**PROJECT NO. 25610**

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| **RULEMAKING PROCEEDING TOAMEND THE RULES IN CHAPTER 25, SUBCHAPTER H, DIVISION 2, REGARDING ENERGY EFFICIENCY AND CUSTOMER OWNED RESOURCES** | **§ § § § § §** | **PUBLIC UTILITY COMMISSION OF TEXAS** |

**ORDER ADOPTING AMENDMENTS TO §§25.181-25.183 AS APPROVED AT THE SEPTEMBER 12, 2002 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts amendments to §25.181, relating to the Energy Efficiency Goal, §25.182, relating to Energy Efficiency Grant Program, and §25.183, relating to Reporting and Evaluation of Energy Efficiency Programs with changes to the text as proposed in the June 14, 2002 *Texas Register* (27 TexReg 5045). The amended rules will provide guidance for the implementation of the energy efficiency goal mandated under Public Utility Regulatory Act (PURA) §39.905, and an energy efficiency grant program and reporting requirements regarding energy and demand savings, and concomitant air emission reduction as mandated under the Health and Safety Code, Title 5, Subtitle C, Chapter 386, Subchapter E, Energy Efficiency Grant Program. In particular, the amended rules now include a definition for an affiliate of an energy efficiency service provider and the procedure for determining affiliate status. In addition, the amendments will allow utilities to acquire demand savings in a more cost-effective manner by implementing load factor caps and allowing adjustments in incentive levels in response to market conditions. The amendments will also enhance the overall quality of the energy efficiency program by giving utilities greater control over the quality of contractors and encouraging greater participation by small contractors.

Because these amendments will increase the burden on the utilities, the amendments will also allow the utilities to continue to expend 10% of the budget on program administration. The amended rules will take effect for any programs being developed for the 2003 calendar program year.

The commission initiated the rulemaking proceeding on March 20, 2002 under Project Number 25610, *Rulemaking Proceeding to Amend the Rules in Chapter 25, Subchapter H, Division 2, Regarding Energy Efficiency and Customer Owned Resources.* The commission's staff hosted one workshop on April 23, 2002 to elicit input from stakeholders on various aspects of the rulemaking. In addition, staff and parties held informal meetings to resolve issues. At the Open Meeting on May 23, 2002, the commission voted to publish the proposed rule amendments for comments in the June 14, 2002 issue of the *Texas Register*.

Written comments were filed on July 15, 2002. American Council for an Energy Efficient Economy (ACEEE), American Electric Power (AEP), Cardinal Glass Industries (Cardinal), Reliant – d/b/a Centerpoint Energy Houston Electric (Reliant), City of Clifton (Clifton), Entergy Gulf States, Inc. (EGSI), Electric Utility Marketing Managers Organization of Texas (EUMMOT), Energy Conservation Coalition (ECC), Felcor Lodging Trust (Felcor), National Association of Energy Service Companies (NAESCO), Office of Public Utility Council (OPC), Oncor Electric Delivery Company (Oncor), Service Providers Coalition (SPC), Texas Association of Air Conditioning Contractors (TACCA), Texas Hotel & Motel Association

(THMA), and Texas Ratepayers Organization to Save Energy, Texas Legal Services Center and Consumers Union, collectively referred to as Consumer Groups, filed written comments. Felcor's comments consisted of a letter expressing support of the comments filed by the THMA.

On July 18, 2002, commission staff held a public hearing pursuant to §2000.029 of the Administrative Procedures Act (APA). The purpose for the hearing was to give parties the opportunity to provide additional, clarifying, or reply comments. Representatives of AEP, Aspen Systems, Cardinal, Clark, Thomas & Winters, Consumer Groups, ECC, EUMMOT, Free Lighting Company, Frontier Associates (Frontier), Good Company, Nexant Consulting, OPC, Oncor, Princeton American Energy, LLC, Reliant, SESCO, Inc., TACCA, and Winegard Energy attended the public hearing. EUMMOT represented AEP, EGSI, Oncor, Reliant, and Texas New Mexico Power Company (TNMP).

AEP, EGSI, Oncor, Reliant, and TNMP submitted comments to indicate their support of the comments submitted by EUMMOT, and in so far they did not differ from EUMMOT they are not reiterated in the preamble. Felcor's comments consisted of a letter expressing support of the comments filed by the THMA, and are therefore addressed as THMA comments in the preamble. ECC submitted comments on behalf of Alliant-Cogenex, Custom Energy, Sempra Energy Solutions, and Siemens Building Technologies. NAESCO, as a trade organization, submitted comments on behalf of its members. The hearing, however, revealed that

NAESCO's comments were not supported by all of its members, and there was no NAESCO member present expressing support for the comments. The comments submitted by SPC did not indicate what parties belonged to the "coalition," and the signatory was not present at the hearing to provide the information. To the extent that comments provided at the hearing differ from the submitted written comments, such comments are summarized herein.

*Comments on specific questions in the preamble of the proposed amended rules.*

In the preamble, the commission requested that interested parties address three issues related to the implementation and final development of the proposed amendments to the rules. The parties' responses are summarized below.

*Issue Number 1: The proposed amendment to §25.181(i)(3) is intended to increase EESP participation and encourage participation by smaller EESPs. Is this an appropriate policy goal? If yes, is the proposed method the most effective means to reach this goal?*

Clifton stated that participation by smaller Energy Efficiency Service Providers (EESPs) is an appropriate policy goal because the city has few, if any, large EESPs capable of meeting the requirements for large contracts. The city does, however, have a number of small EESPs that would benefit from a small EESP set-aside. EUMMOT stated that this is an appropriate policy goal; but there should be an appropriate balance between small, local EESPs, and large,

national EESPs. According to EUMMOT, oversight of numerous small projects increases administrative costs, some utilities budgets are too small to sustain numerous EESPs, and only larger contracts have the ability to meet the security requirements and the assurance that they will meet their contractual goals. EUMMOT stated that it is important to balance the goal of increasing participation by small EESPs with achieving the demand reduction goal, and the proposed language in the rule achieves this balance. EGSI, in separate comments, stated that changes to make the program more accessible to local EESPs will allow customers not only to comparison shop, but will allow customers to do business with local companies they know best, and is therefore good public policy.

OPC stated that the primary purpose of the rule should be to achieve the goals set forth in PURA §39.905 at the lowest possible cost. Therefore, if increased EESP participation leads to higher program costs, the proposed policy goal is inappropriate. According to OPC, the 20% limit placed on EESP participation in subsection (i)(3) increases the number of participating EESPs, thereby increasing customer choice. OPC recognized, however, that smaller utility programs may have difficulty in finding sufficient number of EESPs and concurred that a utility should be able to extend additional funding to a limited number of EESPs if no other EESPs are available to participate without having to seek a waiver. OPC stated that the amendment to subsection (i)(3) provides such balance, but recommended a longer waiting period, from 90 to 120 days.

SPC stated that increasing EESP participation and encouraging participation by small EESPs is an appropriate, albeit a secondary policy goal. Similarly to OPC, SPC argued that if this policy goal leads to increased program costs it is not appropriate, and should only be pursued if the administrative costs remain capped at 5.0% of program costs, as opposed to the proposed 10%. SPC stated it would be particularly inappropriate because it may reduce the amount of energy efficiency achieved under the program. SPC further stated that the proposed rule provisions have already been tested and it has been demonstrated that they are not effective in encouraging small EESP participation. According to SPC, the barrier to small EESP participation is not the size of the projects, but the difficulties with cash flow and the complexities of measure eligibility and pricing. Instead, the rule should address the cash flow problems and simplify the complex pricing policies by placing the 65% cap for lighting on the total incentive dollars, and use a lower percentage of the avoided costs rather than load factor caps. Free Lighting made similar statements during the APA hearing.

ECC strongly supported the policy goal of increasing EESP participation through the creation of a set-aside for smaller projects. ECC stated that this would empower customers to choose an EESP from a larger pool of EESPs than what is currently available. Moreover, having the pool of participants be as small as it is today gives the current participants in the standard offer programs an unfair market advantage. ECC advocated for stronger language that would specify a percentage of funds be set-aside for small projects and limit proposals to a number of units, and allow providers to apply for additional funds only after projects have been completed.

ECC noted that the increased administrative burden of a larger pool of EESPs is more than off-set by the proposed 10% administrative allowance in the rule. In addition, at the APA hearing, ECC stated that the state of New Jersey had similar concerns and, as a result, opened the program up to a larger number of contractors. According to ECC, this action resulted in increased program participation at lower incentive amounts.

TACCA commented that, under the current rule, utilities have used the 20% provision under subsection (i)(3) to craft programs that limit customer choice and arguably fail the test of market neutral administration, particularly in the case of the residential and small commercial standard offer programs. TACCA asserted that having EESP participation limited to five (or even ten) EESPs limits customer choice to these EESPs for incentive funds, thereby giving these few EESPs undue market power. Moreover, as TACCA stated, having all the funds encumbered to a limited number of EESPs within a very short time frame does not guarantee that these EESPs will use all the incentive funds. According to TACCA, the proposed solution in the rule is too vague. TACCA proposed: 1) specifying a set-aside for small contracts of at least 25% of the total program budget; 2) making the incentive funds available only in increments of 10-15 units, until the EESP reaches the 20% limit; and 3) limiting multi-family projects to $5,000, and requiring an affidavit from the customer for any project larger than the threshold. According to TACCA, this will allow EESPs to experiment with the incentive programs, build confidence in their ability to sell energy efficiency, and increase customer choice by increasing provider participation. TACCA further stated that deposits may discourage bids from EESPs with no

means at their disposal, but it will not discourage large EESPs from bidding the maximum amount in order to develop a market advantage over companies that do not have access to the incentive funds.

Consumer Groups supported the goal of increasing EESP participation if the increase is sufficiently large enough to create a vibrant energy efficiency market where competition reduces price and improves quality of service for residential customers. If, however, the only result is to increase EESP participation for large commercial and industrial customers, Consumer Groups noted that residential customers would be better of with fewer EESPs under increased regulatory oversight.

The commission agrees that participation by a larger number of contractors, particularly smaller contractors, is an appropriate policy goal. Increasing the number of contractors will foster the energy efficiency market generally, increase competition, and provide customers with greater choice between contractors and services. Ultimately, this should decrease price and improve quality for energy efficiency services. The commission agrees with TACCA that the 20% incentive cap on contractors has not adequately addressed this issue, even if the timeline is extended as suggested by OPC. Most utilities have treated this provision as a means to limit participation by awarding contracts to only five EESPs. As a result, a limited number of EESPs exercise market power over the remaining EESPs who are unable to offer utility funded incentives to customers. However, requiring each utility to create a set-aside of at least 25% of

program funding for small contractors will not be tenable for utilities with small budgets because there may be a limited number EESPs available in their service area. In addition, by creating small budgets, the program will lose its economies of scale. The commission must therefore balance the need to open up the program to a larger number of participants against the utility's ability to cost-effectively reach its goal. Setting a specific percentage will only serve to force small utilities to request a good cause exception, and may result in a set-aside that is too small for the large utilities. The commission finds that the proposed language as written is adequate. Utilities should have a set-aside budget for small contractors, and the commission fully expects that this set-aside be 25-30% of the program budget for the large utilities. The amount of the set-aside for small contractors will be specified in the utility's energy efficiency plan. The commission has revised §25.181(h)(2)(G) for this purpose. As stated in the proposed rule, the commission may adjust the allocation of the set-aside at any time. The commission disagrees with Consumer Groups with respect to the application of the set-aside. The intent of the provision is clear, in that it applies to residential and small commercial, and hard-to-reach programs only. The commission also disagrees with OPC and SPC that this will increase overall program costs and/or reduce energy savings because the proposed rule will not alter the cost-effectiveness standards or the utilities' current rates. TACCA's concerns regarding the limits placed on individual project submissions is more fully discussed under §25.181(h)(4)(A)-(B), below.

*Issue Number 2: Under §25.181(j)(2)(E), the programs may require a maximum load factor, and allow utilities to rank proposals by load factor in order to more cost-effectively and competitively acquire demand savings. Is this an appropriate policy goal? If yes, is the proposed method the most effective means to reach this goal?*

Clifton, EUMMOT, and OPC supported the provisions that would allow the use of load factor caps or the competitive selection based on load factors to reduce program costs. According to Clifton, the commission should not be concerned that this provision is somewhat untraditional in a standard offer program if the provision ensures that utilities meet their goal more cost-effectively, particularly if high load factor proposals dominate the initial application. EUMMOT stated that the acquisition of demand savings in a more cost-effective manner is an appropriate policy goal. EUMMOT stated that if a utility receives a large number of applications for incentive funds early in the enrollment period, the utility should be given the latitude to select proposals that provide the most cost-effective peak demand reductions, and ranking projects by load factor provides this tool. Without this tool, EUMMOT argued, utilities may be obligated to fund projects that provide energy savings, with minimal peak load reductions, thereby risking not being able to meet the peak reduction goal within their budgets.

THMA and TACCA stated that while they recognized the need to maximize cost-effective peak demand reductions, allowing utilities to rank projects by load factor could lead to projects that are less comprehensive. THMA stated that the proposal would hinder the ability of hotel and

motel owners to participate in these programs. TACCA stated that it would, however, support placing a load factor cap for the overall project if the load factor cap is clearly publicized before the EESPs develop their projects. According to both TACCA and THMA, customers can work with energy efficiency service providers to choose the best mix of measures, knowing what level of incentives are available. They also proposed that the cap may be adjusted up or down, depending on how the market responds, as long as adequate notice is given of the adjustment.

ECC opposed the use of load factors to rank projects after they have been submitted. ECC argued that this would be contrary to a market-based standard offer program, in that it would place the utilities back in the role of judging what projects should be funded based on a competitive selection, meaning that actual eligibility terms would be calculated after the fact by comparing bids. ECC asserted that this would create uncertainty for the project sponsors the customers and lead to gaming in order to assure that some portion of a project would be funded, and likely lead to lowered effectiveness of the overall program. According to ECC, the customer should select the EESP and the measures in such a manner that best fits its needs. ECC did support language allowing the imposition of a reasonable load factor cap, as long as it is not overly restrictive and encourages more comprehensive projects and discourages "cream-skimming" projects. ECC also stated that it would support allowing the utility to lower the incentive levels in order to achieve the goal at a lower cost. However, ECC emphasized, the load factor caps and the incentive levels should be publicized well in advance.

ACEEE and SPC opposed both the imposition of load factor caps and/or reducing payments for higher load factors because this would reduce the incentives for energy savings. According to SPC, the proposal would severely impact the residential and small commercial participants whose electric bills are calculated only by the use of energy. SPC further stated that subsection (h)(2)(F) already allows setting of the incentive as a percentage of the cost-effectiveness standard without the distorting impacts of load factor caps, if the commission wishes to lower program costs. In addition, SPC claimed that the commission already ruled on this issue in response to a recommendation for a competitive selection in the preamble to the current rule, when it stated that each kW and kWh saved receive the same payment, regardless of the measures installed. Similarly, ACEEE argued that load factor caps were contrary to the legislative intent of the energy efficiency programs, in that they would focus attention on demand savings rather than energy savings. ACEEE stated that load factor caps would benefit the utilities, not the customer, and thus would provide private benefits, rather than public benefits as the legislature had intended. ACEEE and SPC argued that load factor caps do not reduce the cost of energy efficiency or energy savings; rather, they increase the cost of energy efficiency measures by the total costs per average saved kWh. They noted that bad factor caps may reduce the total cost per kW saved but they increase the average cost per kWh saved. Therefore, ACEEE and SPC stated, the load factor cap negates the cost-effectiveness determination of the rule and will also distort the marketplace to favor those measures and applications with low load factors while discriminating against measures and applications with

high load factors. In addition, they asserted that the use of load factor caps will increase the cost to administer the program and creates new complexities in the payment stream for the small EESPs. SPC also stated that a more reasonable approach would be to reduce the incentive levels for both kW and kWh by the same percentage, rather than imposing load factor caps.

Consumer Groups also opposed the use of load factors to more cost-effectively acquire demand savings. According to Consumer Groups, placing load factor caps on programs will de-value energy efficiency applications for residential and low-income customers because they benefit most from measures with high load factors. Consumer Groups added that load factor caps would potentially eliminate measures with the highest energy savings, such as refrigerators and ceiling insulation. Consumer Groups further argued that setting load factor caps would put the utilities in the position of choosing the type of measures that will be installed under a standard offer program, which is contrary to the concept of a standard offer program. Consumer Groups requested eliminating the provisions in the rule dealing with load factors.

In reply comments, EUMMOT emphasized that at the time the rule was proposed, commission staff estimated program costs using assumed load factors for each customer class. These load factors were 42% for large commercial and industrial customers, 31.4% for residential and small commercial customers, and 77.6% for the hard-to-reach sector. EUMMOT pointed out that actual contract performance has shown that these load factors are currently substantially different. For example, the load factors for the most popular measures are as high as 114% and

76% for water-related measures and lighting respectively. EUMMOT stated that to the extent that a large number of project sponsors promote only high load factor measures, such as water-saving devices, the actual program costs could far exceed the assumed values when the rule was developed. At the APA hearing, EUMMOT stated that competitive selection based on load factor would not be appropriate for the hard-to-reach program because the program emphasizes a whole-house approach. Nor would it be appropriate for the commercial/industrial programs EUMMOT claimed, because the money has not been fully subscribed. But EUMMOT noted that it would be a useful tool in the residential/small commercial programs contractor selection.

In reply comments, ECC reiterated its opposition to the use of load factors to competitively rank projects, for it would discourage EESPs from offering measures that benefit customers in addition to low load factor measures. As an example, ECC pointed out that an air conditioning EESP that only offered air conditioners at a load factor of 21% would win over an EESP that offered air conditioning and insulation – a more comprehensive project that would provide greater benefits to the customer. On the other hand, ECC noted, imposing a reasonable load factor will encourage load factors and avoid "cream-skimming." ECC expressed surprise that OPC would support competitive ranking of projects by load factor for this would lead to projects that would provide the least cost savings to the customer. ECC emphasized the rule should strike a balance between peak demand reduction and lowering customer energy costs. SESCO provided similar comments at the APA hearing.

At the APA hearing, OPC emphasized that any use of load factors should not be used to artificially restrict funds intended for programs serving residential customers and move these funds to the large commercial/industrial class programs.

The commission finds that the rules should facilitate the ability of the utilities to meet the energy efficiency goal in the most cost-effective manner. The commission agrees, however, that ranking projects by load factor is not an appropriate policy. Such ranking would create uncertainty in the market and encourage EESPs to develop projects with the lowest load factor, rather than creating comprehensive projects that meet the customer needs, while also producing demand savings. The commission also agrees that competitive ranking would lead to the programs or utilities driving measure selection, rather than the market and customers driving measure selection, which is contrary to the market neutrality requirement of a standard offer program. The commission has therefore eliminated the provision that would allow utilities to competitively rank projects by load factor.

The commission disagrees with ACEEE, SPC, and Consumer Groups that the sole intent of PURA is to achieve an energy goal, rather than a demand goal, or create a public benefits program for customers. PURA §39.905 clearly states that the utilities must reduce their growth in demand, not energy consumption, by 10%. In doing so, the utilities must implement programs that reduce demand and energy, and reduce the customer's energy costs. The commission

recognizes its obligation to balance the mandate to meet a peak demand goal, while reducing energy consumption for end-use customers. Historically, EESPs have argued against placing load factor caps on individual measures because high load factor measures would off-set the higher cost of low load factor measures. Unfortunately, experience has shown that EESPs have tended to gravitate towards projects that predominately consist of low-cost, high load factor measures such as lighting and water savers. The commission is concerned that if this trend continues, the utilities will not be able to meet the mandates of PURA §39.905 within their current budgets because too much of the program cost will go to saving energy, rather than to reducing demand.

The commission agrees with EUMMOT, ECC, Clifton, and TACCA that placing a reasonable load factor cap on projects is a legitimate means to ensure that projects will result in demand savings, encourage comprehensiveness, and discourage "cream-skimming" of low-cost, high load factor measures. The commission recognizes that this may increase the average cost per kWh saved, but will reduce the total cost per kW saved. However, this is somewhat irrelevant because the program goal is a demand goal, not an energy goal. Moreover, the program contemplates that customers will bear a part of the cost of measures installed in their homes or businesses. The commission does share the concern that if the load factor caps are too low, the caps may eliminate some measures that are particularly beneficial to low-income customers. The commission also agrees that it may not be to the benefit of the overall program if there is great variation in load factor caps among utilities. The commission therefore finds that the

maximum load factor caps should be set at a reasonable level that balances the need to achieve demand savings and provide energy and cost reductions to the end use customers. In addition, the commission finds that load factor caps should be publicized well in advance to allow EESPs, in conjunction with their customers, to develop meaningful projects within the available incentive perimeters. The commission has revised the §25.181(j)(2)(E) accordingly. In addition, for the purpose of clarity, the commission has added definitions for "demand savings" and "load factor" to the definitions section under §25.181(c).

The commission also finds that adjusting incentive levels is an appropriate method to control program costs. Adjusting incentive levels is consistent with the underlying market philosophy, for the adjustment would occur in response to the market. The commission concurs, however, that, like load factor caps, incentive adjustments must be publicized well in advance to allow EESPs to EESPs, in conjunction with their customers, to develop meaningful projects within the available incentive parameters. The commission has revised the rule accordingly.

In reference to OPC's comments regarding the possibility of utilities manipulating load factors in such a manner that it will shift funds from one customer class to another customer class, the commission finds that load factors should be set at a level reasonable for the customer class, and should be adjusted in response to market conditions. Utilities will expend funds consistent with the budgets submitted in the energy efficiency plans, and any funding shifts between customer classes should only occur in extraordinary circumstances. The commission will

monitor these expenditures based on the annual energy efficiency report. The commission has not revised the rule in response to this comment.

*Issue Number 3: The Texas Health and Safety Code, Title 5, Subtitle C, Chapter 386, requires that new construction in Texas meet the International Energy Conservation Code (IECC). The market transformation programs under §25.181(k) are a means to encourage the new home construction market to comply with and exceed the IECC. What should be the appropriate baseline for such a market transformation program? If the baseline is based on market practice and the market practice is below the IECC, should a utility be allowed to claim savings that are above the baseline but below the IECC?*

Cardinal and EUMMOT stated that actual industry practices, as established through analysis, should set the baseline from which energy efficiency savings and peak demand reductions should be calculated. Cardinal argued that the existence of a code requirement does not necessarily result in market compliance with that requirement by a date certain. EUMMOT pointed out that market transformation programs fall into two categories: those that address the whole house and those that target specific types of equipment. Both Cardinal and EUMMOT stated that as one is a performance approach (whole house) and the other is a component approach (equipment), the IECC will affect these programs differently. According to EUMMOT, this provides for differing justification for using actual industry practice. In the case

of the whole house approach, Cardinal and EUMMOT believed that actual industry practice is justified because it will take time for the IECC to be fully implemented. Incentives, however, according to EUMMOT should only be paid for kW and kWh savings above the IECC to ensure that funds are not used to simply enforce the building code. In the case of the component approach, the builder may follow a performance path and make various efficiency trade-offs. According to EUMMOT, because trade-offs are permitted, there are no real component–level efficiency requirements for building components under IECC, aside from other existing efficiency standards. EUMMOT noted that the baseline study could reveal that the average window or air conditioner installed in the service area is below IECC's prescriptive path, even though the whole house meets the IECC through the performance path. Therefore, they proposed that a baseline study be conducted to identify industry practices and provide a benchmark. According to EUMMOT, the average values found through the baseline study should be used in savings calculations. While EUMMOT supported the proposed amendment as published, it offered some additional language to clarify the above described situation. Cardinal, however, stated that utilities should be permitted to count improvements over actual, real-world baselines rather than the IECC; otherwise utilities will not invest in market transformation programs. Cardinal recommended additional rule language that in establishing the baseline, consideration should be given to the regional implementation of the IECC, and that such consideration shall not preclude establishment of a baseline below the IECC "prescriptive" component, where such compliance is permitted by the IECC through alternative building designs or measures.

OPC stated that the baseline prescribed by the rule should be the IECC standard, unless the utilities can prove that a different baseline applies within its service area. If this is the case, OPC argued that the utilities should be able to claim any savings above the alternative baseline. OPC noted, however, that the utilities should have the burden of proof and it should require that the commission grant a good cause exception to the rule.

SPC stated that market transformation programs should be treated in the same manner as standard offer programs in determining the baselines to be used to calculate and claim savings. Therefore, according to SPC, the baseline should be no lower than the mandated IECC standard. In the alternative, SPC proposed that standard offer programs should also be allowed to calculate savings from a standard market practice baseline. According to SPC, no incentives should be paid for savings resulting from measures that would have been installed without the incentive or for merely complying with existing regulations. Similarly, Consumer Groups stated that the IECC should be the standard baseline and any savings claimed should be limited to savings that exceed the IECC standard. Consumer Groups recognized, however, that there may be extenuating circumstances within local communities, but that solutions to these circumstances should be fully explored in the energy efficiency implementation project (EEIP) under subsection (n).

During the APA hearing, Aspen Systems stated that it supported having the baseline be above the IECC, regardless of the existing local code, but expressed concern that this does not address alternative building codes or materials. Aspen noted that such codes are subject to review and approval by Texas A&M University, and therefore recommended tying Texas A&M University into the rule provision. Similarly, Cardinal indicated that there appear to be contradictions between Senate Bill 5 (77th Leg., Ch. 967, 2001 Texas General Laws 2084) and Senate Bill SB 365 (77th Leg., Ch. 120, 2001 Texas General Laws 238), which are still being reviewed. In addition, according to Cardinal, local municipalities may modify the IECC and submit their alternative code for review by Texas A&M University. TACCA stated that such modifications have led to varying code requirement within small geographic areas, which has made the situation confusing to contractors.

The commission agrees with Cardinal and EUMMOT that the IECC offers a performance approach (whole house) and a component approach (equipment), and that the IECC will affect energy efficiency programs differently. This provides for differing justification for using actual industry practice. In the case of the whole house approach, actual industry practice is justified because it will take time for the IECC to be fully implemented. Incentives, however, should only be paid for kW and kWh savings above the IECC to ensure that funds are not used to simply enforce the building code. In the case of the component approach, the builder may follow a performance path and make various efficiency trade-offs. Because trade-offs are permitted, there are no real component–level efficiency requirements for building components

under IECC. The average window or air conditioner installed in a service area may be below IECC's prescriptive path, even though the whole house meets the IECC through the performance path. Therefore, a baseline study should be conducted to identify industry practices and provide a benchmark. The average values found through the baseline study should be used in savings calculations. However, the commission is concerned that there appears to be substantial uncertainty as to the level of implementation and varying interpretations of the IECC and the statutory mandates under Senate Bills 5 and 365. It also appears that energy codes may vary considerably across the state. The commission therefore finds that the development of benchmarks for the purpose of the new home construction programs should be further explored in the EEIP and a recommendation be made to the commission at a later date.

*General Comments*

Consumer Groups commented that the April 1, 2002 energy efficiency plans filed by the utilities show little progress in reaching the energy efficiency goal and in offering energy efficiency programs to customers, and that the utilities are maintaining their notoriously poor energy efficiency record. Consumer Groups reiterated its previous recommendation under Project Number 21074, *Energy Efficiency Programs*, that utilities pilot residential standard offer programs rather than offering them on a large scale. Consumer Groups conceded, however, that the information in the April 1, 2002 reports did not contain sufficient information to make any definitive conclusions.

The commission finds that the information set forth in the April 1, 2002 reports cover program year 2001, predating the official start-up date of the programs on January 1, 2002. During that year, the utility program budgets were limited to funds available in the bundled rates, the utility did not have a demand goal, and most utilities operated pilot programs to test the new program designs. It is therefore premature to draw any conclusions regarding the program effectiveness based on the 2001 data. The commission agrees, however, that the programs should be subject to ongoing monitoring.

NAESCO stated that there is no empirical evidence to support any of the proposed changes in the rule. According to NAESCO, the proposed changes, such as eligibility, pricing, administration, and customer/technology targeting through load factor caps, would reduce the commission's oversight of major elements of program administration. NAESCO argued that it simply does not work to turn over major areas of program control to one party in a complex public benefits program. NAESCO sited California as an example of how regulatory uncertainty has a detrimental effect on the energy efficiency industry. According to NAESCO, many energy efficiency projects are being delayed because the California commission has attempted to shift major areas of responsibility such as program development to the utilities. Conversely, New York has a successful energy efficiency program because it is based on modest incentives, has maintained consistency over time, and the state commission has retained control over key program elements, such as eligibility, incentive levels and targeting.

NAESCO appears to misunderstand the mandates of PURA §39.905 and the proposed revisions to the rule. Whereas other states provide funding for energy efficiency without setting goals for the programs, PURA §39.905 requires that utilities meet a quantifiable demand reduction goal. The proposed rule revisions do not shift control over program elements from the commission to the utilities; rather, the changes provide clarification as to the utility responsibilities and facilitate the ability of the utilities to meet the goal in a more cost-effective manner, while providing meaningful benefits to the customers. The commission finds that there is no correlation between the California, New York and Texas programs in this regard. The commission has made no revisions in response to NAESCO's comments.

*§25.181(c), Definitions*

In reference to §25.181(c)(1), EUMMOT agreed that the definition of "affiliate" should be included in the rule; however, EUMMOT argued that the "at least 5.0%" threshold of the definition should be modified to 15% or 20% as this modification could be equally effective in ensuring broad-based participation.

The commission rejects EUMMOT's proposal to change the "at least 5.0%" threshold in the definition of "affiliate" to a 15% or 20% threshold. The commission notes that such a change is unnecessary. The affiliate definition adopted in the rule comes directly from the Final Order in

Project Number 22241, *Energy Efficiency Program Implementation Docket; P.U.C. Proceeding to Implement the Requirements of §25.181 relating to the Energy Efficiency Goal*. The commission already decided on a 50% threshold and declines the invitation to reconsider its decision.

ECC suggested clarifying the definition of "energy efficiency" under paragraph (7) to include "materials" and energy gains as well as losses.

ECC did not provide any justification for the proposed change and the commission finds none. No change was made in response to this comment.

In reference to paragraph (8), definition of "energy efficiency measure," ECC, THMA, and TACCA recommended that a measure should reduce energy or demand, but should not be required to do both. ECC and TACCA also stated that it would be appropriate to require that a project reduce both energy and demand. This will allow EESPs to install a combination of measures that in the aggregate will save both energy and demand, and be more comprehensive. ECC and TACCA stated that this would be a more market neutral approach and therefore be more consistent with the intent of a standard offer program.

The commission agrees that individual measures should not be required to result in both energy and demand savings, for this may discriminate against measures that may well fit in the package

of aggregate measures. The commission has replaced the word "and" with "or," and has reinserted "or both" in subsection (c)(8).

In reference to the definition of "energy efficiency project" under paragraph (9), ECC, THMA, and TACCA, consistent with comments regarding paragraph (8), stated that, unlike an individual energy efficiency measure, a project should result in the reduction in the customer's energy consumption **and** peak demand. ECC emphasized that it is willing to support a load factor cap so that projects will achieve both energy and demand reductions.

The commission agrees that a project should achieve both energy and demand savings, and result in reductions in energy costs. This is consistent with the mandate in PURA §39.905 that requires that the utilities meet a demand goal, while also providing benefits to the customer. The commission has revised the definition of energy efficiency project under subsection (c)(9) accordingly. In reference to ECC's comment regarding load factor caps, this issue is fully discussed in the commission response under Preamble Issue Number 1.

Clifton supported the provision under paragraph (10) that allows customers to be their own project sponsor because it had a number of public and private agencies that are potential project sponsors.

EUMMOT commented that the definition of "peak demand reduction" under paragraph (24) may have the effect of disqualifying measures that reduce equipment run time for periods of less than one hour. EUMMOT suggested rephrasing the definition so that the assigned demand reduction will reflect the average anticipated impact over a full hour. OPC questioned whether the intent of the provision was to calculate the total curtailment of demand during one hour or to require curtailment of demand for minimum of a continuous hour. OPC recommended that it refer to the total rather than a continuous hour because otherwise most residential projects would not qualify. Consumer Groups commented that the definition should be revised such that it assures that all measures with high energy efficiency savings are available to residential and low-income customers.

The commission agrees that requiring load curtailment to occur for a continuous hour would preclude most residential applications. The commission finds that the intent of the definition is that the value of the peak load curtailment refers to the average total during an hour. The commission adopts EUMMOT's recommendation and has revised the rule accordingly.

In reference to the definition of peak demand under paragraph (25), SPC claimed that restricting the peak period to between 1:00 p.m. and 7:00 p.m. was not discussed in an Energy Efficiency Implementation Docket (EEID now EEIP) meeting, is inconsistent with utility practice, and inconsistent with commission approved peak periods. According to SPC, the commission has made an affirmative decision not to specify the hours in its definition of peak

demand and that the utility cost of service cases are largely silent on this issue. SPC argued that this is an "unsponsored" rule change that is not consistent with commission approved tariffs. Moreover, SPC proposed that the period should be extended to include October, consistent with TXU's residential tariff. SPC argued that in no way should the rule impose a definition that is more restrictive for the purpose of energy efficiency than that which is used for billing purposes.

At the public hearing, Nexant recommended that the definition should be further restricted to weekdays during the period of May 1 through September 30.

The commission is constrained only by the substantive law, PURA §39.905, and procedural law, the Texas Administrative Procedures Act. A rule change need not to be "sponsored" by any party or reviewed by the EEIP. Moreover, the commission finds restricting peak demand during specific hours of the day is entirely consistent with standard utility practice, even if the specific seasons and hours may vary between utilities. For the purpose of this rule, the commission finds that setting the peak season from May through September, with a daily peak period from 1:00-7:00 p.m. on a statewide basis is appropriate. In reference to SPC's comment that the proposed definition of peak period in the rule is different from the definition used for the purpose of billing, the commission finds that this comment is irrelevant. The peak period for electric demand in Texas is summer afternoons. The utility rates differ from company to company, in how they define summer months, and there are very few customers on time-of-

use rates. For ease of carrying out the energy efficiency program, the commission believes that a uniform definition of peak period that corresponds with actual demand is appropriate. The commission declines to modify the rule based on these comments.

In reference to Nexant's comment regarding weekdays, the commission concurs that it should be restricted to week days and has revised the rule so that it applies to all days, "except for federal holidays and weekends." In addition, the commission has made the same revision in §25.182(c)(11).

SPC objected to the elimination of the provision that allowed multiple energy efficiency service providers to participate under one standard offer contract under §25.181(c)(28) because it would preclude an EESP from subcontracting with other entities for goods and services. In addition, SPC claimed that this change is highly anti-competitive in that it limits participation to those few project sponsors that do not use or need other service providers, and will therefore also have an adverse effect on small EESP.

At the APA hearing, AEP recommended that the reference regarding the targeted weatherization programs administered by the Texas Department of Housing and Community Affairs (TDHCA) be moved to the definition of "standard offer program" under §25.181(c)(29), because these programs fit better within the definition of "standard offer program," rather than with the definition of "standard offer contract."

The commission finds that the proposed revision does not preclude an individual EESP from subcontracting with other providers for any needed goods or services. The revision does clarify, however, that only entity the entity under contract with the utility is ultimately accountable for all project activities. The commission declines reinserting the language. In reference to the comment by AEP regarding the TDHCA programs, the commission agrees this provision should be moved to §25.181(c)(29), and has revised the rule accordingly.

*§25.181(d), Procedure for determining affiliate status*

EUMMOT supported developing a better defined process for determining whether various project sponsors are affiliates. However, EUMMOT argued that the proposed methodology for determining affiliate status is flawed in several ways. First, EUMMOT contended that the burden of proof should not be placed on the utilities to both investigate affiliate status and to determine whether an affiliate relationship exists. EUMMOT indicated that investigating affiliate status is very expensive and time consuming, since such investigations require obtaining legal advice, conferring with investigative consultants, and prodding EESPs to make available information that EESPs are unwilling to provide. Second, EUMMOT argued that proposed §25.181(d) would be duplicative and cumbersome because every utility will be investigating the same set of EESPs and would then have to initiate proceedings. Finally, EUMMOT indicated that the proposed methodology would lead to considerable administrative litigation.

In lieu of the proposed methodology, EUMMOT recommended that the commission develop a registration process to determine whether energy EESPs are affiliates. In the alternative, EUMMOT recommended that the commission adopt a methodology by which EESPs would file affidavits affirming or denying their affiliate status. Furthermore, EUMMOT contended that burden of establishing or denying affiliate status should be on the EESPs rather than on the utilities.

SPC stated that the proposed procedure for determining affiliate status does nothing more than shift the decision to the commission. Furthermore, SPC stated that placing the burden of proof on utilities to determine affiliate status is unfair to both the utilities and to the EESPs: utilities are given an impossible responsibility; EESPs are at the mercy of the utility until a potentially time consuming process has been completed. Additionally, SPC noted that the proposed methodology would be duplicative because the same information would be required by many utilities.

In lieu of the proposed methodology, SPC proposed deleting subsections (d)(1)-(3) and replacing them with a section stating that utilities shall require potential EESPs to register with the commission listing. The registration would include identification of any affiliates with others on the registration listing prior to or concurrent with their approval as service providers. SPC

contended that its proposed methodology should be deemed conclusive of the affiliate issue, unless reversed in accordance with staff's proposed subsections (d)(4)-(6).

Consumer Groups argued that procedures for determining affiliate status are outside the scope of the rule and therefore should not be included. Consumer Groups noted that the definition of affiliates and their relationships is a specialty area that has application to many commission rules.

Clifton agreed that the process for determining affiliate relationships must be streamlined. It proposed a generic project to monitor affiliate status, or to incorporate determination of affiliate status within the Energy Efficiency Implementation Project (EEIP). Clifton stated that rather than having each utility bring evidence of affiliate status to the commission in separate proceedings, interested EESPs should be required to fully disclose all pertinent information regarding affiliate status with other potential participating EESPs. Clifton argued that its proposed methodology would decrease uncertainty for EESPs and utility administrators, while allowing for more rapid deployment of programs. Finally, Clifton noted that its methodology would avoid separate utility filings for each standard offer program.

During the public hearing, Oncor indicated that reliance on affidavits is not the best methodology but could be an acceptable alternative methodology. It indicated that past reliance on affidavits did not resolve the affiliate issue. Furthermore, Oncor stated that reliance on affidavits could lead to continuing administrative litigation at the commission. Also, Oncor indicated that it did

not believe that a registration process would require a separate rulemaking. Moreover, Oncor stated that utilities should not have to be involved in determining affiliate status but that the commission should be involved in this matter. Finally, Oncor indicated that a registration process might be modeled after the process for certification of retail electric providers in which the commission would develop a form that would require EESPs to provide information that would allow the commission to determine whether EESPs are affiliated with one another.

Free Lighting stated that under a registration process, the commission would examine the same factors that the utilities would have examined, if the utilities were performing an affiliate investigation.

During the public hearing, AEP supported Oncor's comments, stating that affidavits are likely to cause confusion. AEP illustrated this point by referring to an instance in which it had two sets of affidavits: one set was to be used if there was an affiliate relationship between project sponsors; the other set was to be used if there was no such relationship. AEP stated that there were sponsors who executed both affidavits. Therefore, AEP supported a registration process as a methodology for determining affiliate relationships.

Consumer Groups expressed concern that a registration process would place hurdles in the path of small EESPs. Consumer Groups indicated that such an effect is contrary to the goal of increasing EESP participating, especially in the small commercial and residential sector. In

response to Consumer Groups' comments, Oncor stated that a registration process would be less burdensome because EESPs would not be asked different questions from different utilities with which they intend to do business. Oncor noted that a registration process would allow EESPs to provide information once. SESCO also responded to Consumer Groups' concerns, stating that EEPS would not necessarily have to register until after they are awarded a contract. SESCO generally supported EUMMOT's proposed registration process.

In response to a question concerning affidavits, SESCO stated that an affidavit could be used to show the absence of an affiliate relationship. SESCO reasoned that if an affiliate relationship exists, it is possible to adduce evidence supporting the existence of such relationship, but that it is not possible to use documentation to show that an affiliate relationship does not exist .

In response to the question about the type of documents that utilities examine to determine whether an affiliate relationship exists, EUMMOT stated that utilities examine secretary of state filings and state licensing requirements for membership on boards or directorships.

The Consumer Groups' assertion that the affiliate issue should not be addressed in this rule is premised on the notion that the definition of affiliate and methodology for determining affiliate status adopted in this rule will apply to other proceedings in which affiliate status is at issue. This premise is incorrect. The definition and methodology adopted in this rule applies only in the energy efficiency context. It does not apply to any other context, because it was not created to

address other contexts in which affiliate issues might arise. The commission finds that it should address the affiliate issue to the extent that it can in this rule.

The commission understands that the affiliate issue is a fact intensive inquiry. Furthermore, this issue arises solely when there is a possibility that 20% or more of available funds will go to affiliated companies. EUMMOT, SESCO, Free Lighting, Oncor, and others invited the commission to develop a registration process, whereby the commission will have the burden of determining whether each project participant is an affiliate. The commission declines to do so. The burden of gathering the information and conducting an investigation is properly on the utilities, which have the duty to administer energy efficiency programs. Proponents of a registration process argue that it is less burdensome because project participants need to provide information only to the commission rather than to several utilities with which they might transact business. While the commission recognizes that this is an advantage of project participant registration, it would be burdensome for the commission to gather the data and serve as a repository for this information. Given that the affiliate issue is germane only when more than 20% of available funds will go to affiliated companies, the issue should not arise with sufficient frequency to justify the administrative burden of a formal registration process.

However, the commission agrees with the comments of EUMMOT, Oncor, and SPC that the burden of proving affiliate status should not be on the utilities. The utilities should have the initial burden to investigate EESPs with which they plan to conduct business — this burden is inherent

in the utilities' duty to administer energy efficiency programs. Assuming that there exists a possibility that 20% or more of available funds will go to possibly affiliated companies, those companies should have the burden to respond to the utility's concerns, since they seek to participate in the programs and they have access to information that would address the affiliate issue. Thus, the commission changes subsection (d)(2) accordingly.

The commission rejects SPC's argument that the methodology initially proposed is flawed because it requires EESPs to wait several months before a decision on affiliate status is rendered. First, the commission notes that the issue of affiliate status arises solely in those circumstances in which 20% or more of the funds available for a particular program will go to affiliated companies. Thus, affiliated companies that fall below the 20% level will remain unaffected. Second, a determination of affiliate status is a fact intensive inquiry. Consequently, the process by its nature is time consuming. Finally, a registration process might also be time consuming, given that the data would have to be collected and then analyzed.

Furthermore, the commission rejects the arguments of EUMMOT and Oncor that the proposed methodology will result in considerable administrative litigation. First, the affiliate issue will arise only in those circumstances in which 20% or more of available project funds go to possibly affiliated companies. Second, it is unclear that the registration process contemplated by EUMMOT would be less administratively burdensome than addressing the issue through litigated proceedings. Finally, a registration process would not eliminate litigation. The staff

might render a recommendation, based upon the information obtained, that certain project participants are affiliates. Assuming that the project participants disagree with the staff's recommendation, the matter would become contested.

As discussed below, the commission adopts the rule change that eliminates the requirement to maintain a list of qualifying EESPs. Accordingly, the commission rejects SPC's proposed affiliate methodology, which assumes the existence of such a list.

*§25.181(e), Cost effectiveness standard*

In reference to subsections (e)(2)(A), ECC recommended that the word "annual" be inserted between "avoided" and "cost", and that kW value be set on an annual basis. These changes would clarify that avoided cost figures refer to an annual value of avoided cost.

The commission agrees that the rule language would benefit from the proposed change and has revised the rule to clarify that these costs are annual values.

In reference to subsection (e)(2)(C), OPC opposed the deletion of the reference to projects having to be "designed to enhance air quality and improve reliability of electric service in the non-attainment area, or both."

The commission finds that that energy efficiency projects will enhance air quality and improve reliability by reducing electric production and congestion on the transmission system. The commission also finds that placing the requirement that such projects be designed to enhance air quality and improve reliability is superfluous, and may only serve to create an unnecessary burden of proof. The commission declines to reinsert the provision.

*§25.181(f), Annual growth in demand*

In reference to subsection (f), EUMMOT stated that the current formula for calculating growth in demand based on historical data often yields unreasonable results, particularly for small utilities, when a large customer enters or leaves the system. EUMMOT stated that such a one-time, historical, and non-recurring event could unduly impact the utility's future goal for energy efficiency. EUMMOT recognized that the commission attempted to address this issue in its proposed revisions, but noted that it would still require a utility to file a good cause waiver from the rule provision. EUMMOT also pointed out that including load forecasts in the formula may not be feasible because utilities may not have such forecasts available to them in a restructured market. EUMMOT suggested language that would allow the utilities to make adjustments to the formula for non-recurring events or factors affecting the historical demand data and submit an alternative formula for good cause without commission oversight.

SPC objected to the provision under §25.181(f)(3) that would allow a utility to submit an alternative method for calculating growth in demand for commission approval. SPC stated that this will result in energy efficiency always getting the short end of the stick, even if the approved request is reasonable in those instances in which the changes are requested by the utility. According to SPC, it is reasonable to assume that the utilities will only seek an adjustment to reduce the energy efficiency goal, and thus reduce the total amount of energy efficiency below what it should be over the long term.

ECC suggested deleting the language in proposed subsection (f)(4) because the statute requires that utilities achieve demand savings *of at least* 10% of the growth in demand and, therefore, utilities should not have to seek commission approval for increasing their energy efficiency goal.

Consumer Groups reiterated their position that the energy efficiency goal should be on energy, not peak demand, and claimed that this would be more consistent with PURA §39.905. Consumer Groups did not, however, object to allowing utilities to request a good cause exception, but stated that if utilities are allowed to reduce their energy efficiency goal there should be a concomitant reduction in the revenue requirement for energy efficiency.

In reply comments, ECC objected to EUMMOT's proposal to allow utilities to recalculate their growth in demand without commission approval. ECC commented that the rule, as proposed

by staff, should at least provide opportunity for staff and interested parties to provide insight and comments on any utility request to lower its energy efficiency goal.

The commission agrees that the utilities should not be allowed to use an alternative methodology without commission review and approval. The commission also agrees that generally the utility will seek an alternative methodology in order to reduce the goal, rather than to increase the goal. In such cases, the methodology should be reviewed within the context of the funding approved for energy efficiency programs. The statute sets a minimum demand reduction goal, therefore, either utility may exceed its 10% goal by expending approved funding, or carry excess funding over to the next program year for future energy efficiency activities. The commission also emphasizes that whenever a utility seeks a good cause exception, such good cause should be based on exceptional circumstances of short duration that would have a distorting impact on the results of the prescribed methodology. The commission declines to revise the rule.

*§25.181(h), Energy efficiency plan*

ACEEE and CPS stated that the proposed language in subsection (h)(2)(F) appears to shift the authority to set incentive levels from the commission to the utilities, and allows the utilities to change incentive levels during the program year. ACEEE and SPC argued that this could lead to wide variation in incentive levels across the state during different times of the year, and would lead to a disjointed, chaotic market that will lead to lower participation, reduced net impact, and

less cost-effective programs. They further noted that varying incentive levels across the state would result in customers arbitrarily being subjected to lower incentives than other customers within the same customer class. ACEEE was particularly concerned that utilities would take advantage of this provision and lower the incentive levels even further, with devastating consequences for the programs. ACEEE recommended that the commission set the current incentive levels as a minimum and allow the utilities to adjust incentive levels upwards. SPC stated that any such adjustment should be subject to a commission proceeding and commission approval.

ECC stated that if the utilities may adjust incentive levels during the program year as allowed under subparagraph (h)(2)(F), they should be required to provide ample advance notification to the EESPs. As long as there is sufficient notification through electronic mail and the Internet exchange, ECC stated it could support this provision. Similarly, Consumer Groups recommended adoption of the proposed language that would allow the utility to set incentive levels, but objected to having the incentives adjusted during the program year because it sends the wrong signal to the market.

NAESCO opposed allowing utilities to adjust incentive levels without commission review.

Consistent with the discussion under Preamble Issue Number 2, the commission finds that the utilities may adjust incentive levels in response to the market, as long as incentive levels are well

publicized in advance to allow EESPs, in conjunction with their customers, to develop meaningful projects within the available incentive parameters. Similarly to setting maximum load factor caps and allowing incentive adjustments based on load factors, the commission recognizes the possibility that this may lead to varying incentive levels across the state. However, this should not lead to lower participation because the utilities must meet their goals, and will therefore adjust incentives upwards if the market does not respond or they are unable to meet other obligations under the rule. The commission also finds that requiring that such adjustments be subject to commission approval would be too time consuming and undermine the utility's ability to respond to market forces. In reference to the comment that varying incentives will potentially subject customers to lower incentives compared to customers of the same class in other areas, the commission notes that incentives are not made available to the customer. Incentives are made available to the EESP, who may or may not, pass this benefit along to the customer. The commission declines to revise the rule.

In reference to former §25.181(h)(3)(B), NAESCO commented that removing the commission maintained list of qualifying project participants represents a shift in power away from the commission and to the utilities. SPC contended that the commission should be required to maintain this list. It asserted that during the adoption of the original rule, the commission decided to maintain the list to avoid violations of §25.272 (relating to *Code of Conduct for Electric Utilities and Their Affiliates*). It also contended that both project sponsors and customers would benefit from a commission maintained list. SPC noted that the original rule,

which required the commission to maintain this list, had been extensively discussed. It also asserted that potential liability could be avoided through appropriate disclosures. Moreover, SPC argued that some utilities have been reluctant to provide a list directly to other project sponsors or to customers because of concerns about restrictions against marketing and affiliate concerns.

SPC also contended that the commission, and not utilities, should maintain a list. It argued that there exists the possibility for abuse if utilities were to maintain the list, and the utility might set standards and procedures to benefit one group of EESPs to the detriment of others. Referencing a discussion in the preamble to the current rule regarding old §25.181(j)(2)(N)(sic) (reference should be §25.181(i)(2)(M)), relating to EESP qualifying criteria, SPC claimed that the commission recognized that utilities may abuse their qualifying authority in developing the list. SPC argued that any standards regarding project participants must be established by the commission rather than by the utilities.

EUMMOT stated that the commission should not have to maintain the list, arguing that maintaining such a list was burdensome to the commission and could be misconstrued as an endorsement of EESPs by the commission. EUMMOT proposed adding the following language to the §25.181: "The utility may provide the public with information regarding the identity of EESPs that are presently or have previously participated in a program sponsored by the utility." EUMMOT recommended that the utilities offer a list of participating EESPs on their

web site and refer public inquiries to their site. EUMMOT also stated that the list could be read over the phone or mailed to an energy consumer who does not have internet access. EUMMOT indicated that the list could include a disclaimer, stating that the commission does not endorse any EEPS on the list.

In reply comments and during the public hearing, ECC stated that it would support the development of a list for the public. However, ECC stated that EUMMOT's proposed language is overly broad. ECC argued that utilities should be limited to providing a web site and responding to customer inquiries. ECC also stated that a disclaimer should be mandatory, it should be included in the rule, and it should provide that neither the utility nor the commission endorse any particular EESP. Finally, ECC stressed the importance of limiting a utility's ability to promote its programs or approved EESPs.

During the public hearing and in comments, EGSI expressed a desire to be able to inform interested parties about the EESPs with which it has contracted. Free Lighting stated that the commission should maintain this list. SESCO indicated that it would not oppose the utility developing and distributing a list.

The commission agrees with EUMMOT's position, as modified by the proposal of ECC: the utilities should be allowed to maintain a list of EESPs and should be allowed to disclose this information to members of the public who inquire. However, the commission agrees with ECC

that the utilities should be limited to providing a website and answering specific customer inquiries. The commission rejects SPC's argument that the commission needs to maintain a list. First, the commission rejects as unfounded the argument that utilities' maintenance of a list would lead to abuse-- the utilities would have to include a list of all EESPs with which they transact business. Second, contrary to SPC's statement, the commission never decided in adopting the original §25.181 that it needed to provide a list to avoid a possible violation of §25.272. In adopting original §25.181, the commission stated that "It would *not be* a violation of §25.272 (relating to the Affiliate Code of Conduct) for a utility to distribute a list compiled by the commission or OPC" (emphasis added). The commission did not state that it would be a violation of §25.272 if the utilities were to maintain a list. Nor did the commission ever view the maintenance of this list as a means for the commission to maintain oversight over the quality of the EESPs participating in the programs. Quality of EESPs has always been and will continue to be the responsibility of the utility. The commission has added new §25.181(i)(2) allowing the utility to make the list available to the public, with the restriction proposed by ECC.

*§25.181(i), Utility administration*

In reference to subsection (i), Clifton and EUMMOT supported allowing the utilities to expend 10% of their budget on administration of the programs. EUMMOT stated that the original assumptions regarding the administrative burden of the programs have proved to be inaccurate and that the administrative burden is in fact much greater than anticipated and will be even

greater under the proposed rule. EUMMOT offered a comparison with other state programs that showed that the average cost of administration is 25% of total program costs. In addition, EUMMOT offered a fairly detailed analysis of all the activities (outreach, program development and enhancement, general administration, inspections and measurement and verification) that utilities must undertake to administer the programs. In addition, EUMMOT stated that these programs are in their early stages and require a collaborative effort between commission staff, industry, advocacy groups, utilities and other interested parties to modify the programs in response to the changing market and efficiency standards. EUMMOT argued that, therefore, the utilities should be allowed to retain the 10% administrative allowance. Clifton stated that utilities should be awarded, not penalized, for any efforts to achieve the goal more cost effectively. Clifton noted that the additional tasks imposed by the rule, such as increased EESP participation, will ultimately benefit the citizens of Clifton and justify a 10% administrative allowance. EGSI stated that increasing EESP participation, particularly small EESPs, will increase outreach activities, inspections, review of paperwork and general "hand-holding." These increased activities justify keeping the administrative costs at 10%.

Consumer Groups did not oppose allowing utilities to expend 10% of the program budget as long the utilities are required to provide a detailed budget regarding the activities under §25.181(i)(1)(A)-(D). Consumer Groups therefore supported the provision under §25.181(h)(4)(G). Consumer Groups objected, however, to §25.181(i)(1)(E) that would

allow the utilities to incur any "other costs as necessary and justifiable for successful program implementation."

NAESCO expressed concern over allowing utilities to reduce payouts by 10% for administrative expenses, rather than 5.0%. OPC and SPC opposed allowing the utilities to maintain 10% administrative costs, rather than reducing the allowance to 5.0%. OPC stated that such increases will raise the costs to the REPs, and thus increase the price-to-beat. According to OPC, administrative costs under traditional programs are 15%, and these programs are more costly because the utility must design, implement, monitor, and sometime even perform energy efficiency services. Therefore, 5.0% of total program costs for administration should be more than adequate for a standard offer program. SPC stated that the commission already decided this issue in its discussions regarding the current rule, and stated that these considerations, with the exception of attracting smaller EESPs, remain the same. According to SPC, best practices in other states, particularly California, indicate that a 5.0% administrative cap is reasonable. Increasing the administrative allowance is therefore not justified. SPC further stated that the rule should be clarified that the cost of administration should not be subtracted from the incentives. SESCO provided similar comments at the public hearing.

In reply comments, EUMMOT provided further analysis regarding the costs involved in administering the energy efficiency programs in Texas, as well as a comparison to the California

programs. According to EUMMOT, a number of activities under the Texas programs are not borne by the California utilities, particularly in the areas of program design, determination of incentive levels development of deemed savings estimates, outreach and proposal evaluation. In addition, the Texas budgets are small compared to California and do not provide the economies of scale. Therefore, EUMMOT argued, the utilities should be allowed to expend 10% of the budget on administration.

The commission finds that parties have provided sufficient data to demonstrate that allowing the utilities to expend up to 10% of the budget on administrative activities is justified, particularly in light of some of the additional burdens imposed on the utilities under the revised rule. In addition, the rule provides clear guidelines regarding allowable administrative activities and the utilities must now also justify administrative expenditures in the annual energy efficiency reports. The commission disagrees with Consumer Groups that subparagraph (E) should be eliminated because it provides a safe-way for necessary activities that are not otherwise directly addressed in the rule. The commission also disagrees with the SPC that the 10% administrative allowance should not be deducted from the available incentive funds, for this would violate the cost-effectiveness requirements. The commission declines to revise the rule.

In reference to subsection (i)(2), NAESCO expressed concern over allowing utilities to bypass EESPs and provide rebates and incentives directly to large commercial and industrial customers. ECC stated that it accepted that large commercial and industrial customers may act as their own

project sponsor, and the utility should be allowed to share information if the customer approaches the utility, but objected to allowing the utility to notify a customer about the program directly. According to ECC, the intent of the statute is to develop a market for EESPs. Alternatively, ECC proposed that the utility should only be allowed to approach customers directly if there is insufficient number of EESPs signing up after 180 days of opening up the program. Consumer Groups also objected to allowing utilities to communicate directly with large commercial and industrial customers. Consumer Groups stated that this may give large commercial and industrial customers a competitive advantage over other market players.

Customers have always been allowed to act as their own project sponsor under §25.181. The revised rule restricts these customers to large commercial and industrial customers. In addition, the revised rule clarifies that utilities may inform such customers of the program as they would any other potential project sponsor or EESP. Restricting such outreach activities to third party EESPs would be discriminatory towards customers acting as their own project sponsors. The commission disagrees that the intent of the statute was to foster or subsidize the EESP market. The intent of the statute is to foster energy efficiency in general through standard offer and market transformation programs. The commission declines to make revisions to the rule based on these comments.

In reference to subsection (i)(3), ESC stated that it supported the 90-day provision because it allowed for sufficient time to fully develop and implement a project after the 90 days have

lapsed. ECC stated that allowing a utility to automatically waive the 20% limitation if insufficient number of EESPs have signed up after 90 days, as proposed under subsection (i)(3), creates an incentive for utilities to perform insufficient outreach to encourage EESPs to participate. ECC recommended that, at a minimum, utilities should be required to wait 180 days and be subject to commission approval upon finding that the utility has made satisfactory effort to attract EESPs.

The commission agrees that the utilities appear to have an incentive to restrict the number of EESPs participating in the program, and thus may not be particularly active in conducting outreach to encourage increased participation. The commission therefore finds that utilities should wait 180 days before waiving the 20% limit and should file with the commission documentation of outreach efforts. If the commission finds that the utility's outreach efforts are insufficient, the commission may require the utility to conduct additional outreach.

SPC recommended that reference to incentive request under subsection (i)(4)(A) should be clarified to be "each" incentive request, so as not to limit an EESP to a single request. SPC also recommended that the cap be changed from 30 dwelling units to a dollar cap because small residential projects do not involve dwelling units and depending on the kind of work 30 units may involve large amounts of money.

The commission agrees that "dwelling" units may not be applicable for a small commercial project, and that dwellings may involve large amounts of money. The commission therefore

revises the reference to 30 dwelling units to a $5,000 cap. The commission also agrees that the EESP is not limited to a single request and has inserted the word "each" in subsection (i)(4)(A).

SPC requested that the affidavit requirement under subsection (i)(4)(B) be changed to "letter of intent or equivalent" because an affidavit is too legalistic and may scare away participants. In addition, according to SPC, the large commercial programs do not have such a requirement. ECC fully supported the provision under subsection (i)(4)(B) that would require a signed affidavit from the project host for projects costing over $10,000. ECC stated that this will prevent EESPs locking in large amounts of incentive moneys and creating a market advantage, without having actual customers lined up. However, according to ECC, the provision appears to be misplaced because this should apply to larger projects, not projects carried in the small EESP set-aside.

The commission disagrees that requiring an affidavit is too legalistic for it is the only document that would make the commitment legally binding. The commission also finds that $5,000 is the proper threshold to require such a commitment from a project host. The commission does agree that the provision should apply to both large commercial and industrial projects, as well as residential and small commercial projects. The commission further agrees that the provision appears to be misplaced and has moved the provision to new paragraph (5).

In reference to subsection (i)(4)(C), SPC requested that this provision be deleted and the utility be allowed to abandon this procedure if the market place has not demonstrated a significant interest in this procedure. SPC proposed that this provision be automatically waived if the set-aside is not subscribed by 75% after 180 days.

The utility is the entity primarily responsible for formulating the amount of the set-aside appropriate to the size of its energy efficiency budget. In addition, the utility appears to have little incentive to actively promote the set-aside. Therefore, the commission finds the utility must file a request a waiver for good cause.

*§25.181(j), Standard offer program*

In reference to §25.181(j)(2)(E), ECC, THMA, and TACCA reiterated their opposition of the use of load factors to rank projects for purpose of project selection, but supported the use of load factor caps, if the caps are well publicized ahead of time. ECC and TACCA positions regarding this issue are fully summarized under Preamble Issue Number 2. Consumer Groups recommended that, in the interest of residential and low-income customers, the provision be deleted. NAESCO expressed concern over allowing utilities to reduce payments for energy savings through the use of maximum load factors and using load factors to select projects or set incentive levels.

As discussed under Preamble Issue Number 2, the commission finds that ranking of load factors for the purpose of competitive selection is not appropriate. In addition, the commission finds that reasonable load factor caps are appropriate and necessary to reduce program costs and encourage comprehensive projects. The load factor caps should, however, be publicized well in advance.

SPC strongly objected to §25.181(j)(2)(O) that would allow utilities to use prior performance to limit EESP participation in the program. According to SPC, this provision is too vague and should address issues such as liability of subcontractors, sharing of information between utilities and access to such information, applicability of performance under one program to other programs, etc. SPC recommended that this issue be further explored in the EEIP. Consumer Groups also stated that the provision is too vague and recommended that prior performance be clarified to mean poor quality performance.

As discussed under §25.181(c)(28), the commission finds that ultimately the project sponsor is accountable for all projects activities, including the performance of subcontractors. Utilities must be able to prevent EESPs with a poor track record from participating in the program and be given the ability to control the quality of the EESPs who participate in the programs. This is particularly important because the program operates on a first-come, first-serve basis rather than a competitive basis. The commission disagrees, however, that the rule should specify all the possible criteria that may constitute poor performance, and how information is shared

among market participants. The commission also disagrees that the quality of work may be the sole criterion; a contractor may produce quality work, but fall short on production and thereby risk the utility's ability to meet the goal. The commission finds that "poor" performance is a sufficient standard and has revised the rule accordingly.

*Miscellaneous comments*

EUMMOT commented that word "contract" should be changed to "program" under §25.182(g)(1)(B), (7) and (8) to keep the rules internally consistent.

The commission finds that the proposed changes are appropriate for §25.182(g)(1)(B) and §25.182(g)(7) and has made the revisions. The commission finds, however, that it is appropriate to place additional reporting requirements in it contract with the utility and therefore declines to make the revision to §25.182(g)(8).

OPC recommended that the rule should allow some type of commercial new construction program.

The rule does not address specific program templates. Rather, such program templates should be developed by the utilities or within the context of the EEIP and submitted for commission

approval. The commission therefore finds that this proposed addition to the rule is outside the scope of this rulemaking.

At the APA hearing, SESCO questioned when the rule provisions would take effect, particularly since these provisions could affect programs that are currently being implemented.

The commission finds that it would not be appropriate to have the rule revisions become effective 20 days after submission to the Secretary of State because that may affect programs that are currently being implemented. The revised rules will be in effect for any programs with a start date of January 1, 2003. This will give utilities sufficient time to incorporate these changes in the programs being developed for 2003 and will give market participants sufficient notice regarding the impending changes. The commission has added new §§25.181(p), 25.182(h), and 25.183(f) to state the effective date of the revised rules.

All comments, including any not specifically referenced herein, were fully considered by the commission. The commission has made other minor modifications for the purpose of clarifying its intent and for grammatical purposes. In addition, on September 1, 2002, the name of Texas Natural Resource and Conservation Commission changed to Texas Commission on Environmental Quality. This conforming change has been made in §25.181 and §25.183.

The amendments are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated (PURA) §14.002, which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its power and jurisdiction; and specifically, PURA §39.905 that requires that the commission promulgate rules to implement the energy efficiency goal and under the Health and Safety Code, Title 5, Subtitle C, Chapter 386, Subchapter E, Energy Efficiency Grant Program.

Cross Reference to Statutes: Public Utility Regulatory Act (PURA) §39.905 and Health and Safety Code, Title 5, Subtitle C, Chapter 386, Subchapter E, Energy Efficiency Grant Program.

**§25.181. Energy Efficiency Goal.**

(a) **Purpose**. The purposes of this section are to ensure that:

(1) electric utilities administer energy savings incentive programs in a market-neutral, non-discriminatory manner, and do not provide competitive energy efficiency services, except as permitted in §25.343 of this title (relating to Competitive Energy Services);

(2) all customers, in all customer classes, have a choice of and access to energy efficiency alternatives that allow each customer to reduce energy consumption and energy costs; and

(3) each electric utility provides, through market-based standard offer programs, or limited, targeted market-transformation programs, or both, incentives sufficient for retail electric providers and competitive energy efficiency service providers to acquire additional cost-effective energy efficiency savings equivalent to at least 10% of the electric utility's annual growth in demand by January 1, 2004, and each year thereafter, as mandated by the Public Utility Regulatory Act (PURA) §39.905.

(b) **Application.** This section applies to electric utilities, as that term is defined in §25.5 of this title (relating to Definitions). This section shall not apply to an electric utility subject to PURA §39.102(c) until the expiration of the utility's rate freeze period.

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

(1) **Affiliate —**

(A) a person who directly or indirectly owns or holds at least 5.0% of the voting securities of an energy efficiency service provider;

(B) a person in a chain of successive ownership of at least 5.0% of the voting securities of an energy efficiency service provider;

(C) a corporation that has at least 5.0% of its voting securities owned or controlled, directly or indirectly, by an energy efficiency service provider;

(D) a corporation that has at least 5.0% of its voting securities owned or controlled, directly or indirectly, by:

(i) a person who directly or indirectly owns or controls at least 5.0% of the voting securities of an energy efficiency service provider; or

(ii) a person in a chain of successive ownership of at least 5.0% of the voting securities of an energy efficiency service provider; or

(E) a person who is an officer or director of an energy efficiency service provider or of a corporation in a chain of successive ownership of at

least 5.0% of the voting securities of an energy efficiency service provider;

(F) a person who actually exercises substantial influence or control over the policies and actions of an energy efficiency service provider;

(G) a person over which the energy efficiency service provider exercises the control described in subparagraph (F) of this paragraph;

(H) a person who exercises common control over an energy efficiency service provider, where "exercising common control over an energy efficiency service provider" means having the power, either directly or indirectly, to direct or cause the direction of the management or policies of an energy efficiency service provider, without regard to whether that power is established through ownership or voting of securities or any other direct or indirect means; or

(I) a person who, together with one or more persons with whom the person is related by ownership, marriage or blood relationship, or by action in concert, actually exercises substantial influence over the policies and actions of an energy efficiency service provider even though neither person may qualify as an affiliate individually.

(2) **Calendar year** — January 1 through December 31.

(3) **Competitive energy efficiency services** — Energy efficiency services that are defined as competitive under §25.341 of this title (relating to Definitions).

(4) **Deemed savings** — A pre-determined, validated estimate of energy and peak demand savings attributable to an energy efficiency measure in a particular type of application that a utility may use instead of energy and peak demand savings determined through measurement and verification activities.

(5) **Demand** — The rate at which electric energy is delivered to or by a system at a given instant, or averaged over a designated period, usually expressed in kilowatts (kW) or megawatts (MW).

(6) **Demand savings** – A quantifiable reduction in the rate at which energy is delivered to or by a system at a given instance, or average over a designated period, usually expressed in kilowatts (kW) or megawatts (MW).

(7) **Demand side management (DSM) —** Activities that affect the magnitude or timing of customer electrical usage, or both.

(8) **Energy efficiency** — Programs that are aimed at reducing the rate at which electric energy is used by equipment and/or processes. Reduction in the rate of energy used may be obtained by substituting technically more advanced equipment to produce the same level of end-use services with less electricity; adoption of technologies and processes that reduce heat or other energy losses; or reorganization of processes to make use of waste heat. Efficient use of energy by customer-owned end-use devices implies that existing comfort levels, convenience, and productivity are maintained or improved at a lower customer cost.

(9) **Energy efficiency measures** — Equipment, materials, and practices that when installed and used at a customer site result in a measurable and verifiable reduction in either purchased electric energy consumption, measured in kilowatt-hours (kWh), or peak demand, measured in kWs, or both.

(10) **Energy efficiency project** — An energy efficiency measure or combination of measures installed under a standard offer contract or a market transformation contract that results in both a reduction in customers' electric energy consumption and peak demand, and energy costs.

(11) **Energy efficiency service provider (EESP)** — A person who installs energy efficiency measures or performs other energy efficiency services. An energy efficiency service provider may be a retail electric provider or large commercial customer, if the person has executed a standard offer contract.

(12) **Energy savings** — A quantifiable reduction in a customer's consumption of energy.

(13) **Existing contracts** — Energy efficiency contracts in effect prior to September 1, 1999, that expire on or after September 1, 1999.

(14) **Growth in demand** — The annual increase in load, measured on the transmission system, in the Texas portion of an electric utility's service area at time of peak demand, as measured according to subsection (f) of this section.

(15) **Hard-to-reach customers** — Customers with an annual household income at or below 200% of the federal poverty guidelines.

(16) **Incentive payment** — Funding that reduces the cost of installing energy efficiency measures, or provides a service or benefit that would otherwise not be available to the end-use customer for installing energy efficiency measures.

(17) **Inspection** — Onsite examination of a project to verify that a measure has been installed and is capable of performing its intended function.

(18) **Large commercial customers** — Retail commercial or industrial customers with a demand that exceeds 100 kW. For the purpose of this subsection, a customer's load within a service territory that is under common ownership shall be combined.

(19) **Load control** — Activities that place the operation of electricity-consuming equipment located at an electric user's site under the control or dispatch of an energy efficiency service provider, an independent system operator, or other transmission organization.

(20) **Load factor** — The ratio of average load to peak load during a specific period of time, expressed as a percent. The load factor indicates to what degree energy has been consumed compared to maximum demand or utilization of units relative to total system capability.

(21) **Load management** — Load control activities that result in a reduction in peak demand on an electric utility system or a shifting of energy usage from a peak to an off-peak period.

(22) **Market transformation program** — Strategic efforts to induce lasting structural or behavioral changes in the market that result in increased adoption of energy efficient technologies, services, and practices, as more fully described in subsection (k) of this section.

(23) **Measurement and verification (M&V)** — Activities intended to determine the actual kWh and kW savings resulting from energy efficiency projects as more fully described in subsections (l) and (m) of this section.

(24) **Off-peak period** — Period during which the load on an electric utility system is not at or near its maximum volume. For the purpose of this section, the off-peak period will be all hours from October 1 through April 30.

(25) **Peak demand** — Electrical demand at the time of highest annual demand on the utility's system, measured in 15 minute intervals.

(26) **Peak demand reduction** — Peak demand reduction on the utility system during the utility system's peak period, calculated as the maximum average demand reduction over a period of one hour during the peak period.

(27) **Peak period** — Period during which a utility's system experiences its maximum demand. For the purposes of this section, the peak period is from May 1 through September 30, during the hours between 1:00 p.m. and 7:00 p.m., excluding federal holidays and weekends.

(28) **Renewable demand side management (DSM) technologies** — Equipment that uses a renewable energy resource (renewable resource), as defined in

§25.173(c) of this title (relating to Goal for Renewable Energy) that, when installed at a customer site, reduces the customer's net purchases of energy (kWh), electrical demand (kW), or both.

(29) **Small commercial customers** — Retail commercial customers with a maximum demand that does not exceed 100 kW.

(30) **Standard offer contract** — A contract between an energy efficiency service provider and a participating utility specifying the standard payment based upon the amount of energy and peak demand savings achieved through the installation of energy efficiency measures at electric customer sites, the measurement and verification protocols, and other terms and conditions, according to the program requirements.

(31) **Standard offer program** — A program under which a utility administers standard offer contracts between the utility and energy efficiency service providers. For the purposes of this section, the targeted weatherization programs under PURA §39.903 (relating to the System Benefit Fund) to be administered by the Texas Department of Housing and Community Affairs shall be considered a standard offer program.

(d) **Procedure for determining affiliate status.**

(1) The utility shall have the burden to investigate each energy efficiency service provider that participates in a standard offer or market transformation program

to determine whether such energy efficiency service provider is an affiliate of any other energy efficiency service provider that has submitted a project.

(2) In any proceeding to determine affiliate status, the Energy Efficiency Service Provider (EESP) shall have the burden of proof.

(3) Upon discovering evidence that an energy efficiency service provider is affiliated with another energy efficiency service provider, the utility shall notify such energy efficiency service providers in writing and shall include evidence supporting the allegation with the notification; the utility shall file this notification together with supporting evidence with the commission. If the utility relies upon an affidavit to demonstrate the existence of an affiliate relationship, the affidavit shall conform to Texas Rules of Civil Procedure §166a(f) and Texas cases construing this rule.

(4) Upon discovering evidence that an energy efficiency service provider is affiliated with another energy efficiency service provider, any party (complainant) may file such claim, together with supporting evidence, with the commission. If the complainant relies upon an affidavit to demonstrate the existence of an affiliate relationship, the affidavit shall conform to Texas Rules of Civil Procedure §166a(f) and Texas cases construing this rule. A complainant shall notify the energy efficiency service provider and utility in writing and include all supporting evidence with the notification.

(5) Upon receipt of a utility's or complainant's notification, the energy efficiency service provider will timely respond to the utility's or complainant's allegations and file such response, together with documentation supporting the response, with the commission. If the energy efficiency service providers rely upon an affidavit to contradict any of the utility's evidence, the affidavit shall conform to Texas Rules of Civil Procedure §166a(f) and all Texas cases construing the rule.

(6) All filings submitted pursuant to paragraphs (3), (4), and (5) of this subsection will be used as evidence by the commission to render a decision on affiliate status.

(e) **Cost-effectiveness standard.**

(1) **Cost-effectiveness**. An energy efficiency project is deemed to be cost-effective if the cost of the project to the utility is less than or equal to the benefits of the project. The cost of a project includes the cost of incentives, the measurement and verification costs, and program administrative costs. The benefits of the project include the value of the purchased electrical energy saved, the value of the corresponding generating capacity requirements, and associated reserves displaced or deferred by the project. The present value of the project benefits shall be calculated over the projected life of the measure, not to exceed ten years.

(2) **Avoided cost**. Incentives shall be set as a percentage of the avoided cost. The avoided cost shall be the estimated cost of a new gas turbine.

(A) Initially, the avoided cost of capacity savings shall be set at $78.5/kW saved annually at the customer's meter.

(B) Initially, the avoided cost energy savings shall be set at 2.68 cents/kWh saved annually at the customer's meter.

(C) The commission may adjust the cost effectiveness standard prescribed in subparagraphs (A) and (B) of this paragraph by using an environmental adder up to 20% for targeted projects conducted in an area that is not in attainment for air emission that is subject to the regulations of the Texas Commission on Environmental Quality (TCEQ). The environmental adder is available only for targeted energy efficiency projects that would not be implemented without the adder.

(f) **Annual growth in demand and energy efficiency goal.** Electric utilities shall meet the minimum mandate of 10% reduction in growth in demand through energy efficiency savings by January 1, 2004. Each utility is required to meet, at a minimum, 5.0% of its growth in demand though energy efficiency by January 1, 2003. Each utility's energy efficiency goal shall be specified as a percent of its historical five-year average rate of growth in demand, calculated as follows:

(1) Each year's historical demand growth data shall be adjusted for weather fluctuations, using weather data for the most recent ten years. The utility's growth in demand is based on the average growth in retail load in the Texas portion of the utility's service area, measured at the utility's annual system peak for the immediately preceding five years.

(2) The goal for energy-efficiency savings for a year is calculated by applying the percentage goal, prescribed in this subsection, to the average rate of growth in demand, based on the average of the five preceding annual growth rates. The baseline for calculating demand growth shall be reset each year.

(3) A utility may submit for commission approval an alternative method to calculate its growth in demand, for good cause.

(4) The utility, subject to commission approval, may increase its energy efficiency goal for targeted projects conducted in an area that is an affected county or a nonattainment area, as defined in §25.182 of this title (relating to the Energy Efficiency Grant Program).

(g) **Basic program elements**. Electric utilities shall administer energy efficiency programs designed to achieve reductions in the customer's purchased energy consumption or demand, or both, and lower energy costs through the implementation of standard offer programs or limited, targeted market transformation programs.

(1) Each electric utility shall submit energy efficiency plans and reports to the commission in accordance with subsection (h) of this section.

(2) Incentive payments shall be made under either standard offer contracts or market transformation contracts, or both, for kWs and kWhs saved. The amount of the incentive payment may vary by customer class in order to effectively reach all customer classes, including hard-to-reach customers. Market transformation programs may offer other incentives or benefits as approved by the commission.

(3) Customer protection provisions shall be included in all electric utilities' energy efficiency programs in accordance with subsection (o) of this section.

(4) All projects performed under a standard offer program shall be subject to inspections, measurement, and verification in accordance with subsection (l) of this section. Energy and peak demand savings under market transformation projects shall be verified in accordance with subsection (k) of this section.

(5) The commission shall establish an implementation project, as described in subsection (n) of this section, to address program design, implementation and administration, and make recommendations to the commission.

(h) **Energy efficiency plans.**

(1) **Schedule**. Each electric utility shall by April 1, 2001, and annually thereafter, file its updated energy efficiency plan and an annual energy efficiency report as described in paragraph (4) of this subsection.

(2) **Energy efficiency plan**. Each electric utility's energy efficiency plan shall describe how the utility intends to achieve the legislative mandate and the requirements of this section. Beginning January 1, 2002, the plan shall be on a calendar year cycle and shall project at least a four-year period. The plan shall propose an annual budget sufficient to reach the 10% legislative goal by January 1, 2004, and annually thereafter. Each electric utility's energy efficiency plan shall include:

(A) A projection of the utility's annual growth in demand based on actual historical data calculated using the methodology and corresponding energy and peak demand savings goal to be achieved under the plan, as defined in subsection (f)(2) of this section.

(B) A description of existing contract obligations and an explanation of the extent to which these contracts will be used to meet the utility's annual energy efficiency requirements. Only additional energy and peak demand savings achieved as a result of projects installed after the effective date of this section may count towards the amount of energy and peak demand savings actually achieved on an annual basis.

(C) An estimate of the energy and peak demand savings to be obtained through each separate standard offer program, market transformation program, or both.

(D) The proposed design and plan for each of the utility's standard offer programs and market transformation programs, including measurement and verification plans when appropriate. For statewide standard offer programs or market transformation programs previously approved by the commission, the program may simply be identified with a description of how it will be implemented in the service territory of the utility. Programs not previously approved by the commission should be presented in detail, including baseline studies, for review and approval.

(E) A description of the customer classes targeted by the utility's energy efficiency programs, specifying the size of the hard-to-reach, residential, small commercial, and large commercial and industrial customer classes, and the methodology used for estimating the size of each customer class.

(F) The incentive levels for each customer class shall be a percentage of the avoided cost set forth in subsection (e) of this section. The incentive levels for individual programs shall be set by each utility subject to the incentive ceilings outlined below and other provisions of this section. Utilities may adjust incentive levels for individual programs during the

program year, but such adjustments must be clearly publicized in the program application guidelines. Until the commission adopts different ceilings for incentive levels, incentive levels for standard offer programs may not exceed:

(i) 100% for hard-to-reach customers.

(ii) 50% for other residential and small commercial customers.

(iii) 35% for large commercial and industrial customers.

(iv) 15% for load management programs.

(G) The proposed annual budget required to implement the utility's standard offer program, market transformation program, or both, broken out by program for each customer class, including hard-to-reach customers, and the amount for the small contractor set-aside pursuant to subsection (i)(4) of this section. The proposed budget should detail incentive payments, utility administrative costs, including the independent M&V expert, and the other administrative functions pursuant to subsection (i)(1) of this section, and the rationale and methodology used to estimate the proposed expenditures.

(H) Savings achieved through programs for hard-to-reach customers shall be no less than 5.0% of the utility's total demand reduction goal.

(I) Savings achieved through load management programs, including interruptible rates, may not exceed 15% of the utility's total demand reduction goal.

(J) A discussion of the types of informational activities the utility plans to use to encourage participation in standard offer programs or market transformation programs, including the manner in which utilities will use to post notice of standard offer programs, market transformation programs, and any other facts that may be considered when evaluating a project.

(3) Prior to the implementation of the energy efficiency program, the commission shall:

(A) Approve market transformation programs and standard offer programs.

(B) Review and approve measurement and verification plans, including deemed savings in accordance with the standard offer or market transformation program guidelines. Projects that require installation-specific measurement and verification may have a measurement and verification process approved by the utility. At the utility's option, the measurement and verification process or deemed savings may be submitted for pre-approval by the commission.

(4) **Annual energy efficiency report**. The annual energy efficiency report shall provide information listed below:

(A) The utility's projected annual growth in demand calculated using the methodology prescribed in subsection (f) of this section.

(B) The corresponding energy and peak demand savings goal for the utility, as defined in subsection (f)(2) of this section, expressed in kWs and kWhs, for the current calendar year.

(C) The utility's actual annual growth in demand for the preceding calendar year.

(D) The most current information available comparing projected savings to reported savings for each of the utility's standard offer programs and market transformation programs.

(E) The most current information available comparing reported savings and verified achieved savings as verified by the independent M&V expert for all programs.

(F) The most current information available comparing the baseline and milestones to be achieved under market transformation programs.

(G) A statement of funds expended by the utility for incentive payments, program administration pursuant to subsection (i)(1) of this section, including inspections, and the independent M&V expert.

(H) A statement of any funds that were committed but not spent during the year, by project.

(I) Any decreases by more than 10% in total program cost, with an explanation for the decrease in cost.

(J) Any remaining program funds that were not committed during the year.

(K) The most current information available of ongoing and completed energy efficiency projects by customer class that includes:

(i) Number of customers served by each project.

(ii) Project expenditures.

(iii) Verified energy and peak demand savings achieved by the project, when available.

(L) A description of proposed changes in the energy efficiency plans.

(M) Any other information prescribed by the commission.

(i) **Utility administration.** Utilities shall administer standard offer programs, market transformation programs, or both, to meet the requirements of the energy efficiency goal in PURA §39.905. The cost of administration may not exceed 10% of the total program costs.

(1) Administrative costs include costs necessary for utility conducted inspection and the independent M&V expert as required under subsections (l) and (m) of this section, and the costs necessary to meet the following requirements:

(A) Conduct informational activities designed to explain the standard offer programs and market transformation programs to energy efficiency service providers and vendors.

(B) Review and select proposals for energy efficiency projects in accordance with the guidelines of the standard offer programs under subsection (j) of this section, and market transformation programs under subsection (k) of this section.

(C) Inspect projects to verify that measures under a standard offer contract were installed and capable of performing their intended function, as required in subsection (l) of this section, before final payment is made. Such inspections shall comply with PURA §39.157 and §25.272 of this title (relating to Code of Conduct for Electric Utilities and Their Affiliates).

(D) Review and approve energy efficiency service providers' savings monitoring reports for both standard offer contracts and market transformation contracts.

(E) Any other costs as necessary and justifiable for successful program implementation.

(2) A utility administering a standard offer program or a market transformation program shall not be involved in directly providing customers any energy efficiency services, including any technical assistance for the selection of energy

efficiency services or technologies, unless the customer is a large commercial customer and the activities are limited to the outreach activities outlined in paragraph (1)(A) of this subsection, or unless a petition for waiver has been granted by the commission pursuant to §25.343 of this title. A utility may provide interested parties a list of EESPs who have participated or are currently participating in the utility's energy efficiency programs. In providing the list, the utility may not endorse or favor any EESP.

(3) The utility shall compensate energy efficiency service providers for energy efficiency projects in accordance with the contract and the requirements of this section. An individual energy efficiency service provider and its affiliates may not receive more than 20% of the total incentive payments available for a particular standard offer program, unless the program is not fully subscribed after 180 days, and the utility has demonstrated that it has performed adequate outreach.

(4) The utility, in its energy efficiency plan pursuant to subsection (h)(2) of this section, shall have a funding set-aside in an amount appropriate to the utility's program budgets for hard-to-reach or residential and small commercial customers for small projects. The commission may adjust the allocation of the set-aside for individual utilities at any time. Under this funding set-aside:

(A) Each incentive request for the hard-to-reach, residential and small commercial customer projects may not exceed $5,000.

(B) A utility may petition the commission for waiver of this limitation if the utility can demonstrate that the utility would not be able to meet its annual energy savings goal under this limitation.

(5) Incentive reserve requests for projects for individual sites or customers exceeding $10,000 shall require a signed affidavit of participation by the project host.

(6) Projects or measures under either the standard offer or market transformation programs are not eligible for incentive payments or compensation if:

(A) A project would achieve demand reduction by eliminating an existing function, shutting down a facility, or operation, or would result in building vacancies, or the re-location of existing operations to locations outside of the facility or area served by the participating utility.

(B) A measure would be installed even in the absence of the energy efficiency service provider's proposed energy efficiency project. For example, a project to install measures that have wide market penetration would not be eligible.

(C) A project results in negative environmental or health effects, including effects that result from improper disposal of equipment and materials.

(D) The project involves the installation of self-generation or cogeneration equipment, except for renewable DSM technologies.

(7) **Cost recovery and unspent funds**. Funds for achieving the energy efficiency goal will be included in each utility's transmission and distribution rates. Each utility shall track its energy efficiency expenditures separately from other expenditures and report these in their annual energy efficiency report. Funds not spent within a given year shall be considered as a source of funding for the following year, and the commission shall consider utilities' requests to roll over unspent funds on a case-by-case basis in connection with the utilities' annual energy efficiency report filing under subsection (h)(4) of this section.

(8) Each utility shall meet its energy efficiency goal annually through the acquisition of cost-effective energy and demand savings, in accordance with this section . A utility shall be deemed to have met its energy efficiency goal when the utility achieves a 10% reduction in growth in demand calculated as prescribed in subsection (f) of this section.

(A) Funds approved in the utility's rates for the purpose of the energy efficiency goal under PURA §39.905 shall be used exclusively to acquire cost-effective energy efficiency savings, even if such savings exceed the utility's energy efficiency goal.

(B) Notwithstanding the costs approved in the utility's cost of service rates, the utility must acquire cost-effective energy efficiency savings equivalent to at least 10% of the utility's annual growth in demand by

January 1, 2004, and each year thereafter, by administering programs consistent with this section.

(j) **Standard offer programs.** A utility's standard offer program shall be implemented through standard offer contracts. The standard offer contract shall describe the terms and conditions according to the requirements of this section for energy efficiency service providers for the delivery of energy efficiency services. Standard offer contracts will be available to any energy efficiency service provider that satisfies the contract requirements within the commission approved program parameters.

(1) Statewide standard offer programs shall be developed and submitted to the commission for approval. Utilities may use the commission approved statewide standard offer programs without further commission review. Other standard offer programs will require commission review for approval.

(2) A utility's standard offer program shall meet the following requirements:

(A) A standard offer program shall be developed to address each customer class. Specific different programs may be developed to address hard-to-reach customers. All customer classes must have access to an equitable share of the incentive funds.

(B) Each standard offer program will offer a standard incentive payment and specify a schedule of payments. The incentive shall be set at a level sufficient to meet the goals of the program and shall be consistent with

the ceiling under subsection (h)(2)(F) of this section, or any revised ceiling adopted by the commission. The standard offer incentive payments may include both payments for kW and kWh savings, as appropriate. Except for load management projects, the incentive payment may vary by customer class, but not within a customer class.

(C) Peak demand and energy savings for each project shall be identified in the proposals the energy efficiency service providers submit to the utility.

(D) Standard offer programs shall not limit eligibility to specific technologies, equipment, or fuels, but shall be neutral with respect to such factors. Energy efficiency projects may lead to switching from electricity to another energy source, provided the energy efficiency project results in overall lower energy costs, lower energy consumption, and the installation of high efficiency equipment. Switching from gas to electricity is not allowable under the program.

(E) Standard offer programs may require maximum load factor criteria for project eligibility.

(i) Increasing load factors may be subject to a decreasing incentive scale.

(ii) Load factor caps and corresponding incentive scales must be clearly publicized in the program application guidelines.

(F) All projects must result in a reduction in purchased energy consumption, or peak demand, or both, and a reduction in energy costs for the end-use customer.

(G) Comprehensive projects incorporating more than one energy efficiency measure shall be encouraged. Lighting measures shall be limited to 65% of the savings of each project. When a project consists of lighting measures only, compensation shall not exceed 65% of the ceiling for that class under subsection (h)(2)(F) of this section.

(H) Projects shall result in consistent and predictable energy and peak demand savings over a ten-year period.

(I) A utility shall not condition the provision of any product, service, pricing benefit, or alternative terms or conditions upon the purchase of any other good or service from the utility or its competitive affiliate, except that only customers taking transmission and distribution services from a utility can participate in its energy efficiency programs.

(J) Projects shall disclose potential adverse environmental or health effects associated with the energy efficiency measures to be installed.

(K) Projects shall include the procedures for measuring and reporting the energy and peak demand savings from installed energy efficiency measures, consistent with the requirements under subsection (l) of this section.

(L) Standard offer programs shall provide a complaint process that allows:

(i) The energy efficiency service provider to file a complaint against a utility.

(ii) A customer to file a complaint against an energy efficiency service provider. The utility may use customer complaints as a criterion for disqualifying energy efficiency service providers from participating in the program.

(M) Renewable DSM technologies are allowed.

(N) A standard offer program shall require contractors to provide the following:

(i) Evidence of good credit rating.

(ii) List of references.

(iii) All applicable licenses required under state law and local building codes.

(iv) Evidence of all building permits required by governing jurisdictions.

(v) Evidence of all necessary insurance.

(O) A utility may use poor performance as a criterion to limit or disqualify an energy efficiency service provider or its affiliate from participating in the programs.

(k) **Market transformation programs**. Market transformation programs are strategic efforts, including, but not limited to, incentives and education designed to reduce market barriers for energy efficient technologies and practices. Market transformation programs must be designed to obtain energy savings and peak demand reductions beyond savings that would be achieved through compliance with building codes and equipment efficiency standards. Utilities should cooperate in the creation of regional or statewide programs, consider statewide administration where appropriate, and where possible, leverage with existing effective national programs that have the potential to save energy in Texas. Statewide market transformation programs shall be developed under the implementation project to address targeted customer classes, as described in subsection (n) of this section. The programs shall be filed for commission review and approval. Utilities may use the statewide commission approved market transformation programs without further commission review. All other market transformation programs will require commission review for approval. Market transformation programs shall be conducted through projects that describe the terms and conditions as required under this section for the delivery of energy efficiency services. Market transformation programs must meet the following criteria:

(1) Competitive solicitation shall be the preferred method for contract selection. Pilot projects may be developed by an individual utility, a group of utilities, or an energy efficiency service provider. A utility may request a waiver from the requirements of a competitive solicitation for good cause.

(2) A market transformation project shall identify:

(A) Project goals.

(B) Market barriers the project is designed to overcome.

(C) Key intervention strategies for overcoming those barriers.

(D) Estimated costs and projected energy and capacity savings.

(E) A baseline study that is appropriate in time and geographic region. In establishing a baseline, the study shall consider the level of regional implementation and enforcement of the International Energy Conservation Code (IECC), when applicable. However, this consideration shall not preclude establishment of a baseline below the IECC "prescriptive" component performance compliance levels where such compliance is permitted by the IECC through alternative building designs or alternative measures. The baseline for new construction programs shall be developed by the Energy Efficiency Implementation Project (EEIP) and submitted to the commission for approval.

(F) Project implementation timeline and milestones.

(G) Method for measuring and verifying savings.

(H) Period over which savings shall be considered to accrue, including a date for final market transformation.

(I) Each proposed project shall include a description of how it will achieve the transition from extensive market intervention activities toward a largely self-sustaining market.

(3) The project must be cost-effective, under the standard in subsection (e) of this section.

(4) The project must be designed to achieve energy or peak demand savings, or both, and lasting changes in the way energy efficient goods or services are distributed, purchased, installed, or used.

(l) **Inspection, measurement and verification.** Each standard offer program shall include an industry accepted measurement and verification protocol approved by the commission as part of the detailed energy efficiency plan that will be used to measure and verify energy and peak demand savings to ensure that the goals of this section are achieved.

(1) The energy efficiency service provider is responsible for the measurement of energy and peak demand savings using the approved measurement and verification protocol, and may utilize the services of an independent third party for such purposes.

(2) Commission approved deemed energy and peak demand savings may substitute for the energy efficiency service provider's measurement and verification where applicable.

(3) Each customer shall sign a certification indicating that the measures contracted for were installed before final payment is made to the energy efficiency service provider.

(4) An energy efficiency service provider may request a utility inspection at its own expense in the event a customer refuses to sign the measure installation certification.

(5) For residential and small commercial customer projects involving over 30 installations, a statistically significant sample of installations will be subject to on-site inspection in accordance with the protocol set out for the project. Inspection shall occur within 30 days of notification of measure installation to ensure that measures are installed and capable of performing their intended function. The energy efficiency service provider shall not receive final compensation until the customer documents work completion and the utility has conducted its inspection on the sample of installations.

(6) Residential and small commercial customer projects of less than 30 installations may be aggregated and a statistically significant sample of the aggregate installations will be subject to on-site inspection in accordance with the protocol set out for the projects. Inspection shall occur within 30 days of notification of measure installation to ensure that measures are installed and capable of performing their intended function. The energy efficiency service provider shall

not receive final compensation until the customer documents work completion and the utility has conducted its inspection on the sample of installations.

(A) An energy efficiency service provider shall not be penalized for the inspection failure rate of another energy efficiency service provider.

(B) An energy efficiency service provider with unsatisfactory inspection results shall be subject to further inspections.

(7) The sample size for on-site inspections may decrease over time for a contractor under a particular contract that has consistently yielded satisfactory inspection results.

(m) **Independent measurement and verification (M&V) expert.** An independent M&V expert shall be selected to verify energy and peak demand savings, including deemed savings, reported by energy efficiency service providers statewide for the calendar year 2002, and periodically thereafter as determined by the commission.

(1) The independent M&V expert shall be selected by the commission by competitive solicitation.

(2) The independent M&V expert shall be funded from the utilities' program administration budgets.

(3) The independent M&V expert shall perform:

(A) A verification of energy efficiency service providers' reported energy and peak demand savings, based on a statistically representative sample of completed projects;

(B) A limited process evaluation; and

(C) Any other task the commission deems necessary.

(4) By March 1, 2003, the independent M&V expert shall report its preliminary conclusions to the commission and make a recommendation whether the utilities' energy and peak demand savings should be adjusted. By March 2004, the independent M&V expert shall provide its full report.

(n) **Energy efficiency implementation project**. The commission shall initiate an implementation project to make recommendations to the commission for its consideration with regard to best practices in standard offer programs and market transformation programs. All orders approved by the commission under Project Number 22241, *Energy Efficiency Program Implementation Docket,* and that are consistent with this section shall be transferred to the energy efficiency implementation project. Material submitted to the commission in this project believed to contain proprietary or confidential information shall be identified as such, and the commission may enter an appropriate protective order. The following functions may be undertaken in the energy efficiency implementation project:

(1) Development and review of statewide standard offer programs.

(2) Identification, design, and review of market transformation programs.

(3) Development of the appropriate baseline for programs addressing new construction.

(4) Determination of measures for which deemed savings are appropriate and participation in the development of deemed savings estimates for those measures.

(5) Recommendation to the commission of one or more independent M&V expert to conduct the audit in accordance with subsection (m) of this section.

(6) Review of and recommendations on the independent M&V expert's report with respect to whether utilities will meet the minimum legislative goal by January 1, 2004, and annually thereafter.

(7) Review of and recommendations on incentive payment levels and the adequacy to induce the desired level of participation by the energy efficiency service providers and customer classes.

(8) Review of and recommendations on the utility annual energy efficiency reports with respect to whether all customer classes have access to energy efficiency programs.

(9) Periodic reviews of the cost effectiveness methodology.

(10) Development of information packets for potential residential and commercial customers.

(11) Other activities as requested by the commission.

(o) **Customer protection.** The customer protection provisions under this section shall apply to residential and small commercial customers only. Each energy efficiency service provider who provides energy efficiency services to the end-use utility customer shall provide:

(1) Clear disclosure to the customer of the following:

(A) The customer's right to a cooling-off period of three business days, in which the contract may be canceled, if applicable under law.

(B) The name, telephone number, and street address of the energy services provider, the contractor, and written disclosure of all warranties.

(C) The fact that incentives are made available to the energy efficiency services provider through a ratepayer funded program, manufacturers or other entities.

(D) Notice of provisions that will be included in the customer's contract as described in paragraph (3) of this subsection.

(2) A form developed and approved by the commission may be used to satisfy the requirements of paragraph (1) of this subsection

(3) Contractual provisions to be included:

(A) Information on work activities, completion dates, and the terms and conditions that protect residential customers in the event of non-performance by the energy efficiency service provider.

(B) Written and oral disclosure of the financial arrangement between the energy efficiency service provider and customer. This includes an explanation of the: total customer payments, the total expected interest charged, all possible penalties for non-payment, and whether the customer's installment sales agreement may be sold.

(C) Disclosure of contractor liability insurance to cover property damage.

(D) An "All Bills Paid" affidavit be given to the customer to protect against claims of subcontractors.

(E) Provisions prohibiting the waiver of consumer protection statutes, performance warranties, false claims of energy savings and reductions in energy costs.

(F) Information on complaint procedures offered by the contractor, or the utility, as required under subsection (j)(2)(L) of this section, and toll free numbers for the Office of Customer Protection of the Public Utility Commission of Texas, and the Office of Attorney General's Consumer Protection Hotline.

(G) Disclosure that the energy efficiency service provider is not part of, or endorsed by the commission or the utility.

(p) **Effective date:** This section shall be in effect for any energy efficiency programs pursuant to this section with a start date of January 1, 2003 and thereafter.

**§25.182. Energy Efficiency Grant Program.**

(a) **Purpose.** The purpose of this section is to provide implementation guidelines for the Energy Efficiency Grant Program mandated under the Health and Safety Code, Title 5, Subtitle C, Chapter 386, Subchapter E, Energy Efficiency Grant Program. Programs offered under the Energy Efficiency Grant Program shall utilize program templates that are consistent with §25.181 of this title (relating to the Energy Efficiency Goal). Programs shall include the retirement of materials and appliances that contribute to energy consumption during periods of peak demand with the goal of reducing energy consumption, peak loads, and associated emissions of air contaminants.

(b) **Eligibility for grants**. Electric utilities, electric cooperatives, and municipally owned utilities are eligible to apply for grants under the Energy Efficiency Grant Program. Multiple eligible entities may jointly apply for a grant under one energy efficiency grant program application. Grantees shall administer programs consistent with §25.181 of this title.

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

(1) **Affected counties** — Bastrop, Bexar, Caldwell, Comal, Ellis, Gregg, Guadalupe, Harrison, Hays, Johnson, Kaufman, Nueces, Parker, Rockwall,

Rusk, San Patricio, Smith, Travis, Upshur, Victoria, Williamson, and Wilson. An affected county may include a nonattainment area, at which point it will be considered a nonattainment area.

(2) **Demand side management (DSM)** — Activities that affect the magnitude or timing of customer electrical usage, or both.

(3) **Electric utility** — As defined in the Public Utility Regulatory Act (PURA) §31.002(6).

(4) **Energy efficiency** — Programs that are aimed at reducing the rate at which electric energy is used by equipment and/or processes. Reduction in the rate of energy used may be obtained by substituting technically more advanced equipment to produce the same level of end-use services with less electricity; adoption of technologies and processes that reduce heat or other energy losses; or reorganization of processes to make use of waste heat. Efficient use of energy by consumer-owned end-use devices implies that existing comfort levels, convenience, and productivity are maintained or improved at lower customer cost.

(5) **Energy efficiency service provider —** A person who installs energy efficiency measures or performs other energy efficiency services. An energy efficiency service provider may be a retail electric provider or a large commercial customer, if the person has executed a standard offer contract with the grantee.

(6) **Grantee —** the entity receiving energy efficiency grant program funds.

(7) **Nonattainment area —** An area so designated under the federal Clean Air Act §107(d) (42 U.S.C. §7407), as amended. A nonattainment area does not include affected counties.

(8) **Peak demand** — Electrical demand at the time of highest annual demand on the utility's system, measured in 15 minute intervals.

(9) **Peak demand reduction** — Peak demand reduction on the utility system during the utility system's peak period for the duration of at least one hour, calculated as the maximum average demand reduction over a period of one hour during the peak period.

(10) **Peak load** — Peak demand.

(11) **Peak period —** Period during which a utility's system experiences its maximum demand. For the purposes of this section, the peak period is May 1 through September 30, during the hours between 1:00 p.m. and 7:00 p.m., excluding federal holidays and weekends.

(12) **Retirement —** The disposal or recycling of all equipment and materials in such a manner that they will be permanently removed from the system with minimal environmental impact.

(d) **Commission administration.** The commission shall administer the Energy Efficiency Grant Program, including the review of grant applications, allocation of funds to grantees and monitoring of grantees. The commission shall:

(1) Develop an energy efficiency grant program application form. The grant application form shall include:

(A) Application guidelines;

(B) Information on available funds, including minimum and maximum funding levels available to individual applicants;

(C) Listing of applicable affected counties and counties designated as nonattainment areas; and

(D) Information on the evaluation criteria, including points awarded for each criterion.

(2) Evaluate and approve grant applications, consistent with subsection (e) of this section.

(3) Enter into a contract with the successful applicant.

(4) Reimburse participating grantees from the fund for costs incurred by the grantee in administering the energy efficiency grant program.

(5) Monitor grantee progress on an ongoing basis, including review of grantee reports provided under subsection (g)(8) of this section.

(6) Compile data provided in the annual energy efficiency report, pursuant to §25.183 of this title (relating to Reporting and Evaluation of Energy Efficiency Programs).

(e) **Criteria for making grants.**

(1) Grants shall be awarded on a competitive basis. Applicants will be evaluated on the minimum criteria established in subparagraphs (A)-(F) of this paragraph.

(A) The extent to which the proposal would reduce emissions of air pollutants in a nonattainment area.

(B) The extent to which the proposal would reduce emissions of air pollutants in an affected county.

(C) The amount of energy savings achieved during periods of peak demand.

(D) The extent to which the applicant has achieved verified peak demand reductions and verified energy savings under this or other similar energy efficiency programs and has complied with the requirements of the grant program established under this section.

(E) The extent to which the proposal is credible, internally consistent, and feasible and demonstrates the applicant's ability to administer the program.

(F) Any other criteria the commission deems necessary to evaluate grant proposals.

(2) Applicants who receive the most points under the evaluation criteria shall be awarded grants, subject to the following constraints:

(A) The commission reserves the right to set maximum or minimum grant amounts, or both.

(B) The commission reserves the right to negotiate final program details and grant awards with a successful applicant.

(f) **Use of approved program templates.** All programs funded through the energy efficiency grant program shall be program templates developed pursuant to §25.181 of this title.

(1) Program templates adopted under this program shall include the retirement of materials and appliances that contribute to energy consumption during periods of peak demand to ensure the reduction of energy, peak demand, and associated emissions of air contaminants.

(2) Cost effectiveness and avoided cost criteria shall be consistent with §25.181(e) of this title.

(3) Incentive levels shall be consistent with program templates and in accordance with §25.181(h)(2)(F) of this title.

(4) Inspection, measurement and verification requirements shall be consistent with program templates and in accordance with §25.181(l) of this title.

(5) Projects or measures under this program are not eligible for incentive payments or compensation if:

(A) A project would achieve demand reduction by eliminating an existing function, shutting down a facility, or operation, or would result in building vacancies, or the re-location of existing operations to locations outside of the facility or area served by the participating utility.

(B) A measure would be installed even in the absence of the energy efficiency service provider's proposed energy efficiency project. For example, a project to install measures that have wide market penetration would not be eligible.

(C) A project results in negative environmental or health effects, including effects that result from improper disposal of equipment and materials.

(D) The project involves the installation of self-generation or cogeneration equipment, except for renewable demand side management technologies.

(g) **Grantee administration:** The cost of administration may not exceed 10% of the total program budget before January 1, 2003, and may not exceed 5.0% of the total program budget thereafter. The commission reserves the right to lower the allowable cost of administration in the application guidelines.

(1) Administrative costs include costs necessary for grantee conducted inspections and the costs necessary to meet the following requirements:

(A) Conduct informational activities designed to explain the program to energy efficiency service providers and vendors.

(B) Review and select proposals for energy efficiency projects in accordance with the program template guidelines and applicable rules of the standard offer programs under §25.181(j) of this title, and market transformation programs under §25.181(k) of this title.

(C) Inspect projects to verify that measures were installed and are capable of performing their intended function, as required in §25.181(l) of this title, before final payment is made. Such inspections shall comply with PURA §39.157 and §25.272 of this title (relating to Code of Conduct for Electric Utilities and Their Affiliates) or, to the extent applicable to a grantee, §25.275 of this title (relating to the Code of Conduct for Municipally Owned Utilities and Electric Cooperatives Engaged in Competitive Activities).

(D) Review and approve energy efficiency service providers' savings monitoring reports.

(2) A grantee administering a grant under this program shall not be involved in directly providing customers any energy efficiency services, including any technical assistance for the selection of energy efficiency services or

technologies, unless the customer is a large commercial customer and the activities are limited to the outreach activities outlined in paragraph (1)(A) of this subsection, or unless a petition for waiver has been granted by the commission pursuant to §25.343 of this title (relating to Competitive Energy Services), to the extent that section is applicable to a grantee.

(3) Only projects installed within the grantee's service area are eligible for compensation under this program.

(4) An electric utility may not count the energy and demand savings achieved under the energy efficiency grant program towards satisfying the requirements of PURA §39.905.

(5) Incentives paid for energy and demand savings under the energy efficiency grant program may not supplement or increase incentives made for the same energy and demand savings under programs pursuant to PURA §39.905.

(6) An electric utility, electric cooperative or municipally owned utility may not count air contaminant emissions reductions achieved under the energy efficiency grant program towards satisfying an obligation to reduce air contaminant emissions under state or federal law or a state or federal regulatory program.

(7) The grantee shall compensate energy efficiency service providers for energy efficiency projects in accordance with the applicable rules of the standard offer programs under §25.181(j) of this title, and market transformation programs under §25.181(k) of this title, and the requirements of this section.

(8) The grantee shall provide reports consistent with contract requirements and §25.183 of this title.

(h) **Effective date:** This section shall be in effect for any energy efficiency programs pursuant to this section with a start date of January 1, 2003 and thereafter.

**§25.183. Reporting and Evaluation of Energy Efficiency Programs.**

(a) **Purpose.** The purpose of this section is to establish reporting requirements sufficient for the commission, in cooperation with Energy Systems Laboratory of Texas A&M University (Laboratory), to quantify, by county, the reductions in energy consumption, peak demand and associated emissions of air contaminants achieved from the programs implemented under §25.181 of this title (relating to the Energy Efficiency Goal) and §25.182 of this title (relating to Energy Efficiency Grant Program).

(b) **Application.** This section applies to electric utilities administering energy efficiency programs implemented under the Public Utility Regulatory Act (PURA) §39.905 and pursuant to §25.181 of this title, and grantees administering energy efficiency grants implemented under Health and Safety Code §§386.201-386.205 and pursuant to §25.182 of this title, and independent system operators (ISO) and regional transmission organizations (RTO).

(c) **Definitions**. The words and terms in §25.182(c) of this title shall apply to this section, unless the context clearly indicates otherwise.

(d) **Reporting.** Each electric utility and grantee shall file by April 1, of each program year an annual energy efficiency report. The annual energy efficiency report shall include the

information required under §25.181(h)(4) of this title and paragraphs (1) - (5) of this subsection in a format prescribed by the commission.

(1) Load data within the applicable service area. If such information is available from an ISO or RTO in the power region in which the electric utility or grantee operates, then the ISO or RTO shall provide this information to the commission instead of the electric utility or grantee.

(2) The reduction in peak demand attributable to energy efficiency programs implemented under §25.181 and §25.182 of this title, in kW by county, by type of program and by funding source.

(3) The reduction in energy consumption attributable to energy efficiency programs implemented under §25.181 and §25.182 of this title, in kWh by county, by type of program and by funding source.

(4) Any data to be provided under this section that is proprietary in nature shall be filed in accordance with §22.71(d) of this title (relating to Filing of Pleadings, Documents and Other Materials.

(5) Any other information determined by the commission to be necessary to quantify the air contaminant emission reductions.

(e) **Evaluation.**

(1) Annually the commission, in cooperation with the Laboratory, shall provide the Texas Commission on Environmental Quality (TCEQ) a report, by county, that

compiles the data provided by the utilities and grantees affected by this section and quantifies the reductions of energy consumption, peak demand and associated air contaminant emissions.

(A) The Laboratory shall ensure that all data that is proprietary in nature is protected from disclosure.

(B) The commission and the Laboratory shall ensure that the report does not provide information that would allow market participants to gain a competitive advantage.

(2) Every two years, the commission, in cooperation with the Energy Efficiency Implementation Project shall evaluate the Energy Efficiency Grant Program under §25.182 of this title.

(f) **Effective date:** This section shall be in effect for any energy efficiency programs pursuant to this section with a start date of January 1, 2003 and thereafter.

This agency hereby certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority. It is therefore ordered that the amendments to §25.181, relating to Energy Efficiency Goal, §25.182, relating to Energy Efficiency Grant Program, and §25.183 relating to Reporting and Evaluation of Energy Efficiency Programs are hereby adopted with changes to the text as proposed.

**ISSUED IN AUSTIN, TEXAS ON THE 2nd DAY OF OCTOBER 2002.**

**PUBLIC UTILITY COMMISSION OF TEXAS**

**Rebecca Klein, Chairman**

**Brett A. Perlman, Commissioner**