an aggregation in excess of 50 kilowatts, may agree to a different level of customer protections related to the provision of brokerage services than is required by this section. Any such agreements do not change the level of customer

protections a client is entitled to relating to the provision of retail electric service. Any agreements containing a different level of protections from those required by this section must be in writing and provided to the client. Copies of such agreements must be provided to commission staff upon request.

(d) **Broker Communications**.

(1) All written, electronic, and oral communications, including advertising, websites, direct marketing materials, and billing statements produced by a broker must be clear and not misleading, fraudulent, unfair, deceptive, or anti-competitive. Prohibited communications include, but are not limited to:

(A) Stating, suggesting, implying or otherwise leading a client to believe that receiving brokerage services will provide a customer with more reliable service from a transmission and distribution utility (TDU);

(B) Falsely suggesting, implying or otherwise leading a client to believe that a person is a representative of a TDU, REP, aggregator, or another broker;

(C) Falsely stating or suggesting that brokerage services are being provided without compensation; and

(D) Falsely claiming to be the client agent of a customer or applicant.

(2) All printed advertisements, electronic advertising over the Internet, and websites must include the broker's registered name.

(e) **Language Requirements.** A broker must offer customer service and any information required by this section to a client in the language used to market the broker's products and services to that client.

(f) **Required Disclosures**. A broker must inform a client of the following prior to the initiation of brokerage services, the renewal of those services, or a material change in the services provided, or the terms and conditions of those services:

(1) The broker's registered name, business mailing address, and contact information;

(2) The broker's commission registration number;

(3) The registered name of any REP that is an affiliate of the broker;

(4) A clear description of the services the broker will provide for the client.

(5) The duration of the agreement to provide brokerage services, if applicable;

(6) A description of how the broker will be compensated for providing brokerage services and by whom;

(7) How the client can terminate the agreement to provide brokerage services, if applicable;

(8) The amount of any fee or other cost the client will incur for terminating the agreement to provide brokerage services, if applicable; and

(9) The commission's telephone number and email address for complaints and inquiries.

(g) **Client Agent Requirements.**

(1) An agreement between a broker and a client that authorizes the broker to act as a client agent for the client must be in writing.

(2) In addition to the requirements of subsection (f) of this section, a broker that acts as a client agent for the client must inform the client of the following:

(A) A clear description of the actions the broker is authorized to take on the client's behalf;

(B) The duration of the agency relationship;

(C) How the client can terminate the agency agreement;

(D) The amount of any fee or other cost the client will incur for terminating the agency agreement; and

(E) How the client's customer data, including proprietary client information, and account access information will be used, protected, and retained by the broker and disposed of at the conclusion of the agency relationship.

(3) A broker that is authorized to act as a client agent for the client must provide evidence of that authority upon request of the client, commission staff, or a REP with which the broker seeks to enroll the client.

(4) For purposes of §25.474 of this title (relating to Selection of Retail Electric Provider), a REP may rely upon the representations made by a client agent provided that the client agent is registered with the commission and provides evidence of agency authority.

(h) Unauthorized Charges and Unauthorized Changes of Retail Electric Provider.

(1) Unauthorized charges. A broker must not bill an unauthorized charge or cause an unauthorized charge to be billed to a customer's retail electric service bill.

(2) Unauthorized service changes. A broker must not switch or cause to be switched the REP of a customer without first obtaining the customer's authorization.

(i) **Discrimination Prohibited.** A broker must not unduly refuse to provide brokerage services or otherwise unduly discriminate in the provision of brokerage services to any client because of race, creed, color, national origin, ancestry, sex, marital status, source or level of income, disability, or familial status; or refuse to provide brokerage services to a

client because the client 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 client.

(j) **Proprietary Client Information.**

(1) A broker must not release proprietary client information to any person unless the client authorizes the release in writing. This prohibition does not apply to the release of such information to the commission.

(2) A broker is not permitted to sell, make available for sale, or authorize the sale of any client-specific information or data obtained unless the client authorizes the sale in writing.

(k) **Client Access and Complaint Handling.**

(1) **Client Access.** Each broker must ensure that clients have reasonable access to its service representatives to make inquiries and complaints, discuss charges on bills or any other aspect of the brokerage services provided to the client by the broker, terminate an agreement to provide services, and transact any other pertinent business. A broker must promptly investigate client complaints and advise the complainant of the results. A broker must inform the complainant of the commission's informal complaint resolution process and the following contact information for the commission within 21 days of receiving the complaint: Public Utility Commission of Texas, Customer Protection Division, P.O. Box 13326, Austin, Texas 78711-3326; (512) 936-7120 or in Texas (toll-free) 1-888-782-8477, fax (512) 936-7003, e-mail address: customer@puc.texas.gov, Internet

website address: www.puc.texas.gov, TTY (512) 936-7136, and Relay Texas (toll-free) 1-800-735-2989.

(2) **Complaint Handling**. A client has the right to make a formal or informal complaint to the commission. A broker may not use a written or verbal agreement with a client to impair this right for a client that is a residential or small commercial customer. A broker must not require a client that is a residential or small commercial customer to engage in alternative dispute resolution, including requiring complaints to be submitted to arbitration or mediation by third parties.

(3) **Informal Complaints**.

(A) A person may file an informal complaint with the commission by contacting the commission at: Public Utility Commission of Texas, Customer Protection Division, P.O. Box 13326, Austin, Texas 78711-3326; (512) 936-7120 or in Texas (toll-free) 1-888-782-8477, fax (512) 936-7003, e-mail address: customer@puc.texas.gov, Internet website address: www.puc.texas.gov, TTY (512) 936-7136, and Relay Texas (toll-free) 1-800-735-2989.

(B) A complaint should include the following information, as applicable:

(i) The complainant's name, billing and service address, telephone number and email address, if any;

(ii) The name of the broker;

(iii) The broker's registration number;

(iv) The name of any relevant REP;

(v) The customer account number or electric service identifier;

(vi) An explanation of the facts relevant to the complaint;

(vii) The complainant's requested resolution; and

(viii) Any documentation that supports the complaint.

(C) The commission will forward the informal complaint to the broker.

(D) The broker must investigate each informal complaint forwarded to the broker by the commission and advise the commission in writing of the results of the investigation within 21 days after the complaint is forwarded to the broker by the commission.

(E) The commission will review the complaint information and the broker's response and notify the complainant of the results of the commission's investigation.

(F) The broker must keep a record for two years after receiving notification by the commission that the complaint has been closed. This record must show the name and address of the complainant, the date, nature, and outcome of the complaint.

(G) While an informal complaint process is pending, the broker must not initiate collection activities, including a report of the customer's delinquency to a credit reporting agency, with respect to the disputed portion of the bill.

(4) **Formal Complaints.** If the complainant is not satisfied with the results of the informal complaint process, the complainant may file a formal complaint with the commission within two years of the date on which the commission closes the

informal complaint. Formal complaints will be docketed as provided in the commission's procedural rules.

(l) **Record Retention.**

(1) A broker must establish and maintain records and data that are sufficient to:

(A) Verify its compliance with the requirements of any applicable commission rules; and

(B) Support any investigation of customer complaints.

(2) All records required by this section must be retained for no less than two years, unless otherwise specified.

(3) Unless otherwise prescribed by the commission or its authorized representative, all records required by this subchapter must be provided to the commission within 15 calendar days of its request.

This agency certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority. It is therefore ordered by the Public Utility Commission of Texas that §25.112 relating to registration of brokers and §25.486 relating to customer protections for brokerage services are hereby adopted with changes to the text as proposed.

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

PUBLIC UTILITY COMMISSION OF TEXAS

DEANN T. WALKER, CHAIRMAN

ARTHUR C. D'ANDREA, COMMISSIONER

SHELLY BOTKIN, COMMISSIONER

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