The Public Utility Commission of Texas (commission) adopts new §25.43, relating to Provider of Last Resort (POLR) with changes to the proposed text as published in the July 14, 2000 *Texas Register* (25 TexReg 6638). The rule is necessary to implement the Public Utility Regulatory Act (PURA) §39.106 and to establish the requirements and procedures for applying to serve as POLR and the terms and conditions of POLR service. Under the POLR rule, the commission will designate, no later than June 1, 2001, one or more retail electric providers (REPs) to serve as POLRs in each Texas transmission and distribution utility (TDU) service area that is open to competition. The POLR must offer a standard retail service package at a fixed, non-discountable rate, to any customer requesting it. The rule also requires the POLR to ensure no interruption of service if a REP fails to provide service to a customer. This new section was adopted under Project Number 21408.

A public hearing on the proposed section was held at commission offices on August 18, 2000 at 9:30 a.m. Representatives from Shell Energy Service (Shell), Consumers Union (CU), Green Mountain Energy Company (Green Mountain), Enron Corporation (Enron), Texas Electric Cooperatives, Inc. (TEC), Texas-New Mexico Power Company (TNMP), Entergy Gulf States, Inc. (EGSI), Office of Public Utility Counsel (OPC), Texas Industrial Energy Consumers (TIEC), Electric Reliability Council of Texas Independent System Operator (ERCOT-ISO), TXU Electric Company (TXU), Southwestern Public Service Company (SPS), El Paso Electric (EPE), Reliant Energy (Reliant), Baker Botts, Central and South West Corporation (CSW), New Braunfels Utilities (New Braunfels), and Clark, Thomas and

Winters attended the hearing and provided comments. To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

The commission received initial comments on the proposed new section from National Energy Marketers Association (NEM), OPC, State of Texas Office of Attorney General of Texas, Consumer Protection Division, Public Agency Representation Section (State of Texas), TEC, Shell, Nucor Steel, TNMP, Steering Committee of the Cities Served by TXU (Cities of TXU), Pedernales Electric Cooperative, Inc (Pedernales), TIEC, Enron, the Cities of Garland and Denton, American Electric Power Energy Services (AEP) SPS, TXU, EGSI, Reliant, and City of Austin, doing business as Austin Energy (COA), and received joint comments of CU, Texas Legal Services Center, Texas Ratepayers' Organization to Save Energy (Consumer Commenters), and of GreenMountain.com, NewEnergy Texas, L.L.C., and Utility.com (Independent Marketers). The commission received reply comments from TXU, Cities of TXU, TIEC, EGSI, Consumer Commenters, AEP, OPC, and Reliant and joint comments of Green Mountain Energy Company and NewEnergy Texas, L.L.C. (Independent Marketers).

Comments on specific questions in the preamble of the proposed rule.

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

Issue Number 1

In the event that a customer who is not eligible for the Price To Beat (PTB) fails to make arrangements to be served by a REP, should service to this customer be provided by the affiliated REP or by the POLR?

AEP, EGSI, Reliant, SPS, TNMP, TXU, Shell, TIEC, and State of Texas took the position that a customer who is not eligible for the PTB and who fails to make arrangements to be served by a REP should be provided service by the affiliated REP. To support their position, these respondents looked to PURA §39.102(b) which states, "The affiliated retail electric provider of the electric utility serving a retail customer on December 31, 2001, may continue to serve that customer until the customer chooses service from a different retail electric provider, an electric cooperative offering customer choice, or a municipally owned utility (MOU) offering customer choice." These respondents reasoned that PURA §39.102(b) is clear evidence that the Legislature intended for the affiliated REP to continue to serve non-PTB customers who fail to make arrangements for service after December 31, 2001. AEP pointed out that this "right to continue service" is not conditioned upon the customer being a PTB customer.

Reliant and SPS asserted that there is no indication in PURA that the Legislature intended for non-PTB customers who fail to make arrangements for service to default to POLR service on January 1, 2002. EGSI, Reliant, TXU, and TIEC pointed out that PURA identifies the only two situations in which the

POLR is supposed to serve a customer: (1) PURA §39.106(c) states that the POLR shall provide a standard retail service package to any requesting customer; and (2) PURA §39.106(g) requires the POLR to offer a standard retail service package to customers whose REP fails to serve them. The non-PTB customer who fails to arrange for service is not covered by either one of these provisions, and was therefore not intended to receive POLR service.

Additionally, Reliant noted that PURA §39.101(b)(2), which states that a customer is entitled to assume that the customer's chosen REP will not be changed without the customer's informed consent, also weighs against designating the POLR as the "default provider" for non-PTB customers who fail to make arrangements for service. TIEC contended that a customer who "chooses not to choose" is more likely to prefer continuation of existing service than to be switched to POLR service.

Enron took the position that PURA does not require non-PTB customers, who do not choose a REP, to be served by the affiliated REP. Enron added that sending these customers to the POLR is a better policy than leaving them with the affiliated REP. Enron asserted that PURA §39.102(b) states that the affiliated REP "*may* continue to serve" and permits the affiliated REP to continue to serve a customer until the customer chooses a different REP, but does not mandate that the affiliated REP serve these customers. Enron argued that if the intent was to set the affiliated REP up as the default provider for non-PTB customers who do not choose a REP, that intent would have been made clear somewhere in PURA. In reply comments, AEP noted that under Enron's interpretation of PURA §39.102(b), instead of meaning "has the right to," the word "may" would mean "does not have the absolute right to." AEP

reasoned that if Enron's interpretation were the proper interpretation, the Legislature could just as easily have replaced "may" with "may not" in §39.102(b), and that if "may" or "may not" can equally convey the intended meaning, the provision is deprived of legal significance. AEP also noted that numerous provisions of PURA say "the commission may," and the regulatory scheme of PURA would therefore be substantially changed if the phrase were now interpreted to mean the commission "does not have the absolute right to."

Enron also pointed to PURA §39.106(b), which gives the commission the authority to set the customer classes for POLR service, and reasoned that this section gives the commission the authority to determine that POLR service for non-PTB customer load should encompass non-PTB customers who have not chosen a REP by the first day of retail competition. Enron commented that sending these customers to the POLR is better policy than sending them to the affiliated REP, because POLR service is commission-approved, whereas the affiliated REP's price, terms and conditions of service are uncertain. Enron was concerned that the affiliated REP would unilaterally set the price, terms and conditions of service for non-PTB default customers, and that this default service would act as a *de facto* cap on what non-affiliated REPs can charge these customers. Enron noted that setting the POLR up as the default provider for non-PTB customers who do not choose a REP might result in lower POLR prices, because the POLR service would encompass a larger group with price certainty. Another of Enron's major concerns with allowing non-PTB customers to default to the affiliated REP is the market power that such a systematic transfer would give the affiliated REP. Enron explained that the affiliated REP would be handed a group of customers and would not have to spend money to market its

services to those customers. Enron argued that this would enable the affiliated REP to provide service at a lower price than other REPs that will have to incur costs for marketing and customer sign-up and set-up. Enron concluded that the commission must determine that non-PTB customers who do not choose a REP default to the POLR.

Although Independent Marketers did not take a position as to whether the affiliated REP or the POLR should serve a non-PTB customer who fails to make arrangements for service, Independent Marketers did advocate for adequate disclosure to such a customer the rate the customer will pay on January 1, 2002. The Independent Marketers stated that such disclosure should take place no later than November 1, 2001. AEP agreed with Independent Marketers that non-PTB customers should be provided with timely and adequate information that gives them the opportunity to select a new REP when competition commences.

The commission finds that the affiliated REP must be the default service provider for non-PTB customers who fail to make arrangements to be served by a REP. The commission believes that PURA §§39.102(b), 39.106(c), and 39.106(g), read together, evidence the Legislature's intent that all customers who do not choose a supplier would be served by the affiliated REP. Furthermore, because PURA §39.102(b) does not distinguish between PTB and non-PTB customers, it would be inconsistent to conclude on the one hand that PTB customers who do not choose a REP default to the affiliated REP, but on the other hand that non-PTB customers who do not choose a REP default to the POLR.

The commission therefore disagrees with Enron and declines to adopt its suggestion that non-PTB customers who fail to make arrangements to be served by a REP default to the POLR.

While the commission has noted the Independent Marketers' concern regarding disclosure of the affiliated REP's rate for non-PTB customers as of January 1, 2002, the commission finds that §25.43 is not the appropriate forum in which to address this concern. Disclosure of terms of service is being addressed in §25.474 of this title (relating to the Selection or Change of Electric Service Provider) that has been proposed in Project Number 22255 (*Rulemaking Proceeding for Customer Protection Rules for Electric Restructuring Implementing Senate Bill 7 and Senate Bill 86*). Therefore, comments concerning this issue should be filed in Project Number 22255.

Issue Number 2

Should the POLR be allowed to require that a default customer take service for a minimum term as a condition of continued service? If so, should the POLR be allowed to disconnect the default customer who refuses to agree to a minimum term?

The proposed rule prescribes that requesting POLR customers commit to a six-month minimum term and that default POLR customers do not have to commit to any minimum term. Many utility affiliated respondents favored a one-year minimum term requirement after a shopping period of two billing cycles for all customers. These respondents stated that, if the POLR rate resulted in a significant under-

recovery of the cost of providing service, the provider would be harmed if customers were allowed to stay on the service at will, or move on and off POLR service when it is advantageous for them to do so. TXU, SPS, AEP, EGS and TNMP recommended that default customers be permitted a shopping period of two billing cycles (TXU specifies one full billing cycle) at the approved POLR rate before being required to take service for a 12-month minimum term. SPS proposed to require the customer to stay for a term of 12 months or until the POLR term expires, while AEP recommended that a POLR should be permitted to continue serving the customer until the contract expires, regardless of when its term as POLR expires. AEP suggested the minimum term of one-year start from the initial transfer to POLR service. TIEC agreed with a shopping period, and along with AEP, proposed that after the shopping period, if the customer remains with the POLR, the customer's status should change to that of a requesting customer. TIEC suggested that POLRs could be entitled to require such requesting customers to agree to a minimum term of no more than six months as a condition of continued service. EGSI stated that, if the fixed pricing mechanism results in a variable rate (that is to say, a rate with a variable energy component indexed to the market price), the minimum term of service may not be required. Reliant commented that REPs should be allowed to submit price and minimum terms in their bids, including minimum terms for default customers. Therefore, one REP may submit a relatively lower price bid with a longer term than another REP that submits a bid with no minimum term. The commission may then choose between prices and minimum terms in selecting a REP to provide POLR service.

Consumer Commenters, Cities of TXU, OPC and Independent Marketers supported the proposed rule as published, which prohibits the POLR from requiring a minimum term of service for default customers. OPC also opposed a minimum term for requesting customers. These respondents argued that a minimum term requirement is anticompetitive, impedes the development of a competitive market, and interferes with the customer's statutory right of choice and ability to exercise that choice by selecting a new REP. Independent Marketers and Shell also argued that if a minimum term were allowed, other REPs would be automatically prevented from marketing to default customers. NEM commented that POLR service design and pricing should encourage minimum stays, not mandate minimum terms. NEM stated that there should never be an incentive for any class of customers to use the POLR service option as a long-term standard service option. State of Texas commented that the customer should be allowed the opportunity to make arrangements for a new REP as soon as possible without being subjected to a contract for a term with the POLR.

Regarding the second part of the question, SPS, Enron, State of Texas and Consumer Commenters did not believe that the POLR should be allowed to disconnect the default customer who refuses to agree to a minimum term. TNMP suggested that the POLR charge market prices from the time the customer started to receive POLR service to the time a minimum term begins, so as to eliminate the scenario in which the POLR disconnects a customer who refuses to agree to a minimum term. Enron stated that a shopping period before the customer is required to commit to a minimum term would be a mild alternative. Reliant suggested that the issue of disconnection should be addressed in the customer protection rulemaking.

In reply comments, Independent Marketers opposed the affiliated REPs' proposal to offer term based service, arguing that the purpose of the POLR is to provide transitional service for those customers whose REP fails to serve them. Independent Marketers further stated that the term-based service is a competitive offering and is antithetical to POLR service. Independent Marketers opposed even a six-month term, arguing that the rate would be different for customers taking service from January through June and those taking service from April through September, and would no longer meet the definition of fixed, non-discountable rate. Referring to the second part of the question, Independent Marketers argued that PURA §39.106 requires the POLR to offer a standard service package to all customers requesting it or in the event a REP fails to serve a customer. Independent Marketers further commented that it would be a violation of PURA to condition service on acceptance of a minimum term.

The commission recognizes that if all POLR customers are allowed to enter and exit POLR service without limitations, POLR loads may be difficult to plan for and expensive to serve. However, the commission agrees with State of Texas that bidders competing to serve as POLR will have the opportunity to build the cost of the business risk inherent to the nature of the loads in their bids. The commission agrees with NEM that POLR service should be designed to encourage minimum stays, and that requiring a minimum term would negate that principle. The commission notes that this question addresses term service for default customers, rather than all customers, and observes that the purpose of the POLR is to be a safety net for customers whose REP defaults. A safety net is transitional by nature. The commission believes that placing minimum term requirements on the safety net would not be

logical. The commission also agrees that locking customers in one-year contracts may inhibit the development of a competitive market, and it would not be appropriate to lock a default customer into a long term contract that would not allow the customer to exercise the right to choose, even if a shopping period of two billing cycles were allowed. The commission notes that two billing cycles may not be sufficient for customers who have been abandoned by their provider of choice in May or June to find a competitive supplier willing to serve them by the middle of the Summer peaking season.

Referring to the second part of the question, the commission agrees with the position of SPS, Enron, State of Texas, Independent Marketers and Consumer Commenters that the POLR should not be allowed to disconnect the default customer who refuses to agree to a minimum term. The commission agrees with Independent Marketers that allowing the POLR to condition service to default customers on acceptance of a minimum term would be contrary to PURA §39.106(g) requiring the POLR to offer a standard service package to any or all customers that a retail electric provider fails to serve. Additionally, the commission determines that AEP's proposal to automatically change the default customer status to requesting customer status after two billing cycles would not be appropriate because it would amount to submitting default customers to a threat of disconnection if they did not commit to a term. In addition, switching a customer to requesting status without the customer's consent as proposed by AEP could be construed as a form of slamming. The commission notes that a fixed pricing mechanism that would result in a variable rate could not be an alternative to a minimum term to prevent gaming as proposed by EGSI and other respondents since PURA §39.106(b) specifically requires a fixed rate. For these reasons, the commission maintains the proposed rule's prohibition of a minimum

term for default customers. The commission also determines that the default customers will not become requesting customers unless they voluntarily request a change in status.

Issue Number 3

Should customers who request POLR service be offered the option to either take service at the POLR hedged rate and sign a contract for a term, or take service at a market-indexed rate? Under the first alternative, how long should the minimum term of service be? In answering this question, please refer to the Pennsylvania Public Utility Commission Tentative Order (adopted June 2, 2000) and Final Order (adopted June 22, 2000) in Docket Number M-00960890F0017.

TXU noted that the Pennsylvania Commission's Tentative and Final Orders address the "gaming" problem that arises when the POLR price is lower than the market price. TXU commented that in that situation customers have switched back and forth between a competitive REP and a capped POLR rate to take advantage of lower rates when market prices were high during the peak period. TXU commented that the proposed draft rule will tend to allow similar gaming. TXU contended that allowing for a minimum term that includes a shopping period would assist the market while allowing customers the freedom to exercise choice. TXU proposed an additional option that would allow the POLR to bid a market-based indexed price for large, non-residential customers. SPS stated that POLR customers should be offered a hedged rate and sign a contract for a one-year term. Reliant commented that the issue of gaming would be addressed if REPs bidding to provide POLR service were allowed to specify

the terms and conditions of POLR service in their bids. TNMP and AEP proposed that the POLR should have the option of either offering a hedged rate for a minimum term of one year or an unhedged, market-indexed rate. AEP proposed to limit the unhedged rate option to a shopping period of two billing cycles. According to AEP, this relatively short shopping period would provide some protection from attempts at gaming, and should encourage customers to participate in the competitive market and secure a new contract. EGSI also supported a 60-day shopping window at the higher of market rates or the POLR rate for POLR customers similar to the one adopted by the Pennsylvania Public Utility Commission in Docket Number M-00960890F0017. EGSI supported a market-indexed rate, stating that the closer to competitive market rate the POLR price is, the less the need for strong anti-gaming rules.

Consumer Commenters and OPC noted that the Pennsylvania order refers only to commercial and industrial customers who are jumping back and forth from the POLR rate. Cities of TXU recognized that there has been a significant increase in the number of industrial and commercial customers opting for rate-capped default service during peak times in states with a competitive retail market. Cities of TXU agreed that either market-indexed rates or minimum contract terms would be appropriate for these larger, more sophisticated customers, but would be inappropriate for residential customers. However, Consumer Commenters noted that a market-indexed rate is a variable rate and is illegal because it is inconsistent with the PURA §39.106(b) fixed rate requirement. Consumer Commenters argued that, unlike a large commercial or industrial customer, the residential customer does not have the means to watch the price index in the wholesale market on a daily basis. According to Consumer Commenters,

over a two-week shopping period, this customer could receive a huge electric bill, based on the indexed rate paid to the POLR.

OPC noted that in other states, the problem suffered by residential customers regarding the POLR has been very different. According to OPC, in those states, REPs or their equivalent have been dropping residential customers when power prices have become too high, thereby forcing residential customers onto the POLR. OPC contended that having a hedged rate with a term contract or a market-indexed rate for the POLR will not cure this problem. Cities of TXU recommended that, unless and until the commission determines a prevalence of residential customers using the POLR service for financial advantage during high-cost months, any term or market-indexed price requirements in the rule should apply only to industrial and commercial customers. State of Texas was opposed to offering any customers a choice between a market-indexed price and a term contract for POLR service, adding that the risk of market fluctuations should be built into the POLR's bid for the fixed rate. Enron stated that the customer may not be given the two options of hedged rate with term contract and market-indexed rates since PURA §39.106(b) requires a single rate. Enron and TIEC contended that the arbitrage concern expressed in the Pennsylvania order is addressed since the proposed rule allows a seasonally differentiated price, and thus does not offer any gaming opportunity. TIEC commented that the imposition of a 12-month minimum term would be unreasonably burdensome to customers and would have a stifling effect on the competitive market. TIEC commented that a six-month term is the longest minimum service term that POLRs should be allowed to impose. NEM, Shell, and Independent Marketers pointed out that if gaming is possible, then POLR services are priced incorrectly and

minimum terms are not the right fix. These parties noted that the problem that the Pennsylvania PUC Order addresses stems from POLR rates that are capped through regulation and do not reflect the market. For these respondents, the key element of a POLR rule is correct POLR pricing that is not capped by regulation and reflects market prices plus a risk premium. Independent Marketers and Shell would support a market-indexed POLR rate as the most efficient, market-based method for eliminating any potential gaming. Independent Marketers and Shell, like State of Texas, opposed offering customers a choice between a market based pricing option and a hedged rate with minimum term. Independent Marketers and Shell believe that it is essential that the rule restrict the POLR to one rate for each class of customers to differentiate POLR service from competitive services, so as not to inhibit retail competition.

In reply comments Independent Marketers agreed with State of Texas that the risk of market fluctuations should be built into the POLR's bid for the fixed rate. Independent Marketers suggested that, once this risk is built into the bid, the gaming problem is solved, and the bidder should strive to reflect in the rate the risk that a customer can leave POLR service at any time. If a bidder does not correctly assess this risk, they added, then under-recovery is the penalty.

In reply comments, EGSI and AEP disagreed with Consumer Commenters and OPC that anti-gaming provisions should only concern the large non-residential customer class. EGSI stated that changes in switching rules pertaining to residential customers in Pennsylvania are being adopted for Philadelphia Electric Company, (PECO) and Pennsylvania Power and Light, (PP&L) and requested by Duquesne

Light Company. Consumer Commenters stated that in Massachusetts, a recent order put residential POLR customers on a fixed rate, six-month contract term, with the option of paying market-indexed rates as an alternative. Consumer Commenters, however, pointed out that the rate of residential customers switching to competitors in Massachusetts is hovering around zero, and that the order on POLR service would do little to motivate customers to take a risk in the retail market.

EGSI and AEP disagreed with the distinction made by OPC between customers gaming the system by switching from a REP to the POLR and REPs abandoning their customers and dropping them on the POLR. EGSI and AEP contended that the adverse effects in the competitive market place and on the POLR are the same whether customers or REPs engage in price motivated gaming. If the commission does not approve anti-gaming protections for all customers, EGSI and AEP contended, it may jeopardize the ability to attract bidders for POLR service, or bidders will submit higher bids to compensate for the risks associated with gaming. AEP added that without a minimum term, a rate with a constant energy component, even allowing for seasonal differentials, cannot be expected to limit gaming by customers since the rates must be bid two years in advance. To prevent gaming, EGSI, AEP and TXU proposed to allow the POLR to either require a minimum term or charge a market-indexed rate to customers in all classes.

Reliant expressed a different view and contended that pricing flexibility such as the use of seasonal prices, which the proposed rule allows, will encourage bidders because they will be able to match their pricing more closely to the risks inherent with POLR service. Reliant contended that if the commission

allows peak and off-peak pricing, then minimum terms may, indeed, be unnecessary. Consumer Commenters disagreed with EGSI, AEP and TXU, saying that residential consumers who are "dumped" on the POLR should not be punished. Consumer Commenters expressed disappointment in that, while during the legislative debate on restructuring consumers were promised lower prices for electricity and choice, most REPs are now proposing to force customers into long term contracts with penalties for early termination.

Reliant proposed that if the bid process fails and the commission appoints an affiliated REP to provide POLR service in its affiliated TDU area at the PTB, that is when POLR customers should be required to commit to a one-year minimum term. To alleviate concerns about minimum terms that prevent customers from participating in the market expressed by Independent Marketers, other competitive REPs, and consumer representatives, Reliant suggested that the customer be allowed to pay a penalty or exit fee to "buy out" of the minimum term. However, Reliant stated this provision would only be necessitated if the commission were to appoint an affiliated REP as POLR in its affiliated TDU area to offer POLR service at the PTB. Consumer Commenters disagreed, saying that any anti-gaming measures adopted in this rule should not apply to PTB customers, who were explicitly promised that Senate Bill 7, 76th Legislative Session (SB 7) would do no harm to their electric bills. Consumer Commenters proposed that the solution is for the POLR and the default provider for customers who do not choose, to be the same company for the early years of competition. Consumer Commenters suggested that under this scenario the affiliated REP would be the POLR for the PTB customers, serving at the PTB. Because the affiliated REP must offer the PTB for five years, Consumer

Commenters contended, it has to plan to serve unanticipated customers returning to PTB anyway and there would be minimal additional negative financial impact on the affiliated REP's ability to plan for these customers. In support of affiliated REPs providing POLR service at the PTB, Cities of TXU and OPC took the position that an affiliated REP enjoys an enviable and lucrative position as the default provider for its affiliated TDU customers until the customers affirmatively elect to receive service from another REP, therefore, it is reasonable that the commission may require a greater degree of responsibility from the affiliated REP.

In its reply comments, TXU agreed with Independent Marketers and Shell in support of a market-indexed rate as the best tool to prevent customer gaming. OPC, however, disagreed, arguing that such a rate will not provide the safety net intended by PURA, and that, if the result of a REP defaulting is to leave customers with very high bills, customer support for electric deregulation is likely to vanish. Independent Marketers in reply comments agreed with State of Texas that there is not a need for a market-indexed rate since bidders have ample opportunity to reflect risk in their bid price.

The commission agrees with TXU that a "gaming" problem is likely to arise when the POLR charges a capped rate that is lower than the market price. The problem has occurred in several states where, as in Pennsylvania, default service is capped below market level through regulation. The commission notes that, where the POLR rate is not capped and is allowed to vary with market price fluctuations, other problems have emerged. In Rhode Island, many large commercial and industrial customers switched from their utility to a competitive supplier when the market opened, but were unable to find a REP to

serve them when wholesale prices skyrocketed in the 2000 peaking season and were forced to take POLR service at market-indexed rates. These rates have resulted in very high energy costs that affected the economic viability of their businesses. The commission is concerned that, if business and industrial customers are forced to curtail or shut down their operations and lay off workers because of high wholesale energy costs passed on to them, the POLR no longer functions as a safety net. In Rhode Island, the experience has served to warn customers about the dangers of leaving their traditional supplier and discourage participation in the market.

The high prices experienced in many states in the 2000 peaking season appear to be the result of dysfunctional markets. The commission agrees with OPC that dysfunctional markets cannot be cured by any POLR design. The commission agrees with NEM and Independent Marketers that the key element of a POLR rule is correct POLR pricing. To avoid gaming, the POLR price must not be capped below the market price. The proposed rule prescribes that the POLR offer service at a hedged rate. As stated by State of Texas, bidders will reflect the risk of expected market fluctuations as well as other risks inherent to POLR service in their bids. As noted by TIEC and Enron, the proposed rule allows the POLR to charge seasonally differentiated rates. The commission agrees with Enron, TIEC, and Reliant in reply comments that a seasonally differentiated rate will help bidders more closely match their bids to the risks inherent to POLR service. Under the proposed rule, the POLR price can be designed to be no lower than the market price in all seasons, which is the intended outcome.

The commission agrees with Consumer Commenters that allowing the POLR to charge a market-indexed rate may discourage customers from leaving their traditional suppliers and inhibit the development of a competitive market. Customers must have the certainty of a reasonable fall back option – a safety net in the real sense of the term – or they will not play the market game. In addition, the commission agrees with Consumer Commenters that PURA §39.106(b) requires a fixed rate and, as EGSI correctly stated, a fixed price mechanism that includes a market-indexed energy component results in a variable rate. The commission therefore concludes that market-indexed POLR rates are not allowable under the statute.

The commission determines that requiring a minimum term would be too burdensome for customers and would inhibit competition. The commission notes, however, that if the POLR offers a level or average payment plan, a minimum term is necessary for averaging payments under the plan. The rule is modified to remove the six-month minimum term requirement imposed on requesting customers, but to allow a six-month minimum term requirement for customers who elect to receive service under a level or average payment plan.

The commission agrees with State of Texas, Enron, Shell and Independent Marketers that the POLR should not offer more than one rate option to each class of customers, and that a POLR service that would offer more than one rate option would become a competitive service offering. The commission also agrees with Enron that the statute limits POLR offering to one standard retail service package at a fixed, non-discountable rate. The commission finds that both the fixed rate requirement and the

statutory requirement of one service package would be violated if the POLR could offer customers the choice of a hedged rate under a term contract or an unhedged rate, as proposed by TNMP, AEP and TIEC.

Issue Number 4

Should an affiliated REP be precluded from being designated to serve as POLR in its affiliated TDU area unless no other REP applies or is qualified to serve as POLR in that area?

OPC, Consumer Commenters, Shell, Cities of TXU, and Independent Marketers contended that the bids submitted by affiliated REPs in their affiliated TDU territory should not deviate from the PTB, and that if no other REP submits a lower bid, the affiliated REP should win. Consumer Commenters noted that while it may be generally worthwhile to nurture competition by favoring nonaffiliated REPs, maintaining a consumer "safety net" at the lowest cost was equally important. TIEC pointed out that the PTB is not a factor for large non-residential users. TIEC contended that precluding affiliated REPs from bidding on POLR services for large non-residential customers would hamper competition among POLR bidders, resulting in artificially and unnecessarily high POLR rates for non-PTB customers.

The State of Texas favored preclusion, arguing that since all non-choosing customers will initially be switched to the affiliated REP, the affiliated REP will have an initial competitive advantage, and the right to provide POLR service should go to another REP, if one is willing and available. Reliant predicted

that, if the commission has the ability to designate the affiliate REP to provide POLR service at the PTB, other REPs will be discouraged from bidding. Reliant argued that if an affiliated REP providing POLR service is locked into the PTB, the affiliated REP should not only be excluded from bidding, but should also be excused from being the designated POLR if the bidding process were to fail. TXU objected to designating an affiliated REP as the POLR in default of any other acceptable bids. TXU proposed that the service should be re-bid with modifications, and if the bidding process does not result in an award, any certified REP should be eligible for designation as the POLR provider. AEP, TNMP and SPS favored allowing affiliated REPs to bid on POLR service without limiting them to the PTB. EGSI also argued for pricing flexibility for the affiliated REP designated as POLR. In reply comments, AEP concurred with Reliant that if affiliated REPs were locked into the PTB, they should be excluded from bidding but also be excused from being the designated POLR if the solicitation process fails.

In reply comments, Cities of TXU rejected TXU's and other affiliated REPs' proposal that affiliated REPs be exempted from being designated as POLR, arguing that an affiliated REP enjoys an enviable and lucrative position as the default provider for its affiliated TDU customers until the customers affirmatively elect to receive service from other REPs, and that if the legislature intended to obviate any responsibility of the affiliated REP with regard to POLR service, it would have placed limitations upon the commission's control to establish the POLR bidding process and ultimately select a POLR provider. Consumer Commenters agreed that an affiliated REP is limited by PURA to the PTB even if serving as POLR, but rejected arguments by affiliated REPs that the additional risk of serving POLR customers justified more pricing flexibility for those REPs. Consumer Commenters suggested that one option

would be to designate the affiliated REP as the POLR during the transitional period, because the affiliated REP already has to plan for unanticipated customers coming in and out of PTB service for the first five years of competition.

The commission agrees with State of Texas, OPC, Consumer Commenters, Shell, Cities of TXU, and Independent Marketers that PURA §39.202 (relating to the PTB) contains no exception for an affiliated REP acting as a POLR. However, the commission is concerned that, in the event the affiliated REP is required to provide service at the PTB, customers who do not pay their bill to the affiliated REP, could then access PTB service as POLR customers and get exactly the same benefits from the same REP. The commission is also concerned that an affiliated REP required to provide POLR service at the PTB may not be able to recover its cost of service. Finally, the commission agrees with Reliant and AEP that designating an affiliated REP to provide POLR service at the PTB might deter other REPs from bidding. The commission agrees with Reliant that the best solution is to preclude affiliated REPs from bidding to serve as POLR for residential and small commercial customers in their affiliate TDU territory for the five years the PTB is in effect in the territory, and determines that an affiliated REP will not be appointed as POLR in its affiliated TDU territory unless no other REP submits a bid or unless no bidders qualify to serve as POLR. Additionally, the commission determines that it must retain the flexibility to consider other options for appointing POLRs if the bid process fails when good cause exists. The commission modifies the rule accordingly.

Even though the commission agrees with State of Texas that competition is best fostered by completely excluding the affiliated REP from bidding in its own area, the commission accepts TIEC's proposal that the affiliated REPs be allowed to bid to serve large non-residential customers not covered by the PTB in their affiliate's territory so as to ensure more bids in the competition to provide POLR service to these customers. The commission modifies the rule to reflect this change. The commission agrees with Consumer Commenters that maintaining a safety net at a low cost is important. The commission believes that its decision to preclude affiliated REPs from bidding to provide POLR service to residential and small commercial customers in their affiliates' territory during the time when the PTB is in effect does not jeopardize the safety net for residential and small commercial customers because these customers have the protection of the PTB during those years. This outcome should satisfy affiliated REPs and TIEC's concerns because the affiliated REPs would still be able to bid to serve non-PTB customers at a market-based price.

The commission finds merit in Reliant and AEP's argument that the affiliated REP who is precluded from bidding to serve residential and small non-residential customers in its affiliate's territory should also be excused from being appointed as POLR for these customers in that territory if the bidding process fails, but the commission reserves the right to appoint the affiliated REP in cases when such appointment is a necessity to preserve the public interest. The commission declines to adopt TXU's suggestion that, if the solicitation fails, POLR service should be automatically re-bid with modifications. The commission determines that bidders will not provide their best offer at the first round of bidding if they know that

they have a second chance at the second round. The issue of re-bidding is further discussed under subsection (i) relating to the selection of the POLR.

Issue Number 5

Please comment on an "insurance" proposal made by EGSI at the June 8, 2000 workshop. Should this proposal be adopted as an alternative to the selection process and POLR pricing method currently included in the draft rule? If so, is it desirable to add a surcharge to transmission and distribution rates as the premium for this insurance, recognizing that it would reduce the headroom for competitive REPs? Does the commission have the authority to impose an additional surcharge on customers to fund such a program?

EGSI stated that a non-fault "insurance" system is an economically efficient method of allowing the POLR to recover the fixed costs associated with reserving the capacity needed for POLR customers. The fixed fee charged to all customers of the electric utility would be equitable, EGSI said, because all customers on the system would benefit from the no-fault insurance system since all customers in a designated POLR area have the right as determined by the commission to receive POLR service. EGSI contended that PURA provides the commission with authority to adopt its proposal, quoting PURA §11.002(a), which states that the purpose of the system of public utility regulation in Texas is to establish a comprehensive and adequate regulatory system to assure rates, operations, and services that are just and reasonable to consumers and utilities. EGSI contended that it would be unreasonably

discriminatory to require POLR customers to bear the costs of this service but not require a contribution from non-POLR customers since non-POLR customers benefit from the availability of POLR service. Thus, according to EGSI, a commission rule requiring TDUs to collect a fee to defray POLR costs from all customers is a use of authority implied by PURA §39.106(b).

TNMP was not opposed to the EGSI proposal if a minimum term agreement is not adopted as part of the rule. SPS recognized that there are certain statutory and regulatory limitations that could inhibit the implementation of EGSI's proposal. TXU, AEP, State of Texas, Cities of TXU, and Consumer Commenters questioned whether the commission has the authority under SB 7 to implement EGSI's proposed surcharge. Cities of TXU, Reliant, OPC, State of Texas, and Independent Marketers expressed concern that the addition of another surcharge would adversely affect the headroom for competitive REPs. Independent Marketers and Shell opposed the proposal because it is not a market-based solution to the provision of POLR service. Enron noted that the proposal is so different from the model on which the proposed rule is based that any attempt to develop this alternative at this time would be a lengthy process and would result in two markedly different approaches. OPC contended that the proposal conflicts with PURA §39.106, which prescribes how the POLR is to be financed. According to OPC, PURA §39.106(b) requires that the standard retail service package be offered at a rate approved by the commission, and there is no reference in PURA Chapter 39 to a non-bypassable surcharge for the POLR. Reliant suggested that it is preferable to maintain the cost causation link rather than spread the cost over all customers, as the EGSI proposal would do. Reliant suggested that, as the market matures, the commission may want to revisit the idea in restructuring future POLR requirements.

TIEC opposed the plan, stating that the 911 principle of a fee spread out over all customers does not work in the POLR context when applied to non-residential electricity customers, because the number of non-residential customers in any given service area is almost certain to be much smaller than the number of residential customers, and when the cost of service is spread over a smaller number of customers, the cost to each customer is proportionately higher.

The commission agrees with Enron that the EGSI proposal is very different from the proposed rule and would require much time and effort to fine-tune and finalize. In addition, the commission agrees with the majority of the respondents who question whether there is sufficient basis in SB 7 and in other provisions of PURA to support the creation of a surcharge that would spread the cost of the POLR to all customers. The commission also agrees with the majority of respondents who expressed concern about the effect of an additional non-bypassable surcharge on the headroom. The commission therefore determines that the EGSI proposal should not be adopted at this time.

Issue Number 6

Should the provisions in subsection (g), separation of service, be relaxed to allow the POLR to engage in some limited marketing of its parent REP services? If so, what marketing activities would be allowed?

Consumer Commenters, State of Texas, OPC, Cities of TXU, TIEC, Shell, Enron and Independent Marketers commented that the provisions in subsection (g) should not be relaxed. TIEC stated that the POLR is a quasi-regulated entity; therefore, requiring full separation of the POLR from the parent REP in the marketing context would be consistent with the Code of Conduct's separation requirement. State of Texas and OPC commented that allowing a POLR to market the services of its parent REP would work against normal forces of competition and give the parent REP a competitive advantage in subscribing new customers by funneling POLR customers to the parent REP company. OPC and Independent Marketers preferred a strengthening of the requirements in subsection (g). Independent Marketers suggested that the POLR hire separate employees specifically dedicated to POLR customer service and enrollment. Enron noted that this issue may be of less concern over time and that, as other REPs establish market share, they would not oppose reviewing this restriction at a later time. Consumer Commenters stated that the role of the POLR is to provide a safety net for consumers, and not to provide a competitive advantage to a REP. Consumer Commenters noted that if the commission relaxes subsection (g), then the commission should require the POLR to reflect the value of joint marketing by a reduction in the POLR rate.

TXU, SPS, TNMP, AEP, EGSI, and Reliant commented that the separation of service provision in the proposed rule should be relaxed. TXU and Reliant commented that a modification of the proposed rule would provide an incentive for REPs to bid to serve as the POLR. Reliant and AEP stated that REPs looking to POLR service as a market entry strategy would likely adjust bids accordingly in an effort to win the bid. TNMP, Reliant, EGSI, and AEP stated that relaxing the rule would avoid customer

confusion and irritation. These respondents stated that if a customer initiated a call to the POLR to make an inquiry about the services offered by the POLR's parent REP, a customer representative should have the flexibility of explaining these services instead of being required to give the customer a different phone number to call for the information.

TXU, Reliant, SPS, and EGSI contended that subsection (g) should allow a POLR employee to offer to transfer the customer to the parent REP for the convenience of the customer in the case of a customer-initiated inquiry. AEP and EGSI noted that the POLR must still satisfy the rule requirements of providing the list of certified REPs in the area to the customer and should not proactively propose to connect the customer to the REP.

In reply comments, Cities of TXU supported Consumer Commenters' suggestion that the commission should require a lower POLR rate if it relaxes subsection (g) to allow joint marketing, while TXU and EGSI opposed it. TXU and EGSI noted that if such marketing does provide value, that value would be reflected in a lower bid price for POLR service. TXU urged the commission to use a marketplace model to develop POLR service, not a model based on regulated prices and price determinations. EGSI stated that the proposal is inconsistent with a bidding arrangement and should be rejected.

In reply comments, Consumer Commenters rejected all suggestions premised on using POLR to enhance the ability of new companies to enter the retail market. OPC replied that any value brought to

the POLR's affiliate is at the cost of an optimally functioning market because the POLR's affiliate REP gains a competitive advantage.

Cities of TXU replied that the commission should not relax subsection (g) because doing so would open the door to anti-competitive practices like slamming. Cities of TXU noted that it would be difficult to monitor whether information about the services of the parent REP was distributed because of a customer-initiated inquiry or due to aggressive marketing of the services of the parent REP. Cities of TXU stated that the POLR was created as a safe haven for customers seeking plain, no-frills service and presumably customers of the POLR will be aware of their ability to choose a competitive REP and do not need to be targeted for more marketing from the POLR provider. If the commission finds it appropriate to relax the separation of service standards, Cities of TXU recommended that the rule incorporate provisions of the anti-slamming rules applicable to the telecommunications industry, such as third-party verification.

The commission finds that SB 7 separated POLR service from other types of REP service and imposed stricter requirements on the POLR. The commission finds it inappropriate for the POLR to market the services of its parent REP, as this would weaken the separation and distinctions of POLR service established by SB 7. The commission agrees with State of Texas and OPC that allowing the POLR to market the services of its parent REP would give the parent REP too much of a competitive advantage. The commission agrees with Cities of TXU that the POLR should not be allowed more flexibility when a customer initiates a request for information about the parent REP because it would be difficult to

monitor whether customers are transferred to the parent REP of a POLR at the customer's unsolicited request or due to aggressive marketing. The commission avoids the necessity for the monitoring of such activities by leaving subsections (g)(1) through (g)(3) unchanged.

Issue Number 7

Should the list of POLR customers be available to all REPs certified to serve electric customers in a designated POLR area for marketing purposes?

Consumer Commenters, TXU, AEP, and SPS commented that the list of POLR customers should not be available for marketing purposes to any third party entity. Consumer Commenters, TXU, and SPS stated that the POLR must protect the privacy of customer information. TXU noted that such disclosure without customer consent would violate the Legislature's determination that customer name and usage history are trade secret information not subject to Open Records disclosure. SPS commented that if the POLR is required to provide a list of its customers to all REPs, this would allow the REPs in that area to "cherry pick" customers from that list, which would be less of an incentive for a REP to bid to be the POLR. Consumer Commenters stated that no REP, including the REP affiliated with the POLR, should have access to this list. Consumer Commenters added that the public purpose of the POLR is to serve the interests of consumers, not the REP community and the public purpose should not be undermined by attempts to "jumpstart" the competitive market by providing free marketing lists to REPs. AEP stated that the requirement in the proposed rule to provide a commission-

approved list of certified REPs to the non-requesting customers should be sufficient. AEP added that a list of requesting customers taking POLR service should not be required either.

OPC, TNMP, Reliant, and Cities of TXU commented that this issue would be addressed in the customer protection rulemaking. OPC added that the POLR rule should be consistent with the customer protection rules regarding this issue.

Shell, Enron, Independent Marketers, and State of Texas commented that the list of POLR customers should be available to all REPs for marketing purposes. Shell stated that, it is essential for all certified REPs to have the information needed to market their services. Independent Marketers stated that the availability of the list would ensure that customers on higher priced POLR service will have increased access to REPs offering lower priced service. EGSI and TIEC had no objection to making such a list available to all REPS within the service territory for marketing purposes, but TIEC added the condition that only a *list* of customers be made available, and not any other information about specific customers.

TNMP, Consumer Commenters, Cities of TXU, Enron and EGSI stated that if POLR customers consent to placement on a marketing list, all REPs certified to serve in the area should have equal access to the list. Enron and EGSI added that customers should be able to opt to be excluded from the list.

EGSI commented that the registration agent or the commission should maintain the POLR customer list. EGSI noted that requiring the POLR to maintain the POLR customer list would add a needless layer of

administrative complexity and associated costs on the POLR and ultimately POLR customers because the POLR will need to develop procedures to ensure that the customer list does not include the names of customers wishing to be excluded from such a list. EGSI commented that the registration agent or the commission would be in the best position to ensure that customers wishing to be excluded from customer lists for marketing purposes are in fact excluded. As an alternative to providing a customer list, EGSI suggested providing customers with the most recently approved, commission-maintained list of certified REPs eligible to serve in a designated POLR area.

The commission agrees that the POLR must protect the privacy of customer information. The issue of privacy of information is being addressed in the customer protection rules currently being developed. To maintain consistency with those rules regarding the release of customer information to competitive REPs, the commission authorizes the registration agent of the Independent Organization to provide a periodically updated mass customer list of customers served by the POLR to REPs and aggregators, providing that the list contains only customer information as permitted by the commission's customer protection rules. The commission amends subsection (g)(4) to clarify that a list of POLR customers may be made available by the registration agent to REPs or aggregators, and to specify that the POLR's customers' list may be used by the POLR's affiliated REP for marketing purposes only if it is also available to other REPs.

Issue Number 8

PURA §41.053(c) states that an electric cooperative shall designate itself or another entity as the POLR for retail customers in its service area. Can an electric cooperative delegate that authority to the commission and request that the commission designate the POLR for its service area at the time when the commission is engaged in designating a POLR for a contiguous or surrounding TDU service area? If so, under what conditions?

TEC argued that PURA §41.053, along with the list of exclusive and broad jurisdictional powers in PURA §41.005, gives an electric cooperative's board of directors the power to designate the commission to act on the board's behalf in designating a POLR within the electric cooperative's certificated service area. TEC also stated that enlarging the service area for a POLR and the number of customers in the service area by including an electric cooperative's service area in the POLR's service area should enhance economies of scale and help to lower prices to retail customers served by the POLR.

TEC suggested several conditions that might be imposed on an electric cooperative delegating its authority to the commission. TEC suggested that it would be reasonable for the commission to require that the electric cooperative delegate its authority to establish the procedures and criteria to be used in the selection process along with its POLR designation authority. TEC suggested that an additional condition that might be imposed by the commission is a requirement that the delegation of authority be for a minimum period corresponding to the minimum period for which POLR service will be bid. Finally, TEC suggested that a new subsection (m) be added to the rule allowing an electric cooperative

that has adopted customer choice to delegate its authority to select a POLR under PURA §41.053(c) to the commission in the certificated service area of the electric cooperative. TEC further suggested that under its proposed new subsection (m), the commission would accept such delegation of authority under the following conditions: (1) the board of directors provides the commission with a copy of a board resolution authorizing such delegation of authority; (2) the delegation of authority is made at least 30 days prior to the time the commission issues a request for proposals to establish a POLR for a contiguous or surrounding TDU service area; (3) the delegation of authority is for a minimum period corresponding to the period for which the solicitation will be made; and (4) the delegation of authority also provides the commission with the authority to select the criteria and procedures to be used in selecting the POLR within the electric cooperative's certificated service area.

SPS and TNMP took the position that an electric cooperative should be able to delegate its authority to the commission. TXU contended that an electric cooperative's ability to delegate its authority to the commission is unclear, but stated that if such authority is determined to exist, the commission should condition its acceptance of the designation upon the electric cooperative's agreement to adopt all commission rules regarding POLR service, including both the process for making a POLR award, as well as the procedures regarding provision of POLR service. Reliant did not take a position on an electric cooperative's ability to delegate its authority to the commission, but noted that an affiliated REP should not be required to provide POLR service at the PTB in an electric cooperative's service area. Enron did not oppose giving an electric cooperative the option to delegate its authority to the commission.

OPC concluded that PURA does not give an electric cooperative the authority to require or compel an entity to serve in the electric cooperative's certificated service area. This conclusion is premised on the language of PURA §41.053(c) which states, "On its initiation of customer choice, an electric cooperative shall designate itself or another entity as the provider of last resort for retail customers within the electric cooperative's certificated service area and shall fulfill the role of default provider of last resort in the event no other entity is available to act in that capacity." OPC interpreted this provision to mean that if no entity agrees or volunteers to serve as POLR in an electric cooperative's service area, the electric cooperative is obligated to serve as the default POLR. In other words, according to OPC an electric cooperative cannot designate as POLR an entity that is not willing to serve as POLR. Furthermore, OPC stated an electric cooperative cannot delegate to the commission authority that it does not have. OPC noted that the comments submitted by other parties do not address this issue of whether an electric cooperative has authority to require an entity to serve as the POLR in the electric cooperative's certificated service area. OPC concluded that the commission has no express or implied authority of its own under PURA Chapter 41 to designate a POLR in an electric cooperative's service area.

OPC also commented on TEC's suggestion that a new subsection (m) be added to the proposed rule to address a REP's delegation of authority to the commission to designate a POLR under PURA §41.053(c). OPC did not support TEC's subsection (m) principally because it would be applicable in situations where no REP or other entity volunteers to serve as POLR in the certificated area of the

electric cooperative and thus, is contrary to PURA §41.053(c). Moreover, OPC questioned whether such a provision is needed or appropriate in the commission's rules, arguing that if REPs or other eligible entities volunteer to serve as the POLR in the certificated service area of the electric cooperative, the electric cooperative may designate the POLR, in accordance with PURA §41.053(c). OPC concluded that if no entity volunteers to serve as the POLR, the electric cooperative is specifically obligated by PURA §41.053(c) to serve as the default POLR.

The commission concludes that the broad authority given to an electric cooperative in PURA Chapter 41 includes the power to delegate to the commission the electric cooperative's authority to designate the POLR for its service area and to establish the procedures and criteria for designating a POLR. If the commission chose to accept the delegated authority, the commission's delegated authority would in all respects resemble the electric cooperative's original authority, and therefore, because an electric cooperative cannot compel an unwilling entity to serve as POLR, the commission likewise could not do so on the electric cooperative's behalf.

The commission adopts new subsection (m) regarding an electric cooperative's delegation of authority to the commission. The language of this new subsection satisfies the concerns of both TEC and OPC. As TEC advocates, subsection (m) recognizes an electric cooperative's ability to delegate its authority to the commission. At the same time, subsection (m) does not exceed the limits of an electric cooperative's authority. A bidder that submits a POLR bid for a service area that includes an electric cooperative's certificated service area would clearly do so voluntarily. Therefore, the selection of a

POLR for an electric cooperative's certificated service area through a competitive bidding process would not exceed an electric cooperative's authority. Furthermore, if the competitive bidding process that includes the electric cooperative's certificated service area fails, the commission's delegated authority is extinguished, and such authority reverts to the electric cooperative. In other words, if the voluntary competitive bidding process fails, then authority to designate an entity as a POLR reverts back to the electric cooperative, and unless the electric cooperative finds an entity that is willing to serve as POLR, the electric cooperative must serve as the default POLR for its own certificated service area. Furthermore, the commission finds that adopting subsection (m) is in the public interest because including an electric cooperative's service area in the POLR's service area should enhance economies of scale and help to lower prices to retail customers served by the POLR. New subsection (m) also gives the commission the discretion to accept or reject an electric cooperative's delegation of authority. This is necessary in order for the commission to be able to efficiently manage and allocate its resources.

Issue Number 9

If the competitive selection process for the POLR fails, should the commission retain the flexibility to appoint a POLR to serve in a service area for more than one year? If so, how should that be reflected in the rule?

The respondents in general broadened the issue to include whether the POLR term should be limited to one year for every POLR, whether appointed or awarded. The Independent Marketers, TXU, TNMP,

Reliant, and Shell supported a yearly bidding process to reduce the price risk and costs associated with having to hedge wholesale electricity prices over a two-year period. TXU suggested that in order to encourage a more robust, competitive market, the commission should limit a POLR service appointment to a single one-year term and require bids every time a new POLR is needed. Shell and the Independent Marketers pointed out that a yearly competitive selection process would help ensure that prices for POLR service more accurately reflect the market price of electricity. Reliant, in its reply comments, stated that until the market matures and REPs have more experience with POLR service, the commission should only require bids for one-year terms.

AEP, EGSI, SPS, and State of Texas were generally not in favor of allowing the commission the flexibility to appoint a REP to serve as a POLR for more than one term if it is unwilling to serve another term. TXU, State of Texas, AEP, TIEC and EGSI suggested that each eligible REP should be required to serve as POLR in an area before an unwilling REP could be appointed to serve another term. AEP added that requiring an unwilling REP to serve a second POLR term would be unreasonable and punitive, and would appear to impose an inappropriate level of market interference and create an unreasonable business risk for the REP. TXU and EGSI suggested that if the bidding process fails once, the commission should request another round of bids, adjusting bid parameters if necessary. EGSI added that the commission should only extend the appointment beyond one year if it finds that such an extension is in the public interest. TIEC expressed a similar view, stating that the commission should retain the authority to re-appoint, but re-appointment should be truly a last resort, to be used

only if the bid selection process has failed for two consecutive years and no other qualified REP becomes available during that time.

Consumer Commentors, Cities of TXU, and OPC generally favored the commission retaining the flexibility to appoint a REP two consecutive terms. OPC stated that the commission must maintain as much flexibility as possible in appointing a POLR. Such a policy would allow the commission to avoid bidding for a POLR annually when it is already known that there will be no acceptable bidders. Consumer Commenters favored amending subsection (i)(3)(A) to give the commission the flexibility to appoint a POLR for a term of more than one year.

Cities of TXU noted that nothing in the statute prohibits the commission from designating a POLR in the event the competitive selection process fails and added that PURA §39.106 provides wide discretion to the commission regarding the designation of the POLR. In fact, Cities of TXU argued that §39.106(e) leaves both the selection process and the schedule for re-designation of the POLR completely within the determination of the commission. Cities of TXU commented that it is essential that the commission preserve its flexibility in the selection process to address issues that may arise. Cities of TXU and Enron both supported the current language in the rule regarding this issue. Extending beyond the issue of the POLR term of service, Reliant suggested that at the end of the POLR term, current POLR customers should not be rolled-over to the new POLR. Rather, the new POLR should serve only new POLR customers.

The commission agrees with Independent Marketers, TXU, TNMP, Reliant, and Shell that a yearly bidding process would reduce the price risk to the POLR and its cost of having to hedge wholesale electricity prices over a two-year period. The commission therefore amends the rule to indicate that it will accept one-year and two-year bids from interested bidders. The commission would prefer a two-year term but reserves the right to select one-year term proposals if the price of two-year term proposals is too high and will indicate as much in the Request For Proposal. The commission generally agrees with the comments of SPS, State of Texas, AEP, TIEC, and EGSI that if the bidding process fails, the appointed POLR will serve for a one-year term and the area will be re-bid prior to the end of the one-year term. If the bidding process fails again, the commission will make every effort to consider all qualified REPs capable of serving as POLR in a given area before appointing an unwilling REP to a second term. If the commission finds that it in the public interest for a REP to serve an additional term after all available options have been considered, it retains the flexibility to appoint a REP for an additional term. The commission disagrees with TXU and EGSI that if the solicitation fails, the commission should automatically request a second round of bids. The commission prefers to retain this as an option rather than an obligation. The commission is concerned that if bidders know that if they don't get it right the first time they get another chance, they will not provide their best bid the first time around.

The commission disagrees with Reliant that customers should be retained by the exiting POLR's parent REP when a POLR's term of service comes to an end. The commission determines that if POLR responsibilities are being transferred to another REP, the customers should be transferred as well, as

they are customers of POLR service, not customers of the POLR's parent REP. Subsection (i)(7) has been added to reflect this determination.

Specific Sections of the Rule

Subsection (a) - Purpose

Pursuant to its general argument that POLR service to large non-residential customers be more flexible for the provider, TXU suggested making an explicit distinction between large non-residential customers and all other types of customers in subsection (a)(1). TXU suggested inserting the phrase "residential and small non-residential customer" into the current wording of subsection (a)(1), and inserting a new subsection covering large non-residential customers whose POLR package would be "at either a hedged or unhedged rate or any combination thereof as determined by selection of the respective bid." In reply comments, TIEC responded that a POLR should not be allowed to offer unhedged POLR pricing as a substitute for a hedged rate. TIEC stated that an unhedged rate was an acceptable option to large non-residential customers as long as a hedged rate was also available.

Consistent with its findings pursuant to Issue Number 3 and to subsection (f) of this rule, the commission declines to make the changes recommended by TXU and TIEC.

AEP objected to the wording of subsection (a)(2) stating that all customers will be assured continuity of service if a REP terminates service. AEP wanted the rule to clarify that continuity of service should not be assured for those customers who have been properly disconnected under the commission's rules.

The commission notes that while a REP has the right to terminate service, it may not have the right to disconnect except for reasons of imminent hazard. This question is addressed in Subchapter R of this title (Relating to Customer Protection Rules for Retail Electric Service). To ensure consistency with the Customer Protection Rules, subsection (a)(2) is amended to ensure that all customers will be assured continuity of service if a REP terminates service for reasons other than those specified in the commission rules relating to disconnection of service.

Subsection (b) - Application

COA, Cities of Garland and Denton, and Pedernales all objected to the provision in subsection (b) that MOUs and electric cooperatives must opt into competition and "meet the requirements for REP certification in Texas" as a condition for being designated to serve as POLR outside their service area. COA wants MOUs to be eligible to serve as POLR outside their service areas if they opt into competition, with no further requirement. The Cities of Garland and Denton and Pedernales stated that the requirement that a MOU or an electric cooperative meet REP certification requirements to be a POLR in its service area is placing an impermissible condition on an MOU or electric cooperative. TEC contended that subsection (b) was inconsistent with other sections of the proposed rule as well as

with PURA. TEC noted that under PURA the commission is to designate a REP to serve as a POLR, and that as defined under law, an electric cooperative cannot be a REP even though it may provide similar functions. TEC said PURA does permit an electric cooperative to be a POLR, however, and argued that the proposed rule is not designed to address the situations where an electric cooperative or MOU is exercising its authority to designate a POLR within its service area. TEC suggested adding to subsection (b) language to specify that the rule does not apply to the situation where an electric cooperative or a MOU exercises its right to designate a POLR within that electric cooperative's or MOU's certificated service area, but that the rule is applicable when an electric cooperative delegates its authority to the commission in accordance with new subsection (m) to select a POLR within the electric cooperative's service area.

In reply comments, OPC stated that TEC's proposed change to subsection (b) and addition of subsection (m) was contrary to PURA §41.053(c), and questioned whether the revision was needed or appropriate in the commission's rules.

The commission agrees with TEC that the proposed rule does not address the situation where a MOU or an electric cooperative is exercising its authority to designate a POLR within its service area and concludes that the proposed rule is therefore not inconsistent with PURA §40.053(c). The commission agrees with TEC that an electric cooperative or a MOU cannot be a REP under PURA §31.002(17) and PURA §11.003(14), and therefore is not eligible to be designated by the commission to be a REP outside its service area, even if it meets the requirements for REP certification in Texas. Consequently,

to maintain consistency with PURA the commission deletes the second sentence in §25.43(b). The commission accepts TEC's proposed addition specifying that the rule does not apply to the situation where an electric cooperative or a MOU exercises its right to designate a POLR within that electric cooperative's or MOU's certified service area as a useful clarification. The commission addresses TEC's proposed addition of a subsection (m) to govern an electric cooperative's delegation of authority to the commission under preamble Issue Number 8 and in new subsection (m) of this section.

Subsection (c) – Definitions

TXU proposed to add a new definition, "awarded," to indicate a REP selected by the commission to serve as POLR through the competitive bidding process. TXU stated that the word "designated" as used in the proposed rule is confusing because it refers to either a REP selected as POLR through the solicitation process, or a REP appointed by the commission in cases when the solicitation fails to provide a winning bidder. TXU proposed to reserve the term "designated" for a POLR appointed by the commission if the solicitation fails to produce a qualified winning bidder, and proposed to use the word "selected" to include both a "designated" and an "awarded" POLR.

The commission agrees with TXU that the use of the word "designated" in the proposed rule can be confusing. However, the commission notes that the word "designated" as used in this section is consistent with the use of this word in PURA §39.106, where "designated" refers to the commission's selection of a POLR either through a solicitation of bids, or through other procedures and criteria. To

relieve the ambiguity and at the same time maintain consistency with PURA, the commission adopts the word "designated" to refer to a POLR who is either appointed by the commission or selected through a solicitation of bids. The word "appointed" is adopted and its definition added to subsection (c) to refer to a REP required to serve as POLR by the commission in the absence of a qualified winner of the solicitation. The word "awarded" is retained as proposed by TXU and added to subsection (c) to refer to a REP selected by the commission to serve as POLR through the competitive bidding process.

Basic firm service

EGSI proposed to modify the definition of basic firm service to indicate in the first sentence that basic service defines service not subject to interruption "for reasons of economics and/or price." EGSI also added an exception in the second sentence to indicate that basic service excludes competitive options "except as otherwise provided in this section."

The commission agrees to add "for economic reasons" after the word "interruption" for clarification purposes, noting that adding "and/or price" would be redundant. The commission declines to include the exception language proposed by EGSI, noting that §25.43 does not provide any such exception.

Default customer

EGSI, AEP, and TNMP proposed to refer to such a customer as "non-requesting customer". TNMP explained that the term "default" is used in other states implementing restructuring in reference to their POLR equivalent, and that leaving the term "default" in this rule could create confusion. In addition, EGSI proposed language changes in the definition that would limit the default customer to "a customer whose REP fails to perform" rather than "a customer no longer served by the customer's selected REP." AEP proposed to replace the phrase "because the customer is no longer served by the customer's selected REP" with the phrase "because the customer's selected REP is unable to provide service." In addition, AEP proposed to add language to this subsection to indicate that a customer will automatically lose its status as a non-requesting customer on the day following the second scheduled meter reading following the initiation of service, and that customers for whom service has been terminated pursuant to applicable commission rules, or whose contracts for electric service have expired according to their terms and who have not chosen service from the same or another REP, are not non-requesting customers.

TXU proposed a language change to define the default customer as a customer who is no longer served by the customer's selected REP, including a customer who is unable to obtain electric service from a REP.

The commission acknowledges that, as EGSI, AEP, and TNMP have stated, other states use words like "default customer" somewhat differently. However, the commission notes that there are variations in the way each state that has developed competitive market rules associates certain concepts with a

number of key words, including the words "default customer" and "provider of last resort." In addition, the commission notes that these definitions keep changing in other states as they revise their rules and create new ones. The commission believes that the word "default customer" is appropriately applied in this rule. It is the purpose of the definition section to specify what is meant by each term in the context of the rule.

The commission declines to adopt EGSI's proposed change because it is less inclusive than the proposed definition. A REP may fail to provide service for reasons other than a "failure to perform." The commission also declines to adopt a similarly limiting change proposed by AEP because a REP may fail to provide service for reasons other than "inability" to provide service. In both cases, the proposed language changes would have the effect of narrowing the availability of POLR default service in ways that would no longer capture the intent of PURA §39.106(g). The commission declines to adopt the following additional changes proposed by AEP because they are not consistent with the overall approach in the rule:

1. The commission declines to adopt the concept of a default customer losing default customer status after two billing cycles for reasons explained under Issue Number 2.
2. The commission concludes that a customer who has been terminated by its REP for whatever reason is entitled to POLR service, consistent with PURA §39.101(a) and PURA §39.106(g).
3. The commission finds that a customer whose contract has been terminated and who has not chosen service from the same or another REP is also entitled to POLR service as a default customer so as to maintain continuity of service, consistent with PURA §39.101(a).

The commission finds that the rewording proposed by TXU does not maintain the concept of a customer automatically assigned to POLR service when no longer served by its chosen REP, which is important to maintain because it conveys the POLR's mission to ensure continuity of service.

The commission accepts TXU's proposal to add language in the definition of "default customer" to include a customer who is unable to obtain electric service from a REP because it properly includes a category of customers who are entitled to POLR default service.

Designated POLR

TXU proposed to add a definition for the "designated POLR."

The commission adopts a definition for "designated POLR" to refer to a POLR who is either appointed by the commission or selected through a solicitation of bids for reasons explained at the beginning of the discussion of subsection (c).

Fixed rate

EGSI proposed to amend the definition of fixed rate such that the fixed rate "would be established by the commission." EGSI also proposed to alter the "fixed rate" definition as "a rate that may be

established by use of a fixed pricing mechanism." TXU proposed to define a fixed rate as "a hedged or unhedged rate." TXU also suggested that the fixed rate be allowed to change according to the pricing structure as submitted during the bid process.

Consumer Commenters stated that a fixed rate cannot have a variable component, and therefore cannot be an unhedged or market-indexed rate.

The commission does not intend to "establish" the POLR rate, as suggested by the proposed EGSI language. PURA §39.106 charges the commission with "approving" the POLR rate, not establishing it. It is the purpose of the rule to obtain a POLR rate that is market-based by requesting bids from interested REPs who will take into account market conditions and risks when establishing their bid price. If the solicitation process fails to result in the selection of a qualified POLR, the rule provides that the commission will appoint a REP to serve as POLR and negotiate the POLR rate with the appointed REP. Even then, it is not the intention of the commission to establish the POLR rate but to negotiate a rate that both parties agree reflects market conditions and risks. The commission therefore declines to adopt EGSI's proposed language change. EGSI also proposed to add that the fixed rate may be established by use of a fixed pricing mechanism. The commission declines to make this change to avoid any ambiguity since a fixed price mechanism can result in either a fixed or a variable rate. EGSI's proposal to eliminate the statement that the POLR rate may be structured so as to reflect a seasonal component is not adopted. To maintain consistency with a change proposed by Enron under Issue Number 3 and adopted by the commission, the rule requires that the POLR rate be structured so as to

reflect a seasonal differential, so as to reduce the risk that the POLR rate would fall under the market rate during the peak season. The commission therefore retains the original concept and modifies the language to indicate in a more general manner that a fixed rate may be structured so as to include a seasonal differential.

The commission declines to define a fixed rate as "a hedged or unhedged rate", as proposed by TXU. The rule as adopted by the commission requires that the POLR offer only one rate for each customer class and that it should be a hedged rate, therefore the commission does not see the need for adding that the fixed rate can be an unhedged rate in the definition. TXU's proposed change also suggests that the fixed rate might change according to the pricing structure submitted by the bidder, so that the pricing structure would be fixed, if not the rate. The commission sees a difference between a fixed rate, and a "constant rate with a fixed pricing structure". TXU's proposal would satisfy the definition of a "constant rate with a fixed pricing structure", but not necessarily that of a fixed rate. The commission finds that this change would open the door to allowing any rate to be defined as a fixed rate, which is contrary to the legislative requirement of a fixed rate.

Hedged rate

EGSI proposed to change the term "hedged rate" to "constant rate." EGSI suggested that, a constant rate would be defined as a fixed pricing mechanism that results in a rate that contains no market-indexed energy component. EGSI proposed to remove the part of the definition that specifies that when the rate

is hedged, it is the POLR's responsibility to mitigate the risk of price fluctuations. In addition, EGSI proposed to add language to indicate that the hedged rate or constant rate may be structured so as to reflect a seasonal differential, and may change due to non-bypassable charges.

AEP proposed to change the term "hedged rate" to "constant energy rate," with no conceptual change to the definition.

The commission determines that the term "hedged" applied to electric rates conveys a concept of risk mitigation that the term "constant" does not convey, and that it is important to maintain this distinction in the rule. The commission determines that EGSI's suggestions for the definition of constant (hedged) rate does not improve on nor add clarity to the definition and therefore it declines to adopt this change. The commission does not agree to strike the portion of the definition that clarifies the purpose of a hedged rate, as it is the purpose of the rule to clearly indicate that, by charging a hedged rate, the POLR will have the responsibility of mitigating the risk of market price fluctuations. The commission declines to adopt the reference to a seasonally differentiated rate proposed by EGSI, since the definition of "fixed rate" in the proposed rule already reflects that a fixed rate, for the purpose of this rulemaking, may include a seasonal differential. The commission recognizes the need for a reference to changes due to non-bypassable charges but determines that the treatment of such changes are better addressed in the definition of a fixed rate. The commission modifies the definition of "fixed rate" accordingly.

Non-discountable rate

EGSI proposed to add language to the definition of non-discountable rate to allow for exceptions that might be provided for in the commission's rules.

The commission agrees with EGSI that there is at least one exception that must be accounted for in the definition of non-discountable rate. The commission notes that PURA §39.106(b) mandates that the POLR charge a non-discountable rate. However, PURA §39.903 provides that certain income-eligible customers will receive a rate discount funded by the System Benefit Fund. Therefore, the commission adopts EGSI's suggestion to modify the definition of "non-discountable rate" so as to maintain consistency with the provisions of PURA §39.903 and with the commission's rules relating to the System Benefit Fund.

Requesting customer

EGSI proposed to specify that a requesting customer is one who "voluntarily" selects the POLR.

The commission accepts the proposed change as a needed clarification because it confirms the commission's previous determination that a customer cannot be switched from default status to requesting status without the customer's consent.

Residential Customer

EGSI proposed to add a definition for residential customer that includes single family residences and individual apartments. The proposed definition excludes common facilities at apartment and other multi-dwelling complexes.

The commission agrees that a definition of residential customer needs to be added and should exclude residents of multi-family facilities that are master-metered or that are considered commercial facilities. The commission modifies the proposed definition to ensure that it includes all customers taking service at their place of residence provided it is not a master-metered multi-family facility or a facility metered as a commercial facility.

Unhedged rate

EGSI proposed to change the term "unhedged rate" to "variable rate". EGSI suggested the definition for "variable rate" to be "a fixed pricing mechanism that results in a rate that contains a market-indexed energy component and may vary from time-to-time to reflect energy price fluctuations and changes to the non-bypassable charges."

TXU proposed to define "unhedged rate" as "a *fixed* rate that contains a market-indexed component." AEP proposed to replace the term "unhedged rate" with "market-indexed rate", without changes to the definition. Independent Marketers proposed to delete the definition of unhedged rate as unnecessary

because the statute only allows one rate, a hedged rate. Consumer Commenters pointed out that unhedged rates have a variable component and therefore are in conflict with the statutory requirement of a fixed rate.

The commission agrees with EGSI that any pricing mechanism that is indexed to the market will result in a variable rate, and not a fixed rate as suggested by TXU. The commission adopts EGSI's definition of a variable rate as a rate that results from a pricing mechanism that includes a market-indexed component and may vary from time to time to reflect market price fluctuations. This definition will help clear the confusion generated around the interpretation of the term "fixed rate". The commission determines that there is not a need for a definition of "unhedged rate" since the term "hedged rate" is sufficiently defined and the term "unhedged rate" does not appear in the rule. In conclusion, the commission adopts Independent Marketers' suggestion to delete the definition of unhedged rate and adds a definition for "variable rate" as suggested by EGSI.

Subsection (d) – POLR service

Nucor Steel asked the commission to reconsider its April 12, 2000 decision that disallowed non-firm POLR service. Nucor Steel stated a concern that the proposed rule unfairly and unlawfully deprives non-firm customers of the POLR service that they are entitled to by statute. Nucor Steel commented that POLR service must be provided to all customers who request it, and that no customers or customer classes may be excluded. Nucor Steel stated that the failure to offer non-firm POLR service violates

the specific mandates of Texas law and unreasonably discriminates against non-firm customers and the non-firm customer classes. According to Nucor Steel, customer classes cannot be combined, eliminated or altered in such a way that if a REP fails to serve a customer, the customer will be forced to take a radically different and unreasonable service. Nucor Steel added that, since firm and non-firm services are radically different in character, by requiring non-firm customers to take firm POLR service (or to have no POLR service at all), the proposed rule effectively denies non-firm customers and customer classes their right to POLR service. In reply comments, Independent Marketers, Cities of TXU, and EGSI stated that the commission has already made its decision on that issue. The Cities of TXU stressed that parties should be entitled to rely upon the commission's policy decisions without having to continuously re-urge their positions. EGSI offered three essential reasons why the POLR should not be required to offer interruptible service. First, a requirement to provide interruptible POLR service is contrary to the intent of PURA §39.106 that POLR service provides a safety net for competitive markets. Secondly, EGSI stated, there are practical operational and economic reasons why interruptible POLR service should not be provided such as the need for determining criteria for interruption, and economic impacts on firm POLR customers. Finally, EGSI suggested that a requirement to provide non-firm POLR service would cause needless complexity in the bid process.

The commission has previously determined that the POLR will not provide interruptible service. PURA §39.106(b) gives the commission the task of designating the classes of customer to whom POLR service applies. For the purposes of this rulemaking, the commission determines the classes of customers to be residential, small non-residential and large non-residential. Each of these classes is

entitled to POLR service and the service will be provided at a firm rate approved by the commission. Non-firm customers may be served by the POLR in one of the three designated classes and will receive firm service and a firm-service rate when they are served by the POLR. Non-firm service is a competitive generation service that is inconsistent with the concept of the POLR as a provider of basic service. The commission declines to adopt Nucor Steel's proposed change to the rule.

TXU and Reliant suggested adding subsection (d)(4) to indicate that POLR providers may, as authorized, or shall, as required, provide billing and collection service for REPs as authorized or required elsewhere in this chapter of the rules or by order of the commission. Reliant stated that the Rulemaking to Establish the Terms and Conditions of Transmission and Distribution Utilities and the securitization financing orders contain provisions under which a POLR may be required to provide billing and collection services for a REP in default. Reliant recommended that if a POLR will indeed be required to provide billing and collection services for a REP in default, then the POLR rule must clearly define and describe such a service, and must provide compensation to the POLR for such service.

The commission agrees that this issue should be addressed in the rule but finds TXU's proposed language for this section vague. The commission adopts more specific language to specify that the POLR shall, as required by and in accordance with §25.108, provide billing and collection service for REPs who have defaulted on payments to the servicer of transition bonds or transmission and distribution utilities.

TXU suggested language be added to subsection (d) to state that a REP may serve any or all of the three customer classes. EGSI suggested changes to subsection (d)(2)(B) to specify that the POLR may be selected to provide service for any requesting customer or any non-requesting customer. EGSI requested a language change in subsection (d)(2) to make specific note that the POLR must follow the customer protection rules.

The commission agrees with TXU that a REP may serve any or all three customer classes, and makes the proposed change. The commission does not find it necessary to make the changes EGSI suggested regarding requesting and non-requesting customers. The commission notes that subsection (d)(2)(A) and (B) sufficiently address requesting customers and default customers. The commission agrees that the POLR must follow the customer protection rules set forth for the POLR, but sees no need to reiterate that here.

The Independent Marketers suggested new introductory wording in subsection (d)(3) to specify that the POLR shall offer a single basic, standard retail service package. The Independent Marketers also proposed to add a new subsection (d)(4) to emphasize that the POLR shall offer only one standard package that is limited to basic firm service.

The commission agrees with Independent Marketers and adopts their proposed language to subsection (d)(3). The commission finds the proposed new subsection (d)(4) redundant and declines to adopt it.

Subsection (e) - Standard of Service

AEP proposed to add specific language to subsection (e)(2) to allow the POLR to require that requesting customers meet minimum credit standards and be subject to disconnection.

The commission finds that these standards are properly addressed in the Customer Protection rule and declines to make this change.

AEP proposed to change subsection (e)(2)(C) to replace "unhedged price" with "market-indexed energy rate". Green Mountain and Shell proposed to eliminate this subsection as unnecessary.

The commission agrees with Green Mountain and Shell and eliminates subsection (e)(2)(C) since it has determined that the POLR can only offer one rate per class of customers and is required to offer a hedged rate.

TXU proposed to add a new subsection (e)(2)(F) to specify that a POLR wishing to require a 12-month term of service pursuant to proposed subsections (e)(2)(D) and (E) shall provide in its bid the rate for the 12-month term.

In light of its discussion under Issue Number 3, the commission determines that subsection (e)(2)(F) is not needed.

TXU proposed to change subsection (e)(3) to indicate that the commission may not designate the affiliated REP to serve as POLR in its affiliated TDU unless no other REP is certificated to serve that area. Reliant, AEP, and Shell expressed a concern that if the affiliated REP can be designated in its affiliated TDU service area to provide POLR service at the PTB, it will deter other REPs from competing for POLR service in the area.

The commission disagrees with the change proposed by TXU because it is too restrictive and limits the commission's flexibility, which may result in inefficient outcomes. In response to Reliant, AEP, and Shell, the commission notes that the provision of subsection (e)(3) limiting instances when the commission can designate the affiliated REP as the POLR in its TDU service territory sufficiently mitigates the concern that the PTB will deter other REPs from competing for POLR service. To improve the organization of the rule, the commission moves subsection (e)(3) to subsection (i) which addresses the selection of the POLR.

Subsection (f) – POLR rate

In subsection (f)(1), TXU proposed that, in the event that the competitive selection process fails, the rate should be established through negotiations between the commission and *any* designated REP, as opposed to *the* designated REP. TXU, SPS, TNMP, EGSI and AEP proposed to eliminate the provision that, if a REP is designated to be the POLR in its affiliated TDU service territory, the rate shall

be set at the PTB for residential and small commercial customers prior to January 1, 2005 or until the affiliated REP loses 40% of the customers in each customer group. These parties contended that the PTB would not allow the POLR to recover its cost of doing business. Consumer Commenters disagreed and stated that PURA §39.202 is clear in limiting the ability of an affiliated REP to charging anything but the PTB. In reply comments, OPC, Cities of TXU, and Independent Marketers agreed with Consumer Commenters.

In response to TXU, the commission determines that the rate negotiations should be between the commission and each of the appointed REPs, and modifies the rule accordingly. The commission agrees with Consumer Commenters and others and reaffirms that the affiliated REP's obligation to charge only the PTB in its affiliated TDU service territory until January 1, 2005 or until the affiliated REP loses 40% of the customers in each customer group is a statutory requirement and declines to accept the change proposed by TXU, SPS, TNMP, EGSI, and AEP.

TIEC proposed to change subsection (f)(2)(A) to allow more than one rate to be offered to each class of customers. Independent Marketers proposed to keep the provision allowing only one rate to be offered to each customer class, but to eliminate subsection (f)(2)(B) and to make it possible for the POLR to bid an unhedged rate for any class of customers. TXU proposed to keep the provision allowing one rate to be offered to each customer class, but would reserve subsection (f)(2)(B) allowing the POLR to bid a hedged rate for the residential and small non-residential customers, and add a new subsection (f)(2)(C) to allow the POLR to bid either a hedged rate or an unhedged rate for the large

non-residential class. TIEC proposed a new subsection (f)(2)(C) in which an unhedged rate would be offered to customers of the large non-residential class provided a hedged rate is also available, adding the provision that large non-residential customers should be allowed to switch from the unhedged rate to the hedged rate or to other REP service at any time after commencing service on the unhedged rate. AEP wanted the POLR to be allowed to offer small non-residential and large non-residential customers a choice between a fixed rate containing a constant energy rate or a fixed rate containing a market-indexed energy rate. Enron noted that there is no language in the rule (outside the definition of "fixed rate" in subsection (c)) to reflect that the POLR is permitted to offer seasonally differentiated rates, which was agreed to by all workshop participants, and proposed to add language to subsection (f)(2)(B) to require such differentiated rates. In reply comments, Reliant stated that a seasonally differentiated rate would provide sufficient pricing flexibility so that a minimum term would not be necessary. OPC proposed to change the wording of subsection (f)(2) from "Fixed non-discountable rate. The POLR:" to, "As part of a fixed non-discountable rate, the POLR:" Consumer Commenters agreed with OPC in reply comments. In reply comments, EGSI opposed TIEC's proposed new subsection (f)(2)(C) arguing that the cost of hedging the customer's ability to lower the price by switching from the unhedged rate to the hedged rate or to other REP service at any time after commencing service on the unhedged rate would have to be reflected in the POLR bid, resulting in higher POLR bids, and added that the rule should permit the POLR price to reflect as nearly as practicable market-based rates, without an option to switch to lower the POLR price.

The commission reaffirms its April 12, 2000 Open Meeting decision that the POLR should only bid one rate for each class of customers in order to be consistent with PURA §39.106(b), which requires that one standard service package be offered per class of customers. The commission further determines that the POLR rate should be a hedged rate as stated in the proposed rule for reasons explained in the discussion under Issue Number 3. The commission agrees with Reliant and accepts Enron's proposal to add language to subsection (f)(2)(B) requiring the POLR to offer a rate that will be seasonally differentiated. The commission declines to make OPC's proposed wording change as it does not add clarity to nor improve the wording of the rule. The commission reorganizes the presentation of subsection (f)(2) to reflect these decisions in a concise manner.

Nucor Steel provided comments to request that the commission reconsider its April 12, 2000 Open Meeting decision not to require POLR services to mirror services historically offered by incumbent utilities, including offering non-firm interruptible service. Nucor Steel stated that non-firm customers are to be differentiated from the large non-residential customer class and have their own customer classes. In reply comments, TXU disagreed with Nucor Steel that non-firm service is a "standard retail service package" and stated that the standard retail service package pursuant to §39.106(b) of PURA is firm service. EGSI and OPC also opposed Nucor's position.

The commission continues to believe that the purpose of the POLR is to offer a basic service package that does not include options offered in the competitive market. Therefore the commission agrees with TXU, EGSI, and OPC and reaffirms its April 12, 2000 Open Meeting decision rejecting Nucor Steel's

proposal to include non-firm services and other historical services in the POLR standard service package.

Subsection (g) – Separation of service

EGSI proposed to add language to the introductory paragraph in subsection (g) to allow for exceptions to the requirement of that subsection as provided elsewhere in the rule. EGSI also proposed to modify the language of the introductory paragraph in subsection (g) to specify that "the POLR shall maintain separate accounts for its competitive REP business and its POLR function," instead of being required to "keep its REP business separate from its POLR function".

The commission declines to adopt the exception language suggested by EGSI as not applicable, since the rule does not provide for any such exception. The commission adopts the language proposed by EGSI to indicate that the POLR and its parent REP shall keep separate accounts in addition to, rather than instead of, the requirement that the POLR keep its REP business separate from its POLR function. The commission finds that this addition clarifies the intent of the rule.

Subsection (h) - Transition from REP to POLR service

EGSI proposed to change subsection (h)(2), which states that the Independent Organization will notify the POLR that a customer is switched to POLR service by adding that this notification will be made in

accordance with the operating rules of the Independent Organization. AEP proposed to refer to the "applicable" Independent Organization to reflect that there are different Independent Organizations in Texas, and to refer to PURA §39.151 in subsection (h)(2). AEP also proposed to add that this subsection applies to a customer that has not been disconnected according to the commission's rules.

The commission adopts EGSI's proposal to clarify that the Independent Organization will act in accordance with its operating rule. The commission adopts the word "applicable" before Independent Organization as proposed by AEP. The commission accepts AEP's suggestion to refer to the part in PURA §39.151 that defines an Independent Organization, but declines to add that this subsection applies to a customer that has not been disconnected according to the commission's rules since subsection (a)(2) already provides the necessary information as to customer eligibility.

EGSI stated that subsection (h)(3) of the proposed rule is unnecessary because subsections (h)(4) and (h)(5) govern the financial responsibility of the REP and POLR during the transition. AEP proposed to change subsection (h)(3) to add "to the appropriate parties" after "without giving notice". AEP proposed to specify that, initially, the TDUs and not the POLR will be responsible for meter readings and should prorate consumption. AEP proposed to substitute the word "consumption" for the word "usage" and to indicate that the customer's consumption will be prorated "using the customer's historic data", rather than "based on the customer's historic data." AEP proposed to specify that the consumption would be prorated to establish "the customer's consumption relevant to the REP and

POLR providers" rather than to establish "the customer's charges for the relevant portion of the billing cycle."

The commission declines to delete subsection (h)(3) as proposed by EGSI, as this subsection provides some useful information on details of the transition to POLR service necessary to determine how consumption will be measured. The commission declines to adopt the wording "to the appropriate parties" as suggested by AEP since, without specifying who the appropriate parties are, this addition does not clarify or improve the rule. The commission declines to give the TDU the responsibility of pro-rating the customer's consumption and assessing the consumption relevant to both the REP and the POLR as suggested by AEP, since this function is separate from the meter reading function and the TDU's task until January 1, 2004 for non-PTB customers and until September 1, 2005 for PTB customers, is limited to passing on to the POLR and the REP the metering information necessary for their billing activities unless specifically requested to provide billing services by the REP. The commission declines to substitute the word "consumption" for the word "usage" as suggested by AEP since these words are synonymous and the proposed change does not improve the clarity of the text.

EGSI stated that the POLR should not be responsible financially until it has a reasonable period of time to obtain the new customer information, assimilate the information, place the load into its overall scheduling process, and commence scheduling the POLR customer's load. EGSI suggested that subsection (h)(4) impose a requirement that the switch occur as soon as practicable but in no event later than five days after notification of the switch by the registration agent.

The commission finds that the POLR's mission is different from that of a regular REP and therefore has to operate under a set of circumstances that may imply different procedures and different risks of doing business. Therefore the commission declines to change the switching requirements of the proposed rule as suggested by EGSI.

EGSI suggested changing subsection (h)(5) which says that a REP who terminates service to a customer is financially responsible until the REP notifies the Independent Organization and until the switchover to the POLR is complete by specifying that these activities will be in accordance with the rules of the commission and the Independent Organization.

The commission determines that the proposed rule is sufficiently clear on how to carry out these activities and that the language suggested by EGSI is unnecessary.

Subsection (i) - Selection of the POLR.

TXU suggested specifying in the introductory paragraph of subsection (i) that the term for POLR service begins January 1, 2002 in all areas open for competition on that date. In connection with its response to Issue Number 8, TEC suggested changing the introductory paragraph to indicate that the commission shall not designate the POLR in the service areas of a MOU or in the service area of an

electric cooperative unless the electric cooperative has delegated its POLR designation authority to the commission in accordance with a new subsection (m) TEC proposes to add to the rule.

The commission adopts TXU's proposed change with a slight modification to indicate that January 1, 2002 is the date the *first* POLR term begins. The commission adopts TEC's suggested revision to the introductory paragraph of subsection (i) because the revision is necessary to harmonize subsection (i) with new subsection (m), which the commission is adopting for the reasons stated in the discussion of TEC's response to Issue Number 8.

EGSI would change subsection (i)(1)(A) to specify that a bid may be submitted to serve the residential, small non-residential, "and"/or large non-residential. EGSI also would add that bids "for more than one class of customers" will be evaluated independently for each class.

The commission declines to accept EGSI's proposed wording modifications to subsection (i)(1)(A) as they neither add clarity to nor improve the proposed rule.

In subsection (i)(2)(B), TXU suggested that the bidding process fails if the bids received are "not within a range," as determined by the commission. AEP was concerned that subsection (i)(2)(B) gives the commission broad discretion to supercede the results of the competitive process, based on its conclusion that terms and conditions are "unreasonable." AEP contended that the most likely point on which the commission would intercede would be price, and offered modifications to subsection (i)(2)(B)

to specify that the competitive bidding process fails if the commission does not receive three bids from qualified bidders as opposed to one bid in the proposed rule, and if the terms and conditions of those bids are unreasonable, as determined by the commission. Additionally, AEP would specify that in making its determination about the reasonableness of the pricing terms, the commission shall consider how those pricing terms compare to the pricing terms for the same class of POLR service in other areas of the state. EGSI was also concerned that the commission's ability to reject bids based on a determination that the bids are "unreasonable" is overly broad. EGSI suggested specifying that the competitive bidding process fails if the terms and conditions of all the bids received do not comply with the request for proposal bidding specifications. EGSI would consider receipt of at least one complying bid from a non-affiliated REP as a reasonable bid.

TXU's suggestion that the phrase "not within a range" be substituted for the term "unreasonable" in subsection (i)(2)(B) is rejected. PURA §39.101(a)(1) charges the commission with the duty of ensuring that retail customer protections are established that entitle customers to reasonably priced electricity. The use of the term "unreasonable" is consistent with PURA §39.101(a)(1), while the substitution of the phrase "not within a range" is not. The commission concludes that the language recommended by AEP concerning three bids is arbitrary and does not necessarily accomplish AEP's stated purpose of attempting to limit the commission's authority to supercede the results of the competitive process. As to AEP's suggestion to assess the reasonableness of pricing terms by comparing them to pricing terms offered by POLRs in other areas of Texas, it would constrain the commission by requiring it to use as yard sticks pricing terms that may be based on a different set of circumstances and different cost

structures. AEP's suggestion would be illogical and inconsistent with the commission's duty under PURA §39.101(a)(1). In addition, it would serve to indicate to bidders what range of prices the commission is bound to accept and would result in bids set at the highest price to be found for POLR service in other areas of the state.

In subsection (i)(3), TXU suggested specifying that the commission may only require a certified REP to become the POLR in an area if the re-bidding process fails. EGSI proposed to change subsection (i)(3)(B) to say that the commission will not require an unwilling REP to serve two consecutive terms unless it finds that it is "in the public interest," rather than if it finds that it is "necessary". In connection with its response to Issue Number 9, OPC suggested that subsection (i)(3)(A) be modified to allow the commission the flexibility to appoint a REP to serve as POLR for such period as the commission may reasonably designate, but no less than one year.

The commission declines to adopt TXU's proposal that the commission may require a certified REP to become the POLR in an area only if the re-bidding process fails. PURA §39.106 gives the commission broad authority in deciding the means by which to designate a POLR, and the commission finds that placing such constraint as suggested by TXU is not necessary and may leave the commission unable to select a POLR if, for unforeseen reasons, it becomes necessary to do so. The commission adopts EGSI's suggested revision as it finds that this revision serves to clarify the intended meaning of the proposed rule. The commission agrees with OPC that it must maintain flexibility with respect to its duty to designate a POLR when a competitive bidding process fails. In fact, that flexibility will be most

important when the competitive bidding process fails. Therefore, the commission adopts OPC's suggested revision to subsection (i)(3)(A), except that the commission eliminates the minimum requirement of one year for the appointed POLR term since there may be cases when the commission may have to appoint a REP to finish the POLR term of an existing POLR. The revision works in concert with subsection (i)(3)(B) to give the commission the flexibility it needs to ensure that there is continuity in reliable POLR service in any service area. Additionally, to maintain maximum flexibility in its ability to appoint POLRs when the bid process fails, the commission adds language to indicate that it retains the authority to consider other options for appointing POLRs if the bid process fails when good cause exists.

TXU suggested modifying proposed subsection (i)(5) to specify that the commission shall repeat the POLR selection process six months before the POLR's term ends.

The commission finds it prudent to retain the discretion to adjust the time period for repeating the POLR selection process and therefore declines to adopt this recommendation.

Subsection (j) – Termination of POLR status

TXU proposed clarifying language for subsection (j)(1)(C) and (j)(2) that specifically defines "due process" as a notice and a hearing.

The commission finds that in some cases, a hearing may not be necessary and retains the current rule language.

TXU proposed adding a subsection (j)(2)(C) that requires the departing POLR to arrange with the new POLR to have existing customers on POLR service switched according to the customer choice switching protocols established by the Independent Organization and approved by the commission.

The commission finds this language unnecessary since switching can only occur through the Independent Organization.

AEP suggested that subsection (j)(1)(C) is vague and only subsections (j)(1)(A) and (B) are necessary.

The commission determines that subsections (j)(1)(A) and (B) are not exhaustive of the procedures for termination. There was a great deal of compromise in this rulemaking proceeding and adding subsection (j)(1)(C) was part of a compromise reached among the workshop participants. Therefore the commission disagrees with AEP and reserves the right to impose penalties for good cause provided the commission affords the failing POLR due process.

EGSI proposed that language be added to strengthen the process of notification of deficiency to the POLR. EGSI's proposal would require that the commission provide at least 15 days to clear the deficiency.

The POLR rule does not attempt to impose different rules than are already in place for enforcement. Therefore the commission disagrees with EGSI's proposed language change.

Subsection (k) - Procedures and criteria for POLR selection.

TXU suggested indicating in subsection (k)(2) that the threshold criteria apply to all prospective bidders that are not required to be certified REPS.

The commission has determined that only certified REPs are eligible to serve as POLR, except that if a REP has applied for certification and its certification is pending, the REP may submit a bid for providing POLR service. The commission modifies subsection (i) to reflect this clarification. The commission further determines that the threshold criteria listed in the proposed rule apply to all prospective bidders, including certified REPs. The commission acknowledges that some of the listed threshhold criteria may appear to subject certified REPs to an unnecessary second level of scrutiny but believes that verification of bidders' REP status is justified. Therefore the commission declines to adopt TXU's proposed change.

TXU proposed to adopt a new subsection (k)(2)(E) to indicate that bidders must, in order to qualify, be able to meet the requirements of the commission's rule relating to the terms and conditions of retail distribution service provided by TDUs.

The commission declines to adopt TXU's proposed new subsection (k)(2)(E) as unnecessary. The Terms and Conditions for Retail Distribution Service rule currently being developed will include the necessary requirements for all REPs, including the POLR.

TXU proposed to substitute the term "determining criterion" for "tie-breaking criterion" in subsection (k)(4).

The commission finds that "tie-breaking" and "determining" as they are used in this subsection are nearly synonymous, and therefore finds it unnecessary to make this change.

Subsection (m) - Electric Cooperative delegation of authority to the commission for the designation of a POLR.

A new subsection (m) was proposed by TEC to set forth a procedure by which an electric cooperative could delegate to the commission the selection of a POLR in the cooperative's service area.

Consistent with its determination under Issue Number 8 that electric cooperatives may delegate their authority to the commission for the designation of a POLR in their service territory the commission adopts subsection (m) to describe the conditions under which this delegation of authority may occur.

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 section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2000) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, §39.106, which requires that the commission designate, no later than June 1, 2001, one or more REPs to serve as POLRs.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 39.101, 39.106, 39.107, 39.151, 39.903, and 41.053(c).

§25.43. Provider of Last Resort (POLR).

(a) **Purpose.** The purpose of this section is to ensure that, as mandated by the Public Utility Regulatory Act (PURA) §39.106:

(1) A basic, standard retail service package will be offered by a POLR at a fixed, non-discountable rate to any requesting customer in all Texas transmission and distribution utilities' (TDUs) service areas that are open to competition; and

(2) All customers will be assured continuity of service if a retail electric provider (REP) terminates service in accordance with the termination provisions of the commission's Customer Protection Rules for Retail Electric Service.

(b) **Application.** This section applies to REPs that may be designated as POLRs in TDU service areas in Texas. This section does not apply when an electric cooperative or a municipally owned utility (MOU) exercises its right to designate a POLR within its certificated service area. However, this section is applicable when an electric cooperative delegates its authority to the commission in accordance with subsection (m) of this section to select a POLR within the electric cooperative's service area.

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

(1) **Appointed POLR** — A REP required to serve as POLR by the commission in the absence of a qualified winner of the competitive bidding process.

(2) **Awarded POLR** — A REP selected by the commission to serve as POLR through the competitive bidding process.

(3) **Basic firm service** — Electric service not subject to interruption for economic reasons and that does not include value added options offered in the competitive market. Basic firm service excludes, among other competitively offered options, emergency or back-up service, and stand-by service.

(4) **Default customer** — A customer who is automatically assigned to be served by the POLR because the customer is no longer served by the customer's selected REP, including a customer who is unable to obtain electric service from a REP.

(5) **Designated POLR** — A POLR who is either appointed by the commission or selected through a solicitation of bids.

(6) **Fixed rate** — A rate that is established when the POLR is designated and does not change over the term of the POLR, except that the POLR rate may reflect changes due to non-bypassable charges. A fixed rate may be structured so as to reflect a seasonal differential.

(7) **Hedged rate** — A rate that contains no market-indexed energy component. When a hedged rate is offered, it is up to the POLR to mitigate the risk associated with energy price fluctuations.

(8) **Large non-residential** — A non-residential customer with a peak demand above one megawatt.

(9) **Non-discountable rate** — A rate that does not allow for any deviation from the price offered to all customers within a class, except as provided by the rate reduction program of the commission's rules relating to the System Benefit Fund.

(10) **Provider of last resort (POLR)** — A REP certified in Texas that has been designated by the commission to provide a basic, standard retail service package to requesting or default customers.

(11) **Requesting customer —** A customer who voluntarily selects the POLR to provide electric service.

(12) **Residential customer —** A customer taking service at the customer's place of residence provided it is not a master-metered, multi-family facility or a facility metered as a commercial facility.

(13) **Small non-residential customer —** A non-residential customer with a peak demand of one megawatt or below.

(14) **Variable rate —** A rate that results from a pricing mechanism that contains a market-indexed energy component and that may vary from time-to-time to reflect market energy price fluctuations.

(d) **POLR service.**

(1) For the purpose of POLR service, there will be three classes of customers: residential, small non-residential, and large non-residential.

(2) The POLR may be designated to serve any or all of the three customer classes in a POLR area. Within the customer class it is designated to serve, the POLR shall provide service to the following customers:

(A) Any customer requesting POLR service; and

(B) Any customer not receiving service from its selected REP for any reason who is automatically assigned to the POLR.

(3) The POLR shall offer a basic, standard retail service package, which will be limited to:

(A) Basic firm service;

(B) Call center facilities for customer inquiries;

(C) Standard retail billing (which may be provided either by the POLR or another entity);

(D) Benefits for low-income customers as provided for under PURA §39.903 relating to the System Benefit Fund; and

(E) Standard metering, consistent with PURA §39.107 (a) and (b) (which may be provided either by the POLR or another entity).

(4) The POLR shall, in accordance with §25.108 of this title (relating to Financial Standards for Retail Electric Providers Regarding the Billing and Collection of Transition Charges), provide billing and collection duties for REPs who have defaulted on payments to the servicer of transition bonds or transmission and distribution utilities.

(e) **Standards of service.**

(1) A REP who has been designated by the commission to serve as POLR for a class in a given area shall serve any or all requesting or default customers in that class.

(2) A POLR shall abide by the applicable customer protection rules as provided for under Subchapter R of this chapter (relating to Customer Protection Rules for Retail Electric Service). In addition, the POLR shall be held to the following general standards:

(A) The POLR shall inform any default customer assigned to it that it is now providing service to the customer and disclose all charges the customer will be responsible for;

(B) The POLR shall provide default customers and any customer who inquires about selecting a provider a commission maintained list of certified REPs;

(C) The POLR may not require that a customer sign up for a minimum term as a condition of service. When the POLR offers a level or average payment plan in accordance with the commission's customer protection rules, a residential or small non-residential customer who elects to receive service under such plan may be required to sign up for a minimum term of no more than six months.

(f) **POLR rate.**

(1) The POLR rate shall be established through the competitive bidding process. In the event that the competitive bidding process fails under circumstances described in

subsection (i)(3) of this section, the POLR rate may be established through negotiations between the commission and an appointed REP. If a REP is appointed to become the POLR in its affiliated transmission and distribution utility (TDU) service territory, the rate will be set at the price to beat (PTB) for residential and small non-residential customers prior to January 1, 2005 or until the affiliated REP loses 40% of its customers in each customer group.

(2) Fixed non-discountable rate. The POLR shall offer one fixed rate for each class of customers identified in this section that will meet the following requirements:

(A) the rate shall be non-discountable, except for the rate discount provided for by the rate reduction program of the commission's rules relating to the System Benefit Fund;

(B) the rate shall be a hedged rate; and

(C) the rate shall be seasonally differentiated.

(g) **Separation of service.** The POLR shall maintain separate accounts for its competitive REP business and its POLR business and keep its REP business separate from its POLR function. In addition, the POLR shall abide by the following provisions:

(1) The POLR and its affiliated REP may share the same facilities, but the POLR shall have a separate phone number.

(2) The POLR and its affiliated REP may share employees.

(3) An employee answering the POLR phone line will read from a script to describe POLR service and will not market the services of the POLR's affiliated REP. If the customer asks about the services of the POLR's affiliated REP's, the employee may only give the caller the REP's telephone number.

(4) The commission may authorize the registration agent of the Independent Organization to provide to REPs and aggregators a periodically updated mass customer list of customers served by the POLR containing information similar to the information that the registration agent is authorized to release under the commission's customer protection rules. The POLR's affiliated REP may not use the POLR's customer list to market its services unless the list is made available to other REPs through the registration agent.

(h) **Transition from REP to POLR service.**

(1) POLR service for a requesting customer is initiated when the customer makes arrangements for service.

(2) If the applicable Independent Organization, as specified by PURA §39.151, becomes aware that a REP is no longer scheduling for a customer, it will notify the POLR that the customer is switched to POLR service in accordance with the operating rules of the Independent Organization.

(3) If the REP terminates service to a customer whose consumption is determined by monthly meter readings without giving notice, the POLR shall prorate the customer's usage based on the customer's historic data or load profile to establish the customer's

charges for the relevant portion of the billing cycle, unless the customer requests and is willing to pay for an out-of-schedule meter read. Nothing in this section precludes a POLR from having an out-of-cycle meter read performed for a new customer on its own initiative provided the POLR does not pass on the cost of the meter read to the customer.

(4) The POLR is responsible for obtaining resources and services needed to serve the customer once it has been notified that it is serving the defaulting REP's customers. The customer is responsible for charges for POLR service at the POLR rate from that time.

(5) If a REP terminates service to a customer, it is financially responsible for the resources and services used to serve the customer until it notifies the Independent Organization of the termination of the service and until the switchover to the POLR is complete.

(6) The POLR is financially responsible for all costs of providing electricity to customers from the time the switchover is complete until such time as the customer leaves POLR service.

(i) **Selection of the POLR.** The commission shall designate certified REPs, or REPs that have applied for certification and meet REP certification requirements, to serve as POLRs in areas of the State in which customer choice is in effect no later than June 1, 2001, and as required when the term of a POLR ends thereafter, except that the commission shall not designate the POLR in the service areas of MOUs or electric cooperatives unless an electric cooperative has delegated its POLR designation authority to the commission in accordance with subsection (m) of this

section The first term for POLR service begins January 1, 2002 in all areas open for competition on that date.

(1) The commission will use a competitive bidding process to select the POLR for each customer class in each designated POLR service area.

(A) A bidder may submit a bid to serve the residential, small non-residential or the large non-residential class. A bidder may submit a bid for more than one class. Bids will be evaluated independently for each class.

(B) A REP may not submit a bid to provide POLR service to the residential and small commercial customer classes in its affiliated TDU service territory during the years when the PTB is in effect. A REP may submit a bid to provide POLR service to non-PTB customers in its affiliated TDU territory.

(C) The commission will consider bids for one-year or two-year terms.

(2) The competitive bidding process fails if:

(A) The commission does not receive any bids from qualified bidders for a given customer class in a given area; or

(B) The terms and conditions of the bids received are unreasonable, as determined by the commission.

(3) If, in a customer class or area, the competitive bidding process fails, the commission may investigate why the bidding process was unsuccessful and re-bid the service with modifications, or the commission may appoint any certified REP serving a customer class in an area to become the POLR for that customer class in that area. Additionally,

for good cause the commission may use other options for appointing POLRs if the bid process fails. If a REP is appointed to serve as POLR, the following terms and conditions will apply:

(A) The appointed REP will serve as POLR for a one-year term, or for such a period as the commission may reasonably designate.

(B) The commission will not appoint an unwilling REP to serve in an area for two consecutive terms unless it finds that requiring such REP to serve two consecutive terms is in the public interest.

(4) The affiliated REP may not be appointed to serve as POLR in its affiliated TDU area unless no other REP applies to serve that area or the commission rejects all bids for that area.

(5) If the commission determines that the bidding process fails under paragraph (2) of this subsection, the commission will negotiate the POLR price for each customer class with the appointed REP. The commission shall negotiate the rate for each class separately to ensure cross subsidization among classes does not occur.

(6) Before the POLR's term of service comes to an end so as to ensure timely continuation of service the commission shall repeat the initial selection process.

(7) When a POLR's term of service comes to an end, responsibility for the POLR's customers will be transferred to the newly designated POLR.

(j) **Termination of POLR status.**

(1) The commission may revoke a REP's POLR status:

(A) If the POLR fails to maintain REP certification;

(B) If the POLR fails to provide service in a manner consistent with the commission rule relating to POLR service after it is provided up to 60 calendar days' notice of the deficiency; or

(C) At the commission's discretion for good cause provided the commission affords the failing POLR due process.

(2) A POLR that wishes to terminate its obligations must inform the commission of the actions it is planning to take to ensure a smooth transition.

(A) The departing POLR may, with the approval of the commission, transfer its POLR obligations to a qualified REP willing to assume the departing POLR's terms of service.

(B) The departing POLR shall notify its customers and inform them of the transfer of POLR obligations to a new POLR at least 60 days before the transfer takes place.

(C) If a POLR terminates its obligations without properly informing the commission and the customers and ensuring a smooth transition, the POLR will be subject to the penalties provided for in §25.107(j) of this title (relating to the Certification of Retail Electric Providers (REPs)).

(3) If a POLR defaults or has its status revoked before the end of its term, the commission may appoint any certified REP serving a customer class in an area to become the POLR

for that customer class in that area until a new POLR is awarded or appointed to serve at a negotiated rate. The conditions of service under subsections (d)-(g) of this section apply to the interim POLR.

(k) **Procedures and criteria for POLR selection.**

(1) The general procedure for the request for proposals (RFP) to select the POLRs will be as follows:

(A) The commission staff will develop an RFP for commission approval.

(B) A commission staff evaluation team will evaluate the proposals submitted in response to the RFP.

(C) The evaluation team will forward its recommendation to the commission.

(2) The following threshold criteria will be used to determine whether bidders qualify:

(A) Bidder's competence and qualifications, including prior REP experience. The bidder should demonstrate that it has retail experience and that it has staff with sufficient electric experience.

(B) Quality of the bidder's activity plan, including its demonstrated readiness to provide service at the beginning of the term of POLR service.

(C) Minimum standards for technical and managerial resources consistent with §25.107(g) of this title.

(D) Minimum standards for financial strength consistent with §25.107(f) of this title.

(3) The proposals of qualified bidders will be evaluated on the basis of the proposed rates for each customer class.

(4) If two or more qualified bidders bid equal rates, the commission will enter into price negotiations with each bidder. If the tie is not resolved through negotiations, contribution to enhancement of market competitiveness will be the tie-breaking criterion.

(l) **Service areas.** The RFP will describe the service areas. The POLR service area should be no larger than an existing TDU service area, and may be smaller. When a TDU service area is divided into smaller areas, the commission will attempt to divide the service area so that the customer composition of the smaller areas will reflect that of the larger TDU service area.

(m) **Electric cooperative delegation of authority.** An electric cooperative that has adopted customer choice may propose to delegate to the commission its authority to select a POLR under PURA §41.053(c) in its certificated service area in accordance with this section. The commission will, at its option, accept or reject such delegation of authority. If the commission accepts the delegation of authority, the following conditions will apply:

(1) the board of directors will provide the commission with a copy of a board resolution authorizing such delegation of authority;

(2) the delegation of authority will be made at least 30 days prior to the time the commission issues a request for proposals to establish a POLR for a contiguous or surrounding TDU service area;

(3) the delegation of authority will be for a minimum period corresponding to the period for which the solicitation will be made;

(4) the electric cooperative wishing to delegate its authority to designate a POLR will also provide the commission with the authority to select the criteria and procedures to be used in selecting the POLR within the electric cooperative's certificated service area; and

(5) if the competitive bidding process that includes the electric cooperative certificated area fails, the commission's delegated authority is extinguished, and such authority reverts to the electric cooperative.

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 §25.43 relating to Provider of Last Resort is hereby adopted with changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE 19th DAY OF OCTOBER 2000.

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