PROJECT NO. 22361

CODE OF CONDUCT FOR MUNICIPALLY OWNED ELECTRIC UTILITIES AND ELECTRIC COOPERATIVES PURSUANT TO PURA §39.157(e)	**§**	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER ADOPTING NEW §25.275, RELATING TO A CODE OF CONDUCT FOR MUNICIPALLY OWNED UTILITIES AND ELECTRIC COOPERATIVES ENGAGED IN COMPETITIVE ACTIVITIES

The Public Utility Commission of Texas (commission) adopts new §25.275, relating to a Code of Conduct for Municipally Owned Utilities and Electric Cooperatives Engaged in Competitive Activities, with changes to the proposed text as published in the December 1, 2000, *Texas Register* (25 TexReg 11811). This new section is adopted under Project Number 22361. The new rule is necessary to implement the Public Utility Regulatory Act, Texas Utilities Code Annotated §39.157(e) (Vernon 1998, Supplement 2001) (PURA) as it relates to adopting a code of conduct for municipally owned utilities (MOUs) and electric cooperatives (COOPs) once they decide to implement retail choice and begin providing service outside their certificated areas. PURA §39.157(e) directs the commission to establish a code of conduct that must be observed by MOUs, COOPs, and their affiliates to protect against anticompetitive practices, and requires that the code of conduct be consistent with PURA Chapters 40 and 41 and not be more restrictive than the rules adopted for transmission and distribution (T&D) utilities under PURA §39.157(d).

Project Number 22361 was opened on March 31, 2000. As part of the drafting process, commission staff conducted workshops on August 16, 2000 and October 17, 2000 in Austin to receive input from

potentially affected persons. Written comments from a number of interested parties were submitted in connection with both of these workshops and commission staff attempted to find areas of agreement among the parties during these workshops. The commission considered the draft rule for publication at the November 16, 2000 open meeting.

The commission received written comments on the proposed new section on January 2, 2001, from TXU Electric-From the Perspective of a Future TXU Retail Electric Provider (TXU), the City of Denton (Denton), Brazos Electric Power Cooperative, Inc. (Brazos), and jointly from Texas Public Power Association and Texas Electric Cooperatives (TPPA/TEC). On January 16, 2001, the commission received reply comments from TXU, Denton, and TPPA/TEC.

Section 25.275, as published in the *Texas Register* on December 1, 2000, establishes broad safeguards to govern the interaction between the transmission and distribution business unit (TDBU) of an MOU or a COOP and its affiliates. The proposed section sets rules and enforcement procedures to govern transactions between the TDBU and its affiliates to avoid potential anticompetitive practices such as cross-subsidization between regulated and competitive activities. The proposed rule also establishes certain reporting requirements for MOUs and COOPs.

Denton specifically objected to the proposed rule because it required an MOU/COOP to functionally separate and create a TDBU. Denton argued that PURA §40.055(a)(2) and §41.055(2) give the

governing bodies of MOU/COOPs the discretion to determine whether to unbundle any energy-related activities and, if they choose to unbundle, whether to do so structurally or functionally. Accordingly, staff proposed an additional subsection (o) to the published rule, which includes the same safeguards to protect against anticompetitive activities, but allows flexibility for the MOU/COOP to decide how to meet those safeguards without having to create a functionally separate TDBU.

On January 22, 2001, a public hearing on the proposed rule with subsection (o) was held at the commission's offices and representatives from TPPA, TEC, Denton, and Brazos provided oral comments. On January 24, 2001, the commission received supplemental written comments on subsection (o) from Brazos, Denton, and TXU. On January 26, 2001, the commission received supplemental reply comments on subsection (o) from TPPA/TEC, Denton, TXU, and Reliant Energy HL&P (Reliant).

General Comments.

Denton commented that the decisions by MOUs or COOPs about whether to compete in the retail electric market and the form under which they may compete are given by PURA exclusively to the governing bodies of the MOU/COOPs. Denton further noted that the commission's jurisdiction over MOUs and COOPs is strictly limited by PURA and that neither MOUs nor COOPs are required to unbundle their energy-related functions in order to engage in retail competition. Denton argued that

MOUs are very different from investor owned utilities (IOUs) in their ownership and governance and that MOUs generally pale in size to IOUs. With regard to MOUs, Denton noted that PURA provides that if an MOU chooses to unbundle, it may further choose whether to do so structurally or functionally. Also, Denton argued that the code of conduct should apply only to anticompetitive activities and to affiliate activities limited to structurally unbundled affiliates. Denton commented that any provisions in the MOU code of conduct that are not related to the prohibition of anticompetitive practices are not authorized by PURA. It noted that requirements that force a *de facto* unbundling are not only illegal, but also deter an MOU from choosing to compete because it would increase the operating costs of the MOU. Denton provided several examples of specific rule provisions that impose additional costs and burdens on MOUs and thus discourage an MOU from choosing to compete in the retail electric market.

In addition, Denton argued that the use of operational constraints between divisions of the same entity violates PURA and, through the erection of barriers, will discourage MOUs from providing customer choice. Instead, Denton argued that the rule should clearly identify anticompetitive practices without resorting to the imposition of unjustified and illegal constraints on how a functionally or structurally bundled MOU transacts business within itself or shares information within itself. If the procedures and safeguards implemented by the MOUs are not appropriate, or are not sufficient to prove their compliance to a complainant or the commission, then the statutorily provided penalty would apply, and the MOU would lose its opportunity to compete outside its service area.

In reply comments, TPPA/TEC stated that Denton's position, which is based on a literal reading of certain PURA provisions, "was not the best approach to protect the public interest in these circumstances…." They averred that the commission's proposed rule, if modified as TPPA/TEC had advocated, would accomplish the objectives of recognizing the diversity among and the special features of publicly owned power entities, while protecting against anticompetitive activities. Nevertheless, TPPA/TEC said that if the commission decides to follow Denton's preferred approach, they would hope to cooperate with the commission to develop a workable rule that treats MOUs and COOPs in a similar way.

TXU argued in reply comments that Denton was "out of step" with other MOU/COOPs and that the broad objections are contrary to Legislative intent and would result in a code of conduct insufficient to protect competition. TXU further commented that Denton's solution that MOU/COOPs be allowed to devise their own safeguards for ensuring that they do not engage in anticompetitive practices is unacceptable. TXU argued that standards found in the proposed rule are necessary to ensure that competition is protected. TXU highlighted the fact that other MOU/COOPs recognize that a code of conduct can have no effect if there is not some separation of wires activities from retail competitive activities within the MOU/COOP. TXU argued that it is implausible to expect MOU/COOPs to adopt adequate safeguards without requiring some standards for what is acceptable.

The commission agrees with Denton that the language in PURA allows the governing bodies of MOU/COOPs to decide whether to unbundle, and if they decide to unbundle, whether to do so

structurally or functionally. Accordingly, the commission has added subsection (o) to accommodate an MOU/COOP that chooses to participate in the competitive electric retail market on a bundled basis (Bundled MOU/COOP). Minor changes were made to the published rule in subsections (a), (b), (c), and (n) to accommodate Bundled MOU/COOPs. Subsection (o) focuses on the broad concepts of anticompetitive safeguards and places the burden on the Bundled MOU/COOP in the form of annual reporting and audits to ensure that the Bundled MOU/COOP does not engage in anticompetitive practices. As noted by TXU, it will be difficult for MOU/COOPs to adopt adequate safeguards without requiring some structure or standard for what is acceptable. Any structure adopted by the commission, however, may be viewed as requiring *de facto* functional unbundling. Accordingly, the commission adopts the general prohibition against anticompetitive practices and defers resolution concerning the adequacy of specific safeguards to the contested case implementation proceeding. After the initial implementation plan is approved, the Bundled MOU/COOP will file annual reports and will be subject to an independent audit requirement once every three years. These provisions will assist the commission in ensuring that a Bundled MOU/COOP does not engage in anticompetitive practices on an ongoing basis.

The commission finds that the modifications for a Bundled MOU/COOP require a revision to the title of the rule from "Code of Conduct for Municipally Owned Utilities and Electric Cooperatives and Their Competitive Affiliates" to "Code of Conduct for Municipally Owned Utilities and Electric Cooperatives Engaged in Competitive Activities."

The commission notes that while Denton objected to the code as proposed, the other MOU/COOPs represented by TPPA/TEC supported many of the standards and guidelines set forth in the published rule. The commission prefers the approach taken by TPPA/TEC, and notes that ensuring that safeguards are in place to protect against anticompetitive practices is more practical with a functional separation. Therefore, the commission declines to make substantial revisions to subsections (c) through (n) of the published rule, except as set forth herein.

Denton commented that parts of the proposed rule are confusing and unclear and, therefore, would be difficult to comply with. Specifically, it pointed to the definitions of "TDBU" and "affiliate." It also pointed to subsections (b)(3)(B) and (d) as other examples of how difficult it will be for a bundled MOU to comply with the proposed rule. Further, Denton argued that the circular cross-references in subsection (m)(3) are confusing and can lead to inadvertent violations of the rule. Moreover, it argued that subsection (g) is unclear in the situation where there is no TDBU. It suggested that the rule could be simplified enormously by separately listing the obligations of each category of MOU/COOP and eliminating the cross-references and special exclusions and instructions.

With respect to the organization of the rule and the application section, the commission acknowledges that the cross-referencing of the rule for small and mid-sized MOUs and COOPs may be time consuming. However, MOUs and COOPs which will be required to comply with the rule and as represented by TPPA/TEC, with the exception of Denton, did not object to the format of the proposed

rule. Accordingly, the commission finds that repetition of certain sections of the rule is not preferable to the existing organization of the rule.

Preamble Question 1 - Compliance variation depending on size of the TDBU.

TPPA/TEC supported a three-tiered approach to regulating the MOU/COOP TDBU. They stated that applying "the full effect of the code" on smaller MOUs and COOPs would impose disproportionate burdens on these utilities that their customers would pay for without necessarily receiving any benefits. Also, they observed that smaller MOUs and COOPs have neither the market power to raise prices or eliminate competitors, nor the incentive to maximize profits for shareholders. In the view of TPPA/TEC, "imposing a one size fits all approach may well act as a significant deterrent to adoption of customer choice." Likewise, TXU did not object to a tiered approach, although TXU argued that the size demarcations should be different, as discussed below. On the other hand, Denton argued that any distinction between MOUs and COOPs based on the total number of megawatt hour sales is an arbitrary division. Denton argued that the MOU/COOPs should have the flexibility to determine what procedures and safeguards are appropriate for that specific MOU/COOP in order to enable it to comply with the requirements in a code of conduct. Denton argued that a better way to account for the size differential among MOUs and COOPs is to comprehensively require them to implement adequate safeguards to preclude employees of any entity, including its competitive affiliate, if applicable, from gaining access to information in a manner that would allow or provide a means to transfer confidential information from an MOU/CCOP to such entity.

The commission agrees with TXU and TPPA/TEC and finds that the tiered approach is most appropriate. The commission finds that smaller MOUs and COOPs would face disproportionate burdens in meeting all aspects of the code, and that their customers would have to pay for these burdens without necessarily receiving any benefits. In addition, smaller MOUs and COOPs do not have the market power to raise prices or eliminate competitors. The commission finds, as previously noted in the preamble to the published rule, that the ultimate barrier to entry is a decision by a small MOU or COOP not to opt into electric retail competition due to overburdensome restrictions or reporting requirements. With respect to Denton's comments, the commission has added subsection (o), which requires a Bundled MOU/COOP to implement adequate safeguards to preclude employees of any bundled entity of any size from gaining access to information in a manner that would allow or provide a means to transfer confidential information.

With respect to the size demarcations with the tiered approach, TPPA/TEC supported the three sizes of MOU/COOPs as proposed in the rule. On the other hand, TXU argued that the threshold for a large TDBU should be lowered from six million megawatt-hours (MWh) to one million MWh. TXU argued that as proposed, only two out of 73 MOUs, Austin Energy and San Antonio Public Service, fall into the large category, and none of the 70 COOPs fall into the large category. In addition, TXU argued that the MWh increase necessary to move from the mid-size to large categories is unrealistically inflated, requiring MOUs or COOPs to double, triple, or quintuple in size before reaching the large category. TXU further argued that many of the mid-sized MOUs and COOPs are in areas of high growth. TXU's

proposal would require the following seven entities to meet the additional requirements of the "large" classification: Garland Power & Light System; Lubbock Power & Light; Denton Municipal Utilities; Pedernales Electric Coop, Inc.; Bluebonnet Electric Coop, Inc.; CoServe Electric; and Guadalupe Valley Electric Coop. TXU argued that the most significant additional requirements between the mid-sized and large classifications are that a large TDBU must: track migration of employees; ensure compliance with the code for new competitive affiliates; provide for detailed safeguards related to the sharing of employees, facilities, or other resources with competitive affiliates; ensure safeguards during the provision of corporate support services; post the provision of aggregated customer information to a competitive affiliate and make such aggregation services available to third parties if made available to a competitive affiliate; not allow competitive affiliates preferential T&D information; require competitive subsidiaries that use the MOU/COOP's trademark, name, brand, or logo to use a disclaimer; refrain from engaging in joint marketing activities; and limit responses to customer inquiries about competitive affiliate or competitive products or services.

In reply comments, TPPA/TEC objected to TXU's proposal to reduce the threshold between large and mid-sized TDBUs from six million MWh per year to one million MWh. They contended that whereas the six-million figure naturally divides the two largest urban areas in ERCOT not served by IOUs from the other public-power entities, the one-million figure is arbitrary: it would lump San Antonio and Austin with other much smaller public systems, while several entities slightly smaller than the latter systems would remain in the mid-sized category.

The commission agrees with TPPA/TEC and declines to modify the MWh thresholds for the size classifications. However, the commission agrees with TXU regarding some of the additional requirements for mid-size TDBUs, as modified to accommodate the fact that mid-size TDBUs will not have the resources necessary to implement the full separation and reporting required for large TDBUs.

First, the commission finds that tracking migration and sharing of employees should be required of mid-sized TDBUs. The commission acknowledges that this requirement was previously omitted due to the fact that some mid-size TDBUs will have employees that perform both T&D functions and competitive energy-related activities. The code contains adequate provisions to protect against the improper use of confidential information, and to ensure that there are no opportunities for preferential treatment or unfair competitive advantage, and that no significant opportunities for cross-subsidization occur by virtue of this sharing. However, the commission finds that it would be appropriate to require mid-sized TDBUs to report information for shared employees, similar to the information requested for transferring employees. Accordingly, the commission adds this requirement as new subsection (b)(4)(D) and modifies the language in subsection (f) requiring that the mid-sized TDBU document assignment of employees engaged in activities for both the TDBU and competitive affiliates.

Second, the commission finds that the safeguards for the provision of corporate support services as set forth in subsection (j)(3) should be applicable to mid-sized TDBUs. The commission acknowledges that a mid-sized TDBU may share personnel performing corporate support services with its competitive affiliate, but the shared corporate support staff should not be used as a means to facilitate the transfer of

confidential information from the TDBU to a competitive affiliate. Accordingly, the commission adds new subsection (b)(4)(J). The commission also notes a language clarification to subsection (j)(3) relating to corporate support services to reflect that corporate support services may be provided by entities other than the TDBU.

Third, the commission finds that mid-sized TDBUs should ensure compliance with the code for new competitive affiliates as set forth in subsection (h) of this section and therefore adds new subsection (b)(4)(F). Posting notice of the newly created competitive affiliate on an Internet site or other public electronic bulletin board for 30 days should not be overly burdensome on a mid-sized TDBU.

The commission declines to make the other adjustments requested by TXU because the burdens placed on the mid-sized MOU/COOP would be disproportionate to the benefits received. In addition, the commission finds that there are adequate safeguards in the code to protect against anticompetitive activities without the additional provisions suggested by TXU.

With respect to the method for determining size by measuring the delivery of total metered electric energy through an MOU/COOP T&D system, TPPA/TEC approved the published method but proposed that the concept be limited to energy delivered for retail sale. TPPA/TEC argued that "introducing wholesale energy metered through a system adds an ambiguous element" that could "confound the intent of categorizing by size based on local wires system service," because wholesale

electricity flows "may be metered in some respect," even if the ultimate retail customer does not reside in the TDBU's certificated service area. Moreover, TPPA/TEC supported the comments filed by Brazos to the effect that the "wholesale" reference could lead to the inclusion of entities that merely provide bulk power to member distribution systems.

Brazos focused its comments on a concern that generation and transmission (G&T) cooperatives may be subject to the code of conduct because the proposed rule counts energy delivered at wholesale when determining the size of the TDBU. Brazos suggested adding language that would exclude G&T cooperatives. Brazos further challenged the commission's ability to apply the proposed code of conduct to G&T cooperatives.

TXU replied that Brazos' concern was unfounded because a G&T cooperative will not be a TDBU subject to the proposed rules because it does not have a certificated service area and will not have the ability to opt into competition. TXU further argued that the G&T cooperative will not be a competitive affiliate of a TDBU because competitive affiliates must sell products or services at retail.

TPPA/TEC recommended in reply comments that the definitions in subsections (c)(8), (9), and (12) (now subsections (c)(10), (11), and (14)) be modified to delete the reference to wholesale. TXU further stated in reply comments that it does not object to such modification.

The commission agrees with the parties and deletes the reference to wholesale from subsections (c)(8), (9), and (12) (now subsections (c)(10),(11), and (14)). Because the code is therefore not applicable to Brazos' wholesale transactions or other G&T cooperatives, the commission does not specifically address Brazos' comments challenging the commission's jurisdiction with respect to applying the provisions of subsections (d), (g), and (e) to Brazos.

TPPA/TEC also recommended that the size classifications be escalated each year by the average load growth in Texas. If such a calculation factor is not included, they urged that proposed subsection (b)(5)(A) (now subsection (b)(6)(A)) be modified to extend the implementation of a larger size classification to two years, rather than six months. TXU opposed the escalator based on growth in Texas and, likewise, opposed expanding the time for compliance from six months to two years.

The commission finds that using the escalation factor for load growth adds unnecessary complexity and does not account for the fact that as systems grow, even if the growth is relative to growth in the entire market, the system should acquire the additional resources to meet stricter standards in the code of conduct. The commission agrees with TPPA/TEC that an MOU or COOP that grows into another classification should have more than six months to meet the more stringent code requirements. Accordingly, the commission modifies subsection (b)(6)(A) to give an MOU/COOP one year after size reclassification to meet the applicable code requirements.

Preamble Question 2 - When the code of conduct becomes applicable.

TPPA/TEC opposed requiring MOU/COOPs to adhere to an internal code of conduct during the transition period. They asserted that such a requirement would conflict with the law, which decrees that the code becomes effective when the TDBU begins competing outside its service area. Likewise, Denton argued that PURA §40.054(b) is very clear as to when an MOU becomes subject to the code of conduct, *i.e.*, when it has chosen to participate in customer choice and is providing electric energy at retail to customers outside its service area. Denton further argued that there is no statutory basis for requiring an internal code of conduct during a period when the MOU is transitioning to competition but is otherwise not subject to the code via the provisions of PURA.

TXU argued that the code should be applicable during a 120-day transition period and, in support noted that the code adopted for IOUs required a code during the transition period from January 10, 2000 to full retail competition. TXU noted that as MOU/COOPs prepare for competition, it is important that safeguards be in place to ensure that anticompetitive conduct does not occur. TXU argued that competitors will be at a distinct disadvantage if, during the transition period, competitive affiliates of MOU/COOPs have their competitive activities subsidized and are allowed unfettered access to confidential information.

Reiterating the position taken in their initial comments, TPPA/TEC opposed TXU's request to apply the code of conduct during the 120-day transition period in their reply comments. TPPA/TEC stated that MOUs and COOPs, unlike IOUs, do not face a transition period imposed by statute because public-power systems are not required to adopt customer choice by any date.

The commission agrees with TPPA/TEC and Denton and declines to impose a code of conduct for MOUs or COOPs during any transition period. The commission determines that PURA is clear as to when the code of conduct becomes applicable and public-power systems are not required to adopt customer choice.

Preamble Question 3 - Mandatory provision of products and services by the TDBU.

TPPA/TEC, Denton, and Brazos opposed requiring TDBUs to offer to third parties products and services, other than corporate support services, that are made available to competitive affiliates. TPPA/TEC expressed concern that such a requirement could jeopardize the tax-exempt status of bonds issued by MOUs and COOPs. Specifically, TPPA/TEC argued that Internal Revenue Service (IRS) private-use regulations raise this threat if an MOU uses facilities funded by tax-exempt bonds for the benefit of private parties and that a COOP would face the same threat if it earns over 15% of its gross revenues from activities other than selling electricity to its members. TPPA/TEC cited the following as examples of products or services provided to a competitive affiliate that could activate these concerns:

engineering services, marketing services, transportation, land and facilities, and credit support. TPPA/TEC commented that subjecting MOUs and COOPs to such a risk would violate PURA §40.104. In addition, TPPA/TEC commented that requiring an MOU to extend non-discriminatory credit availability to a third party could violate the Texas Constitution, Article III, section 52, which prohibits lending of credit to private parties.

TPPA/TEC maintained that more than adequate protection against unfair advantage to a public-power entity's competitive affiliate results from requiring that products and services provided to such an affiliate be priced at approximate market value or fully allocated cost, without preferential discounts or other benefits. Therefore, TPPA/TEC recommended deleting subsections (b)(2)(E) and (b)(3)(I) and modifying subsection (k)(2) accordingly.

TXU argued in reply comments that the proposed rule does not require shared services like transportation, land and facilities, and credit support to be provided to non-affiliated entities.

The commission agrees, in part, with TPPA/TEC. The commission does not want to jeopardize the tax-exempt status of bonds issued by MOUs and COOPs. The commission finds that credit availability is not a product or service that should be provided on a non-discriminatory basis. The commission has considered those services cited by TPPA/TEC (*e.g.*, engineering services, marketing services, transportation, land and facilities, and credit support), and agrees with TXU that it is unlikely that

competitors would request such services. Consequently, it is highly unlikely that the 15% of gross revenue threshold will ever be reached. Accordingly, the commission has modified subsection (k)(2) to exclude credit availability from the mandatory provision of products and services and to protect against violations of PURA §40.104 and §41.104, and the Texas Constitution, Article II, section 52.

Subsection (a), Purpose.

TXU urged in correspondence dated February 20, 2001, for the commission to include a statement of principles that would explicitly set forth the anti-competitive conduct being prohibited in the proposed rule. TXU argued that a statement of principles would provide MOU/COOPs with better direction in complying with the rule, provide competitors with greater assurance that MOU/COOPs will compete fairly, and identify more clearly the intent of the rule.

The commission agrees with TXU and finds that a statement of principles should be provided in subsection (a) to assist MOU/COOPs in devising safeguards against anticompetitive practices. It is intended by this rule that no MOU/COOP subject to this section shall engage in the following anticompetitive practices: 1) subsidize competitive activities directly or indirectly through rates charged for the provision of electric service; 2) allow discriminatory access to transmission and distribution products and services; 3) allow preferential access to transmission and distribution-related information; 4) allow unauthorized access to confidential customer information; and 5) allow employees performing

transmission and distribution functions to provide leads to or promote the products of competitive affiliates or any persons providing competitive energy-related activities on behalf of a Bundled MOU/COOP.

Subsection (b), Application.

To conform the rule's language to that in PURA §40.054(b) and §41.054(b), TPPA/TEC recommended modifying subsection (b)(1)(B)(i) to refer to "the date of customer choice" rather than September 1, 1999. TXU stated in reply comments that it did not object to such modification.

The commission agrees with the parties and modifies the language to reflect the date of customer choice rather than September 1, 1999.

In reply comments, TPPA/TEC recommended that a "technical correction" be made to subsection (b)(3)(B) (now subsection (b)(4)(B)). They observed that this provision conflicts with subsection (b)(3)(L), which specifies the actions a mid-sized TDBU must take if a customer or potential customer makes an unsolicited request for distribution service, competitive service, or information regarding such services. To eliminate this conflict, TPPA/TEC recommended deleting the following language: "including copies of policies implementing subsection (m)(3) of this section, requests for specific competitive affiliate information."

The commission agrees with the corrections suggested by TPPA/TEC and revises subsection (b)(4)(B) accordingly.

In supplemental comments, TXU recommended modifying the newly revised subsection (b)(7) (previously subsection (b)(6)) to clarify "between" which two entities the prohibited items cannot go. In supplemental reply comments, TPPA/TEC opined that TXU's suggestion does not improve the provision's language, as it restricts the paragraph's meaning to the Bundled MOU/COOP's interactions with persons outside the MOU/COOP, whereas the proposed version covers both these interactions and those of personnel within the MOU/COOP.

The commission agrees with TXU and modifies subsection (b)(7) to clarify that a Bundled MOU/COOP shall not circumvent the provisions of PURA §39.157(e) or this section by using any persons to provide information, services, products, or subsidies that would be prohibited by this section between persons providing T&D service on behalf of the Bundled MOU/COOP and persons providing competitive energy-related activities on behalf of the Bundled MOU/COOP. The commission disagrees with TPPA/TEC that the proposed language covered both these interactions and those of personnel within the MOU/COOP.

Subsection (c), Definitions.

TPPA/TEC recommended deleting the last sentence in the definition of "affiliate" in subsection (c)(1), as it has the effect of expanding the commission's jurisdiction beyond the scope set forth in PURA. TXU argued in reply comments that the definition should remain as proposed and provide a mechanism for the commission, after notice and hearing, to determine if an affiliate relationship exists in order to protect against attempts to circumvent the rules.

The commission agrees with TXU and finds that it is proper to include in the definition of "affiliate" an entity determined to be an affiliate by the commission after notice and hearing based on criteria parallel to those prescribed in PURA §11.006. This definition is consistent with that in the IOU code of conduct.

Brazos filed supplemental comments stating that the definition of "Bundled MOU/COOP" in subsection (c)(2) should be revised to limit energy-related services to retail activities. Denton recommended in supplemental comments that the reference to subsection (o)(3)(1) should really be subsection (o)(3)(A) and that the requirement that the MOU/COOP state whether it will provide competitive energy services on a bundled basis should be added to subsection (b)(2). In supplemental reply comments TXU agreed with Denton that the reference to subsection (o)(3)(A) should be changed to subsection (b)(2).

The commission finds that the clarification requested by Brazos is not necessary as the term "energy-related activities" in subsection (c)(2), as discussed below, is limited to retail sales. The commission agrees to clarify the place where the Bundled MOU/COOP must file its statement that it will be operating on a bundled basis and incorporates this additional language in subsection (o)(3)(A)(i). Finally, the commission corrects the typographical error to correctly reflect subsection (o)(3)(A) instead of subsection (o)(3)(1).

Denton filed supplemental comments that the definition of "competitive energy services" (now subsection (c)(5)), and as it is used throughout the rule, should be replaced by the term "competitive energy-related activities." Denton stated that the former term is a defined term in the commission's rules, §25.341(6) of this title, and such definition would include "many activities that would not appropriately be applied to MOU/COOPs." In supplemental reply comments, TXU stated that it does not believe Denton's change is necessary. TPPA/TEC noted in supplemental reply comments that "the provision of" should be stricken from Denton's proposed language.

The commission agrees with Denton and TPPA/TEC and replaces the term "competitive energy services" with "competitive energy-related activities" throughout the rule. The commission further deletes the phrase "the provision of."

TXU proposed that the definitions of "large transmission and distribution business unit (TDBU)" (now subsection (c)(10)) and "Mid-size transmission and distribution business unit (TDBU)" (now subsection (c)(11)) be revised in accordance with its suggestions discussed in Preamble Question 1. Denton, in reply comments, disagreed with TXU's suggestion that the definition of large and mid-size TDBUs be changed so as to bring more MOU/COOPs within the large category. Denton noted that TXU's argument completely ignores the reality of the size of the market power wielded by MOUs and COOPs and the detrimental consequences that this proposal would have on state-wide retail competition.

For the reasons discussed in response to Preamble Question 1, the commission declines to modify the size demarcations for mid-size or large TDBUs.

As discussed in response to Preamble Question 1, TPPA/TEC stated their preference in reply comments for deleting "and wholesale" from subsection (c)(8) and (9), relating to large TDBUs and mid-sized TDBUs, respectively (now subsection (c)(10) and (11)) as proposed in their original comments. TPPA/TEC further replied that "at retail" should be added to subsection (c)(14) (now subsection (c)(16)), instead of adopting Brazos' suggestion to completely exempt G&T COOPs from the rule. TPPA/TEC asserted that "other entities besides G&Ts with similar functions could be affected by the current language, and … any of these entities might conduct retail energy sale or distribution activities that should bring them within the code's scope." TXU stated in reply comments that it did not object to not counting electric energy delivered at wholesale.

For the reasons discussed in response to Preamble Question 1, the commission agrees with the parties and adopts modifications to the definitions of small, mid-sized, and large TDBUs to delete the reference to wholesale. In addition, the commission agrees with TPPA/TEC and adopts their suggested modification to the definition of TDBU.

To conform the definition of "municipally owned utility/electric cooperative (MOU/COOP)" to that in the definition of "affiliate," TPPA/TEC proposed modifying the last sentence in subsection (c)(10) (now subsection (c)(12)) by replacing the word "controls" with "has an affiliate relationship with." TXU stated in reply comments that it did not object to this modification.

The commission agrees with the parties and adopts the proposed modification to subsection (c)(12), definition of MOU/COOP.

TPPA/TEC recommended deleting the last sentence in subsection (c)(14) (now subsection (c)(16)), which defines a TDBU. TPPA/TEC commented that the language "A TDBU shall not provide competitive energy services" conflicts with PURA, including Chapters 40 and 41, which give MOU/COOPs the ability to decide what services they will provide and whether to provide services on a bundled or unbundled basis. TXU stated in reply comments that it does not object to authorizing a TDBU to provide competitive energy services that it is specifically authorized by statute to provide. However, TXU is opposed to allowing TDBUs to provide competitive energy services not specifically

authorized by statute and is opposed to the change as suggested by TPPA/TEC. As a compromise, TXU suggested adding "except as specifically authorized by statute."

The commission agrees to the modification proposed by TXU because it acknowledges that PURA may allow a TDBU to perform certain competitive energy-related activities. However, the commission declines to delete the language as suggested by TPPA/TEC because if the TDBU is providing competitive energy services beyond what is specifically permitted by PURA, then the MOU/COOP is operating as a Bundled MOU/COOP and is subject to subsection (o) of the rule relating to Bundled MOU/COOPs. An MOU or a COOP with a TDBU has chosen to embrace a functional separation approach to participating in a competitive market, and therefore consistent with that approach, the TDBU should not be providing competitive energy services, except as specifically authorized by statute.

Subsection (h), Ensuring compliance for new competitive affiliates.

TXU commented that subsection (h) should be amended to include an audit requirement. As proposed, subsection (h) is only applicable to large TDBUs and requires the MOU/COOP to post notice of newly created competitive affiliates and to ensure that its annual report of code-related activities reflects all changes that result from the creation of new competitive affiliates. TXU commented that MOU/COOPs should be required to have a compliance audit prepared by an independent auditor when requested by the commission, the Office of Public Utility Counsel, or an interested third party, and that an

MOU/COOP could only be audited once every three years. TXU further suggested that the MOU/COOP should be required to file the results of the audit with the commission within one month of the audit's completion. TXU noted that this proposal is less burdensome than the mandatory audit provisions in the IOU code of conduct. TXU argued that relying on third parties to complain about code of conduct abuses is not a sufficient deterrent to such abuses.

In reply comments, TPPA/TEC opposed TXU's recommendation to add a provision requiring compliance audits to deter code-of-conduct abuses. They contended that subsection (n)(7)(C), which authorizes the commission to conduct such an audit, provides "both a sufficient deterrent and a completely adequate mechanism for the commission to use in enforcing the code's provisions." Allowing any interested party to require a compliance audit, they asserted, could impose significant financial burdens for many public-power systems, which, unlike IOUs, have no shareholders to bear the cost. Moreover, TPPA/TEC argued that public-power systems need no additional deterrent against anti-competitive behavior because their governing bodies are accountable to their owner/customers for implementing the community's desire to participate fairly in customer choice.

The commission agrees with TXU that third-party audits are necessary to ensure that the spirit, intent, and letter of the law are followed. The commission agrees with TXU that audits serve four important purposes. First, audits ensure that adequate safeguards, consistent with the proposed rules, are in place. Second, audits act as a deterrent to violative conduct. Third audits identify weaknesses in a compliance program. Finally, audits detect rule violations. The commission agrees with TPPA/TEC,

however, that subsection (n)(7)(C), which authorizes the commission to conduct such an audit, is sufficient in light of the safeguards for unbundled MOU/COOPs found in subsections (d) through (n) as applicable. The commission adopts an audit requirement for Bundled MOU/COOPs as set forth in subsection (o) for the reasons discussed in detail below.

Subsection (i), Separation of TDBU from its competitive affiliates.

TPPA/TEC recommended modifying subsection (i)(1) by deleting "that the commission determines" from the language "safeguards that the commission determines are adequate to preclude employees of a competitive affiliate from gaining access to confidential information …." TPPA/TEC argued that requiring such commission intervention would be burdensome to the commission and needlessly duplicative of the code implementation filing required by subsection (n)(1). TXU objected in reply comments and stated that the commission should approve a TDBU's proposed safeguards for sharing employees, officers, and certain resources.

The commission agrees with TXU and declines to make the modification suggested by TPPA/TEC. As noted by TPPA/TEC, the commission will determine whether the safeguards presented by the MOU or COOP in its implementation filing are adequate to preclude employees of a competitive affiliate from gaining access to confidential information, so there is no harm or extra burden imposed by leaving the language as originally proposed.

TXU commented that subsection (i)(1) should be modified to protect against sharing of certain employees and information by large TDBUs. TXU suggested adding the following revision to subsection (i)(1): "In order to ensure that information regarding the billing rates of a retail electric provider are not disclosed to a competitive affiliate, MOU/COOPs classified as large may not share billing, marketing or sales employees or any information regarding the billing rates or practices of a retail electric provider with a competitive affiliate." TXU argued that the potential for conflict of interest, and therefore unfair competitive advantage, exists where MOU/COOPs are permitted to share certain employees and information regarding market rates charged by competitors in instances where the customer opts to receive a single bill for transmission, distribution, and generation services from the MOU/COOP. TXU argued that a retail electric provider (REP) would be at a significant disadvantage in retaining customers or bidding on new customers if the MOU/COOP's competitive affiliate is privy to its pricing information because an employee receiving the billing information from the REP is also a marketing or business development person for the competitive affiliate. TXU argued that, at a minimum, large TDBUs should be prohibited from sharing employees who would possess pricing information of REPs and from disclosing that pricing information to a competitive affiliate.

In reply, TPPA/TEC opposed TXU's proposed additional language prohibiting large MOU/COOPs from sharing with a competitive affiliate any employees involved in billing, marketing, or sales, or any information concerning the rates or practices of a competitive REP. According to TPPA/TEC, the desired protection "is already thoroughly provided by provisions in the proposed code," and TXU's

suggested language "would merely create ambiguities regarding the safeguards already provided for." In particular, TPPA/TEC asserted that TXU's language would conflict with the code's provisions allowing "employee migration and sharing, subject to information safeguards, and the sharing of information subject to public interest criteria, by absolutely prohibiting the sharing of such employees and such information."

Although the commission acknowledges the concerns of TXU, PURA specifically allows the MOU/COOP to perform the billing option in the event the customer opts to receive a single bill for transmission, distribution, generation, and other services. The commission notes that information concerning rates of REPs must be disclosed pursuant to the customer protection rules and, in many instances will be available from the REP's Internet website. If TXU's concern centers on customer specific contracts, the commission notes that the MOU/COOP will not have the information concerning the rate to bill until after the customer has executed a contract with a REP. It is assumed that the REP will protect itself with penalties for early termination of the contract which would make it more difficult for the MOU/COOP to use pricing information in such a manner as to attempt to undercut a REP's rates and attract a customer away from the REP. In addition, the commission notes that the proposed rule contains additional safeguards and limitations regarding disclosure of confidential information and that such provisions should protect against any of the anticompetitive concerns raised by TXU.

Subsection (j), Transactions between a TDBU and its competitive affiliates.

TXU commented that the code must ensure proper cost allocation. TXU argued that while the proposed rule does address the issue of transactions between an MOU/COOP and its competitive affiliates, the rule neglects to ensure, first, that MOUs and COOPs do not subsidize the business activities of a competitive affiliate with their revenues, or second, that the cost of shared services, including corporate support services, offices, employees, property, equipment, computer systems, information systems, and any other assets, services, or products shared between a TDBU and its competitive affiliate, are fully allocated. TXU argued that an MOU/COOP is not restricted from setting its wires rates at a level high enough to subsidize the competitive activities of its competitive affiliates. TXU contended that under this scenario, it would be difficult for any other REP to compete because the competitive affiliate could profitably charge artificially low rates for energy. TXU argued that the rule must be modified to ensure that the costs of the employees' time and the equipment used are properly allocated between the MOU/COOP and its competitive affiliate. TXU cited PURA §41.054(f), which states that "An electric cooperative shall maintain separate books and records of its operations and the operations of any subsidiary and shall ensure that the rates charged for provision of electric service do not include any costs of its subsidiary or any other costs not related to the provision of electric service." Accordingly, TXU suggested adding the following language to subsection (j)(1): "A TDBU shall not subsidize the business activities of a competitive affiliate with its revenues. A TDBU and its competitive affiliate shall fully allocate costs for any shared services, including corporate support services, offices, employees, property, equipment, computer systems, information systems, and any other shared assets, services, or products."

In reply comments, TPPA/TEC opposed TXU's proposal to prohibit any subsidization of competitive affiliate activities with revenues from a public-power entity and to require full allocation of costs for corporate support services and related shared assets. They maintained that the proposed rule deals with subsidization and cost allocation in a way that reasonably allows for the unique characteristics of public-power systems. The proposed rule, they noted, requires that a TDBU's prices reflect market value or fully allocated cost, with certain appropriate exceptions. TPPA/TEC noted that corporate support services, for example, are difficult or impossible to segregate among the benefiting functions, so the rule requires that such activities are to be conducted so as to not allow for *significant opportunities* for cross subsidization of the competitive affiliate. Similarly, they said, the rule properly distinguishes between the records of a competitive division and those of a competitive subsidiary.

The commission agrees with TXU that cross subsidization is an anticompetitive practice, and as such is prohibited, both by PURA and the code of conduct. The commission finds, however, that subsection (j)(1) of the proposed rule adequately addresses TXU's concerns. The proposed rule requires "any transaction between a TDBU and its competitive affiliate to be accomplished at pricing levels that are fair and reasonable to the customers of the TDBU, and that reflect the approximate market value of the assets or the fully allocated cost of the assets, services, or products…." In addition, subsection (o) provides adequate safeguards with regard to Bundled MOU/COOPs, as more fully explained in the discussion of subsection (o). Finally, the commission notes that the circumstances are different for MOU/COOPs than for IOUs. The MOU/COOPs are owned and controlled, either directly or indirectly, by their members/citizens/customers. Accordingly, it is expected that the citizens of an MOU

or members of a COOP would not allow their governing bodies to engage in behaviors that result in cross subsidizes to their detriment.

Subsection (k), Safeguards related to provision of projects and services.

With regard to subsection (k)(2), TPPA/TEC and Denton noted that any code of conduct provision that required a municipality to violate any private-use restrictions would be in violation of PURA §40.104, which provides in part that nothing shall impair the tax-exempt status of municipalities, nor shall anything in PURA compel any municipality to use its facilities in a manner that violates any contractual provisions, bond covenants, or other restrictions applicable to facilities financed by tax-exempt debt. TXU argued in reply comments that a TDBU should be required to provide non-discriminatory access to its products and services.

As discussed in Preamble Question 3, the commission adopts modification to the language proposed in subsection (k)(2).

Subsection (l), Information safeguards.

TPPA/TEC recommended deleting subsection (l)(5). This provision requires a TDBU desiring to share information with a competitive affiliate, other than that related to corporate support services or

otherwise allowed by the code, to prove to the commission that the public interest will not be impaired by such a release of information. Again, TPPA/TEC contended that this degree of commission oversight is unnecessary for public-power entities. Instead, they concluded, the complaint process and the code-implementation procedure provide sufficient protection to ensure that the code's objectives are achieved, without the burdensome approval process of (l)(5). TXU replied that the prohibition on a TDBU sharing non-public TDBU information with a competitive affiliate should remain in place.

The commission declines to delete the requirement in subsection (l)(5) that the TDBU prove to the commission that a sharing of information that is not otherwise covered in the code of conduct will not compromise the public interest prior to any such sharing. This requirement is only applicable to large TDBUs in instances where the information sharing has not been otherwise addressed. Accordingly, commission oversight should not be excessive or burdensome, especially in light of the code-implementation procedures.

Subsection (n), Remedies and enforcement.

In order to deter complaints intended to harass or ones made after records become unavailable and behavior may have changed, TPPA/TEC proposed amending subsection (n)(2)(B) to include a three-year limitations period within which any complaint must be filed. TXU stated in reply comments that it

did not object to this modification; however, it noted that this limit gives further support for the audit requirement.

The commission finds that the modification suggested by TPPA/TEC is reasonable and should be adopted. MOU/COOPs are required to retain certain records of transactions under the code for a period of three years. It is possible that after a three-year period, no records would exist with which the MOU/COOP could respond or defend a claim. Accordingly, this limitations period is appropriate.

Subsection (o), Provisions for Bundled MOU/COOPs.

General Comments on Subsection (o).

Denton stated in supplemental comments that it is pleased to have the right of choice recognized in the proposed rule. On the other hand, TXU and Reliant urged in supplemental comments and supplemental reply comments that subsection (o) should be deleted from the proposed rule. TXU expressed concern that the proposed rule was modified to create an entirely new category of MOU/COOP, *i.e.*, the Bundled MOU/COOP. Reliant argued that subsection (o) could potentially damage the competitive market, and, at a minimum, the rule should be postponed until this subsection undergoes the appropriate scrutiny that had been afforded the remainder of the rule. TXU observed that only one commenter had not recognized the need for some degree of unbundling. Absent a commission decision to delete

subsection (o), TXU advocated making the subsection's safeguards more stringent. TXU did, however, support the requirements of a mandatory audit and a contested hearing for addressing the greater risk of anti-competitive behavior.

Brazos stated in supplemental comments that many of this subsection's provisions "would be so onerous and unworkable as to require all" MOU/COOPs to unbundle in order to compete outside their certificated service area. It asserted that most of the provisions in subsection (o) are vague and ambiguous. Denton disagreed in supplemental reply comments with Brazos' characterization of subsection (o) as penalizing Bundled MOU/COOPs. Denton observed that small MOU/COOPs would have the choice to unbundle or remain bundled, and that a Bundled MOU/COOP's implementation plan (required by subsection (o)(3)(A)) would afford flexibility for the MOU/COOP in satisfying the subsection's requirements. In addition, Denton disputed Brazos' contention that a Bundled MOU/COOP would have to speculate whether its procedures would be sufficient to ensure the proper transfer of assets or products. It said that the implementation filing would enable the MOU/COOP to obtain a commission order approving its procedures and safeguards.

TXU noted in supplemental reply comments that subsection (o) does not penalize smaller MOU/COOPs if they choose to unbundle, but rather that the smaller MOU/COOP has four options regarding application of code of conduct rules. First, it could not opt into competition and not be subject to any code of conduct rules. Second, it could opt into competition but not compete outside their certificated service areas and not be subject to any code of conduct rules. Third, it could opt into

competition, compete outside its certificated service area and be subject to the limited safeguards under subsection (b)(3). Finally, it could opt into competition, compete outside its certificated service area, and be a Bundled MOU/COOP subject to the more extensive safeguards of (o).

TXU assessed the safeguards in subsection (o) to be comparable in degree to those facing mid-size TDBUs in other parts of the rule, but less stringent than those applying to large TDBUs. Therefore, it contended, additional restrictions should be added to this subsection, as large public-power entities otherwise would be motivated to remain bundled. Specifically, TXU proposed revisions to prohibit cross-subsidies and joint marketing. Denton agreed in supplemental reply comments with TPPA/TEC that TXU was incorrect in arguing that subsection (o) constitutes a more lenient alternative for large MOU/COOPs. The public entities noted that only Bundled MOU/COOPs must undergo contested hearings to have their implementation plans approved; Denton opined that such hearings, at which TXU and other large retail providers could participate, would impose safeguards ensuring that large Bundled MOU/COOPs do not engage in anti-competitive activity. TPPA/TEC also observed that the Bundled MOU/COOP would face a compliance audit every three years. TPPA/TEC additionally argued that large MOU/COOPs actually have a greater incentive to unbundle because the separation of functions offers a more efficient mode of competition for organizations with more employees and other resources. Moreover, they contended, the more explicit standards set out in the provisions applicable to unbundled entities provide more certainty in planning competitive activities.

TPPA/TEC stated in supplemental reply comments that they agreed that subsection (o) does not and should not substantively modify the other sections of the proposed code of conduct.

As previously discussed, the commission adopts subsection (o) to comply with the provisions of PURA that allow the governing bodies of MOU/COOPs to decide whether to unbundle, and if they decide to unbundle, whether to do so functionally or structurally. The commission notes that Denton's concerns were raised early in the informal workshop sessions, and that the proposed subsection (o) is similar in format and concept to the proposed code filed by Denton on August 3, 2000. Accordingly, the parties have been afforded ample opportunity to review and consider the concepts of subsection (o). The commission acknowledges that some provisions in subsection (o) lack the specificity that is found in other sections of the rule but defers resolution to the contested case implementation proceeding.

Subsection (o)(1), Transactional safeguards relating to provision of products and services.

Brazos argued in supplemental comments that subsection (o)(1)(A), which prohibits tying arrangements, would prevent the offering of bundled services. TPPA/TEC joined Denton in supplemental reply comments disputing Brazos' conclusion that subsection (o)(1)(A) would prevent a Bundled MOU/COOP from continuing to offer bundled service offerings to its customers. These commenters noted that subsection (k)(1) contains a similar provision prohibiting an unbundled TDBU from conditioning the provision of a product, service, or pricing benefit on the purchase of any other good or

service from the TDBU or its competitive affiliate. They also asserted, in Denton's words, that a "small MOU/COOP will always be able to *offer* the bundled service, but it will never be able to *require the purchase* of the bundled service." TXU agreed that the provision does not prohibit a Bundled MOU/COOP from bundling together various products to sell to customers. To better mirror the tying provision applicable to unbundled entities, TPPA/TEC suggested inserting the words "transmission or distribution" into subsection (o)(1)(A) so that the provision would read as follows: "A Bundled MOU/COOP shall not condition the provision of any transmission or distribution product, service, pricing benefit, or alternative terms or conditions upon the purchase of any other good or service from the Bundled MOU/COOP."

The commission finds that the prohibition against tying arrangements does not prevent the optional offering of bundled services; but merely prohibits a mandatory tying. The commission incorporates the language modification suggested by TPPA/TEC to better mirror the tying provisions applicable to unbundled entities.

With respect to subsection (o)(1)(B), Denton reiterated in supplemental comments its view that this provision, requiring the Bundled MOU/COOP to provide competitive energy services to all entities in a non-discriminatory fashion, should apply only if the product or service could be made available to a third party. Consequently, it advocated adding a provision to subsection (b)(1), the general applicability subsection, stating that nothing in the section shall require an MOU/COOP to provide to third parties products or services in violation of the MOU/COOP's private-use restrictions. Denton restated in

supplemental reply comments its belief that the phrase "persons providing competitive energy services on behalf of the Bundled MOU/COOP" was intended to refer to third parties outside the MOU/COOP. To clarify this intent, Denton suggested revising the phrase to read "persons outside the Bundled MOU/COOP providing competitive energy services on behalf of the Bundled MOU/COOP." TPPA/TEC endorsed Denton's comments in supplemental reply comments, with certain exceptions. In connection with Denton's comments on the provisions in subsection (o)(1)(B), TPPA/TEC contended that Denton's suggested addition to subsection (b) would inadequately protect MOU/COOPs. This addition incorrectly assumes, they said, that private-use concerns can be mitigated by the manner of providing products and services to third parties. According to TPPA/TEC, statutory and constitutional constraints prohibit the mandatory provisions of products and services contemplated in subsections (o)(1)(B) and (k)(1). In addition, they claimed, practical constraints in some cases could require that a third party be charged a fee for municipal services. TXU, in supplemental reply comments, reurged its argument that private-use restrictions do not affect products and services sold in competitive markets.

For the reasons discussed under subsection (k)(2), the commission addresses this concern by adding language to this section that the provision of any such products or services shall not violate PURA §40.104 or §41.104, or the Texas Constitution, Article III, section 52.

To ensure that the Bundled MOU/COOP does not include costs from competitive activities in its distribution rates, thereby obtaining an unfair advantage against competitors, TXU recommended in supplemental comments adding a new subparagraph (o)(1)(C) to explicitly prohibit such cross-subsidization. In supplemental reply comments, Denton and TPPA/TEC strongly opposed TXU's

proposed specific cross-subsidization modifications to subsection (o). Denton opined that TXU's proposals would effectively nullify subsection (o), as they would impose the unbundling requirements the new subsection seeks to avoid. TPPA/TEC expressed a similar conclusion with respect to small MOU/COOPs, which, they said, "cannot guarantee an absolute absence of subsidy or accomplish full allocation of costs" involving shared functions.

Denton likewise stated that TXU's "blanket prohibition against subsidizing" competitive activities would require virtual unbundling and is unnecessary in light of the other protections provided by subsection (o)(1)(C).

The commission agrees in part with TXU and incorporates language prohibiting cross- subsidization, as modified to be consistent with the other provisions of the proposed rule that refer to significant opportunities for cross-subsidization.

Regarding subsection (o)(1)(C) (now subsection (o)(1)(D)), Denton, in supplemental comments, deemed "too onerous" the requirement that a Bundled MOU/COOP maintain separate books of accounts and records of all transactions involving the provision of competitive energy services. Denton recommended instead requiring the maintenance of only *segregated* accounts for such transactions. It stated that the latter requirement, which subsection (d)(4) applies to competitive divisions of functionally unbundled MOU/COOPs, would leave a good audit trail and allow the commission to determine compliance, without possibly necessitating "financial unbundling" to maintain the separate books. Denton added that if the commission does not consider segregated accounts sufficient, it could require

Bundled MOU/COOPs to use the FERC chart of accounts or a comparable tracking method. TXU argued that this requirement is critical and recommended adding to the old subsection (o)(1)(C) (now subsection (o)(1)(D)) the following sentence to ensure against cross-subsidization: "Such expenses shall not be included in the Bundled MOU/COOP's transmission and distribution rates."

The commission agrees with Denton and modifies subsection (o)(1)(D) to require segregated accounts reflecting the FERC chart of accounts or a comparable tracking method. The commission also agrees with TXU and incorporates TXU's proposed language changes.

Brazos argued in supplemental comments that subsection (o)(1)(D) (now subsection (o)(1)(G)), regarding transfer or use of assets or products to provide competitive energy services, is too vague, saying that it is unclear what situation would be covered by the required safeguards regarding the transfer or use of assets or products "by a person providing competitive energy services on behalf of the bundled MOU/COOP to provide a competitive energy service." Denton suggested deleting the phrase "to provide competitive energy service" to clarify this provision. TXU stated in supplemental reply comments that it did not object to Denton's proposed modification.

The commission notes Brazos' concern but concludes that because the Bundled MOU/COOP has decided to remain bundled, it has the responsibility to devise a plan that ensures that the transfer is in accordance with the guidelines of this section. The commission agrees with the clarification suggested by Denton and supported by TXU and, therefore, deletes the specified language.

Denton expressed concern in supplemental comments that subparagraphs (E) and (F) (now subparagraphs (F) and (G) in subsection (o)(1)) could prohibit the sharing of personnel that is otherwise permitted by the rule. It stated that subparagraph (E) (now subparagraph (F)), by not allowing the transfer of confidential information in the provision of corporate support services, could prevent a Bundled MOU/COOP's employees from performing their roles. Denton likewise asserted that subparagraph (F), by disallowing preferential access "by any person providing competitive energy services" to information about its T&D systems, could have such a disabling effect if a Bundled MOU/COOP's employee's job results in his or her having information about both sets of services. Denton opined that subparagraphs (A) through (D) of subsection (o)(2) provide adequate protection against the inappropriate use of these types of information. Consequently, it recommended revising subparagraph (E) (now subparagraph (F)) by replacing the language "not allow, provide, or create a means for the transfer of confidential information, the opportunity for preferential treatment …" with "comply with the provisions of subsection (o)(2)(A) through (D) hereof, thereby preventing the opportunity for preferential treatment …." In addition, it recommended adding to subparagraph (F) (now subparagraph (G)) the sentence, "Such information shall be provided as required in subsection (o)(2)(D) hereof."

In contrast, Reliant and TXU objected in supplemental reply comments to Denton's suggested modifications. Reliant noted that success and fairness of the competitive market must take precedence over the difficulty any one company may have in unbundling services, and that some separation of function is absolutely necessary. Reliant and TXU argued that individuals with knowledge of the T&D systems cannot be permitted to use that knowledge in their retail marketing function regarding

competitive energy services. TXU proposed what it characterized as "although not a complete safeguard, a reasonable protection" to allow the sharing of all employees except those employees involved in marketing roles. TXU and Reliant strongly objected to the modifications suggested by Denton to subsections (o)(1)(E) and (F) (now subsections (o)(1)(F) and (G)). Further objections to the sharing of employees engaged in T&D functions and retail marketing functions were expressed by TXU and Reliant addressing subsection (o)(1)(I).

Although the commission acknowledges the concerns of TXU, as stated in the discussion regarding subsection (i)(1), there are safeguards in the proposed rule that prohibit the use of confidential information in an anticompetitive manner. The commission agrees with the concerns of Denton and declines to adopt the modifications suggested by TXU and Reliant because the modifications would have the implications of requiring a functional unbundling. The commission adopts Denton's suggested modifications to subsection (o)(1)(F).

TXU proposed revising subsection (o)(1)(H) (previously subsection (o)(1)(G)) to ensure that there is no cross subsidization when sharing personnel, facilities, and resources. Denton objected to TXU's proposed changes, claiming it would force at least partial unbundling and that the changes are not needed because the MOU/COOP's implementation plan must provide adequate safeguards against anti-competitive behavior.

The commission agrees with TXU and incorporates additional language to ensure against cross-subsidization. Likewise, as discussed in response to Preamble Question 1, documenting the sharing of

employees engaged in both T&D functions and competitive energy-related activities is necessary to enforce against anticompetitive activities so the commission modifies subsection (o)(1)(H) accordingly. The commission finds that requiring a Bundled MOU/COOP to document the assignment of shared employees will not require unbundling and will provide the commission with the relevant and necessary data in the event the commission must address a complaint regarding anticompetitive actives.

TXU also objected to the "ambiguous statement" in subsection (o)(1)(H) (now subsection (o)(1)(I)) intended to prevent anti-competitive marketing and advertising activities by the Bundled MOU/COOP. Such a statement, TXU claimed, is a poor substitute for the specific safeguards of subsection (m), which are applicable in their entirety to large TDBUs. To strengthen this provision and to lessen confusion, TXU recommended adding the following sentences at the end of old subparagraph (H): "Specifically, a Bundled MOU/COOP's T&D function and its competitive energy services function shall not engage in joint marketing, advertising or promotional activities, including, but not limited to those activities set forth in Subsection (m)(2)(B) relating to a TDBU and its competitive affiliate. Further, any person having access to confidential, proprietary customer information shall not be permitted to assist or engage in marketing, advertising and promotional activities, including, but not limited to those activities set forth in Subsection (m)(2)(A)(i)-(v)." TPPA/TEC argued in reply comments that TXU's suggested elaborations on the marketing and advertising safeguards intrude on the Bundled MOU/COOP's required implementation filing.

Although the commission shares the concerns of TXU, the suggestions proposed would require the Bundled MOU/COOP to functionally separate its marketing activities and, therefore, must be rejected.

The commission has, however, incorporated language to prevent cross-subsidization and tracking with respect to shared personnel, which would include any employees involved in both marketing and advertising and engaged in T&D functions.

TXU noted in supplemental comments that the phrase "employee marketing" is substituted in subsection (o)(2)(A) for the term "person providing competitive energy-related activities" as used throughout the rest of the rule. Denton opposed TXU's proposed technical correction to subsection (o)(2)(A). Denton averred that the use of the word "employee," rather than "person," is appropriate for this provision. Denton argues that the term "employee" clarifies that the Bundled MOU/COOP's employees are prohibited from showing favoritism to third parties acting on the MOU/COOP's behalf to the detriment of unrelated third parties.

First, the commission prefers the term "person" because it is broader than the term "employee." Second, the term "persons providing competitive energy-related activities on behalf of the Bundled MOU/COOP" should be used for consistency throughout the rule. Finally, the commission modifies the language from "employees of any third party" to "any entities" and reverses the order of these named persons and entities to be consistent with subsection (l)(1) of this section.

Denton voiced concern in supplemental comments regarding subsection (o)(2)(B). It stated that by prohibiting the release of proprietary customer information to "a person providing competitive energy services on behalf of the Bundled MOU/COOP," this subparagraph would prevent an employee from performing both T&D functions and competitive functions. Denton claimed that the required

implementation plan will specify how the MOU/COOP "will prevent the unauthorized release of such information by an employee who wears several hats." In supplemental reply comments, TXU restated its belief that employees engaged in marketing of competitive energy services should not be shared with that part of the MOU/COOP responsible for T&D system operations.

The commission agrees with Denton that the implementation plan of the Bundled MOU/COOP is the appropriate place to specify how the Bundled MOU/COOP will prevent the unauthorized release of such information by an employee who wears several hats. As requested by Denton, the commission clarifies that "a person providing competitive energy-related activities on behalf of the Bundled MOU/COOP" refers to any employee who engages in any amount of competitive energy related activities, regardless of whether that employee is responsible for other non-competitive energy related activities.

To clarify that subsection (o)(2)(D) pertains to the accounting of costs incurred in providing information to customers about the Bundled MOU/COOP's competitive energy services, Denton, in supplemental comments recommended modifying the second sentence. Specifically, it suggested replacing the phrase "such service in accordance with subsection (o)(1)(C)" with "the provision of such information in the same manner as transactions involving the provision of competitive energy related activities, in accordance with subsection (o)(1)(C)." TXU stated in supplemental reply comments that it agrees with Denton's proposed change.

The commission agrees with the parties' suggested clarification and modifies the language accordingly.

Denton noted in supplemental comments that despite the requirement in subsection (o)(3)(C) that the Bundled MOU/COOP file copies of its contracts with its "competitive affiliates," the bundled entity would have no such affiliates. Denton also objected to the possibility that this provision could require the bundled entity to file with the commission copies of contracts it may have with third parties providing competitive energy services on the MOU/COOP's behalf. It claimed that such contracts are exempt from the public-disclosure requirements of the Public Information Act. Moreover, Denton asserted that such a requirement would place a Bundled MOU/COOP at a competitive disadvantage to both IOUs and unbundled MOU/COOPs, which are required by subsection (e) only to provide copies of agreements with its competitive affiliates, not with third parties. In supplemental reply comments, TXU stated that it did not object to the deletion of "competitive affiliate," but it does object to removing the requirement that a Bundled MOU/COOP must file contracts it has with "persons providing competitive energy services on behalf of a Bundled MOU/COOP" because the relationship with and transaction between an MOU/COOP and these "persons" are the focus of the proposed rule.

The commission agrees with Denton and TXU and deletes the term "competitive affiliate," as a Bundled MOU/COOP will likely not have an affiliate. The commission agrees with Denton and modifies the language to clarify that the Bundled MOU/COOP does not have to produce any contracts it has with third parties if such contracts were negotiated on an arm's length basis. The commission does not require IOUs to provide contracts with third parties and the commission cannot be more restrictive on MOU/COOPs. The commission notes that it has the authority to disallow unreasonable expenses when setting the rates for IOU T&D utilities, but no such authority exists for MOU/COOPs.

Finally, Denton and TXU suggested corrections to typographical errors in subsection (o)(3)(B) and (C).

The commission incorporates these editorial corrections.

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

This new rule is adopted under the Public Utility Regulatory Act (PURA), Texas Utilities Code Annotated §§14.002, 39.157(e), 40.001, 40.004, 40.054, 40.056, 41.001, 41.004, 41.054, and 41.056 (Vernon 1998, Supplement 2001). Section 14.002 provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. Section 39.157(e) requires that the commission establish a code of conduct that must be observed by COOPs and MOUs and their affiliates to protect against anticompetitive practices. Chapter 40 addresses competition for MOUs and river authorities, and Chapter 41 addresses competition for COOPs. Specifically, §40.001 addresses the law applicable to MOUs. Section 40.004 gives the commission jurisdiction over MOUs for certain purposes. Section 40.054 subjects the MOU to the commission's authority in certain instances. Section 40.056 grants the commission authority over complaints for anticompetitive actions. Section 41.001 addresses the law applicable to COOPs. Section 41.004 gives the commission jurisdiction over COOPs for certain purposes. Section 41.054 subjects the

COOP to the commission's authority in certain instances. Section 41.056 grants the commission authority over complaints for anticompetitive actions.

Cross Reference to Statutes: PURA §§14.002, 39.157(e), 40.001, 40.004, 40.054, 40.056, 41.001, 41.004, 41.054, and 41.056.

§25.275. Code of Conduct for Municipally Owned Utilities and Electric Cooperatives Engaged in Competitive Activities.

(a) **Purpose**. To protect against anticompetitive practices, consistent with the provisions of the Public Utility Regulatory Act (PURA) §39.157(e) and Chapters 40 and 41, the provisions of this section establish safeguards to govern the interaction between the transmission and distribution business unit (TDBU), as defined in subsection (c) of this section, of a municipally owned utility (MOU) or electric cooperative (COOP) and its competitive affiliates, and establish specific anticompetitive standards to apply to the activities of Bundled MOU/COOPS, as defined in subsection (c) of this section. It is intended by this section that no MOU/COOP subject to this section shall engage in the following anticompetitive practices:

(1) Subsidize competitive activities directly or indirectly through rates charged for the provision of electric service;

(2) Allow discriminatory access to transmission and distribution products and services;

(3) Allow preferential access to transmission and distribution-related information;

(4) Allow unauthorized access to confidential customer information; and

(5) Allow employees performing transmission and distribution functions to provide leads to or promote the products of competitive affiliates or any persons providing competitive energy-related activities on behalf of a Bundled MOU/COOP.

(b) **Application.**

(1) **General application**. This section applies to the TDBU of a municipally owned utility or an electric cooperative (collectively referred to as MOU/COOP) operating in the State of Texas, and the transactions or activities between the TDBU and its competitive affiliates, and to an MOU/COOP that is conducting the activities of a TDBU and of a competitive affiliate on a bundled basis, provided that each of the following conditions is met:

(A) The MOU/COOP has chosen to participate in customer choice pursuant to PURA §40.051(b) or PURA §41.051(b).

(B) The competitive affiliate of an MOU/COOP or a Bundled MOU/COOP is providing electric energy at retail to consumers in Texas outside its certificated retail service area. For the purposes of this section, an MOU/COOP shall not be considered to be providing electric energy to retail consumers outside its certificated retail service area if:

(i) the MOU/COOP was serving the area prior to the date of customer choice;

(ii) after receiving notice that the MOU/COOP or its affiliate is selling electric energy at retail outside its retail service area, which identifies the service location, the MOU/COOP or its affiliate promptly investigates and thereafter takes reasonable steps to cease the provision of service outside its service area as soon as reasonably practicable; or

(iii) there is a dispute concerning the service area boundary and no commission order resolving the dispute has become final or the commission's order is subject to appeal.

(2) **Effect of unbundling on application**. Pursuant to PURA §40.055 and §41.055 it is the discretion of the governing body of the MOU/COOP to determine whether to unbundle any energy-related activities, and whether to do so structurally or functionally. The MOU/COOP shall file with the commission, in conjunction with the filing required by subsections (n)(1)(A) or (o)(3)(A) of this section, a written declaration of whether it chooses to structurally or functionally unbundle or whether it will provide services in a competitive market on a bundled basis. The written declaration may be amended from time to time but no amendment shall be effective before it is filed with the commission. The MOU/COOP shall comply with this section as follows:

(A) A structurally or functionally unbundled MOU/COOP shall comply with the provisions of this subsection, as applicable to entities of its size. Subsection (o) of this section is not applicable to a functionally or structurally unbundled MOU/COOP.

(B) A Bundled MOU/COOP shall comply with the requirements of paragraphs (5) and (7)-(9) of this subsection, subsection (n)(2)-(10), and subsection (o) of this section.

(3) **Small TDBU**. A small unbundled TDBU is subject to the following provisions of this section only:

(A) paragraphs (1) and (5)-(9) of this subsection, application;

(B) subsection (i)(4) of this section, separate books and records;

(C) subsection (j)(1) of this section, transactions with competitive affiliates; however, transactions provided for under subsection (j)(1) of this section shall be conducted at pricing levels that are fair and reasonable to the customers of the small TDBU and that reflect not less than the book value of the assets and the cost of employee time determined on the basis of aggregate percentage of time devoted by the employee to the competitive function or transmission and distribution function and do not include any discounts, rebates, fee waivers or alternative tariff terms and conditions;

(D) subsection (k)(1) of this section, tying arrangements prohibited;

(E) subsection (k)(2) of this section, products and services available on a non-discriminatory basis; and

(F) subsection (n) of this section, remedies and enforcement.

(4) **Mid-size TDBU.** A mid-size unbundled TDBU is subject to the following provisions of this section only:

(A) paragraphs (1) and (5)-(9) of this subsection, application;

(B) subsection (d) of this section, annual report of code-related activities; however, a mid-size TDBU shall report only with respect to the activities for which it is subject to regulation under this section;

(C) subsection (e) of this section, copies of contracts or agreements;

(D) subsection (f) of this section, tracking migration and sharing of employees;

(E) subsection (g) of this section, reporting deviations from the code of conduct; however, a mid-sized TDBU shall only report deviations with respect to the activities for which it is subject to regulation under this section;

(F) subsection (h) of this section, ensuring compliance for new competitive affiliates;

(G) subsection (i) of this section, separation of a TDBU from its competitive affiliates; however, sharing of employees, facilities, or other resources with competitive affiliates shall be allowed, and the safeguards shall be deemed achieved through compliance with the transactional, information transfer, and marketing and advertising standards applicable to a mid-size TDBU under subsections (j), (k), and (l) of this section;

(H) subsection (j)(1) of this section, transactions with competitive affiliates; however, transactions provided for under subsection (j)(1) of this section shall be conducted at pricing levels that are fair and reasonable to the customers of the mid-size TDBU and that reflect not less than the book value of the assets and the cost of employee time determined on the basis of aggregate percentage of time devoted by the employee to the competitive function or transmission and

distribution function and do not include any discounts, rebates, fee waivers or alternative tariff terms and conditions;

(I) subsection (j)(2) of this section, records of transactions;

(J) subsection (j)(3) of this section, provision of corporate support services, except to the extent that sharing of confidential information may not practicably be avoided due to cross-functional responsibilities of employees;

(K) subsection (k)(1) of this section, tying arrangements prohibited;

(L) subsection (k)(2) of this section, products and services available on a non-discriminatory basis;

(M) subsection (l)(1) of this section, proprietary customer information;

(N) subsection (1)(2) of this section, nondiscriminatory availability of aggregate customer information. A mid-size TDBU shall make aggregate customer information available to all non-affiliates under the same terms and conditions and at the same price or fully allocated cost that it is made available to any of its competitive affiliates, but is not otherwise subject to the reporting requirements in subsection (l)(2) of this section.

(O) subsection (l)(3) of this section, no preferential access to transmission and distribution information. A mid-size TDBU shall comply with this paragraph except to the extent preferential access may not practicably be avoided due to cross-functional responsibilities of employees or other operating constraints as reasonably determined by the mid-size TDBU;

(P) instead of the restrictions in subsection (m)(2) of this section, a mid-sized TDBU may participate in joint marketing, advertising, and promotional activities with a competitive affiliate, provided that the mid-size TDBU informs the customer that the competitive energy services to which the promotional activities are directed are available from other providers as well as the mid-size TDBU and makes available to the customer upon request a copy of the most recent list of competitive energy service providers as developed and maintained by the commission;

(Q) instead of the restrictions in subsections (m)(3) and (m)(4) of this section, if a customer or potential customer of a mid-size TDBU makes an unsolicited request for distribution service, competitive service, or information relating to such services, the mid-size TDBU shall inform the customer that competitive energy-related activities are available not only from the mid-size TDBU but also from other providers. The mid-size TDBU shall make available to a customer upon request a copy of the most recent list of competitive energy service providers as developed and maintained by the commission and may make available telephone numbers and other commonly available information; and

(R) subsection (n) of this section, remedies and enforcement.

(5) **Duration of code application.** This section applies to a TDBU and a Bundled MOU/COOP, regardless of whether it is classified as large, mid-size or small, only so long as each of the conditions of paragraph (1) of this subsection continue to be met.

(6) **Report of energy system sales and declaration of code applicability.** A report of total metered electric energy (MWh) delivered through the TDBU's system for sale at retail and wholesale, for the average of the three most recent calendar years, shall be filed annually with the commission by each MOU/COOP subject to the provisions of this section. The initial report shall be filed in conjunction with subsection (n)(1) of this section. After the initial report filing, the report of energy system sales shall be filed annually by June 1, and shall encompass the period from January 1 through December 31 of the preceding year. The annual report of energy system sales shall be filed under a control number designated by the commission for each calendar year. Both the initial and annual reports of energy sales shall include a statement from the MOU/COOP affirming that it is classified as either a small, mid-size, or large TDBU.

(A) In the event that the MWhs delivered through the TDBU's system increase so that a TDBU is reclassified to a larger size, the TDBU shall notify the commission through the annual report of energy system sales. The TDBU shall have one year from the date of the reclassification to implement the applicable provisions of this section.

(B) Petition for exception to reclassification. Any TDBU may petition the commission for exception to the size determination. Upon request, if a small TDBU is reclassified as a mid-sized TDBU, the commission may consider an adjustment for growth based upon total Texas retail sales.

(7) **No circumvention of the code of conduct**. An MOU/COOP shall not circumvent the provisions of PURA §39.157(e) or this section by using any affiliate to provide

information, services, products, or subsidies that would be prohibited by this section between a competitive affiliate and a TDBU. A Bundled MOU/COOP shall not circumvent the provisions of PURA §39.157(e) or this section by using any persons to provide information, services, products, or subsidies that would be prohibited by this section between persons providing transmission and distribution service on behalf of the Bundled MOU/COOP and persons providing competitive energy-related activities on behalf of the Bundled MOU/COOP.

(8) **Good cause exception.** An MOU/COOP that is or may become subject to this section may petition the commission at any time for an exception or waiver of any provision of this section on a showing of good cause. Good cause may be demonstrated by showing that the cost or difficulty of achieving compliance outweighs the benefit to be achieved or that there are other alternative actions that are likely to produce reasonable results under the circumstances.

(9) **Notice of conflict with other regulation and petition for waiver.** Nothing in this section shall affect or modify the obligation or duties relating to any rules or standards of conduct that may apply to an MOU/COOP or its affiliates, whether competitive or noncompetitive, under orders or regulations of the Federal Energy Regulatory Commission (FERC), Securities and Exchange Commission (SEC), or shall violate PURA, Chapters 40 and 41, subchapter C. An MOU/COOP shall file with the commission a notice of any provision in this section that conflicts with FERC or SEC orders or regulations. An MOU/COOP that is subject to statutes or regulations in any

state that conflict with a provision of this section may petition the commission for a waiver of the conflicting provision on a showing of good cause.

(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** — An entity, including a business unit or division, that controls, is controlled by, or is under common control with, an MOU/COOP. Control means the power and authority to direct the management or policies of an entity through directly or indirectly owning or holding at least a 5.0% voting or ownership interest. Affiliate includes an entity determined to be an affiliate by the commission after notice and hearing based on criteria parallel to those prescribed in PURA §11.006.

(2) **Bundled MOU/COOP** – An MOU/COOP that is conducting both transmission and distribution activities and competitive energy-related activities on a bundled basis without structural or functional separation of transmission and distribution functions from competitive energy-related activities and that makes a written declaration of its status as a Bundled MOU/COOP pursuant to subsection (o)(3)(A) of this section.

(3) **Competitive affiliate** — An affiliate of an MOU/COOP that provides services or sells products at retail in a competitive energy-related market in this state, including telecommunications services to the extent those services are energy-related. An affiliate of an MOU/COOP that is selling energy only in the capacity of a provider of last resort within the scope of PURA §40.053(c) and (d) or PURA §41.053 (c) and (d) is not a

competitive affiliate under this definition. The term competitive affiliate shall include both competitive divisions and competitive subsidiaries.

(4) **Competitive division (CD)** — A competitive affiliate that is organized as a division or other part of an MOU/COOP.

(5) **Competitive energy-related activities** - Services or products that are sold at retail in a competitive energy-related market in this state, including telecommunications services to the extent those services are energy-related.

(6) **Competitive subsidiary (CS)** — A competitive affiliate that is organized as a corporation or other legally distinct entity.

(7) **Confidential information** — Any information not intended for public disclosure and considered to be confidential or proprietary by persons privy to such information. Confidential information includes, but is not limited to, information relating to the interconnection of customers to an MOU/COOP's transmission or distribution systems, proprietary customer information, trade secrets, competitive information relating to internal manufacturing processes, and information about an MOU/COOP's transmission or distribution system, operations, or plans for expansion.

(8) **Corporate support services** — Services shared by a TDBU, or an affiliate created to perform corporate support services, with the MOU/COOP's affiliates of joint corporate oversight, governance, support systems, and personnel. For a Bundled MOU/COOP, "corporate support services" includes governance, support systems, and personnel.

(A) Examples of services that may be shared, to the extent the services comply with this section, include human resources, procurement, information technology,

regulatory services, administrative services, real estate services, legal services, accounting, environmental services, research and development unrelated to marketing activity and/or business development for the competitive affiliate regarding its services and products, internal audit, community relations, corporate communications, financial services, financial planning and management support, corporate services, corporate secretary, lobbying, corporate planning, and community economic development if the economic development activities are within the MOU/COOP's certificated retail service area.

(B) Examples of services that may not be shared, except as otherwise allowed under the terms of this section, include engineering, purchasing of electric transmission facilities and service, transmission and distribution system operations, and marketing.

(9) **Fully allocated cost** — The cost of a product, service, or asset based on book values for the component elements established through generally accepted accounting principles (GAAP); or alternatively, an internal transfer price based upon the actual or expected (budgeted) operating and maintenance expenses and a capital component, as appropriate, divided by the expected or actual units for the service or product produced. Such transfer prices may be set as needed but shall not be used beyond a three year period without review. The operating and maintenance expenses shall be fully loaded with applicable overheads. The capital component shall consider the original cost of the associated assets and a reasonable return. Such internal prices may

include an allowance for transfers to a municipal general fund at the discretion of the municipality.

(10) **Large transmission and distribution business unit (TDBU)** — A TDBU that:

(A) delivers total metered electric energy through its system for sale at retail for the average of the three most recent calendar years greater than 6,000,000 MWh; and

(B) is otherwise subject to the provisions of this section as provided in subsection (b)(1) of this section.

(11) **Mid-size transmission and distribution business unit (TDBU)** — A TDBU that:

(A) delivers total metered electric energy through its system for sale at retail for the average of the three most recent calendar years that is less than or equal to 6,000,000 MWh and is greater than 500,000 MWh; and

(B) is otherwise subject to the provisions of this section as provided in subsection (b)(1) and (b)(4) of this section.

(12) **Municipally owned utility/electric cooperative (MOU/COOP) —** A municipally owned utility (MOU) as defined in PURA §11.003(11) or an electric cooperative (COOP) as defined in PURA §11.003(9). As used in this section, MOU/COOP does not include a competitive affiliate but does include an MOU, a COOP, or a river authority that has an affiliate relationship with a TDBU that is a division or part of the MOU/COOP.

(13) **Proprietary customer information** — Any information compiled by a TDBU on a customer in the normal course of providing electric service that makes possible the

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

(14) **Small transmission and distribution business unit (TDBU)** — A TDBU that:

(A) delivers total metered electric energy through its system for sale at retail of less than 500,000 MWh for the average of the three most recent calendar years; and

(B) is otherwise subject to the provisions of this section as provided in subsection (b)(1) and (b)(3) of this section.

(15) **Transaction** — Any interaction between a TDBU and its competitive affiliates in which a service, asset, product, property, right, or other item is transferred or received by either the TDBU or its competitive affiliates.

(16) **Transmission and distribution business unit (TDBU)** — The business unit of an MOU/COOP, whether structurally unbundled as a separate legal entity or functionally unbundled as a division, that owns or operates for compensation in this state equipment or facilities to transmit or distribute electricity at retail, except for facilities necessary to interconnect a generation facility with the transmission or distribution network, a facility

not dedicated to public use, or a facility otherwise excluded from the definition of electric utility in a qualifying power region certified under PURA §39.152. TDBU does not include an MOU/COOP that owns, controls, or is an affiliate of the TDBU if the TDBU is organized as a separate corporation or other legally distinct entity. Except as specifically authorized by statute, a TDBU shall not provide competitive energy-related activities.

(d) **Annual report of code-related activities.** A report of activities related to this section shall be filed annually with the commission. Using forms approved by the commission, a TDBU shall report activities among itself and its competitive affiliates in accordance with the requirements of this section. The report shall be filed by June 1, and shall encompass the period from January 1 through December 31 of the preceding year during which the MOU/COOP was subject to this section.

(e) **Copies of contracts or agreements**. A TDBU shall reduce to writing and file with the commission copies of any contracts or agreements it has with its competitive affiliates. The filing of an earnings report does not satisfy the requirements of this section. All contracts or agreements shall be filed by June 1 of each year as attachments to the annual report of code-related activities required in subsection (d) of this section. In subsequent years, if no significant changes have been made to the contract or agreement, an amendment sheet may be filed in lieu of refiling the entire contract or agreement.

(f) **Tracking migration and sharing of employees.** An MOU/COOP shall track and document the movement between the TDBU and its competitive affiliates of all employees engaged in transmission or distribution system operations, including persons employed by the MOU/COOP who are engaged in transmission or distribution system operations on a day-to-day basis or who have knowledge of transmission or distribution system operations. An MOU/COOP shall also document the assignment of shared employees engaged in both transmission or distribution system operations and competitive energy-related activities, if any. Employee migration and sharing information shall be included in the MOU/COOP's annual report of code-related activities. For migrating employees, the tracking information shall include an identification code, the respective titles held while employed at the TDBU and the competitive affiliate, and the effective dates of the migration. For shared employees, the tracking information shall include the employees' name, job title, scope of activities, and allocation of time to transmission and distribution functions and competitive energy-related activities.

(g) **Reporting deviations from the code of conduct**. A TDBU shall report information regarding the instances in which deviations from this section were necessary to ensure public safety or system reliability pursuant to this section. The information reported shall include the nature of the circumstances involved and the date of the deviation. Within 30 days of each deviation relating to a competitive affiliate, the MOU/COOP shall report this information to the commission and shall conspicuously post the information on its Internet site or a public electronic bulletin board for 30 consecutive calendar days. Information regarding a deviation shall be summarized in the MOU/COOP's annual report of code-related activities.

(h) **Ensuring compliance for new competitive affiliates**. An MOU/COOP and a new competitive affiliate are bound by this code of conduct, to the extent applicable, immediately upon creation of the new competitive affiliate. The MOU/COOP shall post a conspicuous notice of any newly created competitive affiliates on its Internet site or a public electronic bulletin board for 30 consecutive calendar days. Additionally, the MOU/COOP shall ensure that its annual report of code-related activities reflects all changes that result from the creation of new competitive affiliates.

(i) **Separation of a TDBU from its competitive affiliates.**

(1) **Sharing of employees, officers and directors, property, equipment, computer and information systems, other resources, and corporate support services.** An MOU/COOP and its competitive affiliate may share common employees, officers and trustees/directors, property, equipment, computer and information systems, other resources, and corporate support services, if the TDBU implements safeguards that the commission determines are adequate to preclude employees of a competitive affiliate from gaining access to confidential information in a manner that would allow or provide a means to transfer confidential information from the TDBU to the competitive affiliate, create an opportunity for preferential treatment or unfair competitive advantage, lead to customer confusion, or create significant opportunities for cross-subsidization of a competitive affiliate.

(2) **Employee transfers and temporary assignments**.

(A) An MOU/COOP shall not assign to a competitive affiliate for less than one year employees engaged in transmission or distribution system operations unless safeguards are in place to prevent transfer of confidential information. TDBU employees engaged in transmission or distribution system operations, including persons employed by a structurally unbundled service company affiliate of the TDBU who are engaged on a day-to-day basis in or have knowledge of transmission or distribution system operations and are transferred to a competitive affiliate, shall not remove or otherwise provide or use confidential information or information gained from the TDBU or affiliated service company, in a discriminatory or exclusive fashion to the benefit of the competitive affiliate or to the detriment of non-affiliated electric suppliers.

(B) Movement of employees to a competitive affiliate may be accomplished either through the employee's termination of employment with the TDBU and acceptance of employment with the CS or through a transfer to the CD as long as the transfer results in the TDBU bearing no ongoing costs associated with that employee.

(C) Transferring employees shall sign a statement indicating that they are aware of and understand the restrictions set forth in this section. The TDBU also shall post a conspicuous notice of such a transfer on its Internet site or other public electronic bulletin board within 24 hours and for at least 30 consecutive calendar days.

(D) Employees may be temporarily assigned to an affiliate or non-affiliated TDBU to assist in restoring power in the event of a major service interruption or to assist in resolving emergency situations affecting system reliability. Any such deviation shall be reported and posted on the TDBU's Internet site or other public electronic bulletin board within 24 hours and for at least 30 consecutive calendar days.

(3) **Sharing of office space.** A TDBU's office space shall be physically separate from the office space of its competitive affiliates. Physical separation is accomplished by having office space in separate buildings or, if within the same building, by a method such as having offices on separate floors or with separate access.

(4) **Separate books and records.** A TDBU shall maintain separate books of accounts and records from those of any CS. In a proceeding under subsection (n)(3) of this section, the commission may review records relating to a transaction between a TDBU and a CS. Costs of CDs, other than those costs related to corporate support services, shall be segregated by account.

(A) In accordance with generally accepted accounting principles, a TDBU shall record all transactions with its CS whether they involve direct or indirect expenses, and all transactions with CDs that relate to the transmission and distribution function.

(B) A TDBU shall prepare financial statements that are not consolidated with those of a CS.

(5) **Limitations on credit support by a TDBU for a competitive affiliate**. A TDBU and its affiliates may share credit, investment, or financing arrangements with a competitive affiliate if the TDBU implements adequate safeguards precluding employees of a competitive affiliate from gaining access to information in a manner that would allow or provide a means to transfer confidential information from the TDBU to the competitive affiliate or lead to customer confusion. Nothing in this section shall impair existing contracts, covenants, or obligations between an MOU/COOP and its lenders and holders of bonds issued on behalf of or by an MOU/COOP.

(A) MOU. In issuing debt related to competitive affiliates, an MOU shall be governed by and maintained, operated, and managed in accordance with the laws of the State of Texas, including the ordinances and resolutions authorizing the issuance of any form of indebtedness and the provisions thereof, which require that funds reasonably necessary for operation and maintenance expenses (including TDBU operation and maintenance expenses) have priority in any pledge of gross revenues of the municipally owned utility system.

(B) COOP. A COOP TDBU shall not allow a competitive affiliate to obtain credit under any arrangement that would include a specific pledge of assets reasonably necessary for TDBU operations or a pledge of gross revenues of the TDBU.

(j) **Transactions between a TDBU and its competitive affiliates**.

(1) **Transactions with competitive affiliates**. Except for transfers implementing unbundling, transfers of property pursuant to a rate order having the effect of a financing

order, credit support, and corporate support services provided by a TDBU to its competitive affiliate, any transaction between a TDBU and its competitive affiliate shall be accomplished at pricing levels that are fair and reasonable to the customers of the TDBU and that reflect the approximate market value of the assets or the fully allocated cost of the assets, services, or products, and that do not include any preferential discounts, rebates, fee waivers or alternative tariff terms and conditions. Such transfers include, but are not limited to, the following:

(A) sale or provision of products or services by a TDBU to its competitive affiliate;

(B) purchase or acquisition of products, services, or assets by a TDBU from a competitive affiliate; or

(C) assets transferred from a TDBU to a competitive affiliate.

(2) **Records of transactions.** Each transaction between a TDBU and its competitive affiliates, other than those involving corporate support services or transactions governed by tariffs of general applicability filed at the commission or approved by the TDBU's governing body, shall be reflected in a contemporaneous written record of the transaction including the date of the transaction, name of the competitive affiliate, name of a TDBU employee knowledgeable about the transaction, and description of the transaction. Such records shall be maintained for three years.

(3) **Provision of corporate support services**. A TDBU may engage in transactions directly related to the provision of corporate support services with its competitive affiliate. Such transactions shall be carried out in such a way as to not allow or provide the means for the transfer of confidential information from the TDBU to the competitive

affiliate, the opportunity for preferential treatment or unfair competitive advantage, customer confusion, or significant opportunities for cross-subsidization of the competitive affiliate.

(k) **Safeguards relating to provision of products and services.**

(1) **Tying arrangements prohibited.** A TDBU 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 TDBU or its competitive affiliate.

(2) **Products and services available on a non-discriminatory basis.** Any product or service, other than corporate support services or credit arrangements, made available by a TDBU to its competitive affiliate shall be made available to all similarly situated entities at the same price and on the same basis and manner that the product or service was made available to the competitive affiliate, provided however, that such provision does not violate PURA §40.104 or §41.104, or the Texas Constitution, Article III, section 52. Any service required to be provided in compliance with PURA §39.203 shall be provided in a non-discriminatory manner and in accordance with the tariffs developed pursuant to any commission rule implementing that section.

(l) **Information safeguards**.

(1) **Proprietary customer information**. Upon request by the customer, a TDBU shall provide a customer with the customer's proprietary customer information. Unless a TDBU obtains prior affirmative written consent or other verifiable authorization from the

customer as determined by the commission, or unless otherwise permitted under this subsection, it shall not release any proprietary customer information to a competitive affiliate or to any other entity, other than the customer, an independent organization as defined by PURA §39.151, or a provider of corporate support services for the sole purpose of providing corporate support services in accordance with subsection (j)(3) of this section. The TDBU shall maintain records that include the date, time, and nature of information released when it releases customer proprietary information to another entity in accordance with this paragraph. The TDBU shall maintain records of such information for a minimum of three years and shall make the records available for third party review within three business days of a written request or at a time mutually agreeable to the TDBU and the third party. When the third party requesting review of the records is not the customer, commission, or Office of Public Utility Counsel, the records may be redacted in such a way as to protect the customer's identity. If proprietary customer information is released to an independent organization or a provider of corporate support services, the independent organization or entity providing corporate support services is subject to the rules in this subsection with respect to releasing the information to other persons.

(A) Exception for law, regulation, or legal process. A TDBU may release proprietary customer information to another entity without customer authorization where authorized or requested to do so by the commission or by law, regulation, or legal process. Nothing in this rule requires disclosure of

information that may be withheld from disclosure under Texas Government Code, Chapter 552.

(B) Exception for release to governmental entity. Without customer authorization, a TDBU may release proprietary customer information to a federal, state, or local governmental entity or in connection with a court or administrative proceeding involving the customer or the TDBU, provided however, that the TDBU shall take all reasonable actions to protect the confidentiality of such information, including, but not limited to, providing such information under a confidentiality agreement or protective order, and shall also promptly notify the affected customer in writing that such information has been requested.

(C) Exception to facilitate transition to customer choice. In order to facilitate the transition to customer choice, an MOU/COOP may release proprietary customer information to its competitive affiliate without authorization of those customers, where either entity will be exercising the function of retail electric provider or provider of last resort, provided however, that such information may be released only during the six-month period prior to implementation of customer choice, during the six-month period prior to implementation or expansion of a pilot project, or such additional periods as may be prescribed by the commission.

(D) Exception for release to providers of last resort. On or after January 1, 2002, a TDBU may provide proprietary customer information to a provider of last

resort without customer authorization for the purpose of serving customers who have been switched to the provider of last resort.

(E) Exception for release to customer's selected competitive retailer. Subject to demonstration by the competitive retailer that the customer has selected that competitive retailer, a TDBU shall release proprietary customer information for a particular customer to the competitive retailer chosen by that customer in connection with provision of metering data or otherwise in compliance with the Access Tariff applicable to the TDBU under PURA §39.203.

(2) **Nondiscriminatory availability of aggregate customer information.** A TDBU may aggregate non-proprietary customer information, including, but not limited to, information about a TDBU's energy-related goods or services. However, except in circumstances solely involving the provision of corporate support services in accordance with subsection (j)(3) of this section, a TDBU shall aggregate non-proprietary customer information for a competitive affiliate only if the TDBU makes such aggregation service available to all non-affiliates under the same terms and conditions and at the same price or fully allocated cost as it is made available to any of its competitive affiliates. In addition, no later than 24 hours prior to a TDBU's provision to its competitive affiliate of aggregate customer information, the TDBU shall post a conspicuous notice on its Internet site or other public electronic bulletin board for at least 30 consecutive calendar days, providing the following information: the name of the competitive affiliate to which the information will be provided, the rate charged or cost allocated for the information, a meaningful description of the information provided, and the procedures by which non-

affiliates may obtain the same information under the terms and conditions. The TDBU shall maintain records of such disclosure information for a minimum of three years and shall make such records available for third party review within three business days of a written request or at a time mutually agreeable to the TDBU and the third party.

(3) **No preferential access to transmission and distribution information.** A TDBU shall not allow preferential access by its competitive affiliates to information about its transmission and distribution systems.

(4) **Other limitations on information disclosure.** Nothing in this rule is intended to alter the specific limitations on disclosure of confidential information in the Texas Utilities Code, the Texas Government Code, Chapter 552, or the commission's substantive and procedural rules.

(5) **Other information.** Except as otherwise allowed in this subsection, a TDBU shall not share information with competitive affiliates, except for information required to perform allowed corporate support services unless the TDBU can prove to the commission that the sharing will not compromise the public interest prior to any such sharing. Information that is publicly available, or that is unrelated in any way to utility activities, may be shared.

(m) **Safeguards relating to joint marketing and advertising.**

(1) **Name and logo.** A TDBU may not, prior to September 1, 2005, allow the use of its corporate trademark, name, brand, or logo by a CS on employee business cards or in any written or auditory advertisements of specific services to existing or potential

residential or small commercial customers located within the TDBU's certificated service area, whether through radio or television, Internet-based, or other electronic format accessible to the public unless the CS includes a disclaimer with its use of the TDBU's corporate trademark, name, brand, or logo. Such disclaimer of the corporate trademark, name, brand, or logo in the material distributed must be written in a bold and conspicuous manner or clearly audible, as appropriate for the communication medium, and shall state the following: "{Name of CS} is not the same entity as {name of TDBU} and you do not have to buy {name of CS}'s products to continue to receive quality services from {name of TDBU}." A TDBU may allow the use of its corporate name, brand, or logo by a CD in any context.

(2) **Joint marketing, advertising, and promotional activities.**

(A) A TDBU shall not:

(i) provide or acquire leads on behalf of its competitive affiliates;

(ii) solicit business or acquire information on behalf of its competitive affiliates;

(iii) give the appearance of speaking or acting on behalf of any of its competitive affiliates in connection with any marketing, advertising or promotional activities, other than community economic development activities;

(iv) share market analysis reports or other types of proprietary or non-publicly available reports relating to retail energy sales, including, but not

limited to, market forecast, planning, or strategic reports with its competitive affiliates; or

(v) request authorization from its customers to pass on information exclusively to its competitive affiliate.

(B) A TDBU shall not engage in joint marketing, advertising, or promotional activities of its products or services with those of a competitive affiliate in a manner that favors the competitive affiliate. Such joint marketing, advertising, or promotional activities include, but are not limited to, the following activities:

(i) acting or appearing to act on behalf of a competitive affiliate in any communications and contacts with any existing or potential customers;

(ii) joint sales calls;

(iii) joint proposals, either as requests for proposals or responses to requests for proposals;

(iv) joint promotional communications or correspondence, except that a TDBU may allow a competitive affiliate access to customer bill advertising inserts so long as access to such inserts is made available on the same terms and conditions to non-affiliates offering similar services as the competitive affiliate that uses bill inserts;

(v) joint presentations at trade shows, conferences, or other marketing events within the state of Texas; and

(vi) providing links from a TDBU's Internet web site to a competitive affiliate's Internet web site.

(C) At a customer's unsolicited request, a TDBU may participate in meetings with a competitive affiliate to discuss technical or operational subjects regarding the TDBU's provision of transmission or distribution services to the customer but only in the same manner and to the same extent the TDBU participates in such meetings with unaffiliated electric or energy services suppliers and their customers. Representatives of a TDBU may be present during a sales discussion between a customer and the TDBU's competitive affiliate but shall not participate in the discussion or purport to act on behalf of the competitive affiliate.

(3) **Requests for specific competitive affiliate information**. If a customer or potential customer makes an unsolicited request to a TDBU for information specifically about any of its competitive affiliates, the TDBU may refer the customer or potential customer to the competitive affiliate for more information. Under this paragraph, the only information that a TDBU may provide to the customer or potential customer is the competitive affiliate's address and telephone number. The TDBU shall not transfer the customer directly to the competitive affiliate's customer service office via telephone or provide any other electronic link whereby the customer could contact the competitive affiliate through the TDBU. When providing the customer or potential customer information about the competitive affiliate, the TDBU shall not promote its competitive affiliate or its competitive affiliate's products or services, nor shall it offer the customer or potential customer any opinion regarding the service of the competitive affiliate or any other service provider.

(4) **Requests for general information about products or services offered by competitive affiliates and their competitors**. If a customer or potential customer requests general information from a TDBU about products or services provided by its competitive affiliate or the competitors of its CS or CD, the TDBU shall not promote its competitive affiliate or its competitive affiliate's products or services, nor shall the TDBU offer the customer or potential customer any opinion regarding the service of the competitive affiliate or any other service provider. The TDBU may direct the customer or potential customer to a telephone directory or to the commission, or provide the customer with a recent list of suppliers developed and maintained by the commission, but the TDBU may not refer the customer or potential customer to the competitive affiliate except as provided for in paragraph (3) of this subsection.

(n) **Remedies and enforcement.**

(1) **Code implementation filing.**

(A) Not later than 120 days prior to the implementation of customer choice by an MOU/COOP, a TDBU shall file with the commission its plan for implementing the provisions of this section, addressing all applicable requirements of this section in the context of its operations as they will be conducted in the competitive retail market. The TDBU shall post notice of its filing on its Internet site or a public electronic bulletin board for 30 consecutive days and shall provide copies of the filing to requesting parties. Interested parties may file comments on the filing with the commission within 30 days following the filing

and shall provide copies of such comments to the TDBU. Commission staff shall review the code implementation filing and provide to the TDBU its comments and recommendations as to any suggested changes in the filing within 60 days following the date of the filing. The TDBU may amend its initial filing based on the comments and recommendations and shall file any such amendments not later than 75 days following the date of the initial filing. The filing provided for in this paragraph is not subject to the contested hearings process, except upon complaint by an interested party or the commission staff.

(B) In lieu of the implementation filing provided for in subparagraph (A) of this paragraph, an MOU/COOP may file with the commission a statement that it does not at this time intend to provide electric energy at retail to consumers in Texas outside its certificated retail service area as provided for in subsection (b)(1)(B) of this section. Subsequently, if an MOU/COOP intends to provide electric energy at retail to consumers in Texas outside its certificated retail service area as provided for in subsection (b)(1)(B) of this section, it shall file with the commission the implementation filing provided for in subparagraph (A) of this paragraph not later than 120 days prior to the time it provides retail electric energy in Texas outside its certificated retail service area.

(2) **Informal complaint procedure.** A TDBU or a Bundled MOU/COOP shall establish and file with the commission a complaint procedure for addressing alleged violations of this section. This procedure shall contain a mechanism whereby all complaints shall be

placed in writing and shall be referred to a designated officer or other person employed by the TDBU or the Bundled MOU/COOP.

(A) All complaints shall contain:

(i) the name of the complainant;

(ii) a detailed factual report of the complaint, including all relevant dates, entities or divisions involved, employees involved, and the specific claim.

(B) A complaint must be filed with the TDBU or the Bundled MOU/COOP within 90 days of the date the complaining party knew, or with diligent investigation should have known, that the violation occurred, but in no event may a complaint be filed more than three years after the violation occurred.

(C) The designated officer shall acknowledge receipt of the complaint in writing within five working days of receipt. The designated officer shall provide a written report communicating the results of the preliminary investigation to the complainant within 30 days after receipt of the complaint, including a description of any course of action that will be taken.

(D) In the event the TDBU or the Bundled MOU/COOP and the complainant are unable to resolve the complaint, the complainant may file a formal complaint with the commission. In the event the complainant advises the TDBU or the Bundled MOU/COOP that the complainant does not consider the complaint fully resolved by the course of action proposed by the TDBU or the Bundled MOU/COOP then the TDBU or the Bundled MOU/COOP shall notify the

complainant of his or her right to file a formal complaint with the commission and shall provide the complainant with the commission's address and telephone number. The informal complaint process shall be a prerequisite for filing a formal complaint with the commission.

(E) A large TDBU or Bundled MOU/COOP shall report to the commission regarding the nature and status of informal complaints handled in accordance with this paragraph in its annual report of code-related activities filed pursuant to subsection (d) of this section. The information reported to the commission shall include the name of the complainant and a summary report of the complaint, including all relevant dates, companies involved, employees involved, the specific claim, and any actions taken to address the complaint. Such information on all informal complaints that were initiated or remained unresolved during the reporting period shall be included in the 'annual report of code-related activities of the large TDBU or Bundled MOU/COOP.

(3) **Filing a complaint.** Following the informal process, a formal complaint may be filed with the commission alleging a violation of this section. No complaint shall be valid unless filed with the commission within 30 days after the designated officer or employee of the TDBU or the Bundled MOU/COOP mails its written report communicating the results of the preliminary investigation to the complainant. Each complaint shall contain the name of the complainant and a detailed factual report of the complaint, including all relevant dates, entities or divisions involved, employees involved, and the specific claim. Additionally, each complaint shall identify the specific provisions of this section that are

alleged to have been violated, contain a sworn affidavit that the facts alleged are true and correct to the best of the affiant's knowledge and belief, and if the complainant is a corporation, a statement from a corporate officer that he or she is authorized to file the complaint.

(4) **Notification of complaint and opportunity to respond**. The commission shall provide a copy of the complaint to the TDBU or the Bundled MOU/COOP. The TDBU or the Bundled MOU/COOP shall respond to the complaint in writing within 15 days. The TDBU or the Bundled MOU/COOP and the complainant shall make a good faith effort to resolve the complaint on an informal basis as promptly as practicable.

(5) **Settlement conference**. Upon request by the MOU/COOP subject to the complaint, commission staff shall conduct a settlement conference. At such settlement conference, each party, including the commission staff, shall recommend what steps are necessary to cure any violation that it believes has occurred. Discussions at the settlement conference, including the recommendations to cure the violation, shall not be admissible at a hearing on the complaint.

(6) **Opportunity to cure.** The MOU/COOP shall have three months to cure the violation in accordance with an agreement arising from the settlement conference or following a hearing. An MOU/COOP may cure the violation in any reasonable manner as set forth in the settlement agreement or hearing, including taking action designed to prevent recurrence of the violation or amending the rule or order.

(7) **Enforcement by the commission.** In the event the commission finds there has been a violation which has not been reasonably cured, the commission may enforce the provisions of this section.

(A) The commission may recommend actions to be taken by the MOU/COOP within a prescribed time, and if such actions are not taken, the commission may:

(i) seek an injunction to eliminate or remedy the violation or series or set of violations; or

(ii) limit or prohibit retail service outside the 'certificated retail service area of the TDBU or the Bundled MOU/COOP until the violation or violations are adequately remedied. This remedy shall not be applied in a manner that would interfere with or abrogate the rights or obligations of parties to a lawful contract.

(B) In assessing enforcement remedies, the commission shall consider the following factors:

(i) the 'prior history of violations by the TDBU or the Bundled MOU/COOP, if any, found by the commission after hearing;

(ii) the 'efforts 'made by the TDBU or the Bundled MOU/COOP to comply with the commission's rules;

(iii) the nature and extent of economic benefit gained by the TDBU's competitive affiliate or the Bundled MOU/COOP;

(iv) the damages or potential damages resulting from the violation or series or set of violations;

(v) the size of the business of the competitive affiliate involved; and

(vi) such other factors deemed appropriate and material to the particular circumstances of the violation or series or set of violations.

(C) The commission may conduct a compliance audit of affiliate activities to ensure compliance with the code of conduct.

(8) **No immunity from antitrust enforcement.** Nothing in these affiliate rules shall confer immunity from state or federal antitrust laws. Enforcement actions by the commission for violations of this section do not affect or preempt antitrust liability, but rather are in addition to any antitrust liability that may apply to the anti-competitive activity. Therefore, antitrust remedies may also be sought in federal or state court to cure anti-competitive activities.

(9) **No immunity from civil relief.** Nothing in these affiliate rules shall preclude any form of civil relief that may be available under federal or state law, including, but not limited to, filing a complaint with the commission consistent with this subsection.

(10) **Preemption.** This section supersedes any procedures or protocols adopted by an independent organization as defined by PURA §39.151, or similar entity, that conflict with the provisions of this section.

(o) **Provisions for Bundled MOU/COOPs.**

(1) **Transactional safeguards relating to provision of products and services.** To protect against anticompetitive activities, the provisions of this subsection apply to all Bundled MOU/COOPs meeting the qualifications set forth in subsection (b)(1)(A) and

(B) of this section, regardless of whether the MOU/COOP has any affiliates or competitive affiliates.

(A) Tying arrangements prohibited. A Bundled MOU/COOP shall not condition the provision of any transmission or distribution product, service, pricing benefit, or alternative terms or conditions upon the purchase of any other good or service from the Bundled MOU/COOP.

(B) Products and services available on a non-discriminatory basis. Any product or service, other than corporate support services or credit arrangements, made available by a Bundled MOU/COOP to any third party or any persons providing competitive energy-related activities on behalf of the Bundled MOU/COOP, shall be made available to all similarly situated entities at the same price and on the same basis and manner that the product or service was made available to any persons providing competitive energy-related activities on behalf of the Bundled MOU/COOP, provided however, that such provision does not violate PURA §40.104 or §41.104, or the Texas Constitution, Article III, section 52. Any service required to be provided in compliance with PURA §39.203 shall be provided in a non-discriminatory manner and in accordance with the tariffs developed pursuant to any commission rule implementing that section.

(C) Cross-subsidization prohibited. A Bundled MOU/COOP shall not create significant opportunities for cross subsidization of competitive energy-related activities with revenues from distribution and transmission rates.

(D) Records of transactions involving competitive energy-related activities. A Bundled MOU/COOP shall maintain segregated accounts and records of all transactions regarding the provision of competitive energy-related activities consistent with the FERC chart of accounts or a comparable tracking method. In accordance with generally accepted accounting principles, a Bundled MOU/COOP shall separately record all transactions regarding the provision of competitive energy-related activities and all transactions relating to the transmission and distribution function. Such records shall include all expenses, whether direct or indirect, and at the fully allocated cost to provide such competitive energy service. Such expenses shall not be included in the Bundled MOU/COOP's transmission and distribution rates.

(E) Transfer or use of assets or products to provide competitive energy-related activities. A Bundled MOU/COOP shall implement procedures and safeguards to ensure that the transfer or use of assets or products by a person providing competitive energy-related activities on behalf of the Bundled MOU/COOP shall be accomplished at pricing levels that are fair and reasonable to the customers of the transmission and distribution system of the Bundled MOU/COOP and at pricing levels that do not include any preferential discounts, rebates, fee waivers or alternative tariff terms and conditions.

(F) Provision of corporate support services. The provision of corporate support services by a Bundled MOU/COOP to provide competitive energy-related activities shall be carried out in such a way as to comply with the provisions of

paragraph (2)(A)-(D) of this subsection, thereby preventing the opportunity for preferential treatment or unfair competitive advantage, customer confusion, or significant opportunities for cross-subsidization.

(G) No preferential access to transmission and distribution information. A Bundled MOU/COOP shall not allow preferential access by any person providing competitive energy-related activities on behalf of the Bundled MOU/COOP to information about its transmission and distribution systems. Such information shall be provided as required in paragraph (2)(D) of this subsection.

(H) Sharing of personnel, facilities, and resources. A Bundled MOU/COOP shall implement procedures and safeguards governing the sharing of personnel, facilities, officers and directors, equipment, and corporate support services with persons providing competitive energy-related activities on behalf of the Bundled MOU/COOP to ensure that confidential information is protected, that there are no opportunities for preferential treatment or unfair competitive advantage, that undue customer confusion will be prevented, and that no significant opportunities for cross-subsidization are created. A Bundled MOU/COOP shall document the assignment of shared employees engaged in both transmission or distribution system operations and the provision of competitive energy-related activities. For shared employees, the tracking documentation shall include the employees' name, job title, scope of activities, and allocation of time to the transmission and distributions functions and competitive energy-related activities. The tracking documentation for shared employees shall be

filed annually with the annual report of code-related activities required by paragraph (3)(B) of this subsection.

(I) Marketing and advertising. A Bundled MOU/COOP shall implement procedures and safeguards relating to the marketing and advertising of the Bundled MOU/COOP's competitive energy-related activities to prevent favoritism being shown to the competitive energy-related activities provided by the Bundled MOU/COOP, to prevent customer confusion, to prevent the inappropriate sharing of customer information, and to prevent significant opportunities for cross-subsidization.

(2) **Informational safeguards.** The following provisions apply to Bundled MOU/COOPs.

(A) Sharing of customer information. A Bundled MOU/COOP shall implement adequate safeguards to preclude any persons providing competitive energy-related activities on behalf of the Bundled MOU/COOP, or any other entities, from gaining access to information in a manner that would allow or provide a means to transfer confidential information, create an opportunity for preferential treatment or unfair competitive advantage, lead to customer confusion, or create significant opportunities for cross-subsidization. Non-proprietary information possessed by the Bundled MOU/COOP that is made available to any persons providing competitive energy-related activities provided by the Bundled MOU/COOP shall likewise be made available to third parties providing

competitive energy-related activities at the Bundled MOU/COOP's cost to produce such information for the third party.

(B) Proprietary customer information. Upon request by the customer, a Bundled MOU/COOP shall provide a customer with the customer's proprietary customer information. Unless a Bundled MOU/COOP obtains prior affirmative written consent or other verifiable authorization from the customer as determined by the commission, or unless otherwise permitted under this subparagraph, it shall not release any proprietary customer information to a person providing competitive energy-related activities on behalf of the Bundled MOU/COOP or to any other entity, other than the customer, an independent organization as defined by PURA §39.151, or a provider of corporate support services for the sole purpose of providing corporate support services. The Bundled MOU/COOP shall be permitted to release proprietary customer information under the same terms and conditions as a TDBU as set forth in subsections (l)(1)(A)-(E) of this section.

(C) Nondiscriminatory availability of aggregate customer information. A Bundled MOU/COOP may aggregate non-proprietary customer information, including, but not limited to, information about a Bundled MOU/COOP's energy-related goods or services. However, except in circumstances solely involving the provision of corporate support services, a Bundled MOU/COOP shall aggregate non-proprietary customer information for a third party or any person providing competitive energy-related activities only if the Bundled MOU/COOP

makes such aggregation service available to all non-affiliates and third parties under the same terms and conditions and at the same price or fully allocated cost as it is made available to any person providing competitive energy-related activities on behalf of the Bundled MOU/COOP.

(D) Requests for information. If a customer or potential customer of a Bundled MOU/COOP makes an unsolicited request for distribution service, competitive energy-related activities, products or services provided by an Bundled MOU/COOP, or for information relating to such products or services, the Bundled MOU/COOP shall inform the customer that competitive energy-related activities are available not only from the Bundled MOU/COOP, but also from other providers. If the Bundled MOU/COOP provides the customer or potential customer with information about competitive energy-related activities offered by the Bundled MOU/COOP, the Bundled MOU/COOP must record and allocate the costs associated with the provision of such information in the same manner as transactions involving the provision of competitive energy related activities, in accordance with paragraph (1)(C) of this subsection. The Bundled MOU/COOP shall not offer the customer or potential customer any opinion regarding the service of any other competitive energy service provider. Upon request, the Bundled MOU/COOP shall make available to a customer a copy of the most recent list of competitive energy service providers as developed and maintained by the commission and may make available telephone numbers and other commonly available information. Such

information shall also be made available by the Bundled MOU/COOP to its transmission and distribution customers at the time the Bundled MOU/COOP undertakes marketing to those customers of its competitive energy-related activities.

(3) **Reporting and auditing requirements.** A Bundled MOU/COOP shall maintain and file the following information so the commission can ensure that the Bundled MOU/COOP is not engaging in any anticompetitive activities as a result of its competitive energy-related activities being bundled with the transmission and distribution operation.

(A) Code implementation filing.

(i) Not later than 120 days prior to the implementation of customer choice by a Bundled MOU/COOP, the Bundled MOU/COOP shall file with the commission a written declaration that it will operate as a Bundled MOU/COOP and its plan for implementing the provisions of this section. The plan shall address all applicable requirements of this section in the context of operations as they will be conducted in the competitive retail market. The Bundled MOU/COOP shall post notice of its filing on its Internet site or a public electronic bulletin board for 30 consecutive days and shall provide copies of the plan to requesting parties. The code implementation plan proposed by the Bundled MOU/COOP shall be subject to a contested hearing process. Interested parties may file comments on the filing with the commission.

The commission shall issue an order either approving the code implementation plan, approving the plan with modifications, or rejecting the plan within 120 days.

(ii) In lieu of the implementation filing provided for in clause (i) of this subparagraph, a Bundled MOU/COOP may file with the commission a statement that it does not at this time intend to provide electric energy at retail to customers in Texas outside its certificated retail service area as provided for in subsection (b)(1)(B) of this section. Subsequently, if a Bundled MOU/COOP intends to provide electric energy at retail to consumers in Texas outside its certificated retail service area as provided for in subsection (b)(1)(B) of this section, it shall file the implementation filing provided for in clause (i) of this subparagraph with the commission not later than 120 days prior to the time it intends to provide retail electric energy in Texas outside its certificated retail service area.

(B) Annual report of code-related activities. A report of activities related to this subsection shall be filed annually with the commission under a control number designated by the commission. The report shall be filed by June 1 and shall encompass the period from January 1 through December 31 of the preceding year. The report shall contain detailed information on how the Bundled MOU/COOP met each of the provisions of paragraphs (1) and (2) of this subsection and any deviations from the actions set forth in the initial code

compliance filing. Commission staff shall review the annual report of code-related activities. The filing provided for in this paragraph is not subject to the contested hearings process, except upon complaint by an interested party or the commission staff.

(C) Copies of contracts or agreements. A Bundled MOU/COOP shall reduce to writing and file with the commission copies of any contracts or agreements it has with any persons providing competitive energy-related activities on behalf of the Bundled MOU/COOP. The Bundled MOU/COOP does not have to produce any contracts it has with third parties if such contracts were negotiated on an arm's length basis. The requirements of this section are not satisfied by the filing of an earnings report. All contracts or agreements shall be filed by June 1 of each year as attachments to the annual report of code-related activities required in subparagraph (B) of this paragraph. In subsequent years, if no significant changes have been made to the contract or agreement, an amendment sheet may be filed in lieu of refiling the entire contract or agreement.

(D) Compliance audits. No later than one year after the Bundled MOU/COOP becomes subject to this section as set forth in subsection (b)(1) and (2) of this section, and, at a minimum, every third year thereafter, the Bundled MOU/COOP shall have an audit prepared by independent auditors that verifies that the Bundled MOU/COOP is in compliance with this section. The Bundled MOU/COOP shall file the results of each audit with the commission within one month of the audit's completion.

(4) **Remedies and enforcement.** Bundled MOU/COOPs shall be subject to the provisions of subsection (n)(2)-(10) of this section on the same terms and conditions as the TDBU.

This agency hereby certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority. It is therefore ordered by the Public Utility Commission of Texas that §25.275 relating to Code of Conduct for Municipally Owned Utilities and Electric Cooperatives Engaged in Competitive Activities are hereby adopted with changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE 5th DAY OF MARCH 2001.

PUBLIC UTILITY COMMISSION OF TEXAS

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CHAIRMAN PAT WOOD, III

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COMMISSIONER JUDY WALSH

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COMMISSIONER BRETT A. PERLMAN