

PROJECT NO. 41615

**RULEMAKING TO REVISE P.U.C. § PUBLIC UTILITY COMMISSION
SUBST. R. §25.107, CERTIFICATION §
OF RETAIL ELECTRIC PROVIDERS § OF TEXAS
(REPS) §**

**ORDER ADOPTING AMENDMENT TO §25.107
AS APPROVED AT THE MARCH 27, 2014 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts an amendment to §25.107, relating to Certification of Retail Electric Providers (REPs) with changes to the proposed text as published in the November 8, 2013 issue of the *Texas Register* (38 TexReg 7812). The amendment to the rule clarifies the definition of principal and executive officer; modifies the reporting requirement to extend the relevant time period for complaint history, disciplinary record, and compliance record while also specifying that such histories must include information from the U.S. Commodity Futures Trading Commission and any self-regulatory organization relating to physical or financial transactions in commodities; adds an affidavit reporting requirement identifying all principals and current employees of the applicant REP that experienced a mass transition of the REP's customers to a Provider of Last Resort (POLR); and provides additional bases for the suspension or revocation of a REP certificate. Additionally, the proposed amendment standardizes the REP Application and Amendment form. This amendment is adopted under Project Number 41615.

The commission received comments on the proposed amendment from the Retail Electric Provider Coalition (REP Coalition) consisting of the Alliance for Retail Markets (ARM – consisting of Constellation NewEnergy, Inc., Direct Energy, LP, Green Mountain Energy Company, and Noble Americas Energy Solutions LLC), Green Mountain Energy Company,

Reliant Energy Retail Services, LLC, the Texas Energy Association of Marketers (TEAM – consisting of Accent Energy d/b/a IGS Energy, Cirro Energy, Entrust Energy, Just Energy, Spark Energy, StarTex Power, Stream Energy, TriEagle Energy, and TruSmart Energy), and TXU Energy Retail Company LLC. Comments were also received from the Texas Legal Services Center (TLSC) and Texas Ratepayers Organization to Save Energy (Texas ROSE) (collectively, TLSC and Texas ROSE). Reply comments were received from the REP Coalition. No party provided comprehensive comments on the proposed amendments to the REP certification application.

General concern

The REP Coalition expressed concern that the adoption of the amended rule, as proposed, will require REPs to amend certificates in a subsequent compliance filing. The REP Coalition presumed that adoption of the proposed amendments would not trigger compliance or “material change” amendments to certificates held by existing REPs already certificated to provide retail electric service. Specifically, the REP Coalition believed the expanded ten-year period applicable to complaint histories and other records in proposed subsection (g)(2)(B) and the new affidavit requirement in proposed subsection (g)(2)(G) would only apply to new or “initial” applications. The REP Coalition argued that neither the expanded ten-year period applicable to complaint histories and other records, nor the new affidavit requirement, would result in a “material change” to the information provided by a REP “as the basis for the commission’s approval of the certification application.” The REP Coalition asked the commission to clarify under what circumstances a currently certificated REP must comply with the new certification requirements.

Commission response

The commission agrees with the REP Coalition that the expanded ten-year period applicable to complaint histories and other records in proposed subsection (g)(2)(B) and the affidavit requirement in proposed subsection (g)(2)(G) applies to new or initial applications. However, the commission's clarification of the definition of "principal" in subsection (b)(11) does trigger a "material change" pursuant to subsection (i)(3) that may require some REPs to file an amendment application pursuant to subsection (i)(3).

Subsection (b)(11) – Definitions - Principal

The REP Coalition opposed the revision of the term "principal" in subsection (b)(11). The REP Coalition stated its belief that the proposed revision "runs contrary to generally accepted definitions of the term" and that it believes the current definition of principal found in the rule is the proper definition to use. The REP Coalition contended that the definition of principal should be limited to include only those individuals who exercise controlling authority or influence over the company's business activities. The REP Coalition argued that certain elements of the proposed definition of principal were inconsistent with the concept of "control." The REP Coalition contended that based on well recognized definitions of the word principal, the exercise of controlling authority or influence over the company's business activities is integral to the identification of a principal. The inclusion of an agent, a permanent employee, a contractor, a consultant, and an accountant, is inappropriate according to the REP Coalition because they, by their definition, cannot control. An employee, contractor, consultant, or accountant cannot be a principal as a factual matter because they lack the authority to control a company's actions by

definition of their job. The REP Coalition asserted that these people are engaged to perform services or duties on a company's behalf and therefore, under such arrangement, cannot be principals because a principal retains the authority to direct the company's actions. The REP Coalition stated that a person cannot serve as both an agent and a principal because an agency relationship would fail to exist under such circumstances as a matter of law. Finally, the REP Coalition argued that the identity of a principal is largely a function of the company's organizational structure and is rooted in whether a person can exercise a level of authority that represents control.

The REP Coalition recommended that the commission retain the current definition of "principal" in subsection (b)(11) because it adequately captures the persons acting in such a capacity based on the integral element of control. However, the REP Coalition offered the following alternative language if the commission decided that some degree of specificity is warranted:

(b)(11) Principal – An executive officer; general partner; owner; director; shareholder of a privately held company or a publicly traded company who owns more than 10% of a class of equity securities; or any other person or a member of a group of persons that controls the person in question.

The REP Coalition believed their proposed language is better than that proposed by the commission because it does not reference persons or entities that cannot, or do not, exercise controlling authority or influence over a REP's business by definition. In addition, the REP Coalition believed, from a practical and legal perspective, the proposed rule's five percent (5%) security ownership threshold is insufficient to constitute "control" and should therefore be

amended to a ten percent (10%) ownership threshold for shareholders of both privately held and publicly traded companies. The REP Coalition argued that this 10% stock ownership threshold is consistent with the Commodities and Futures Trading Commission's definition of "principal" found in 17 C.F.R. 3.1(a)(2). In addition, the REP Coalition argued that the wholesale inclusion of any manager or supervisor in the commission's definition limits future employment opportunities regardless of the specific job responsibilities held by these individuals in their previous employment.

Commission response

The commission does not believe there is an accepted and agreed upon definition of principal, and that the definition proposed by the REP Coalition does not comprehensively reflect who, within a company, can exercise control over that company. The commission is concerned that the proposed definition may be misinterpreted to limit who is considered a principal under the control test. Therefore, the commission has removed the list modified by the phrase "that controls the person in question" to ensure that any person that controls a REP meets the definition of principal. To be clear, the removal of "an agent, a permanent employee, contractor, consultant, accountant, entity" is not intended to limit the scope of persons who may be considered as controlling a REP. Instead the commission removes these modifiers to make clear that it is not an exhaustive list and specify that principals include, but are not limited to agents, permanent employees, contractors, consultants, accountants, and other entities or persons, if they in fact exercise sufficient control. The commission concludes that its adopted definition more adequately captures,

with less room for misinterpretation, that all persons with a controlling interest in a REP are principals.

With the change in the definition of principal, the commission concludes that it is also necessary to update the definition of executive officer to harmonize the two terms as the term as the term “executive officer” is included within definition of “principal.” The revisions made to the definition of “executive officer” properly identifies persons who perform significant policy making functions. The revised definition, in turn, further clarifies individuals the commission considers to be principals of a REP.

Additionally, the commission agrees with the REP Coalition’s concerns regarding the wholesale inclusion of a manager or supervisor. Therefore, the commission revised the definition of principal to ensure managers or supervisors are principals under the definition when they exercise control of the person in question.

The commission agrees with the REP Coalition’s recommendation to use a 10% ownership threshold when defining principal as this is the threshold used by the Commodities and Futures Trading Commission.

Subsection (g)(2)(B)

The REP Coalition opposed the proposed ten-year period applicable to the complaint history, disciplinary records, and compliance records an applicant must include in its initial certification application, as included in the amended subsection (g)(2)(B). The REP Coalition regarded the

ten year period as too burdensome stating that it doubles the length of time an applicant must research in order to comply with the subsection. The REP Coalition noted that subsection (g)(2)(B)(ii) already acknowledges the difficulty of researching the present five year period by allowing applicants to request to limit the inclusion of this information if it would be unduly burdensome to provide; a limitation if it is burdensome, subject to the adequacy of other information submitted by the applicant. The REP Coalition also stated that the proposed ten-year period is unworkable because of governmental agencies' policies regarding record retention. The REP Coalition noted that some record retention policies do not extend ten years and therefore no amount of due diligence or good-faith effort on the applicant's part can surmount these gaps in information. The REP Coalition further contended that as a result of the proposed revision in subsection (j)(1), discussed subsequently, the unwitting omission of information pursuant to the revised standards of subsection (g)(2)(B) might result in suspension or revocation of a REP Certificate. For these reasons, the REP Coalition recommended retaining the five-year period currently in the certification rule.

Commission response

The commission recognizes issues of record accessibility as it relates to reporting requirements, but also notes the limitations of the current 60 month (5 year) requirement regarding the capture of significant complaint, disciplinary, and compliance issues affecting the applicant, its similar affiliates, and its significant personnel. The commission believes a more expansive review is warranted. To the extent that some governmental agencies' record retention policies do not extend to ten years, the commission agrees with the REP Coalition that subsection (g)(2)(b)(ii) allows REP applicants to request to

limit the inclusion of information that is unduly burdensome to provide. Therefore, the commission declines to retain the five-year compliance reporting period as proposed by the REP Coalition.

For clarity as to what information the commission considers to be relevant under this subsection, the commission adds the U.S. Commodity Futures Trading Commission as well as any self-regulatory organization relating to physical or financial transactions in commodities to the non-exclusive list of bodies for which REP applicants must provide relevant information regarding complaint history, disciplinary records, and compliance records. The commission believes information from self-regulatory organizations relating to physical or financial transaction in commodities and federal agencies will aid in a more expansive review of REP applications. The commission would like to clarify that this list is in no way exhaustive and all relevant information, including information from other federal and state agencies, must be provided.

Subsection (g)(2)(G)

The REP Coalition opposed adoption of the new affidavit proposed for subsection (g)(2)(G), requiring the identification of all principals and current employees that have had a relationship with a REP that experienced a mass transition to POLR service. The REP Coalition noted four problems with the affidavit language as proposed. First, subsection (g)(1)(D) currently precludes an individual who served as a principal of a REP that experienced a mass transition of customers to POLR service from directly or indirectly controlling a REP, and therefore serving as a

principal. Consequently, the REP Coalition argued that the inclusion of principals in the affidavit requirement is moot because such identification would demonstrate a prima facie violation of subsection (g)(1)(D). Second, the REP Coalition contended that the identification of “current employees” who were previously employed by a REP that transitioned customers to POLR service serves no legitimate purpose, given that such individuals do not exercise any controlling authority or influence in the operation of a REP’s business, and therefore cannot bear responsibility for a mass transition. The REP Coalition contended that, given this lack of accountability, the identification of current employees in the affidavit lacks any rational justification, but instead suggests guilt by association and arguably tarnishes the names and reputations of those individuals for no valid reason. Third, the REP Coalition argued that information about the failed REP’s settlement of outstanding financial obligations may not be publicly available or memorialized in detail. Therefore, it would be unreasonable to assume that the REP applicant can access or has knowledge of such information, particularly if the affidavit requirement is triggered by the recruitment of a mid- to low-level employee who once worked for a REP that experienced a mass transition of customers to POLR service. The REP Coalition continued by arguing that the commission should have access to information about the failed REP’s settlement of outstanding financial obligations and should therefore not rely on an applicant to include such history as part of a REP certificate application.

Finally, the REP Coalition believed the word “relationship” as used in subsection (g)(2)(G) is vague and may be subject to differing interpretations. They argued that because there is no definition of the term “relationship,” in this context it may include vendors, power suppliers, and, or, any person who has ever worked for the REP in any position. Additionally, because there are

no parameters around the length of time or type of position/role around this “relationship,” it could include a person who merely worked in a clerical position for a REP in the early part of his/her work history.

The REP Coalition recommended that subsection (g)(2)(G) not be adopted, but if it is, and the affidavit is retained, it recommended that the language should be modified to indicate only persons with a position of “control or influence” during the “relationship” with the failed REP be identified.

Commission response

The commission disagrees with the REP Coalition’s arguments against adoption of the new requirements in subsection (g)(2)(G). The commission determines that this is an affirmative reporting requirement that should be performed at the time of the initial REP certification application by the applicant who has access to knowledge about its personnel and their previous involvement in POLR events. However, the commission agrees with the REP Coalition that it is appropriate to specify that persons with a position of control or influence be included in the reporting requirement and has therefore revised subsection (g)(2)(G) accordingly.

Subsection (i)

TLSC and Texas ROSE requested that the commission establish expiration dates for REP certifications and procedures for periodic REP recertification (biennial recertification

requirements) to ensure that REPs possess adequate financial and technical resources and adhere to customer protection standards.

In its reply comments the REP Coalition opposed TLSC and Texas ROSE's proposal to set a two-year expiration date for REP certificates and to require REPs to obtain recertification, stating that it was unnecessary and detrimental to the competitive retail electric market. In support of its position the REP Coalition noted that subsection (i) requires a REP to timely update the information that was submitted when applying for their certificate and that strict timelines are required for the provision of this information, for example, a REP must amend its certificate within ten working days of any "material change" and, if a REP no longer complies with the access to capital requirements in subsection (f)(1)(A) or (B), a three day notification and a ten working day submission of a remedy plan. In addition, the REP Coalition advised that an annual and a semi-annual report are required of every REP that is designed to update all pertinent information regarding the REP's qualifications on an ongoing basis. The REP Coalition argued that through the submission of certificate amendments, compliance plans, and annual and semi-annual reports, a REP keeps the commission informed of the status of its continued compliance with the financial, technical, managerial, and other requirements in the certification rule, and therefore recertification is unnecessary. The REP Coalition argued that the commission currently has the discretion to undertake a thorough review of any REP's qualifications and, pursuant to the criteria in subsection (j), may amend, suspend, or revoke a certificate for a significant violation rendering recertification unnecessary and also administratively burdensome for the REPs and the commission.

Finally, the REP Coalition's reply comments argued that the imposition of any expiration date on a REP's certification, especially one as short as two years, would frustrate a REP's long-term business plan for operating in the competitive retail electric market. The REP Coalition asserted that any business plan covering a period in excess of the expiration date would be contingent on the ability to obtain recertification which would stunt overall growth in the retail market. In addition, the REP Coalition argued that such a limited certification period introduces an element of perceived risk that could result in unintended consequences, which would likely be borne by retail customers. For these reasons, the REP Coalition urged the commission to reject a recertification process or the establishment of an expiration date on a REP's certification, as proposed by TLSC and Texas ROSE.

Commission response

The commission agrees with the reasoning of the REP Coalition that REP certifications should not be subject to an expiration date. The REP certification rule is designed to thoroughly review initial applications for qualifications while also providing for commission review of any amendments which would constitute a "material change" in the application. In addition to the initial application review process, annual reporting requirements, and requirements to amend a REP certificate, the commission also monitors the reports of the Electric Reliability Council of Texas (ERCOT) and engages in audits and reviews via its own Oversight and Enforcement Division. The commission disagrees with TLSC and Texas ROSE that a recertification process is necessary. The commission views the proposal as redundant and would be an unnecessary burden to REPs.

Subsection (j)

TLSC and Texas ROSE argued for more transparency and requested that a REP's certification and continued certification be conditioned upon the REP not violating Texas and federal laws relating to the REP's marketing to, contracting with, providing services to, selling to, billing to, and collection actions against its customers. TLSC and Texas ROSE request subsection (j)(1) be amended to read:

- (j) Suspension and revocation. A certificate granted pursuant to this section, is subject to amendment, suspension, or revocation by the commission for a significant violation of PURA, Texas and federal laws related to a REP's marketing to, selling to providing service to, contracting with, billing to, and/or collection actions against its retail customers.

TLSC and Texas ROSE recommended an additional amendment to subsection (j), the addition of a new item (3), and subsequent item re-numbering for its inclusion, which reads:

- (3) engaging in violation of Texas or federal law relating to a REP's marketing to selling to, providing service to, contracting with, billing to, and/or collection actions against its retail customers.

TLSC and Texas ROSE argued again that these amendments are needed because arguments have been raised that unless a PUC rule incorporates violations of Texas and federal laws into the commission rules, the commission cannot bring enforcement actions for these violations. TLSC and Texas ROSE believed their proposed amendments could remedy this problem as well as bring greater transparency and more efficient regulatory enforcement of customer protections.

In reply comments the REP Coalition opposed TLSC and Texas ROSE's proposed amendment to subsection (j). The REP Coalition stated they believe the commission lacks the statutory authority to enforce statutes like the Texas Uniform Commercial Code and the Texas Deceptive Trade Practices-Consumer Protection Act. The REP Coalition argued that the commission only has the authority to enforce the Public Utility Regulatory Act (PURA) and its own rules, as well as the ERCOT Protocols, and therefore TLSC and Texas ROSE's proposed amendment would go beyond the commission's authority by contemplating the commission's independent enforcement of statutes that it does not have the authority to enforce. The REP Coalition, however, acknowledged that REPs must comply with rules and statutes that are beyond the scope of the commission's authority but objected to TLSC and Texas ROSE's recommendation to add language in subsection (j) that connects violations of Texas and federal law regarding marketing, contracting, collection, and other customer service related actions to possible amendment, suspension, or revocation of a certificate by the commission.

In addition, the REP Coalition asserted that the suggested amendment is not necessary because the commission may suspend or revoke a REP certificate pursuant to any of the existing grounds in subsection (j) which includes "engaging in fraudulent, unfair, misleading, deceptive, or anticompetitive practices, or unlawful discrimination..." The REP Coalition noted that under PURA, the commission's rules regarding certification "shall be no less effective than federal law" and that §25.471(b)(2) states one of the purposes of Subchapter R of the commission's electric rules is to, "provide customer protections and disclosures established by other state and federal laws and rules including but not limited to Fair Credit Reporting Act (15 U.S.C. §1681, *et seq.*) and the Truth in Lending Act (15 U.S.C. §1601, *et seq.*) *Such protections are*

applicable where appropriate, whether or not it is explicitly stated in these rules[.] (emphasis added).” Therefore, the REP Coalition concluded that the additional amendment requested by TLSC and Texas ROSE is unnecessary and should not be adopted.

Commission response

The commission declines to adopt amendments proposed by TLSC and Texas ROSE. The commission believes that it has the capability to enforce violations through the rule as proposed. The commission also agrees with the REP Coalition that commission’s statutory requirements and its rules already address concerns of TLSC and Texas ROSE. Therefore, the commission declines to make the modifications proposed by TLSC and Texas ROSE.

Subsection (j)(1)

The REP Coalition recommended that the additional significant violation in subsection (j)(1), justifying suspension or revocation of a REP certificate, be limited to failure to disclose “material” information. The REP Coalition argued that the current proposal could trigger suspension or revocation in cases of omissions or nondisclosures of relatively minor information in a REP certificate application or in its annual report. The REP Coalition acknowledges that it is unlikely the commission would institute such actions against a REP for such immaterial omissions. The REP Coalition therefore recommends the following language be adopted:

- (j)(1) Providing false or misleading information to the commission, including a failure to disclose any *material* information required by this section;

Commission response

A totality of information is used to determine if the commission will grant a requested certification, therefore it is impossible to tell what information alone is material in nature. Therefore, the commission declines the REP Coalition's proposed modification to subsection (j)(1).

The commission also amends subsection (g)(2)(B)(i) to further clarify information regarding complaint history, disciplinary record, and compliance records of the U.S. Commodity Futures Trading Commission and any self-regulatory organization relating to physical or financial transactions in commodities should be reported by a REP applicant. This information is deemed important in evaluating REP applications and is part of the totality of information the commission considers in granting a certification request.

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 amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (West 2007 and Supp. 2013) (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 §39.352, which grants the commission the authority to certify a person as a REP if the person demonstrates, among other things, the financial and technical resources to provide continuous and reliable electric service, the managerial and

technical ability to supply electricity at retail in accordance with customer contracts, and the resources needed to meet customer protection requirements and which requires a person applying for certification as a REP to comply with all customer protection provisions, disclosure requirements, and marketing guidelines established by the commission and PURA; PURA §17.004, which authorizes the commission to adopt and enforce rules concerning REPs that protect customers against fraudulent, unfair, misleading, deceptive, or anticompetitive practices and that impose minimum service standards relating to customer deposits and termination of service; PURA §§17.051-17.053, which authorize the commission to adopt rules for REPs concerning certification, changes in ownership and control, customer service and protection, and reports; and PURA §39.101, which authorizes the commission to adopt and enforce rules that ensure retail customer protections and entitles a customer: to safe, reliable, and reasonably priced electricity, to other information or protections necessary to ensure high-quality service to customers including protections relating to customer deposits and quality of service, and to be protected from unfair, misleading, or deceptive practices, and which requires the commission to ensure that its customer protection rules provide at least the same level of customer protection against potential abuses and the same quality of service that existed on December 31, 1999.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 17.004, 17.051-17.053, 39.101, and 39.352.

§25.107. Certification of Retail Electric Providers (REPs).

- (a) **Applicability.** This section applies to all persons who provide or seek to provide electric service to retail customers in an area in which customer choice is in effect and to retail customers participating in a customer choice pilot project authorized by the commission. This section does not apply to the state, political subdivisions of the state, electric cooperatives or municipal corporations, or to electric utilities providing service in an area where customer choice is not in effect. An electric cooperative or municipally owned utility participating in customer choice may offer electric energy and related services at unregulated prices directly to retail customers who have customer choice without obtaining certification as a REP.
- (1) A person must obtain a certificate pursuant to this subsection before purchasing, taking title to, or reselling electricity in order to provide retail electric service.
 - (2) A person who does not purchase, take title to, or resell electricity in order to provide electric service to a retail customer is not a REP and may perform a service for a REP without obtaining a certificate pursuant to this section.
 - (3) A REP that outsources retail electric functions remains responsible under commission rules for those functions and remains accountable to applicable laws and commission rules for all activities conducted on its behalf by any subcontractor, agent, or any other entity.
 - (4) All filings made with the commission pursuant to this section, including a filing subject to a claim of confidentiality, shall be filed with the commission's Filing

Clerk in accordance with the commission's Procedural Rules, Chapter 22, Subchapter E, of this title (relating to Pleadings and other Documents).

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

- (1) **Affiliate** -- An affiliate of, or a person affiliated with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under the common control with, the person specified.
- (2) **Continuous and reliable electric service** -- Retail electric service provided by a REP that is consistent with the customer's terms and conditions of service and uninterrupted by unlawful or unjustified action or inaction of the REP.
- (3) **Control** -- The term control (including the terms controlling, controlled by and under common control with) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through ownership of voting securities, by contract, or otherwise.
- (4) **Customer** -- Any entity who has applied for, has been accepted for, or is receiving retail electric service from a REP on an end-use basis.
- (5) **Default** -- As defined in a transmission and distribution utility (TDU) tariff for retail delivery service, Electric Reliability Council of Texas (ERCOT) qualified scheduling entity (QSE) agreement, or ERCOT load serving entity (LSE) agreement.
- (6) **Executive officer** -- When used with reference to a person means its president or chief executive officer, a vice president serving as its chief financial officer, or a

vice president serving as its chief accounting officer, a vice president in charge of a principal business unit, division or function, any other officer of the person who performs a policy making function for the person, or any other person who performs similar policy making functions for the person. Executive officers or subsidiaries may be deemed executive officers of the person if they perform policy making functions for the person.

- (7) Guarantor -- A person providing a guaranty agreement, business financial commitment, or a credit support agreement providing financial support to a REP or applicant for REP certification pursuant to this section.
- (8) Investment-grade credit rating -- A long-term unsecured credit rating of at least “Baa3” from Moody’s Investors’ Service, or “BBB-” from Standard & Poor’s or Fitch, or “BBB” from A.M. Best.
- (9) Permanent employee -- An individual that is fully integrated into a REP’s business organization. A consultant is not a permanent employee.
- (10) Person -- Includes an individual and any business entity, including and without limitation, a limited liability company, a partnership of two or more persons having a joint or common interest, a mutual or cooperative association, and a corporation, but does not include an electric cooperative or a municipal corporation.
- (11) Principal -- An executive officer; partner; owner; director; shareholder of a privately held company; shareholder of a publicly traded company who owns more than 10 % of a class of equity securities; or a person that controls the person in question.

- (12) Retail electric provider -- A person that sells electric energy to retail customers in this state. As provided in Public Utility Regulatory Act (PURA) §39.353(b), a REP is not an aggregator.
- (13) Shareholder -- The term shareholder means the legal or beneficial owner of any of the equity of any business entity, including without limitation and as the context and applicable business entity requires, stockholders of corporations, members of limited liability companies and partners of partnerships.
- (14) Tangible net worth -- Total shareholders' equity, determined in accordance with generally accepted accounting principles, less intangible assets other than goodwill.
- (15) Working day -- A day on which the commission is open for the conduct of business.

(c) **Application for REP certification.**

- (1) A person applying for certification as a REP must demonstrate its capability of complying with this section. A person who operates as a REP or who receives a certificate under this section shall maintain compliance with this section.
- (2) An application for certification shall be made on a form approved by the commission, verified by oath or affirmation, and signed by an executive officer of the applicant.
- (3) Except where good cause exists to extend the time for review, the presiding officer shall issue an order finding whether an application is deficient or complete within 20 working days of filing. Deficient applications, including those without

necessary supporting documentation, will be rejected without prejudice to the applicant's right to reapply.

- (4) While an application for a certificate is pending, an applicant shall inform the commission of any material change in the information provided in the application within ten working days of any such change.
 - (5) Except where good cause exists to extend the time for review, the commission shall enter an order approving, rejecting, or approving with modifications, an application within 90 days of the filing of the application.
- (d) **REP certification requirements.** A person seeking certification under this section may apply to provide services under paragraph (1) or (2) of this subsection, and shall designate its election in the application.
- (1) **Option 1.** This option is for a REP whose service offerings will be defined by geographic service area.
 - (A) An applicant must designate one of the following categories as its geographic service area:
 - (i) The geographic area of the entire state of Texas;
 - (ii) A specific geographic area (indicating the zip codes applicable to that area);
 - (iii) The service area of specific TDUs or specific municipal utilities or electric cooperatives in which competition is offered; or
 - (iv) The geographic area of ERCOT or other independent organization to the extent it is within Texas.

- (B) A REP with a geographic service area is subject to all subsections of this section, including those pertaining to basic, financial, technical and managerial, customer protection, and reporting and changing certification requirements.
 - (C) The commission shall grant a certificate to an applicant proposing to provide retail electric service to a geographic service area in Texas if it demonstrates that it meets the requirements of this section.
 - (D) The commission shall deny an application if the configuration of the proposed geographic area would discriminate in the provision of electric service to any customer because of race, creed, color, national origin, ancestry, sex, marital status, lawful source of income, disability, or familial status; because the customer is located in an economically distressed geographic area or qualifies for low income affordability or energy efficiency services; or because of any other reason prohibited by law.
- (2) **Option 2.** This option is for a REP whose service offerings will be limited to specifically identified customers, each of whom contracts for one megawatt or more of capacity. The applicant shall be certified as a REP only for purposes of serving the specified customers. The commission shall grant a certificate under this paragraph if the applicant demonstrates that it meets the requirements of this paragraph.
- (A) A person seeking certification under this paragraph must file with the commission a signed, notarized affidavit from each customer, with whom

it has contracted to provide one megawatt or more of capacity. The affidavit must state that the customer is satisfied that the REP meets the standards prescribed by PURA §39.352 (b)(1)-(3) and (c).

(B) The following subsections apply to REPs certified pursuant to this paragraph:

- (i) Subsection (e) of this section (relating to Basic Requirements);
- (ii) Subsection (f)(5) of this section (relating to Billing and Collection of Transition Charges); and
- (iii) Subsection (i) of this section (relating to Requirements for Reporting and Changing Certification).

(3) **Option 3.** This option is for a REP that sells electricity exclusively to a retail customer other than a small commercial and residential customer from a distributed generation facility located on a site controlled by that customer. The following subsections do not apply to REPs certified pursuant to this paragraph: subsections (f), (g), (h), and (i)(4)-(5) of this section, except that a person seeking certification under this paragraph shall file an application with the commission that identifies a power generation company that owns the distributed generation facilities and provides the information required in subsection (g)(2)(A) of this section. A person seeking certification under this paragraph shall ensure that the distributed generation facility from which it buys electricity is owned by a power generating company (PGC) that has registered in accordance with §25.109 of this title (relating to Registration of Power Generation Companies and Self Generators), and

- (A) Conforms to the requirements of §25.211 of this title (relating to Interconnection of On-Site Distributed Generation (DG)) and §25.212 of this title (relating to Technical Requirements for Interconnection and Parallel Operation of On-Site Distributed Generation);
- (B) Is installed by a Licensed Electrician, consistent with the requirements of the Texas Department of Licensing and Regulation; and
- (C) Is installed in accordance with the National Electric Code as adopted by the Texas Department of Licensing and Regulation and in compliance with all applicable local and regional building codes.

(e) **Basic requirements.**

- (1) **Names on certificates.** All retail electric service shall be provided under names set forth in the granted certificate. If the applicant is a corporation, the commission shall issue the certificate in the corporate name of the applicant.
 - (A) No more than five assumed names may be authorized for use by any one REP at one time.
 - (B) Business names shall not be deceptive, misleading, vague, otherwise contrary to §25.272 of this title (relating to Code of Conduct for Electric Utilities and Their Affiliates), or duplicative of a name previously approved for use by a REP certificate holder.
 - (C) If the commission determines that any requested name does not meet the requirements of subparagraph (B) of this paragraph, it shall notify the applicant that the requested name shall not be used by the REP. An

application shall be dismissed if an applicant does not provide at least one suitable name.

- (2) **Office requirements.** A REP shall continuously maintain an office located within Texas for the purpose of providing customer service, accepting service of process and making available in that office books and records sufficient to establish the REP's compliance with PURA and the commission's rules. The office satisfying this requirement for a REP shall have a physical address that is not a post office box and shall be a location where the above three functions can occur. To evaluate compliance with requirements in this paragraph, the commission staff may visit the office of a REP at any time during normal business hours. An applicant shall demonstrate that it has made arrangements for an office located in Texas.

(f) **Financial requirements.**

- (1) **Access to capital.** A REP must meet the requirements of subparagraphs (A) or (B) of this paragraph.

(A) A REP or its guarantor electing to meet the requirements of this subparagraph must demonstrate and maintain:

- (i) an investment-grade credit rating; or
- (ii) tangible net worth greater than or equal to \$100 million, a minimum current ratio (current assets divided by current liabilities) of 1.0, and a debt to total capitalization ratio not greater than 0.60, where all calculations exclude unrealized gains and losses resulting

from valuing to market the power contracts and financial instruments used as supply hedges to serve load, and such calculations are supported by an affidavit from an executive officer of the REP attesting to the accuracy of the calculation.

- (B) A REP electing to meet the requirements of this subparagraph must demonstrate shareholders' equity, determined in accordance with generally accepted accounting principles, of not less than one million dollars for the purpose of obtaining certification, and the REP or its guarantor must provide and maintain an irrevocable stand-by letter of credit payable to the commission with a face value of \$500,000 for the purpose of maintaining certification.
- (i) The required shareholders' equity of one million dollars shall be determined net of assets used for collateral pledged to secure the irrevocable stand-by letter of credit of \$500,000.
- (ii) For the period beginning on the date of certification and ending two years after the REP begins serving load, a REP shall not make any distribution or other payment to any shareholders or affiliates if, after giving effect to the distribution or other payment, the REP's shareholders' equity is less than one million dollars, net of assets used for collateral pledged to secure the irrevocable stand-by letter of credit of \$500,000. The restriction on distributions or other payments contained in this subparagraph includes, but is not

limited to, dividend distributions, redemptions and repurchases of equity securities, or loans to shareholders or affiliates.

- (iii) A REP that began serving load on or before January 1, 2009 is not required to demonstrate the shareholders' equity required pursuant to subparagraph (B) of this paragraph, and is not subject to the restrictions on distributions or payments to shareholders or affiliates contained in subparagraph (B) of this paragraph.

(2) **Protection of customer deposits and advance payments.**

- (A) A REP certified pursuant to paragraph (1)(A) of this subsection shall keep customer deposits and residential advance payments in an escrow account or segregated cash account, or provide an irrevocable stand-by letter of credit payable to the commission in an amount sufficient to cover 100% of the REPs outstanding customer deposits and residential advance payments held at the close of each month.
- (B) A REP certified pursuant to paragraph (1)(B) of this subsection shall keep customer deposits and residential advance payments in an escrow account or segregated cash account, or provide an irrevocable stand-by letter of credit payable to the commission in an amount sufficient to cover 100% of the REP's outstanding customer deposits and residential advance payments held at the close of each month. For purposes of this subparagraph only, to qualify as a segregated cash account, the account must be with a financial institution whose deposits, including the deposits in the segregated cash account, are insured by the Federal Deposit

Insurance Corporation, the account is designated as containing only customer deposits, the account is subject to the control or management of a provider of pervasive and comprehensive credit to the REP that is not affiliated with the REP, and the terms for managing the account protect customer deposits.

- (C) In lieu of the requirements of subparagraph (B) of this paragraph, a REP certified pursuant to paragraph (1)(B) of this subsection that is providing electric service under the provisions of §25.498 of this title (relating to Retail Electric Service Using a Customer Prepayment Device or System) shall be required to keep all deposits and an amount sufficient to cover the credit balance that exceeds \$50 for all customer accounts that have a credit balance exceeding \$50 at the close of each month in an escrow account, or to provide an irrevocable stand-by letter of credit payable to the commission in an amount equal to or greater than the amount required to be deposited in the escrow account.
- (D) Each escrow account and segregated cash account shall be reconciled no less frequently than at the close of each month to ensure that it equals or exceeds deposits and residential advance payments held as of the end of the month, and shall maintain at least that amount in the account until the next monthly reconciliation.
- (E) Any irrevocable stand-by letter of credit provided pursuant to this paragraph shall be in addition to the irrevocable stand-by letter of credit required by paragraph (1)(B) of this subsection, if applicable.

- (3) **Protection of TDU financial integrity.**
- (A) A TDU shall not require a deposit from a REP except to secure the payment of transition charges as provided in §25.108 of this title (relating to Financial Standards for Retail Electric Providers Regarding Billing and Collection of Transition Charges), or if the REP has defaulted on one or more payments to the TDU. A TDU may impose credit conditions on a REP that has defaulted to the extent specified in its statewide standardized tariff for retail delivery service and as allowed by commission rules.
- (B) A TDU shall create a regulatory asset for bad debt expenses, net of collateral posted pursuant to subparagraph (A) of this paragraph and bad debt already included in its rates, resulting from a REP's default on its obligation to pay delivery charges to the TDU. Upon a review of reasonableness and necessity, a reasonable level of amortization of such regulatory asset shall be included as a recoverable cost in the TDU's rates in its next rate case or such other rate recovery proceeding as deemed necessary.
- (4) **Financial documentation required to obtain a REP certificate.** The following shall be required to demonstrate compliance with the financial requirements to obtain a REP certificate.
- (A) Investment-grade credit ratings shall be documented by reports of a credit reporting agency.
- (B) Tangible net worth shall be documented by the audited financial statements of the REP or its guarantor for the most recently completed

calendar or fiscal year, and unaudited financial statements for the most recently completed quarter. Audited financial statements shall include the accompanying notes and the independent auditor's report. Unaudited financial statements shall include a sworn statement from an executive officer of the REP attesting to the accuracy, in all material respects, of the information provided in the unaudited financial statements. Three consecutive months of monthly statements may be submitted in lieu of quarterly statements if quarterly statements are not available. The requirement for financial statements may be satisfied by filing a copy of or by providing an electronic link to its most recent statement that contains unaudited financials filed with any agency of the federal government, including without limitation, the Securities and Exchange Commission.

- (C) Shareholders' equity shall be documented by the audited and unaudited financial statements of the REP for the most recent quarter. Audited financial statements shall include the accompanying notes and the independent auditor's report. Unaudited financial statements shall include a sworn statement from an executive officer of the REP attesting to the accuracy, in all material respects, of the information provided in the unaudited financial statements. Three consecutive months of monthly statements may be submitted in lieu of quarterly statements if quarterly statements are not available. The requirement for financial statements may be satisfied by filing a copy of or by providing an electronic link to its most recent statement that contains unaudited financials filed with any

agency of the federal government, including without limitation, the Securities and Exchange Commission.

- (D) Segregated cash accounts shall be documented by an account statement that clearly identifies the financial institution where the account holder maintains the account, and that clearly identifies the account as an account that is designated as containing only customer deposits and residential advanced payments. Segregated cash accounts shall be maintained at a financial institution that is supervised or examined by the Board of Governors of the Federal Reserve System, the Office of the Controller of the Currency, or a state banking department, and where accounts are insured by the Federal Deposit Insurance Corporation.
- (E) Escrow accounts shall be documented by the current account statement and the escrow account agreement. The escrow account agreement shall provide that the account holds customer deposits and residential advance payments only, and that the deposits are held in trust by the escrow agent and are not the property of the REP or in the REP's control unless the customer deposits are applied to a final bill or applied to satisfy unpaid amounts if allowed by the REP's terms of service. The escrow agent shall deposit the customer deposits and residential advance payments in an account at a financial institution that is supervised or examined by the Board of Governors of the Federal Reserve System, the Office of the Controller of the Currency, or a state banking department, and where accounts are insured by the Federal Deposit Insurance Corporation.

- (F) Irrevocable stand-by letters of credit provided pursuant to paragraphs (1) or (2) of this subsection must be issued by a financial institution that is supervised or examined by the Board of Governors of the Federal Reserve System, the Office of the Controller of the Currency, or a state banking department, and where accounts are insured by the Federal Deposit Insurance Corporation. The REP must use the standard form irrevocable stand-by letter of credit approved by the commission. The irrevocable stand-by letter of credit must be irrevocable for a period not less than twelve months, payable to the commission, and permit a draw to be made in part or in full. The irrevocable stand-by letter of credit must permit the commission's executive director or the designee to draw on the irrevocable stand-by letter of credit if:
- (i) ERCOT performs a mass transition of the REP's customers; or
 - (ii) the commission issues an order revoking the REP's certificate.
- (G) A REP may satisfy the requirements of paragraph (1)(A) of this subsection by relying upon a guarantor that meets one of the capital requirements of paragraph (1)(A) of this subsection, provided that:
- (i) The guarantor is an affiliate of the REP and has executed and maintains the standard form guaranty agreement approved by the commission, or
 - (ii) The guarantor is one or more persons that are affiliates of the REP and such affiliates have executed and maintain guaranty agreements, business financial commitments, or credit support

agreements that demonstrate financial support for credit or collateral requirements associated with power purchase agreements and for security associated with participation at ERCOT, or

(iii) The guarantor is a financial institution that maintains an investment-grade credit rating and has executed and maintains guaranty agreements, business financial commitments, or credit support agreements that demonstrate financial support for credit or collateral requirements associated with power purchase agreements and for security associated with participation at ERCOT, or

(iv) The guarantor is a provider of wholesale power supply to the REP, or one of such power provider's affiliates, and such person has executed and maintains guaranty agreements, business financial commitments, or credit support agreements that demonstrate financial support for credit or collateral requirements associated with a power purchase agreement and for security associated with participation at ERCOT.

(5) **Billing and collection of transition charges.** If a REP serves customers in the service area of a TDU that is subject to a financing order pursuant to PURA §39.310, the REP shall comply with §25.108 of this title.

(6) Proceeds from an irrevocable stand-by letter of credit.

(A) Proceeds from an irrevocable stand-by letter of credit provided under this subsection may be used to satisfy the following obligations of the REP, in the following order of priority:

- (i) first, to pay the deposits to retail electric providers that volunteer to provide service in a mass transition event under §25.43 of this title (relating to Provider of Last Resort (POLR)) of low income customers enrolled in the system benefit fund rate reduction program pursuant to §25.454(f) of this title (relating to Rate Reduction Program);
 - (ii) second, to pay the deposits to retail electric providers that do not volunteer to provide service in a mass transition event under §25.43 of this title of low income customers enrolled in the system benefit fund rate reduction program pursuant to §25.454(f) of this title;
 - (iii) third, for customer deposits and residential advance payments of customers that did not benefit from clause (i) or (ii) of this subparagraph;
 - (iv) fourth, for services provided by the independent organization related to serving customer load;
 - (v) fifth, for services provided by a TDU; and
 - (vi) sixth, for administrative penalties assessed under Chapter 15 of PURA.
- (B) Proceeds from an irrevocable stand-by letter of credit provided under this subsection shall, to the extent that the proceeds are not needed to satisfy an obligation set out in subparagraph (A) of this paragraph, be paid to the REP.

(g) **Technical and managerial requirements.** A REP must have the technical and managerial resources and ability to provide continuous and reliable retail electric service to customers, in accordance with its customer contracts, PURA, commission rules, ERCOT protocols, and other applicable laws.

(1) Technical and managerial resource requirements include:

- (A) Capability to comply with all applicable scheduling, operating, planning, reliability, customer registration, and settlement policies, protocols, guidelines, procedures, and other rules established by ERCOT or other applicable independent organization including any independent organization requirements for 24-hour coordination with control centers for scheduling changes, reserve implementation, curtailment orders, interruption plan implementation, and telephone number, fax number, e-mail address, and postal address where the REP's staff can be directly reached at all times.
- (B) Capability to comply with the registration and certification requirements of ERCOT or other applicable independent organization and its system rules, or contracts for services with entities registered with or certified by ERCOT or other applicable independent organization.
- (C) Compliance with all renewable energy portfolio standards in accordance with §25.173 of this title (relating to Goal for Renewable Energy).
- (D) Principals or permanent employees in managerial positions whose combined experience in the competitive electric industry or competitive

gas industry equals or exceeds 15 years. An individual that was a principal of a REP that experienced a mass transition of the REP's customers to POLR shall not be considered for purposes of satisfying this requirement, and shall not own more than 10% of a REP or directly or indirectly control a REP.

- (E) At least one principal or permanent employee who has five years of experience in energy commodity risk management of a substantial energy portfolio. Alternatively, the REP may provide documentation demonstrating that the REP has entered into a contract for a term not less than two years with a provider of commodity risk management services that has been providing such services for a substantial energy portfolio for at least five years. A substantial energy portfolio means managing electricity or gas market risks with a minimum value of at least \$10,000,000.
- (F) Adequate staffing and employee training to meet all service level commitments.
- (G) The capability and effective procedures to be the primary point of contact for retail electric customers for distribution system service in accordance with applicable commission rules, including procedures for relaying outage reports to the TDU on a 24-hour basis.
- (H) A customer service plan that describes how the REP complies with the commission's customer protection and anti-discrimination rules.

- (2) An applicant shall include the following in its initial application for REP certification:
- (A) Prior experience of one or more of the applicant's principals or permanent employees in the competitive retail electric industry or competitive gas industry;
 - (B) Any complaint history, disciplinary record and compliance record during the ten years immediately preceding the filing of the application regarding: the applicant; the applicant's affiliates that provide utility-like services such as telecommunications, electric, gas, water, or cable service; the applicant's principals; and any person that merged with any of the preceding persons;
 - (i) The complaint history, disciplinary record, and compliance record shall include information from any federal agency including the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission; any self-regulatory organization relating to the sales of securities, financial instruments, physical or financial transactions in commodities, or other financial transactions; state public utility commissions, state attorney general offices, or other regulatory agencies in states where the applicant is doing business or has conducted business in the past including state securities boards or commissions, the Texas Secretary of State, Texas Comptroller's Office, and Office of the Texas Attorney General. Relevant information shall include

the type of complaint, status of complaint, resolution of complaint, and the number of customers in each state where complaints occurred.

(ii) The applicant may request to limit the inclusion of this information if it would be unduly burdensome to provide, so long as the information provided is adequate for the commission to assess the applicant's and the applicant's principals' and affiliates' complaint history, disciplinary record, and compliance record.

(iii) The commission may also consider any complaint information on file at the commission.

(C) A summary of any history of insolvency, bankruptcy, dissolution, merger, or acquisition of the applicant or any predecessors in interest during the 60 months immediately preceding the application;

(D) A statement indicating whether the applicant or the applicant's principals are currently under investigation or have been penalized by an attorney general or any state or federal regulatory agency for violation of any deceptive trade or consumer protection laws or regulations;

(E) Disclosure of whether the applicant or applicant's principals have been convicted or found liable for fraud, theft, larceny, deceit, or violations of any securities laws, customer protection laws, or deceptive trade laws in any state;

(F) An affidavit stating that the applicant will register with or be certified by ERCOT or other applicable independent organization and will comply

with the technical and managerial requirements of this subsection; or that entities with whom the applicant has a contractual relationship are registered with or certified by the independent organization and will comply with all system rules established by the independent organization;

- (G) An affidavit identifying all principals, executive management, and employees, or contract employees of the applicant that exercised influence or control over a REP that experienced a mass transition of the REP's customers to POLR. If such a relationship existed, the applicant shall include in the affidavit the name of the REP that experienced a mass transition of the REP's customers to POLR and provide factual statements as to whether and, if so, how the REP that experienced a mass transition of the REP's customers to POLR settled all outstanding obligations including the return of any owed customer deposits; and
- (H) Other evidence, at the discretion of the applicant, supporting the applicant's plans for meeting requirements of this subsection.

(h) **Customer protection requirements.** A REP shall comply with all applicable customer protection requirements, including disclosure requirements, marketing guidelines and anti-discrimination requirements, and the requirements of this section.

(i) **Requirements for reporting and changing certification.** To maintain a REP certificate, a REP must keep its certification information up to date, pursuant to the following requirements:

- (1) A REP shall notify the commission within five working days of any change in its business address, telephone numbers, authorized contacts, or other contact information.
- (2) A REP that demonstrates compliance with certification requirements of this section by submitting an affidavit shall supply information to the commission to show actual compliance with this section.
- (3) A REP shall apply to amend its certification within ten working days of a material change to the information provided as the basis for the commission's approval of the certification application. A REP may seek prior approval of a material change, including a change in control, by filing the amendment application before the occurrence of the material change. The transfer of a REP certificate is a material change.
- (4) For an Option 1 REP, the REP shall notify the commission within three working days of its non-compliance with subsection (f)(1)(A) or (B) of this section. The notification shall set out a plan of recourse to correct the non-compliance with subsection (f)(1)(A) or (B) of this section within 10 working days after the non-compliance has been brought to the attention of the commission. The commission staff may initiate a proceeding to address the non-compliance.
- (5) For an Option 1 REP, the REP shall file a report due on March 5, or 65 days after the end of the REP or guarantor's fiscal year (annual report), and August 15, or 225 days after the end of the REP or guarantor's fiscal year (semi-annual report), of each year.

- (A) The annual report shall include:
- (i) Any changes in addresses, telephone numbers, authorized contacts, and other information necessary for contacting the certificate holder.
 - (ii) Identification of areas where the REP is providing retail electric service to customers in Texas compiled by zip code.
 - (iii) A list of aggregators with whom the REP has conducted business in the reporting period, and the commission registration number for each aggregator.
 - (iv) A sworn affidavit that the certificate holder is not in material violation of any of the requirements of its certificate.
 - (v) Any changes in ownership.
 - (vi) Any changes in management, experience, and personnel relied on for certification in each semi-annual report before the REP begins serving customers and in the first semi-annual report after the REP serves customers.
 - (vii) Documentation to demonstrate ongoing compliance with the financial requirements of subsection (f) of this section, including, but not limited to, calculations showing tangible net worth, financial ratios or shareholders' equity, as applicable, and the amount of customer deposits and the balance of an account in which customer deposits are held, supported by a sworn statement from an executive officer of the REP attesting to the accuracy, in

all material respects, of the information provided. Any certified calculations provided as part of the annual report to demonstrate such compliance shall be as of the end of the most recent fiscal quarter. A REP may submit any relevant documentation of the type required by subsection (f)(4) of this section to demonstrate its ongoing compliance with the financial requirements of subsection (f) of this section.

- (B) The semi-annual report shall include:
- (i) Documentation to demonstrate ongoing compliance with the financial requirements of subsection (f) of this section, including, but not limited to, calculations showing tangible net worth, financial ratios or shareholders' equity, as applicable, and the amount of customer deposits and the balance of an account in which customer deposits are held, and shall be supported by a sworn statement from an executive officer of the REP attesting to the accuracy of the information provided. Any certified calculations provided as part of the semi-annual report to demonstrate such compliance shall be as of the end of the most recent fiscal year and most recent fiscal quarter. A REP may submit any relevant documentation of the type required by subsection (f)(4) of this section to demonstrate its ongoing compliance with the financial requirements of subsection (f) of this section.

- (ii) The audited financial statements of the REP or its guarantor for the most recent completed calendar or fiscal year with accompanying footnotes and the independent auditor's report, if not previously filed.
 - (iii) The unaudited financial statements for the most recent six-month financial period that immediately follows the end of its most recent fiscal year. Unaudited financial statements shall include a sworn statement from an executive officer of the REP attesting to the accuracy, in all material respects, of the information provided in the unaudited financial statements. In lieu of six-month unaudited financial statements, six consecutive months of monthly financial statements may be submitted.
- (C) The requirement for financial statements may be satisfied by filing a copy of or by providing an electronic link to its most recent statement that contains unaudited financials filed with any agency of the federal government, including without limitation, the Securities and Exchange Commission. A REP that is part of a structure that is consolidated for financial reporting purposes and files financial reports with a federal agency on a consolidated company basis may provide financial statements for the consolidated company to meet this requirement.
- (D) REPs or guarantors with an investment-grade credit rating are not required to provide financial statements pursuant to this section.

- (6) A REP shall not cease operations as a REP without prior notice of at least 45 days to the commission, to each of the REP's customers to whom the REP is providing service on the planned date of cessation of operations, and to other affected persons, including the applicable independent organization, TDUs, electric cooperatives, municipally owned utilities, generation suppliers, and providers of last resort. The REP shall file with the commission proof of refund of any monies owed to customers. Upon the effective cessation date, a REP's certificate will be suspended. A REP must demonstrate full compliance with the requirements of this section, including but not limited to, the requirement to demonstrate shareholders' equity of not less than one million dollars and its associated restrictions pursuant to subsection (f)(1)(B) of this section, in order for the commission to reinstate the certificate. The commission may revoke a suspended certificate if it determines that the REP does not meet certification requirements.
- (7) If a REP files a petition in bankruptcy, is the subject of an involuntary bankruptcy proceeding, or in any other manner becomes insolvent, it shall notify the commission within three working days of this event and shall provide the commission a summary of the nature of the matter. The commission shall have the right to proceed against any financial resources that the REP relied on in obtaining its certificate, to satisfy unpaid obligations to customers or administrative penalties.
- (8) A REP shall respond within three working days to any commission staff request for additional information to confirm continued compliance with this section.

(j) **Suspension and revocation.** A certificate granted pursuant to this section is subject to amendment, suspension, or revocation by the commission for a significant violation of PURA, commission rules, or rules adopted by an independent organization. A suspension of a REP certificate requires the cessation of all REP activities associated with obtaining new customers in the state of Texas. A revocation of a REP certificate requires the cessation of all REP activities in the state of Texas, pursuant to commission order. The commission may also impose an administrative penalty on a person for a significant violation of PURA, commission rules, or rules adopted by an independent organization. The commission staff or any affected person may bring a complaint seeking to amend, suspend, or revoke a REP's certificate. Significant violations include the following:

- (1) Providing false or misleading information to the commission, including a failure to disclose any information required by this section;
- (2) Engaging in fraudulent, unfair, misleading, deceptive, or anticompetitive practices, or unlawful discrimination;
- (3) Switching, or causing to be switched, the retail electric provider for a customer without first obtaining the customer's permission;
- (4) Billing an unauthorized charge, or causing an unauthorized charge to be billed, to a customer's retail electric service bill;
- (5) Failure to maintain continuous and reliable electric service to customers pursuant to this section;
- (6) Failure to maintain financial resources in accordance with subsection (f) of this section;

- (7) Bankruptcy, insolvency, or the inability to meet financial obligations on a reasonable and timely basis;
- (8) Failure to timely remit payment for invoiced charges to an independent organization;
- (9) Failure to observe any applicable scheduling, operating, planning, reliability, and settlement policies, protocols, guidelines, procedures, and other rules established by the independent organization;
- (10) A pattern of not responding to commission inquiries or customer complaints in a timely fashion;
- (11) Suspension or revocation of a registration, certification, or license by any state or federal authority;
- (12) Conviction of a felony by the certificate holder, a person controlling the certificate holder, or principal employed by the certificate holder, or any crime involving fraud, theft, or deceit related to the certificate holder's service;
- (13) Not providing retail electric service to customers within 24 months of the certificate being granted by the commission;
- (14) Failure to serve as a POLR if required to do so by the commission;
- (15) Providing retail electric service in an area in which customer choice is in effect without obtaining a certificate under this section;
- (16) Failure to timely remit payment for invoiced charges to a transmission and distribution utility pursuant to the terms of the statewide standardized tariff adopted by the commission;

- (17) Erroneously imposing switch-holds or failing to remove switch-holds within the timeline described in §25.480 of this title (relating to Bill Payment and Adjustments);
- (18) Failure to comply with §25.272 of this title; and
- (19) Other significant violations, including the failure or a pattern of failures to meet the requirements of this section or other commission rules or orders.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority. It is therefore ordered by the Public Utility Commission of Texas that §25.107, relating to Certification of Retail Electric Providers (REPs) is hereby adopted with changes to the text as proposed.

SIGNED AT AUSTIN, TEXAS the _____ day of _____ 2014.

PUBLIC UTILITY COMMISSION OF TEXAS

DONNA L. NELSON, CHAIRMAN

KENNETH W. ANDERSON, JR., COMMISSIONER

BRANDY D. MARTY, COMMISSIONER