PROJECT NO. 22816

RULEMAKING PROCEEDING TO DEVELOP STANDARDS FOR THE LABELING OF ELECTRICITY WITH RESPECT TO FUEL MIX AND AIR EMISSIONS	**§ § § § §**	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER ADOPTING NEW §25.476, RELATING TO LABELING OF ELECTRICITY WITH RESPECT TO FUEL MIX AND ENVIRONMENTAL IMPACT, AS APPROVED AT THE AUGUST 23, 2001 OPEN MEETING

The Public Utility Commission of Texas (commission) adopts new §25.476, relating to Labeling of Electricity with Respect to Fuel Mix and Environmental Impact, with changes to the proposed text as published in the May 18, 2001 *Texas Register* (26 TexReg 3587). The rule is necessary to further the Legislature's goals as set forth in the Public Utility Regulatory Act (PURA) §39.101 to ensure that residential and small commercial electricity customers in areas of retail competition: (a) receive sufficient information to make an informed choice of service provider; (b) are protected from unfair, misleading, or deceptive practices; and (c) are provided with information in a standard format that will permit comparison of the environmental impacts associated with certain production facilities. The provisions of this section govern how retail electric providers (REPs) and affiliated REPs calculate the fuel and emissions components of the Electricity Facts label (EFL) as required under §25.475 of this title (relating to Information Disclosures to Residential and Small Commercial Customers). This new section is adopted under Project Number 22816.

An earlier version of this rule was proposed in the February 2, 2001 issue of the *Texas Register* (26 TexReg 1051). The commission subsequently found that the use of the term "power

generation company" was too narrow for the purposes of the proposed rule, however, and decided to republish the rule replacing that term with the more inclusive "owner of generation assets." Republication was necessary because the new term expanded the scope of affected parties beyond what was originally published. In its decision to republish, the commission also decided to defer a number of other changes until final adoption. These changes were included in a memorandum from Chairman Pat Wood, III to Commissioner Brett A. Perlman, filed April 18, 2001, and discussed at the commission's April 24, 2001 open meeting.

Broadening the scope of this rule affected issues in Docket Number 23802, *Proceeding to Consider Section 14 of the ERCOT Protocols (Severed from Docket No. 23220)*, with the most significant common issue being the treatment of renewable energy credit (REC) offsets. The commission's final order in that docket resolved key issues for most parties, however, eliminating the need for special provisions in this rulemaking to accommodate REC offset holders.

A public hearing on the proposed section was held at commission offices on June 21, 2001, at 9:30 a.m. Representatives from Central Power and Light Company, Southwestern Electric Power Company, and West Texas Utilities Company (collectively, American Electric Power Company, Inc. (AEP)), the City of Austin d/b/a Austin Energy (Austin Energy), Brazos Electric Power Cooperative, Inc. (Brazos), Brownsville Public Utilities Board, East Texas Cooperatives (ETEC), the Electric Reliability Council of Texas (ERCOT), Entergy, Green Mountain Energy Company (Green Mountain), Lower Colorado River Authority (LCRA), Reliant Energy, Inc. (Reliant), Southwestern Public Service Company (SPS), Texas Ratepayers' Organization to Save

Energy and TXU Electric Company (TXU) attended the hearing and provided comments. To the extent that these comments differ from the submitted written comments, such comments are summarized herein. No further comments were accepted after the public hearing.

The commission received written comments on the proposed new section from AEP; Austin Energy; Brazos; City Public Service Board of San Antonio (San Antonio); El Paso Electric Company (EPE); ETEC; Environmental Defense; ERCOT; Green Mountain; Enron Energy Services Inc, The New Power Company, and Strategic Energy Ltd. (collectively, Independent Marketers); LCRA; Linda Hajek; Public Citizen; Reliant; SPS; South Texas Electric Cooperative, Inc. (STEC); State of Texas; Texas Electric Cooperatives, Inc. (TEC); Texas Ratepayers' Organization to Save Energy, Consumers Union Southwest Regional Office, Texas Legal Services Center, and AARP (Consumer Commenters); Texas Renewable Power Coalition (TRPC); TXU; and the U.S. Department of Energy (DOE).

All section numbers cited in the following summary correspond to the rule as published in the May 18, 2001 issue of the *Texas Register*. Unless specifically indicated otherwise, all references are to §25.476.

COMMENTS ON QUESTIONS PUBLISHED FEBRUARY 2, 2001

Question No. 1: Should the commission require a competitive retailer to disclose the megawatt-hours (MWh) of electricity it sells under each of its various products, as proposed under subsection (g)(7)(A), if those products are marketed with different fuel mix and environmental

disclosures? If not, how should the commission verify that a competitive retailer has not sold more electricity under a "green" or "renewable" label than it obtained from its suppliers?

AEP, Consumer Commenters, Environmental Defense, Green Mountain, Independent Marketers, Public Citizen, Reliant, SPS, State of Texas and TXU said that the report required under subsection (g) was an appropriate method for ensuring that competitive retailers have not sold more of a specific energy product than the retailer has actually acquired. Independent Marketers agreed with TXU that the disclosure of such information *to the commission* will enable the commission to verify the information, but cautioned that this will be highly sensitive, competitive information and must be protected from further disclosure (emphasis in original comment). Citing PURA §39.001(b)(4), which provides that it is in the public interest to protect the competitive process in a manner that ensures the confidentiality of competitively sensitive information, Independent Marketers argued that the megawatt hour sales of each product will be competitively sensitive information which must therefore be protected from disclosure to persons outside the commission. Green Mountain, Reliant and TXU made similar arguments. Similarly, Environmental Defense suggested that if retailers have competitive concerns about this information, they should submit it under seal so that the accuracy of their disclosures could be verified by the commission. On the other hand, State of Texas said it did not see the merit in affording confidential treatment to the information, and that general principles of open government and public access to information should prevail. Public Citizen said the information should not only be provided to the commission but should also be posted on the Internet.

The commission agrees with Independent Marketers and other parties that disclosure to the commission is a reasonable tool for evaluating the marketing claims regarding fuel mix or emissions. The commission recognizes that retailers may regard some of this information as competitively sensitive, however. PUC Procedural Rule §22.71 provides a method by which REPs may declare documents confidential and submit those under seal. PURA §39.001(b)(4) also mandates that it is in the public interest to protect the competitive process in a manner that ensures the confidentiality of competitively sensitive information during the transition to a competitive market and after the commencement of customer choice. The commission requires REPs to fully disclose all information required under §25.476, and a REP may file its report according to Procedural Rule §22.71. The commission will apply the standard of PURA §39.001(b)(4) in determining whether a presumption of confidentiality is appropriate, and amends §25.476(b) accordingly. The commission also acknowledges that it is bound to follow the requirements of the Texas Government Code Chapter §552.001, *et. seq.*, the Texas Public Information Act (PIA). As with all requests for information, the commission will comply with the PIA's requirements in determining whether to release information.

Independent Marketers also stated that there should be no required disclosure of megawatt hour sales regarding a retailer's standard product or regarding products for which the retailer does not associate with a specific fuel mix or specific emissions marketing claim.

The commission disagrees with Independent Marketers and finds that megawatt hour sales regarding a retailer's standard product should be required regardless of whether or not the retailer is making a specific fuel mix or specific emissions marketing claim. Data for all products are

mathematically essential for calculating the overall residual or default scorecard described in subsection (e), which in turn is essential for more accurate disclosures to customers. The purpose of this rule will still be served, however, if the retailer wishes to aggregate data for all products carrying the same fuel and emissions profile. The disclosure is still required, however, regardless of how the retailer markets the products.

TEC asserted that proposed §25.476(g)(1) conflicts with the statutory provisions of PURA §41.004(5), while San Antonio said the section conflicts with PURA §40.004(7). TEC recommended revision of the proposed rule text to clarify that §25.476(g)(1) applies to entities other than an electric cooperative (co-op) or a municipally owned utility (MOU). San Antonio urged the commission to make the reporting requirements proposed under subsection (g)(1) voluntary rather than mandatory for MOUs because the requirement, as proposed, is outside the scope of the reports that may be required by the commission under PURA §40.004(7).

Environmental Defense responded to TEC's and San Antonio's assertion and commented that if MOUs and co-ops are not required to report the information, authentication of these entities' facts labels would be impossible. Environmental Defense commented that these entities generally purport to be responsive to their customers; therefore, Environmental Defense found it curious that these entities are now reticent to disclose information that would authenticate the electric products that they offer. Environmental Defense concluded that unless every entity that provides competitive retail electric services is subject to the same requirements regarding EFLs, then customers' ability to make informed decisions about the electricity products available in the market is seriously weakened.

The commission shares the concerns of Environmental Defense and agrees that if municipally owned utilities and electric cooperatives are not required to report the information, authentication of what they tell their customers will be nearly impossible. The commission disagrees with San Antonio and TEC that §25.476(g)(1) is in conflict with PURA §40.004(7) and §41.004(5) with respect to municipally owned utilities and electric cooperatives operating as competitive retailers outside their certificated service territories. The commission reminds all commenters of its decision in the order adopting Chapter 25 Subchapter R, Customer Protection Rules for Retail Electric Service:

"The commission agrees that these customer protection rules apply to customers served by an electric cooperative or municipally owned utility operating outside of its certificated service area. …The commission also determines that PURA §17.005 and §17.006 give an electric cooperative or municipally owned utility the authority to adopt and enforce its own customer protection rules for customers *inside its certificated service area*, which must meet the customer protection objectives of PURA. The commission's rules should serve as a model for the minimum customer protections that all customers can expect in a competitive market." (*Customer Protection Rules for Retail Electric Service,* Project No. 22255, Order (December 20, 2000) at 307, emphasis added.)

The commission further notes that as §25.476 will be part of Subchapter R, the term "competitive retailer" as used in this rule is defined in §25.471(d)(3), which includes MOUs and co-ops that have opted into competition only to the extent that they operate outside their

certificated service areas. Therefore, the reporting required by §25.476(g)(1) does not apply to service by an MOU or co-op within that entity's certificated service area. Within its certificated service area, however, an MOU or co-op may voluntarily use the provisions of this rule as a mechanism for its own electricity labeling, if offered, and may voluntarily report supplier information as San Antonio suggests.

Question No. 2: The proposed rule allows electricity generated outside of Texas to be included in a competitive retailer's fuel and environmental disclosure if there is a supply contract between the competitive retailer and the owner of the out-of-state generation facility (subsection (g)(2)). However, subsection (f) excludes non-Texas facilities from the proposed certificates program. Does this allow a competitive retailer sufficient means to authenticate its use of out-of-state generation to meet customer demand in Texas?

AEP, Environmental Defense, Independent Marketers, Reliant, SPS, State of Texas and TXU said the rule as proposed provides sufficient means for REPs to authenticate out-of-state generation. Green Mountain also supported the provision, but suggested language that would allow authentication through power marketers who have direct contracts with power generation companies (PGCs) and can provide the contract documentation needed to verify fuel and emission sources for generating facilities used to serve a REP's load. AEP sought clarification on the timing of reporting out-of-state contracts used to support fuel mix and environmental impact claims.

The commission declines to expand §25.476(g)(2) as suggested by Green Mountain. Tracking purchases through power marketers raises the kind of technical and accounting difficulties the commission has sought to avoid throughout this rulemaking. However, the commission has no objection to reporting under this section, where a power marketer acts as a broker between a specific generator and a specific retailer, as long as the result is a supply contract that involves no other generator or retailer. Otherwise, supplies purchased by a retailer from a power marketer are considered system power and shall be represented by the default scorecard. With regard to timing, the commission modifies §25.476(g) to clarify that information pertaining to out-of-state supply contracts must be included in the retailer's six-month supply reports.

AEP noted that PURA §39.9044(d)(2) specifies that electricity generated from natural gas may be marketed as "green" only if the natural gas is produced in Texas, and that the proposed rule does not address this distinction. State of Texas also suggested adding language specifying that when out-of-state supply contracts are used for green energy, natural gas cannot be included as a component of that supply. Similarly, Public Citizen said that a REP should be able to use non-Texas renewable or green power in its disclosures to customers only if it can provide data that are functionally equivalent to what is required under Texas rules. Consumer Commenters said that non-Texas resources should be subject to the same verification procedures as in-state resources.

The commission finds that it is not necessary to distinguish between Texas and non-Texas natural gas with respect to the fuel mix calculations described in this rule. Natural gas produced in New Mexico, Oklahoma or Louisiana may not qualify as "green" under PURA

§39.9044(d)(2), but it is still natural gas and therefore should be shown as such in the fuel mix on the Electricity Facts label. PURA §39.9044(d)(2) pertains only if the retailer plans to market the power as "green." The commission therefore adds new paragraphs to §25.476(d) and (g)(1) specifying that if a retailer intends to tell customers that the natural gas in its fuel mix is "green," it must provide the commission with proof that the natural gas was produced in Texas.

Question No. 3: Subsection (d) of the proposed rule sets forth a general principle for marketing electricity products as "green" or "renewable." Should the proposed rule set such standards, and if so, what should they be? If there is to be a fixed benchmark for marketing an electricity product as 'green,' how much of the fuel mix should be renewable or natural gas? How much should come from renewable fuels before it can be sold to customers as "renewable"?

SPS, Public Citizen, State of Texas, Consumer Commenters, and Environmental Defense all supported fixed benchmarks for marketing "green" and "renewable" products. SPS, State of Texas, and Environmental Defense agreed that energy products labeled "renewable" should be 100% renewable generation sources. SPS, Public Citizen, and State of Texas said that power marketed as "green" should come from generation sources that use only natural gas. Consumer Commenters, however, said that any product marketed as "green" should be 100% renewable. Replying to SPS, Environmental Defense argued that it should be permissible to count generation from either natural gas or renewable sources as "green," otherwise customers would likely be confused.

TXU, AEP, Reliant Energy, Independent Marketers, TRPC, and Green Mountain all opposed fixed benchmarks. TXU and AEP argued that if customers do not know the criteria used, the benchmarks may be confusing. In addition, the two companies stated that a benchmark would not allow consumers the opportunity to choose products that only in part contain "green" or "renewable" energy if their products fail to meet the criteria. Green Mountain, Independent Marketers, Reliant, San Antonio, and TXU argued further that the fixed benchmark for marketing "green" or "renewable" energy retards product differentiation. Independent Marketers argued that setting benchmarks "would be analogous to removing the detailed information required by law on current food labels concerning grams of fat, protein, carbohydrate, etc." In its reply comments, Green Mountain said that a fixed benchmark is not a protection against misleading claims by retailers and could possibly retard the growth of the market for renewable generation.

State of Texas and Environmental Defense agreed that it would be appropriate for companies whose products do not meet a benchmark to label their products with the percentage of "green" and "renewable" as long as the claim was accurate. To this end, State of Texas suggested amending subsection (d)(1) so that it corresponds to subsection (d)(2): "A product may be marketed as 'green' without reference to a fuel mix percentage only if the product's authenticated fuel mix is 100% 'green.'" TRPC, however, suggested modifying subsection (d)(1) so that marketing statements about a "green" product include the individual percentage of natural gas and the individual percentage of renewable energy, rather than the sum of the two. Similarly, Consumer Commenters said that when renewable power sources are combined with other resources, all advertising and all marketing materials should specifically state the renewable

percentage. Public Citizen argued that so little renewable energy exists that it should be marketed as a percentage. Environmental Defense agreed with the revision proposed by State of Texas, but added that "green" should also include a combination of natural gas and renewable energy and that a product composed of 100% renewables should also qualify as "green."

TXU, however, said subsection (d)(1) should be modified so that the retailer does not have to disclose its product's mix percentage. Rather, it argued, there should be an option in the rule for retailers to state the "availability of such information." Environmental Defense disagreed, arguing that the furthest the TXU proposal could be taken would be to clarify that a competitive retailer or affiliated REP "may market an electricity product as 'green' or 'renewable' if the criteria in the subsections are met."

The commission agrees with Consumer Commenters, Environmental Defense, Public Citizen, SPS and State of Texas that a fixed benchmark should be established for the marketing of "green" and "renewable" sources. The aim of the Electricity Facts label is to give consumers a clear, informative and accurate guide to the electricity available to them. Therefore, the commission finds that power marketed as "renewable" should comprise 100% renewable sources. Likewise, power marketed as "green" should comprise electricity generated 100% from renewable energy, Texas natural gas, or any combination of the two. While the commission is sympathetic to TRPC's suggestion that the renewable energy and natural gas percentages be disclosed separately on marketing materials, the commission finds that the same end will be accomplished by a disclaimer: "A green product may include Texas natural gas and renewable energy. See the Electricity Facts label for this product's exact mix of renewable energy and

Texas natural gas." This allows a retailer more flexibility in advertising while at the same time directing the customer's attention to the Electricity Facts label.

Question No. 4: PURA §39.262 requires affiliated power generation companies (PGCs) to auction entitlements to 15% of their generating capacity. Section 25.381, relating to Capacity Auctions, establishes four kinds of capacity auction products, three of which are fueled by natural gas and the other by coal, lignite, and nuclear energy. How should the proposed labeling rule treat the fuel mix and associated emissions of generation that a retail electric provider (REP) acquires under capacity auctions?

TXU noted that under §25.381, relating to Capacity Auctions, entitlements are not plant specific but rather are for system capacity. PGCs will know which of its plants will be available to generate power for each auction category, however. A category scorecard can be calculated from the characteristics of all units identified for possible dispatch in that auction. TXU also noted a much easier path would exist under the proposed rule if a REP wished to differentiate a product: it could acquire RECs or certificates of generation. Reliant commented that if capacity is acquired through one of the three natural gas generation auctions, it should be considered "green." Consumer Commenters and Public Citizen said that each capacity auction product will have emission characteristics that should be part of the purchasing REP's product mix, and that these characteristics should be adjusted annually. Environmental Defense and Independent Marketers said that capacity auction purchases should be treated in the same manner as electricity obtained through a supply contract with the PGC. AEP, Independent Marketers, SPS

and State of Texas said capacity acquired at auction should be treated in the same manner as all other sources of energy.

Because capacity auction products are not plant-specific, power acquired under a capacity auction cannot be treated in the same manner as all other sources of energy. The commission finds that TXU's proposal for capacity auction scorecards is reasonable, feasible and consistent with §25.381. Subsection (e) is amended to include TXU's proposal. The commission further finds that this approach is consistent with the points made by Consumer Commenters and Public Citizen.

COMMENTS ON QUESTIONS PUBLISHED MAY 18, 2001

The first two questions published by the commission on May 18, 2001 involved the certificates of generation program described in subsection (f). Indeed, a large portion of the comments received by the commission concerned the certificates program either directly or in connection with other aspects of the rule. After reviewing the various comments summarized below, the commission finds that the proposed certificates of generation program should not be a mechanism for Electricity Facts label disclosures during the first year of full competition. Whether and how such a program could enhance product disclosures can only be determined with confidence after the competitive market has matured and participants' interests have been informed by actual experience. The reasons for this decision are set forth in the discussion below regarding original subsection (f) and the first two questions asked by the commission on May 18, 2001.

Question No. 1: Should owners of renewable energy generation assets have the option to split a plant's output between a certificate of generation and a renewable energy credit (REC) offset? If so, what procedure would ensure that the output is not double-counted?

AEP, EPE and LCRA said eligible facilities should be allowed to both qualify for REC offsets and issue certificates of generation. LCRA added that once a facility's output (either in part or in total) is converted from an offset to a certificate, there should be no reverting back to an offset. On the other hand, Reliant, TXU and ETEC said eligible facilities should be designated as REC offset generators or allowed to earn certificates of generation, but not both. Brazos said that the additional complexity of dividing the output would seem to outweigh the benefits of the certificate program itself.

The commission finds that the issue of splitting the output of eligible facilities between REC offsets and certificates of generation should be resolved when it has been determined that the certificates program is necessary. At that time, the commission will weigh the complexity cited by Brazos, ETEC, Reliant and TXU against the benefits anticipated by AEP, EPE and LCRA, in the context of the issues the program has to address.

Question No. 2: How should the optional certificates program accommodate generation from federally owned hydroelectric facilities whose output must be sold to municipally owned utilities and electric co-operatives?

DOE noted that the commission has no authority over federal agencies, including those that operate and sell power from federally owned hydroelectric facilities. Nevertheless, DOE said that if the commission were to include federally owned hydroelectric plants in the optional certificates of generation program for Texas, DOE would itself issue one-year certificates to its existing hydropower customers, and that such certificates could not be resold or otherwise transferred to another party without the approval of DOE.

Brazos, ETEC and STEC commented extensively on this question and more broadly on co-ops' disclosure obligations under the commission's proposed rule. All three said that given the commission's decision in Docket Number 23802, *Proceeding to Consider Section 14 of the ERCOT Protocols (Severed from Docket No. 23220)*, there was no need from their perspective to include federal hydroelectric resources that are currently accounted for by REC offsets in the proposed certificates program. STEC and Brazos said making federally owned hydro eligible for certificates as an alternative to REC offsets could jeopardize the co-ops' preference power and could create conflicts between the co-ops and the federal power marketing entities. STEC also said that the option to sell certificates could create conflict within a co-op's board of directors, consequently discouraging the board from opting into competition. In addition, ETEC said it would actually have less flexibility to take care of its member cooperatives' renewable resource needs if its offsets were converted to certificates because it does not actually own or control output from the hydro facilities and therefore would not own the certificates.

Relying upon the legal principles of mootness and jurisdiction, ETEC questioned the commission's purpose and the public policy reason for allowing REC offsets to be converted into

generation certificates. It cited PURA §17.006 and argued that the commission has only limited jurisdiction over competitive activities of distribution cooperatives which choose to opt into retail competition, and then only to the extent that the distribution co-op provides competitive retail service outside its certificated service area or otherwise served through other's distribution facilities. Even if a cooperative opts into retail competition, ETEC argued that the commission has no jurisdiction over the labeling or marketing activities inside that co-op's certificated service area. As an example, ETEC said that if a retailer (or opt-in distribution cooperative) chooses to resell the generation certificate to another party while retaining the electricity, the retailer is required under the rule to use the generator's scorecard to describe the attributes of retained electricity. ETEC questioned whether that provision prevents an opt-in distribution cooperative that sells the generation certificate associated with its REC offset from telling its retail customers, or its retail customers receiving a competitive rate, that the electricity they are buying is a product of renewable generation. ETEC challenged this perception, because hydro is renewable.

Brazos expressed that it does not share staff's opinion that the proposed rule is a viable vehicle for co-ops with REC offsets, asserted that commission Docket Number 23802 adequately addressed Brazos' REC offset concerns, and recommended that there is no further need to continue making this rule applicable to co-ops. Brazos opposed adoption of the rule, as proposed, because the commission lacks authority with regard to co-ops, the benefits of the compromise reached in Docket Number 23802 would be destroyed, and because preference power issues as applied to federal resources may affect co-ops adversely.

Aside from comments by the co-ops, TXU said the certificates program should treat federal hydro no differently than it treats other facilities. Green Mountain was concerned that the commission's lack of jurisdiction over the actions of the federal government made federal participation in the certificates program problematic. In addition, Green Mountain said competitive problems could arise by allowing government-subsidized facilities to participate in a program that was designed to be pro-competitive.

The commission appreciates DOE's interest and cooperation with respect to the proposed certificates of generation. The commission also acknowledges the concerns raised by the electric cooperatives with regard to the treatment of federally owned hydro and especially their desire that it not be possible to convert REC offsets to certificates without the consent of the offset holder. The status of REC offsets is controlled by §25.173 of this title (relating to Goal for Renewable Energy) and by the ERCOT Protocols, Section 14. In view of its decision not to adopt a certificates program now, the commission finds that questions relating to the conversion of REC offsets need not be addressed in this rulemaking.

Question No. 3: To simplify and streamline the reporting and calculation process, the commission has developed forms, spreadsheets, and templates, residing on the agency web-page, for data reporting from power generation companies (PGCs) and calculation of the generator scorecard. Prototype scorecards with supporting data can be found at http://www.puc.state.tx.us/rules/rulemake/22816/22816.cfm. The commission has also developed forms, spreadsheets and templates for retail electric provider (REP) calculation of fuel mix and emissions impacts, using the generator scorecards. These will be used for web-based reporting

and automated data compilation, to minimize compliance effort and cost for the parties and the commission. Parties are welcome to comment on these forms and spreadsheets, which will be adopted after comment as part of final rule adoption.

AEP said that the PGC scorecard unnecessarily complicates the implementation of the labeling rule with little or no real benefit. TXU recommended that the concept of the forms be incorporated into the adopted rule, but TXU believed the forms are complicated and should continue to be refined.

TXU commented that a retailer that does not wish to distinguish its power from default power should be able to simply report its total MWh sales as "Balance not accounted for" in the "Product" section, and should not be required to complete the "Contracts," "RECs," and "Certificates" sections of the spreadsheet. TXU further expressed concern over inconsistencies in the forms and spreadsheet with subsections (c)(1) and (g)(1)(A).

The commission disagrees with TXU. The Electricity Facts label is a tool for customers to use in making informed decisions regarding the purchase of electric power. It is not an optional marketing tool for REPs. The reporting requirements are for *all* REPs selling to residential and small commercial customers, regardless of whether they end up above or below average. The default scorecard is to be used only when the generation source is *not known* – i.e. for supplies purchased from power marketers, on the balancing energy market, or from some other source that does not have a commission-calculated scorecard. If the supplier has a scorecard, the scorecard must be used. This provision does not require the retailer to collect additional

information beyond what is already known by the retailer. The reporting requirement therefore does not constitute a significant burden or a barrier to market entry.

TXU stated that the spreadsheets should allow for power associated with a single certificate of generation, REC, and REC offset to be apportioned among one or more product labels, so long as the total aggregate electricity that is associated with all of those occurrences of the same certificate number does not exceed the total electricity represented by that certificate. TXU further suggested that the data for power associated with certificates of generation, RECs, and REC offsets should be automatically inputed into the forms and spreadsheets through a link to the databases maintained by the REC program administrator. In addition, TXU stated that in the interest of efficiency and accuracy, certificate, REC, and REC offset identification numbers should be entered in sequentially numbered blocks.

Additional changes or additions to the spreadsheets were suggested by TXU: (1) configure spreadsheets so that each tab is labeled with a title and instructions to correspond with the contents of the tab and the electricity product to which the data corresponds; (2) tabs should "roll up" so that one Electricity Facts label is produced for each product; (3) shading should clearly delineate which fields are protected and which are not; (4) roll-up scorecard summary table should contain the information described in §25.476(e)(2); (5) "total" line or "weighted average" line, as appropriate, should be included on each spreadsheet; (6) each spreadsheet should ensure that the cell sizes are sufficient to accommodate the complete display of all required data; and (7) emissions and waste disclosures should be consistent and conform to the emissions listing order found in proposed §25.476(c)(6).

The commission finds that TXU's comments contain good suggestions for improvement to the proposed forms and spreadsheets. The commission does not find it necessary to incorporate the proposed modifications into the rule; however, the commission will use the suggestions to improve the reporting forms and spreadsheets.

San Antonio commented that the labeling of residual generator data should be modified to reflect that the Generator Scorecard is only intended to be used as an aid in the creation of the EFL and that the data may differ substantially from the actual unadjusted scorecard for the generation owner.

The commission finds San Antonio's suggestion reasonable. The commission amends subsection (e) to provide that unadjusted scorecards shall be posted on the commission's web site and that adjusted scorecards shall be included only on the reporting forms to be used by REPs, with a statement that the data may differ from the unadjusted scorecard and a reference to the commission's web site.

Question No. 4: Should the PGC generation scorecards and the REP fuel mix label be updated only once per year, or would there be value to the market to develop updates at more frequent intervals once the competitive retail market has stabilized? For instance, would it be appropriate to use the same set of scorecards and fuel mixes for all of 2002, but change the reporting and update schedule to quarterly editions beginning in 2003? Given the availability of standardized, web-based, automated reporting and calculation of these informational tools, what

would be the costs and benefits of more frequent updates, and what would be the appropriate timing and preparation schedule?

TXU, SPS, AEP, and Reliant all stated that an annual update of the data with respect to generators' portfolios and subsequent scorecards is prudent. LCRA stated that generators whose portfolios change should update scorecards accordingly and new generators entering the market should have a scorecard.

El Paso Electric Company recommended that the commission's reporting deadline dates be more flexible and coincide with existing deadlines required by the U.S. Environmental Protection Agency under 40 CFR §75.64.

The commission appreciates EPE's desire to simplify overall reporting requirements. However, the quarterly reporting requirements under 40 CFR §75.64 require different information. Further, while the commission does not object to receiving reports more often than required, its proposed rule requires annual reporting. The commission makes no modification to its rule in response to this comment.

The commission agrees with TXU, SPS, AEP, and Reliant that an annual update to reflect portfolio changes that are reflected in generator scorecards is appropriate. This measure will not burden the commission or generators with administrative tasks and a scorecard that changes only once per year on a specified date will still result in an Electricity Facts label that will be easy for consumers to understand and use, as was intended.

TXU said quarterly updates of the Electricity Facts label would impose significant costs, and questioned whether the twice-yearly updates would be any more beneficial than annual updates. SPS said a REP's supply portfolio probably will not change significantly over the course of a year, therefore annual updates would be sufficient. TXU and Reliant said that updating labels more frequently than annually should be optional. San Antonio, also supporting annual updates, opined that customers who select a provider on the basis of fuel and environmental impact would probably be those with a long-term "buy and hold" strategy rather than a short-term "day trader" approach.

While the commission understands providers' preference for the Electricity Facts label to be updated only on an annual basis, it finds that semiannual updates will not pose an undue burden, especially with the elimination of the certificates program. The commission recognizes that midyear updates to the EFL will be based on the same generator data used for the previous label and therefore will not reflect changes in generator emission rates. But a REP's supply mix could easily change from one period to the next. Thus, a midyear update to the EFL would reflect changes in the REP's supply portfolio – a change that customers are entitled to know if it would affect their choice of electricity provider. San Antonio may be correct in its prediction of stable customer-buying strategies, but an important benefit of twice-yearly updates is that if a *retailer* changes its supply strategy, the customer will find out sooner rather than later and will be able to decide in a timely manner whether to change providers. The commission therefore amends the rule throughout to reflect updates to the Electricity Facts label every six months.

To accommodate new products, the commission further amends subsection (g) to allow retailers the option to authenticate new-product projections after six months. If the "at least as favorable" standard has been met after six months, then the retailer has the right to drop the word "projected" from the new product's label and make a more definitive statement about fuel mix and environmental impact. If the standard has not been met, then the retailer has another six months to manage its supply acquisitions and retirement of RECs so that, at the end of the year, the authenticated fuel mix and environmental impact is consistent with what customers were told.

Question No. 5: As new generators enter the market and existing generators' portfolios change, what updating process should be developed to reflect these changes in the generator scorecards? Is it necessary to develop some verification process, as well, to assure that no erroneous or fraudulent reporting occurs?

AEP believed that a PGC should not be required to report to the commission any fuel mix and emissions data not already required under §25.91 of this title (relating to Generating Capacity Reports) and noted that additional reporting and monitoring requirements increase the cost of compliance. AEP further stated that the commission should not develop and should not implement a labeling program that disproportionately places the compliance and reporting burden on PGCs rather than on REPs making renewable or green claims.

The commission acknowledges AEP's desire to reduce costs associated with reporting requirements. Section §25.91(g) provides a list of reporting items currently required concerning

generation capacity and sales, and the commission finds that it has the authority to require further information relating to fuel mix and emissions data. While the commission appreciates AEP's concern regarding costs, the commission must consider the necessity for obtaining the information and the various options for requiring information from any person or entity under its jurisdiction. Moreover, many of the concerns raised by AEP and other parties regarding costs are addressed by not implementing the certificates of generation program. The commission declines to modify the rule in response to this particular comment.

AEP stated that it is the responsibility of the REPs to report energy supplies truthfully and accurately, making it unnecessary for the commission to create additional verification processes and requiring PGCs to report data more frequently than required by §25.91. SPS stated that a systematic sampling and analysis of REP Electricity Facts labels should be effective in policing of errors and fraud. LCRA recommended that the commission should develop new procedures to ensure that generators entering the market have a scorecard and that existing generators update their scorecard as the portfolio changes. LCRA noted that environmental attributes are reported to other State and Federal regulators, and that could serve as verification. TXU and Reliant agreed that the rule as proposed is appropriate because there are sufficient mechanisms already incorporated to verify and update generator information while maintaining flexibility to adapt to market changes. SPS encouraged the commission to audit disclosures made on the EFL to protect against errors and fraud.

The commission agrees that no further verification process is necessary. In addition, the commission will allow PGCs an opportunity to review scorecard data to check for errors prior to use of the data by retailers.

COMMENTS ON SPECIFIC SUBSECTIONS

§25.476(a) – Purpose.

TXU, SPS, Environmental Defense, and Reliant commented that the proposed rule provides an efficient and reasonable approach for the disclosure of fuel mix and emissions information for inclusion on the EFL. On the other hand, AEP and Austin Energy stated that they find the proposed rule to be needlessly complex and costly. Austin Energy went on to say that the rule fails to provide meaningful information to customers and does not fulfill its objective. Both AEP and Austin Energy recommend that the commission consider simplifying the entire process.

In response to a statement by TXU that the disclosure requirements are applicable only to retailers and PGCs who "voluntarily" choose to distinguish their electricity by the use of certificates of generation, renewable energy credits, or specific supply contracts, Environmental Defense proposed that subsection (a) be revised to state that competitive retailers and affiliated REPs must generate electricity labels for their electricity products and that "affiliated REPs" be included within the ambit of the proposed rule's requirements. TXU responded that proposed §25.476 along with §25.475 clearly require the use of EFLs by all competitive retailers and

affiliated REPs and Environmental Defense had misinterpreted the use of the word "voluntarily" in TXU's initial comments.

Brazos, STEC, and ETEC questioned the commission's limited jurisdictional authority over electric cooperatives, and thus oppose adoption of the rule.

The commission acknowledges the concerns raised by AEP and Austin Energy with regard to the complexity of the proposed rule. The commission finds that the decision to withdraw the proposed certificates of generation program will address some of the concerns expressed and result in simplification of the process. The commission agrees with TXU that application of the rule is properly addressed elsewhere and no revision is necessary to subsection (a). The comments of Brazos, STEC and ETEC regarding the commission's jurisdiction over electric cooperatives are addressed in the discussion of Question Number 1 (February 2, 2001) and subsection (i).

§25.476(b) – Application

San Antonio stated that the application of the rule to competitive retailers is appropriate in limiting application of municipally-owned utilities acting in that capacity only to the extent they are serving outside their certificated areas. Brazos commented that the application of the rule to "owners of generation assets" as it applies to electric cooperatives is inconsistent with the commission's limited authority of co-ops as set forth in PURA §41.004(5).

The commission makes no changes to subsection (b) in response to these comments. With regard to the concerns of Brazos, the commission finds that it does have authority to collect generation data from electric cooperatives under PURA §39.155, which under PURA Chapter 41 is applicable to electric cooperatives, if the information is necessary for the development of a competitive retail market in the state.

§25.476(c) – Definitions

TXU Electric suggested that subsection (c)(1) and (c)(10) be revised to recognize that REC offsets should be used to authenticate fuel and emissions characteristics. Additionally, TXU stated that to the extent RECs were used to authenticate generation, the rule should refer to "retired" RECs in all instances. AEP stated that §25.476(c)(1) should be amended to allow affiliated REPs to use the authenticated generation provisions of the rule in the same manner as competitive retailers. AEP stated that subsection (c)(1) should be revised to strike "retired renewable energy credit (REC)," but that if the commission did not, the definition of authenticated generation should be expanded to include REC offsets. TPRC commented that subsection (c)(1) should be revised to state that it is "ultimately used on the Electricity Facts label of the competitive retailer."

The commission agrees that the definition of "authenticated generation" should be revised to include the output from certified REC offset generators. However, the commission points out that the offset itself is a fixed number based on historical generation. Thus, the numerical value of the offset cannot be used as authentication for current generation. Actual output must be used,

but because the output is from a certified REC offset generator, the output is renewable as defined by PURA §39.904 and §25.173 of this title, and may be counted as such. Also, the commission adds the language suggested by TPRC that clarifies the authenticated generation will ultimately be used on the EFL.

AEP also suggested that the term "scorecard" as used in subsection (c)(3) and (c)(8) be revised to another term such as "fuel mix and environmental impact." It argued that this term inappropriately applies a judgment or grading of the PCG's fuel mix and emissions; it should be given a name or acronym that does not imply or suggest any judgment about the fuel mix or emissions impact.

The commission declines to replace the term "scorecard," although the definition is modified in response to other comments pertaining to subsection (e). The commission does not believe that the term implies judgment; it merely implies a compilation of numbers into an easy-to-use format.

Public Citizen and Linda Hajek commented that in §25.476(c)(6), the commission should use the common terms for emissions. For example, "smog" for NO_x, "acid rain" for SO_2, "global warming" for CO_2 and "soot" for particulates. TXU replied that the format of the label was extensively discussed by parties and decided by the commission in Docket Number 22255, and that it was not appropriate to change the format in this rulemaking.

The commission declines to make the modifications to the terms for emissions. Although using the common terms may purport to provide the information to customers in a more understandable format, the commission finds that using the common terms may result in more customer confusion. Using the more scientific terms provides context for customers to find further information about emissions and to apply their own judgment.

TRPC commented that in subsection (c)(7), which defines fuel mix, the term "power" should be revised to "that portion of MWhs that derive from resources defined as renewable."

The commission declines to make TPRC's suggested change. The commission finds that the term "power" is clear and understandable.

ETEC commented that the provision of subsection (c)(11) that states "electric cooperative that owns or controls generating facilities in the State of Texas" is problematic. ETEC argued that for many hydro facilities, the federal government owns the facility; however, the electric cooperatives control the REC offset. Electric cooperatives are therefore concerned that they could lose the value of the REC offsets if the facility issued certificates of generation instead.

The commission believes that ETEC's main concern with this definition is obviated by the deletion of subsection (f). Related issues are discussed further in the commission's response to comments regarding Question Number 2 of May 18, 2001, and regarding subsection (g). The commission will determine how to address the issue of federal ownership when it considers the certificates of generation program in a future rulemaking.

§25.476(d) – Marketing standards for "green" and "renewable" electricity products

Comments concerning this section are summarized above, in the discussion regarding Question Number 3 of February 2, 2001.

§25.476(e) – Compilation of scorecard data

Many issues regarding the scorecards are addressed in the context of the specific questions summarized above. In addition to those comments, SPS said the commission should disclose the vintage as well as the source of the data used in the generator scorecard calculations.

TXU commented that generators should have an opportunity to review and comment on their scorecards prior to their dissemination, and that they should be based on data for the immediately preceding calendar year. Review and timely updates are necessary to reflect compliance with federal requirements that certain generating facilities reduce their nitrogen oxide and sulfur dioxide emissions, and TXU said further that the scorecards should reflect reasonably projected changes due to expected implementation of emissions reductions, changes in fuel use, or other operating changes. Scorecards should also be adjusted to reflect the sale of facilities. Environmental Defense disagreed with the use of projected changes, saying that TXU's proposal would open the door to misreporting and would require constant and ongoing verification by the commission.

The commission agrees with Environmental Defense that the scorecards should not include any projected changes. The emissions and fuel data must represent activity that is actual and measured. The commission also agrees with TXU that generators should have an opportunity for early review of their scorecard data and agrees with SPS that scorecards should include source and vintage of data. Subsection (e), as proposed, allows for scorecard adjustments due to new plants placed in operation and to retirement of plants previously in operation. Early review by generators may also detect administrative errors that spuriously affect the result. The commission therefore amends subsection (e) to ensure that generators have a month to inspect initial scorecard data prior to publication on the commission's web site.

While using data that generators are already reporting to other federal and state agencies will reduce the reporting burden, the commission reminds generators that it also has authority under PURA to require them to report data directly to the commission. TXU's request for using data from the previous calendar year illustrates some of the considerations the commission must balance. Emission-related data reported to federal agencies may take two or three years before they are included in a public database. Reporting directly to the commission may be the only way to reduce the lag time, but it may also increase the burden on generators. The ultimate consideration with respect to this rule is whether the information at hand is sufficient for meaningful disclosure to customers, and the commission finds that it is prudent to maintain flexibility with respect to data collection. To clarify this point, the commission amends subsection (e)(2) to reflect that it will use the "best available data" in compiling generator scorecards, allowing the commission flexibility to use other agencies' data or gather its own, as may be needed.

AEP objected to excluding renewable energy credits (RECs), REC offsets and certificates of generation from generator scorecards, and objected to publishing the scorecards on the commission's web site. It also raised a number of questions, among them: Are generators required to submit scorecards; does the generator have recourse if it disagrees with a scorecard; are there concerns about posting data for a generator that owns only one Texas facility; and how would multiple ownership be treated? In reply comments, Reliant agreed that the scorecards should not be published on the Internet, while Independent Marketers supported Internet publication of the scorecards. Reliant disagreed with AEP with regard to including RECs, REC offsets and certificates of generation on the scorecards, as other entities will have contracted specifically for the electricity represented by these instruments. Including them in the scorecard would result in double-counting, Reliant said.

TRPC suggested distinguishing between the "inaugural" scorecard and the adjusted scorecard. The inaugural or unadjusted scorecard would include all of a generator's resources, including those participating in the REC trading program. These initial scorecards would be published on the commission's web site. Power associated with RECs would be deducted from the initial scorecard along with the adjustment for certificates of generation.

The commission finds that TRPC's suggestion is reasonable, and subsection (e) is amended accordingly. A generator's initial scorecard, which shall reflect the company's entire Texas fleet of plants, shall be published on the commission's web site. The adjusted scorecard shall deduct certified REC generators and approved REC offset generators and shall appear only on the

commission-approved spreadsheets used by REPs to calculate their Electricity Facts label disclosures. The commission also modifies the definition of "generator scorecard" to reflect a more general notion, relying on subsection (e) to establish the distinction between initial and adjusted scorecards.

LCRA said that the methodology used for plants with multiple owners may in some instances result in the misappropriation of environmental attributes. For example, the Sam Seymour/Fayette Power Project comprises three coal-fired units, two of which LCRA co-owns with the City of Austin. In the sample scorecard spreadsheet posted by the commission on its web site, the environmental attributes of Sam Seymour were distributed to LCRA and Austin Energy on the basis of capacity ownership. Because the environmental attributes of the three units differ, LCRA said, a simple pro-rata distribution would be inaccurate.

With respect to multiple ownership of generating facilities, it is the responsibility of the owners to inform the commission as to the most appropriate way to apportion a plant's output and emissions, whether by percentage ownership of the entire plant, by ownership of specific turbines or boilers at the plant, or by some other method indicative of actual ownership. This should be part of the generator's scorecard review process.

§25.476(f) – Certificates of generation

Austin Energy, Consumer Commenters and Environmental Defense advocated eliminating the certificates program from the rule. Austin Energy said it would create a loophole that would

allow any retailer to represent all the products it marketed to residential and small commercial customers as being fueled by "green" natural gas. Noting that disclosure is required only for residential and small commercial customers, Austin Energy said Texas has sufficient natural gas generation for every Electricity Facts label to reflect a 100% "green" natural gas fuel mix. Consequently, customers would have no meaningful information to help them choose among suppliers on the basis of fuels used.

They also said tradable certificates would enable companies to misrepresent the attributes of the electricity products they sell to customers. Austin Energy, along with Brazos and ETEC, said it would be possible for a retailer to obtain all its power under a contract with a coal-fired generator, and use natural gas certificates to represent the product as coming from "green" natural gas.

Environmental Defense concluded that REPs would still be able to market products with specific fuel and environmental profiles by selectively entering into supply contracts with power generators. On the other hand, Austin Energy said that it would not be an adverse outcome if a more active wholesale market resulted in all disclosures looking more like the default scorecard. Austin Energy also advocated limiting product-specific disclosures to renewable products; otherwise, retailers would average the fuel mix and emissions of their suppliers and (for power coming from generation sources that are not reasonably traceable) the default scorecard.

Environmental Defense and Austin Energy also said the certificates program served no economic or policy purpose. Environmental Defense said that trading programs are designed to achieve

mandated goals (installation of new renewable generation, emission reductions, automobile fuel efficiency) in the most cost-effective manner, but are not appropriate for product disclosures. Austin Energy said trading programs are intended to address market failures, but that it was unclear what market failure the certificates program would address.

Consumer Commenters said at the public hearing that they were in agreement with Environmental Defense and were especially concerned about the potential for gaming under the certificates program. The group said that if the program were to be used, it should be set up in such a way that gaming was not possible, because if consumers can not get a clear and accurate representation of the emissions of the products they are buying, then "we may as well just throw the whole emissions disclosure out the window."

The commission disagrees with Environmental Defense and Austin Energy regarding their comparison of the certificates program with emission trading programs. There is no quantifiable target or baseline involved with the certificates program, and therefore the cap-and-trade model is inapplicable and irrelevant. To the extent that the "green" attributes of generation have value to customers, certificates represent a way of capturing that market value in the form of a security and making the existing value more amenable to exchange. By contrast, cap-and-trade programs deal with economic externalities that are not being valued by the market, a situation the certificates program is not intended to address.

The commission notes that if there is an abundance of natural gas generation, there will probably be an abundance of "green" residential electricity offerings regardless of how a retailer's fuel mix

is authenticated. Thus, Austin Energy's assertion that the certificates program will saturate the market with "green" offerings is unfounded. However, Environmental Defense correctly notes that due to the abundance of natural gas generation, retailers may not need certificates in order to assemble product offerings with different fuel mixes and emission profiles. Thus the question is whether a simple tracking of supply contracts will be sufficient to connect "green" generation with all customers who are willing to pay. Only experience will provide a definitive answer.

The commission believes the certificates concept is a viable tool to augment the market's ability to connect customers and generators. Many of the concerns raised by Environmental Defense, Austin Energy, and other parties would be resolved by limiting the applicability of certificates so that they could only replace generation that otherwise would be represented by the default scorecard. However, the commission is also mindful of concerns raised by Consumer Commenters that certificates may be confusing to customers. The commission is also concerned about the cost of the certificates program, a matter that was raised by several commenters. Supply contracts are straightforward; therefore, it is preferable to rely on them as the basis for disclosures. If experience shows that there are certain impediments, however, a certificates approach may be a useful remedy to augment a contract-based system. Therefore, the commission deletes subsection (f), but may revisit the concept once the full competitive market has had an opportunity to mature.

San Antonio supported the certificates program, saying that it provides the ability for market participants to avoid unnecessary and burdensome business procedures and contractual relationships which would otherwise be necessary. SPS and TXU suggested changing paragraph

(3) to allow a certificate to account for all or a portion of a facility's output. TXU further suggested allowing REPs more flexibility in applying certificates to different products, eliminating the affidavit requirement, and calculating nuclear waste on the basis of average pounds of spent fuel per MWh produced during a specific fuel load cycle. AEP said that creating an anonymous exchange procedure would be costly, and that a simpler approach would be to register changes in ownership. AEP, ERCOT and Reliant also said the rule should specify who would pay the fees that would support the certificates program. Green Mountain, Independent Marketers and Environmental Defense said the commission should retain oversight with respect to user fees. Independent Marketers also said certificates should not be bound to a supply contract, that generators must be required to register a certificate with the program administrator before it could be sold, and that a specific date should be set for the selection of a program administrator. TXU disagreed, however, and argued that market participants should have the flexibility to package energy and certificates as needed. TXU also said there should be no restriction on when certificates could be sold as long as their registration and retirement were in compliance with other provisions of the rule.

The various revisions suggested by parties relate to issues that will be more clearly defined once full competition begins. Because the commission is not adopting a certificates process now, these issues need not be addressed now.

§25.476(g) – Calculating fuel mix and environmental impact disclosures

AEP said that RECs should not be used to validate renewable claims. Instead, renewable power should be authenticated just as provided in the proposed rule for all other sources of power: either by supply contract or by a certificate of generation. AEP said the REC trading program was established to meet the renewable energy capacity requirements of Senate Bill 7 (76th Legislature), and that RECs and REC offsets were intended to be traded separately from the energy bought and sold in the wholesale market. Environmental Defense disagreed with AEP's suggestion, however, noting that by definition a REC represents a megawatt of renewable energy that is actually produced, metered and verified. Reliant, also disagreeing with AEP, said not recognizing RECs for disclosure purposes has the potential to dilute the value of the REC market, thereby discouraging renewable energy development in Texas. Reliant said the REP retiring the REC has obviously purchased the REC and is therefore entitled to take credit for it.

The commission disagrees with AEP. If RECs were excluded from the disclosure calculus and only contracts were used, a REC purchaser could actually subsidize a competitor's ability to market renewable power. Using RECs as the sole means of authenticating power from certified renewable energy credit generators is the best way to prevent this unfair distortion of the market. This approach fulfills the Legislature's intent with regard to developing renewable energy in Texas and provides customers with credible assurance that their money is being used to support renewable resources.

However, the commission also acknowledges the confusion that may arise from reading §25.173(p), concerning renewable resources eligible for sale in the Texas wholesale and retail markets, alongside this subsection. The commission notes that subsection (p) is the only part of

§25.173 that does not pertain directly to the renewable energy credit trading program. Moreover, §25.173(p) was written and adopted before the Electricity Facts label was created. Issues regarding the marketing of renewable energy to customers are adequately and appropriately addressed in the context of customer protection, which is the purpose of §25.476. For these reasons, the commission finds that §25.173(p) should be superceded by §25.476. It is the intent of the commission to propose amending §25.173 to delete subsection (p) in a future rulemaking.

AEP also said that if the commission decides to retain RECs as a means of authentication, then REC offsets should also be used. TRPC said, however, that the subsection should be clarified to reflect that a REC offset may not be used, but that the actual production and emissions associated with the offset should. Environmental Defense said offsets should not be used because they were created for a different purpose: to provide a fixed adjustment to allocated REC requirements based on existing renewable energy generation. By contrast, disclosures under the proposed rule ought to rely on the actual production of renewable energy.

There may be some confusion regarding the nature of REC offsets. TRPC and Environmental Defense correctly note that offsets do not describe current output and, therefore, are not appropriate for customer disclosure. An offset is associated with ownership of or a supply contract from existing renewable energy facilities. Subsection (g)(4) as proposed provides that an offset "may be used to authenticate the renewable attributes of its associated supply contract." Thus, the output of a REC offset generator may be counted as renewable energy for the purposes of customer disclosure. No revision is necessary, other than to expand the language of this paragraph to include ownership of the facility.

TXU recommended changes that would allow fuel and emissions information to be apportioned between products on something other than a per-MWh basis. In reply comments, Green Mountain agreed, while Environmental Defense said TXU's proposal would unnecessarily complicate the labeling disclosure process and should be rejected. AEP recommended deleting the requirement that each label reflect a certain number of RECs, saying that it goes beyond the provisions of the customer protection rules.

A number of commenters responded to the provision limiting affiliated REPs to one fuel and environmental impact profile for all Price-to-Beat products it offers in its affiliated service area. AEP and TXU said the provision should be deleted. Green Mountain and Independent Marketers said it should remain.

The Legislature clearly intended the Price-to-Beat to be a constraint on affiliated REPs, with the power of incumbency held in check for the first years of choice so that competitive retailers could establish footholds in the newly opened markets. To allow affiliated REPs flexibility to offer "green" price-to-beat products alongside standard price-to-beat products would run counter to the Legislature's intent. However, as TXU notes, the commission has provided for unique "green" or "renewable" price-to-beat offerings if the utility had a renewable energy tariff on January 1, 1999. Subsection (g)(8) is therefore amended to specify that a special Price-to-Beat label is permissible only if there was a renewable tariff in place on January 1, 1999.

TXU recommended other clarifying editorial changes in this subsection: replacing "purchased" with "acquired" throughout the section to reflect that REPs may obtain power from generators other than through purchases; and specifying that scorecards are associated not with a REP but with the generator from which the REP acquires power through a supply contract. It also suggested changing the due date for Electricity Facts label updates from April 1 to 30 days after the commission posts the adjusted scorecards.

The commission agrees with TXU with respect to acquired power, the accurate association of scorecards, and the due date for updated Electricity Facts labels, and incorporates these changes. To simplify the timeline, however, the commission adopts beginning-of-month due dates for REP supply reports and Electricity Facts label updates.

TXU also expressed concern that the commission's proposed standard for compliance is inflexible and may be unattainable for reasons outside the control of the REP. TXU surmised that there will be differences between posted scorecards and actual performance over the course of a year. To accommodate those differences and to create flexibility, TXU recommended that the commission modify the language in proposed subsections (g)(9) and (h) from an "at least as favorable" standard to a "not materially inconsistent" standard. First, TXU questioned whether "at least as favorable" means that the actual performance must result in lower emissions and more gas or renewable fuels than reported on the EFL (or precisely the same as reported). TXU provided two examples. First, if consumers' preferences change such that over the course of a year they switch from one product to another or buy more or less of a product, the actual generation required to serve them may be significantly different from what was anticipated.

TXU contended that such changes in customers' preferences would be completely beyond the retailer's control and easily could result in actual performance being not as favorable as the initial EFLs. TXU provided a second example that, over time, more and more generation or green generation will be used; therefore, more and more RECs and certificates of generation will be employed resulting in the Texas-wide default scorecard becoming "dirtier" each year. TXU noted that a retailer which chooses to sell only system power would report on its EFL the previous years' default scorecard data, but for the subsequent year the actual performance of the system power generators would probably not be "at least as favorable" as the previous year, due to increasing use of renewable and green power. Therefore, TXU argued that through no fault of its own, such retailers could be in violation of the "at least as favorable as" standard every succeeding year. Instead, TXU recommended that the commission modify its standard to reflect that the retailer's performance should not be materially inconsistent with the EFLs of the retailer's electricity products. TXU argued that the "not materially inconsistent" standard would protect consumers from being misled while allowing room for non-material, inevitable deviation. TXU provided its recommended language modifications. In reply comments, Green Mountain and Independent Marketers concurred with using the phrase "not materially inconsistent with."

The commission agrees with TXU that the "at least as favorable" standard of compliance means that the actual performance of the retail provider must result in precisely the same or lower emissions than reported on the EFL. In other words, the actual performance must be precisely the same or incorporate more natural gas or renewable fuels than reported on the EFL. The commission declines to make any modification to the provision as it plainly expresses the commission's intent. In order to encourage retailers to exercise due diligence in their acquisition

of power throughout the year so that their fuel mix is what the retailer projected, the commission purposefully selected a clear, bright-line standard. Achieving this standard is by no means out of the retailer's control; the retailer has full discretion over the numbers it chooses for its projection and over how it acquires supplies over the course of the year being projected. The commission declines to incorporate TXU's recommended language because the meaning of "materially inconsistent" is ambiguous. The retail provider's EFL must correctly reflect the retailer's electricity products. The commission does not disagree that consumers' preferences may change over the course of a year and that consumers may switch between different product mixes. However, retailers' use of contracts is within their direct control as the marketing of the product. The commission desires to promote the availability of informative, accurate, useful information to the retail customers of Texas.

§25.476(h) – Special provisions for the first year of competition

TXU asserted that the use of a two-prong methodology to distinguish between a competitive retailer and affiliated REP is discriminatory. TXU argued that to assume that affiliated REPs will acquire all the power they sell from their affiliated PGC is based on an incorrect assumption. TXU urged that all retailers should use the projection approach.

TXU, Green Mountain, and Enron proposed that the commission replace the phrase "at least as favorable as" with the phrase "not materially inconsistent with."

The commission agrees with TXU that affiliated REPs and competitive retailers should be treated the same with respect to the first year of competition, and subsection (h) is amended accordingly. However, the commission declines to drop the "at least as favorable" standard, for reasons previously set forth in this preamble.

§25.476(i) – Compliance and enforcement

ETEC questioned the commission's jurisdictional authority over co-ops when considering the limitations of PURA §41.004. ETEC questioned whether the proposed reporting and filing requirement is enforceable against co-ops or MOUs, questioned whether the commission has jurisdictional authority to require co-ops to label generation sources to its members or customers, and questioned the proposed provisions that address labeling for a co-op that has not opted into retail competition or that opts into retail competition but chooses to compete only within its service territory.

With regard to proposed §25.476(i)(1), ETEC questioned whether an advisory to the media does anything other than incite a war of words if the commission has no real enforcement authority and the co-op believes it did nothing wrong and refuses to change its practices. ETEC believed that the commission does not have the jurisdiction to control the co-op's advertising, marketing, and information activities and therefore recommended the commission adopt a modified version which states that the rule does not affect co-ops and that REC offsets are not instruments that can be converted into generation certificates.

Both San Antonio and Austin Energy objected to §25.476(i)(1) because allowing the commission to issue an advisory to local news media is beyond those specific enforcement action remedies allowed for anti-competitive actions by an MOU under PURA Chapter 40. Austin Energy further commented that, for other violations, the commission should alert the governing board or municipal body which has oversight authority of the utility in question because those bodies are responsible for the actions of the utilities and are responsive to the customer-citizens of those entities. San Antonio argued that PURA §40.056 prescribes a specific enforcement process, involving the receipt of a complaint, notice, and the right to a hearing. Following a hearing, if required, and upon a finding that the complaint is valid, the commission must provide the MOU three months to cure the anticompetitive or noncompliant behavior. Finally, following the three-month period, the commission may then prohibit the MOU from providing retail service outside its certificated retail service area until the rule, action, or order is remedied. San Antonio supported the statutory provisions as appropriate because San Antonio believed that the rule will apply to municipally owned utilities and cooperatives only to the extent that they are participating in retail competition outside their traditional service areas.

TXU commented that proposed subsection (i) grants the commission greater enforcement authority than allowed under PURA §§39.101(e), 39.356, and 39.357 in that the proposed language allows the commission to take any corrective action while PURA limits the commission to specific remedial powers and provides the specific remedies the commission may use. TXU recommended that in subsection (i)(1), the phrase "shall order the REP to take corrective action as necessary" be deleted and replaced with "may take remedial action consistent with PURA §§39.101(e), 39.356, or 39.357."

STEC pointed to PURA §17.006 and argued that the commission may enforce its customer protection rules only for customers served by an electric cooperative outside its certificated area. Instead, STEC argued, it is the board of directors of an electric cooperative which has the sole jurisdiction to enforce customer protection rules for customers served within its certificated area. Thus, STEC concludes that §25.476(i) does not comport with PURA. STEC argued that the provisions, as proposed, allow the commission to interfere with the board of director's jurisdiction regarding customers within its certificated service area. Even though the remedial actions permitted under the rule are for the commission to inform the electric cooperative's board of directors and general manager of a violation and issue an advisory to the local media, STEC regarded the proposed rule as imposing the commission's labeling rule on electric cooperatives serving customers within their certificated service areas. Consequently, STEC recommended that subsection (i) apply only to competitive retailers and to affiliated REPS and recommended that references in subsection (i) to municipally-owned utilities or electric cooperatives be deleted.

The commission agrees with ETEC, San Antonio, Austin Energy, and STEC that an advisory to the local media may not be the most appropriate remedy for correcting anti-competitive activity. The commission modifies this portion of its rule in response to these comments.

The commission disagrees with TXU that subsection (i) grants the commission greater enforcement authority than allowed under PURA §§39.101(e), 39.356, and 39.357 in that the proposed language allows the commission to take any corrective action. However, the

commission agrees that the wording of the proposed rule could be ambiguous. Therefore, in response to TXU's comments, the commission modifies subsection (i)(1) to delete the phrase "shall order the REP to take corrective action as necessary" and replaces with "may take remedial action consistent with PURA §§39.101(e), 39.356, or 39.357."

STEC agreed with the commission that the rule should not provide a competitive retailer or an affiliated REP protection against prosecution under the deceptive trade practices act (DTPA). However, STEC commented that the proposed rule allows for a violation of the DTPA because it allows the competitive retailer or REP to purchase all of its power for resale from facilities using coal or lignite, and to purchase certificates of generation at a cost significantly less than the cost of renewable energy. STEC commented that such an arrangement would mislead the retail customer into believing that all of its power is generated through the use of renewable resources. STEC further asserted that the information provided to the customer on emissions and waste per kWh generated will be false because the customer will be provided information on the emissions from the use of renewable resources rather than emission information on the use of coal and lignite. STEC believed that, in most instances, the competitive retailer will also charge the misled retail customer more for its power because of the environmental benefits associated with renewable energy. STEC claimed that many people believe such practice is a violation of the DTPA. STEC referred to PURA §17.004 and §39.101 and asserted that the intent of the Legislature is to provide to customers correct information regarding the impact the power they choose to purchase will have on the environment. STEC recommended that the rule allow the retail customer to distinguish between renewable power generated from renewable resources and renewable power occasioned by the labeling rule under the certificates of generation program.

STEC further recommended that the rule be amended so that the most unsophisticated retail customer can determine whether it is purchasing actual renewable energy or only energy labeled renewable because of the certificates of generation program.

Similarly, Brazos was concerned about the apparent deceptiveness of the entire proposed rule because it allows competitive retailers and affiliated REPS to represent to consumers that by purchasing certificates "brown" generators produce "green" power and that fossil fuel generators are "renewable" resources. Brazos also noted that the provision in proposed §25.476(g)(9)(D) relating to the DTPA appears to apply only to new products' projected sales. Brazos questioned why the provision is needed at all and, if needed, why the provision does not apply to the remaining subsections. Finally, Brazos recommended that the commission reject the proposed rule.

Although the DTPA was not mentioned in its comments, Environmental Defense did suggest that allowing companies to use tradable certificates of generation on a voluntary basis allows companies to misrepresent their product attributes because the companies are able to easily disguise the true nature of their electricity product. Environmental Defense suggested that because emissions and fuel certificates would not be scarce, the use of the certificates would not provide any means to actually affect the portfolio of electric generating resources in the State.

As previously explained, the commission finds that direct supply contracts with generators are the preferred means of authenticating the attributes of power initially sold by retailers to customers. It may consider a certificates program if experience suggests that it is a better

approach. Issues relating to a certificates program are more appropriately addressed if and when the commission chooses to implement it.

However, the commission agrees in part with Brazos regarding the application of the DTPA provision to the entire rule. The commission acknowledges that the DTPA remains a separate cause of action available to those who qualify to take action under the Act. Anyone eligible under the DTPA to bring a claim may do so. In response to Brazos' comment, the commission will delete the provision in §25.476(g)(9)(D) and will instead make it applicable to the entire section by inserting it in subsection (b) entitled Applicability.

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 2001) (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, PURA §39.101 which grants the commission authority to establish various specific protections for retail customers, including entitling customers to have information concerning the environmental impact of certain production facilities, and information sufficient to make an informed choice of electric service provider; §39.9044 which grants the commission authority to establish rules allowing and encouraging competitive retailers to market electricity generated using natural gas produced in this state as environmentally

beneficial; and PURA Chapter 17, Subchapter A, which authorizes the commission to adopt rules to protect retail customers and requires the commission to promote public awareness of changes in the electric utility market.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 14.052, 39.101, 39.9044, and Chapter 17, Subchapter A.

§25.476. Labeling of Electricity with Respect to Fuel Mix and Environmental Impact.

(a) **Purpose.** The purpose of this section is to establish the procedures by which competitive retailers calculate and disclose information on the Electricity Facts label pursuant to §25.475 of this title (relating to Information Disclosures to Residential and Small Commercial Customers).

(b) **Application.**

(1) This section applies to all competitive retailers and affiliated retail electric providers (affiliated REPs) as defined in §25.471(d) of this title (relating to General Provisions of Customer Protection Rules). Additionally, some of the reporting requirements established in this section apply to all owners of generation assets as defined in subsection (c) of this section.

(2) Nothing in this section shall be construed as protecting a competitive retailer or affiliated REP against prosecution under deceptive trade practices statutes.

(3) In accordance with PURA §39.001(b)(4), the commission will protect the competitive process in a manner that ensures the confidentiality of competitively sensitive information during the transition to a competitive market and after the commencement of customer choice.

(c) **Definitions.** The definitions set forth in §25.471(d) of this title apply to this section. In addition, the following words and terms, when used in this section, shall have the following meanings unless the context indicates otherwise:

(1) **Authenticated generation** — Generated electricity with quantity, fuel mix, and environmental attributes accounted for by a retired renewable energy credit (REC), or supply contract between a competitive retailer or affiliated REP and an owner of generation assets, to be used in calculating the retailer's Electricity Facts label disclosures.

(2) **Default scorecard** — The estimated fuel mix and environmental impact of all electricity in Texas that is not authenticated as defined in paragraph (1) of this subsection.

(3) **Electricity Facts label —** A standardized format, as described in §25.475(e) of this title, for disclosure information and contract terms made available to customers to help them choose a provider and an electricity product.

(4) **Electricity product** — A product offered by a competitive retailer or affiliated REP to a customer for the provision of retail electric service under specific terms and conditions, and marketed under a specific Electricity Facts label.

(5) **Environmental impact** — The information that is to be reported on the Electricity Facts label under the heading "emissions and waste per kWh generated," comprising indicators for carbon dioxide, nitrogen oxides, particulates, sulfur dioxide, and spent nuclear reactor fuel. For the purposes of this section, environmental impact refers specifically to emissions and waste from generating facilities located in Texas, except as provided in subsection (f)(3) of this section.

(6) **Fuel mix** — The information that is to be reported on the Electricity Facts label under the heading "sources of power generation." The fuel mix shall be the

percentage of total MWh obtained from each of the following fuel categories: coal and lignite, natural gas, nuclear, renewable energy, and other known sources. Renewable energy shall include power defined as renewable by the Public Utility Regulatory Act (PURA) §39.904(d).

(7) **Generator scorecard** — The aggregated fuel mix and environmental impact of all generating facilities located in Texas that are held by the same owner of generation assets.

(8) **New product** — An electricity product during the first year it is marketed to customers.

(9) **Other generation sources —** A competitive retailer's or affiliated REP's supply of generated electricity that is not accounted for by a direct supply contract with an owner of generation assets.

(10) **Owner of generation assets** — A power generation company, river authority, municipally owned utility, electric cooperative, or any other entity that owns or controls generating facilities in the state of Texas.

(11) **Renewable energy credit (REC)** — A tradable instrument representing the generation attributes of one MWh of electricity from renewable energy sources, as authorized by PURA §39.904 and implemented under §25.173 of this title (relating to the Goal for Renewable Energy).

(12) **Renewable energy credit offset (REC offset) —** A non-tradable allowance as defined by §25.173(c)(10) of this title and created by §25.173(i) of this title. For the purposes of this section, a REC offset authenticates the renewable attributes, but not the quantity, of generation produced by its associated facility.

(d) **Marketing standards for "green" and "renewable" electricity products.**

(1) A competitive retailer or affiliated REP may market an electricity product as "green" only in the following instances:

(A) All of the product's fuel mix is renewable energy as defined in PURA §39.904(d), Texas natural gas as specified in PURA §39.9044(d)(2), or a combination thereof, and

(B) All statements representing the product as "green," if not containing 100% renewable energy, as defined in PURA §39.904(d), shall include a footnote, parenthetical note, or other obvious disclaimer that "A 'green' product may include Texas natural gas and renewable energy. See the Electricity Facts label for this product's exact mix of renewable energy and Texas natural gas."

(2) A competitive retailer or affiliated REP may market an electricity product as "renewable" only in the following instances:

(A) All of the product's fuel mix is renewable energy as defined in PURA §39.904(d); or

(B) All statements representing the product as "renewable" use the format "x% renewable," where "x" is the product's renewable energy fuel mix percentage.

(3) If a competitive retailer or affiliated REP makes marketing claims about a product's "green" content on the basis of its use of natural gas as a fuel, the competitive retailer or affiliated REP must include with the report required under

subsection (f)(1) of this section proof that the natural gas used to generate the electricity was produced in Texas.

(e) **Compilation of scorecard data.**

(1) The commission will create and maintain a database of generator scorecards reflecting each owner of generation assets' company-wide fuel mix and environmental impact data based on generating facilities located in Texas. These scorecards shall be used by competitive retailers and affiliated REPs in determining the fuel and environmental attributes of electricity sold to retail customers.

(2) Initial generator scorecards based on the best available data will be published on the commission's internet web site and shall state:

(A) MWh obtained from each fuel source (coal and lignite, natural gas, nuclear, renewable energy, and other sources), and the corresponding percentages of total MWh;

(B) tons of carbon dioxide, nitrogen oxides, particulates, sulfur dioxide, and spent nuclear fuel produced (with spent nuclear fuel annualized using standard industry conversion factors), and the corresponding emission rates in tons per MWh; and

(C) sources from which data were obtained, including year of publication and year of generation.

(3) Each generator will have one month to review its initial scorecard data prior to publication on the commission's web site. The commission will accept changes

reflecting retirement of facilities, the addition of new facilities, the sale or purchase of facilities, verified changes in a facility's emission rates and fuel use, and the correction of administrative errors.

(4) Not later than March 1 and September 1 of each year, the commission will adjust all generator scorecards to deduct the MWh and associated attributes of:

(A) power for which a REC has been issued; and

(B) power from facilities that have been designated by the commission as REC offset generators.

(5) Not later than March 1 and September 1 of each year, the commission will calculate a combined scorecard for all generating units whose capacity will be auctioned under §25.381(e)(1)(A) of this title (relating to Capacity Auctions), and a combined scorecard for all generating units whose capacity will be auctioned under §25.381(e)(1)(B)-(D) of this title.

(6) Not later than March 1 and September 1 of each year, the commission will calculate a default scorecard to account for all electric generation in the state that is not authenticated as defined in subsection (c)(1) of this section.

(A) The default fuel mix shall be the percentage of total MWh of generation not authenticated that has been obtained from each fuel type.

(B) Default emission rates for each environmental criterion shall be calculated by dividing total tons of emissions or waste by total MWh, using data only for generation not authenticated.

(7) The commission will include the adjusted generator scorecards, capacity auction scorecards and the default scorecard on the reporting forms to be used by

competitive retailers and affiliated REPs to calculate their Electricity Facts label disclosures. The adjusted generator scorecard shall include a statement that the data may differ from the unadjusted scorecard and shall include a reference to the commission's web site for additional information.

(f) **Calculating fuel mix and environmental impact disclosures.**

(1) Not later than February 1 and August 1 of each year, each competitive retailer and affiliated REP shall report to the commission the following information for the previous six-month period ending December 31 or June 30:

(A) all owners of generation assets, other entities and capacity auctions from which the competitive retailer or affiliated REP purchased electricity for delivery to customers during the previous calendar year and the MWh obtained from each supplier, with sources that together supplied less than 5.0% of the competitive retailer's electricity combined and treated as other generation sources;

(B) MWh sold under each electricity product offered by the competitive retailer or affiliated REP during the previous calendar year; and

(C) attestations from power generators that the natural gas used to generate electricity supplied to the competitive retailer or affiliated REP was produced in Texas, if the competitive retailer or affiliated REP intends to market "green" electricity on the basis of that power.

(2) Not later than April 1 and October 1 of each year, each competitive retailer and affiliated REP shall calculate its fuel mix and environmental impact for the

previous six-month period ending December 31 or June 30. Calculations shall include a disclosure that aggregates all electricity products offered by the competitive retailer, and specific disclosures for each electricity product. Disclosures provided on an Electricity Facts label shall describe a specific electricity product sold to customers during the previous six-month period ending December 31 or June 30, except as provided in paragraph (9) of this subsection.

(3) For power purchased from sources outside of Texas, a supply contract between a competitive retailer or affiliated REP and the owner of a generating facility may be used to authenticate fuel mix and environmental impact claims.

(A) The contract must identify a specific generating facility from which the competitive retailer or affiliated REP is to obtain electricity.

(B) The competitive retailer or affiliated REP shall include fuel mix and environmental impact information for the specified generating facility in its report to the commission pursuant to paragraph (1) of this subsection. Data shall come from the same sources used by the commission as reported pursuant to subsection (e)(2)(C) of this section. If the generating facility is not included in any database used by the commission, the retailer and the generating facility owner may provide other comparable public data that have been reported to a federal or state agency for the specified facility.

(4) For the purposes of disclosures on the Electricity Facts label, the retirement of RECs shall be the only method of authenticating generation for which a REC has been issued in accordance with §25.173 of this title. The retirement of a REC

shall be equivalent to one megawatt-hour of generation from renewable resources. The use of RECs to authenticate the use of renewable fuels on the Electricity Facts label must be consistent with REC account information maintained by the Renewable Energy Credits Trading Program Administrator. A REC offset may be used to authenticate the renewable attributes of the current MWh output from its associated supply contract.

(5) A competitive retailer's or affiliated REP's company fuel mix shall be the MWh-weighted average of the fuel mixes represented by the adjusted scorecards of its suppliers, scorecards for successfully bid capacity auctions, out-of-state supply contracts, retired RECs, REC offsets and the default scorecard. MWh from generation sources not authenticated in accordance with this section shall be represented by the fuel mix of the default scorecard.

(6) A competitive retailer's or affiliated REP's company environmental impact shall be the MWh-weighted average of the emission rates represented by the adjusted scorecards of its suppliers, scorecards for successfully bid capacity auctions, out-of-state supply contracts, retired RECs, REC offsets and the default scorecard. Emissions of MWh from generation sources not authenticated in accordance with this section shall be represented by the default scorecard. The weighted average of each category of environmental impact shall then be indexed by dividing it by the corresponding state average emission rate and multiplying the result by 100.

(7) If a competitive retailer or affiliated REP offers multiple electricity products that differ with regard to the fuel mix and environmental impact disclosures presented on the Electricity Facts labels, the retailer:

(A) may apply any supply contract to the calculation of any product label as long as the sum of MWh applied does not exceed the MWh acquired under the contract; and

(B) may apply any number of RECs to the calculation of any product label as long as:

(i) the number of RECs applied to all product labels is consistent with the number of RECs the retailer has retired with the REC Trading Program Administrator, and

(ii) the number of RECs applied to each product label results in a renewable energy content for each product that is equal to or greater than a benchmark to be calculated from data maintained by the REC Trading Program Administrator. The benchmark shall be defined on an annual basis as:

SRR / TS,

where

SRR = the statewide REC requirement, in MWh, as calculated by the REC Trading Program Administrator for the compliance period coinciding with the Electricity Facts label disclosure, and

TS = total MWh sales for all competitive retailers to Texas customers during the compliance period coinciding with the Electricity Facts label disclosure.

(8) An affiliated REP shall use only one fuel mix and environmental impact disclosure for all price-to-beat products sold to residential and small commercial customers of its affiliated transmission and distribution utility, except that if the predecessor bundled utility had an approved renewable energy tariff in accordance with §25.251 of this title (relating to Renewable Energy Tariff) on file with the commission during the freeze on existing retail base rate tariffs established by PURA §39.052, the affiliated REP may sell a renewable Price-to-Beat product.

(9) A competitive retailer or affiliated REP may anticipate the fuel mix and environmental impact of a new product and adjust the disclosures for its existing products to account for the new product's projected sales.

(A) On the fuel mix disclosure of a new product's Electricity Facts label, the heading "Sources of power generation" shall be replaced with "Projected sources of power generation."

(B) On the environmental impact disclosure of a new product's Electricity Facts label, the heading "Emissions and waste per kWh generated" shall be replaced with "Projected emissions and waste per kWh generated."

(C) The competitive retailer or affiliated REP shall exercise due diligence in its acquisition of purchased power throughout the year so that the fuel mix and environmental impact authenticated at the end of the year is at least as favorable as what the retailer projected.

(D) A projected fuel mix may be used only for new products, and the projections may not change during the year except as provided in subparagraph (E) of this paragraph.

(E) At the end of the first six months that a new product is offered, a retailer may choose to authenticate the product's fuel mix and environmental impact according to the provisions of this section and delete the word "projected" from the Electricity Facts label.

(g) **Special provisions for the first year of competition.** Each competitive retailer and affiliated REP shall estimate the fuel mix and environmental impact of its electricity products offered to customers during the first year of competition, and shall exercise due diligence in its power acquisitions throughout the year so that the fuel mix verified at the end of the year is at least as favorable as what was projected.

(h) **Compliance and enforcement.**

(1) If the commission finds that a REP, other than a municipally owned utility or an electric cooperative, is in violation of this section, the commission may take remedial action consistent with PURA §§39.101(e), 39.356, or 39.357, and the REP may be subject to administrative penalties pursuant to PURA §15.023 and §15.024. If the commission finds that an electric cooperative or a municipally owned utility is in violation, it shall inform the cooperative's board of directors and general manager, or the municipal utility's general manager and city council.

(2) If the commission finds that a REP, other than a municipally owned utility or an electric cooperative, repeatedly violates this section, and if consistent with the public interest, the commission may suspend, restrict, deny, or revoke the registration or certificate, including an amended certificate, of the REP, thereby denying the REP the right to provide service in this state.

(3) The commission shall coordinate its enforcement efforts regarding the prosecution of fraudulent, misleading, deceptive, and anticompetitive business practices with the office of the attorney general in order to ensure consistent treatment of specific alleged violations.

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 rule §25.476 relating to Labeling of Electricity with Respect to Fuel Mix and Environmental Impact is hereby adopted with changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE 24th DAY OF SEPTEMBER 2001.

PUBLIC UTILITY COMMISSION OF TEXAS

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MAX YZAGUIRRE, CHAIRMAN

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BRETT A. PERLMAN, COMMISSIONER

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REBECCA KLEIN, COMMISSIONER