PROJECT NO. 35628

RULEMAKING RELATING TO INDUSTRIAL CUSTOMER OPT-OUT OF RENEWABLE PORTFOLIO STANDARD	**§ § § §**	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER ADOPTING AMENDMENT TO §25.173
AS APPROVED AT THE DECEMBER 4, 2008 OPEN MEETING

The Public Utility Commission of Texas (commission) adopts an amendment to §25.173, relating to the Goal for Renewable Energy, with changes to the proposed text as published in the September 12, 2008 issue of the *Texas Register* (33 TexReg 7655). The amendment will implement Public Utility Regulatory Act (PURA) §39.904(m-1) and (m-2), which allow customers taking electric service at transmission-level voltage to opt out of the renewable energy portfolio standard program and direct the commission to establish the reporting requirements and a schedule associated with opting out of this program. This rule is a competition rule subject to judicial review as specified in PURA §39.001(e). This amendment is adopted under Project Number 35628.

The commission received initial comments on the amendment from Good Company Associates (Good Company), Reliant Energy Retail Services, LLC (Reliant), Texas Industrial Energy Consumers (TIEC), and TXU Energy Retail Company, LLC (TXU). TXU and TIEC submitted reply comments, along with El Paso Electric Company, Entergy Texas, Inc., Southwestern Electric Power Company, and Southwestern Public Service Company, who filed as Joint Parties (Joint Parties). TIEC also provided supplemental reply comments. No stakeholder requested a public hearing.

Preamble Question 1

Does PURA permit or require the commission to allow customers receiving electric service at transmission-level voltage who provided the commission with notice in calendar year 2007 to opt out in compliance year 2008 (a) despite the rule not being in effect at the time that notice was provided or (b) if the rule is not in effect by the end of compliance year 2008? If the commission is permitted but not required to allow such opt-outs, should the commission do so?

Good Company stated that if customer notice was provided to the commission in 2007 after the law became effective, then the commission is required to reduce the requirement for that customer. TIEC stated that the ability of industrial customers to opt out became effective when §39.904(m-1) was adopted by the legislature and that the statute allows customers who submitted opt-out notices in 2007 to be excluded from the renewable portfolio standard (RPS) calculations for the 2008 compliance period. TIEC stated that the statute simply requires a customer who wishes to opt out to submit a notice to the commission "before any year for which the commission calculates renewable energy requirements."

TIEC also stated that customers who filed their opt-out notice in 2007 submitted that notice before 2008, the year for which the commission will calculate the renewable energy requirement. Thus, the commission should allow customers who complied with §39.904(m-1) by submitting notice in 2007 to opt out of the RPS program for the 2008 compliance period. Moreover, TIEC stated that the RPS allocation for the 2008 compliance period will not be calculated until early 2009. Under §14.9 of the Electric Reliability Council of Texas (ERCOT) Protocols, the allocation is not conducted until the first quarter of the year following the compliance period.

This means that the allocation for the 2008 compliance period will not be calculated until the first quarter of 2009. TIEC stated that allowing industrial customers to opt out for the 2008 compliance period will not create any additional obstacles for the 2008 allocation, as that process will not commence until 2009. Therefore, TIEC continued, allowing the customers who submitted notice in 2007 to opt out for the 2008 compliance period would not create any additional allocation issues. TIEC recommended that the commission allow customers who opted out in 2007 to be excluded from the RPS requirements for 2008.

Commission Response

The commission agrees with Good Company and TIEC that the legislature established a statutory right for eligible customers to be excluded from the RPS allocation for 2008, regardless of when the proposed rule takes effect. Moreover, allowing these customers to opt out will not complicate the RPS allocation process, which has not yet occurred for 2008. Therefore, those customers that opted out by the close of Calendar Year 2007 for the 2008 compliance period will be excluded from the RPS requirements for 2008.

General Comments

The Joint Parties stated that the amendment includes the filing of a tariff by investor-owned utilities (IOUs) to remove renewable energy credit costs that have been allocated to opt out transmission-level voltage customers; however, the amendment fails to adequately address the recovery of costs being removed. The Joint Parties stated that because renewable energy credit (REC) costs are included in IOU rates, the complexity of cost recovery and allocation increases in the event transmission-level voltage customers opt out. Joint Parties stated that a mechanism

should be provided for the IOU to recover those costs from remaining customers. Implementation of PURA §39.904(m) and (m-1) in a manner prescribed by the amendment may result in trapped, and otherwise unrecoverable, reasonable and necessary costs if cost recovery and allocation issues are not more fully addressed in this rulemaking or another proceeding for each of the non-ERCOT IOUs. The Joint Parties stated that the best way to mitigate the complexities of cost recovery is not to include such costs in base rates of the non-ERCOT IOUs, but to treat those costs as fuel. Joint Parties proposed that these costs be collected through the fuel factor and later reconciled, and that a revision to the rule be made to allow for this recovery method.

TIEC replied that the amendment will not cause any entity to have an RPS allocation that is based on energy sales to customers who have opted out. In other words, TIEC stated, no retail entity will have a REC requirement that is disproportionate to the sales from which it can recover the costs of that requirement. Each entity's RPS allocation will be based on its retail sales to the customers that remain after any transmission-level voltage customers have opted out. TIEC added that the amendment is clear that, "prior to the preliminary RPS allocation, each retail entity's total retail energy sales are reduced to exclude the consumption of customers that opt-out…" TIEC concluded that this process ensures that the sales attributable to the opt-out customers are taken out of the allocation process upfront, so no "trapping" will result from subsequent adjustments or reallocations. Lastly, TIEC argued that because the RPS allocation for the 2008 compliance period has not yet occurred, even allowing transmission-level voltage customers to opt out for 2008 will not result in an RPS allocation that is disproportionate to an entity's remaining retail sales.

Commission Response

A utility's REC obligation may either increase or decrease as a result of opt-outs, depending on the amount of the utility's retail energy sales that are removed from the REC obligation calculation in relation to the total statewide amount of retail energy sales that are removed. Each retail entity's preliminary REC allocation is determined by dividing its total retail energy sales in Texas (numerator) by the total retail sales in Texas of all retail entities (denominator), and multiplying that percentage by the total statewide REC requirement. The opt-out of a utility's customers will decrease the numerator in the calculation, whereas the denominator will be reduced by the opt-outs for all retail entities. The utility's REC obligation will increase if the percentage of its retail sales that are opted-out is higher than the average opt-out percentage for retail entities, whereas the utility's REC obligation will decrease if its opt-out percentage is higher than average.

The commission believes that the amendment will not result in a significant "trapping of costs" for non-ERCOT IOUs. Under the amended rule, the program administrator determines the retail entity's obligation for a compliance period by January 31 of the year following the compliance period, and the retail entity must retire RECs to meet its obligation by March 31. This schedule allows the retail entity to retire the exact number of RECs that are required to meet its obligation and reduce or eliminate trapped costs by selling RECs that are in excess to its needs.

Joint Parties stated that if the commission determines that REC costs should be recovered in base rates of non-ERCOT IOUs, the amendment creates cost recovery challenges. The utility could re-file all of its tariffs without having to file a full base rate case or a separate surcharge mechanism could be adopted by the commission. Further, the surcharge could be periodically updated to recover costs from remaining customers.

Commission Response

The commission does not agree with the Joint Parties that re-filing of all tariffs or the adoption of an alternative mechanism to recover REC costs will be necessary. A utility's costs and revenues are not static over time. Although some costs may increase, others may decrease. As indicated by PURA §36.051, if a utility's overall revenues are insufficient to recover its total costs and a reasonable return, it has the option of filing an application to increase rates. Although a utility's net costs may increase as a result of industrial opt-outs, the commission believes that the net cost will be relatively small. If the impact to utilities becomes substantial as more customers opt out of the RPS requirement, the commission may adopt a REC-specific cost recovery mechanism. The commission can address this issue at a later date.

Subsection (c)

TIEC stated that the rule should be revised to include a definition of "transmission-level voltage customer." Defining this term will ensure that not only those customers that take electric service at 60 kilovolts (kV) or higher are eligible to submit an opt-out notice under the rule, but also those customers that receive service directly through a utility-owned substation that is connected

at 60kV or higher. TIEC stated that customers receiving service directly through a utility-owned substation are effectively "transmission-level customers," as there are no "distribution assets" required to serve that customer. By virtue of the customer purchasing transformation service (either by leasing or through a transformation tariff), the utility effectively provides transmission-level service to the customer. Consequently, these customers should be eligible to submit an opt-out notice under the rule. In certain utility service areas, customers may own or lease the substation facilities. In other utility service areas, the utility owns the substation and customers are often discouraged from doing so. In both cases, the customer is taking electric service without the use of distribution assets. Thus, customers that do not own the substation should not be treated differently for purposes of the rule.

Commission Response

The commission agrees with TIEC that a definition for "transmission-level voltage customer" should be added to the rule and has changed the rule in accordance with this recommendation.

Subsection (h)

Reliant stated that the proposed allocation language is complicated to implement in competitive areas. For this calculation to be done accurately, the REC program administrator, ERCOT, needs to know which retail electric providers (REPs) are serving an opt-out customer, and more specifically, which electric service identifiers (ESI IDs) are served by which REP(s). Reliant recommended that the opt-out customer provide information directly to ERCOT concerning the

specific customer ESI IDs and the REPs serving those ESI IDs. This information would need to be handled in accordance with procedures that will protect confidentiality.

Commission Response

The commission agrees with Reliant that opt-out customers should provide information to ERCOT, as well as to the commission, concerning the specific customer ESI IDs and the REPs serving those ESI IDs when sending in the notice for purposes of the calculation. The commission further agrees that this information should be handled in accordance with procedures that protect the confidentiality of the customers opting out. Accordingly, the commission changes subsection (j)(3) concerning contents of the opt-out notice. To the extent that a customer provided an opt-out notice prior to the effective date of this section but did not include the ESI ID information, the customer may amend the notice after the effective date to provide the information.

Subsection (j)(1)

Good Company stated that as a further measure of disclosure, the notice required should include both the name of the customer opting out and the name of the corporate parent. Good Company stated that because of the link between a parent and its subsidiaries, the public should have access to the names of both entities when reviewing a notice to opt out. This would avoid a situation where multiple subsidiaries have opted out, but the more commonly known corporate parent is not included in the notice. TIEC replied that no such requirement exists in the statute, and that such disclosure is unnecessary and potentially burdensome, and opposed Good Company's recommendation.

Commission Response

The commission agrees with Good Company that the notice should include the name of the customer opting out. The commission rejects the recommendation by Good Company that the opt-out notice include the name of the corporate parent and agrees with TIEC that the statute does not require that level of disclosure and that providing the information is unnecessary to implement the statutory requirements.

To improve organization of the rule, Reliant recommended that the statement in proposed subsection (j)(1), specifying that the opt-out period can be up to two years, be moved to paragraph (3), where the proposed rule addresses filing of the notice. Reliant further recommended that the first sentence of subsection (j)(1) be deleted. Reliant stated that the rules do not place any RPS requirement on customers, so there is no reason to state that a customer is excluded from the RPS requirement. TIEC did not agree with Reliant that subsection (j)(1) should be removed. TIEC stated that this paragraph is meant to be a general statement of the rule and cannot reasonably be interpreted to limit a REP's ability to contract for specific terms with a customer who opts out of the RPS requirement. Under the terms of the amendment, a REP and a transmission-level voltage customer should be allowed to agree to pricing and service terms as determined by the market. Thus, the language in subsection (j)(1) is necessary to establish a context for the more detailed and technical provisions of the rule.

Commission Response

The commission agrees with Reliant that the provision in subsection (j)(1) specifying that the opt-out period can be up to two years is better suited to be located in subsection (j)(3) and has changed the rule accordingly. However, the commission does not agree with Reliant that subsection (j)(1) should be deleted in its entirety; rather, the commission agrees with TIEC that retaining the opening statement of subsection (j)(1) is necessary to establish the context of the rule, but the commission is modifying the sentence to clarify that the opt-out customer's load, and not the actual customer, is excluded from the RPS calculation.

Subsection (j)(2)

Reliant stated that PURA §39.904(m-3) is applicable to the amendment, and stated that the subsection does not alter the renewable energy goals or targets established in §39.904(a) or reduce the minimum statewide renewable energy requirements of §39.940(c)(1). Reliant stated further that the statute does not state that a REP is required to charge the customer anything different as a result of these provisions. Reliant explained that in accordance with the existing REC program structure, a REP with an opt-out customer would have a number of RECs reduced from its requirement, but would also have RECs added (to maintain the overall REC requirement), which may or may not result in a benefit. Therefore, as a practical matter, Reliant added that REPs must consider REC program compliance costs in setting their prices. The commission cannot prohibit a REP from pricing in a way to try to cover its costs. Further, many contracts have a bundled price negotiated between REP and customer, so there is no practical way for a REP to prove that certain costs were not included in a particular customer's price.

Reliant recommended the language be changed to remove any implication that REPs' prices are subject to regulation and be clarified to apply only to IOUs.

TXU stated that REPs who have executed other contract terms with customers affected by the amendment should be excluded from the requirements. TXU also stated that it does not believe treatment of the costs attributable to the REC program between REPs and eligible customers needs to be specified in the rule. TXU stated that the contract between the REP and the transmission-level voltage customer should be allowed to dictate the requirements related to REC payments and costs, since the contract defines the terms and conditions of each party to the contract. TXU further stated that many REPs and transmission-level voltage customers are currently operating under long-term contracts. Requiring REPs to absorb REC costs that they may have built into their pricing structure and agreed to with their customers may severely burden such entities financially. The REPs may gain a financial benefit from the opt-out of their customers; however, pricing decisions may have been made well in advance and at different price points and under a different set of assumptions. TXU agreed to the language recommended by Reliant.

TIEC stated that a contract between a REP and an individual transmission-level voltage customer should govern under the terms of the rule. However, TIEC did not oppose clarifying that subsection (j)(2) applied only to IOUs, as proposed by Reliant.

Commission Response

The commission agrees with Reliant that the statute does not require that a REP is required to charge a customer anything different as a result of the new provisions. The commission also agrees with TXU to the extent that treatment between REPs and eligible customers of the costs attributable to the REC program do not need to be addressed in the rule. Accordingly, the commission is changing subsection (j)(2) to limit its application to IOUs.

Subsection (j)(3)

TXU Energy recommended that the customers opting out should submit their ESI ID, meter number, or unique account numbers. Similarly, Reliant recommended that customers who opt out be required to provide their ESI IDs and identify the REP who serves those ESI IDs. TIEC agreed with TXU that customers who opt out must provide appropriate identifying information, but agreed with Reliant that any confidential information must be protected. Accordingly, TIEC supported adding language to subsection (j)(3) requiring the addition of ESI IDs and applicable account information as proposed by TXU.

Commission Response

The commission agrees that identifying information is necessary and has adopted the changes to subsection (j)(3) recommended by Reliant, TIEC, and TXU, except that it does not believe that customer account information is necessary to identify the customer.

Further, the commission has changed this subsection to require customers who revoke an opt-out notice to notify ERCOT as well as the commission of the revocation.

All comments, including any not specifically discussed herein, were fully considered by the commission.

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2008) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically §39.904(m-1), which allows customers taking electric service at transmission–level voltage to opt out from the renewable energy portfolio standard program; §39.904(m-2), which directs the commission to establish the reporting requirements and schedule associated with opting-out from this program; and §39.904(m-3), which provides that subsections (m-1) and (m-2) do not alter the goals or targets established by §39.904.

Cross Reference to Statutes: PURA §§14.002, 39.904(m-1), 39.904(m-2), and 39.904(m-3).

§25.173. Goal for Renewable Energy.

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

(1) to ensure that the cumulative installed generating capacity from renewable energy technologies in this state totals 2,280 megawatts (MW) by January 1, 2007, 3,272 MW by January 1, 2009, 4,264 MW by January 1, 2011, 5,256 MW by January 1, 2013, and 5,880 MW by January 1, 2015, with a target of at least 500 MW of the total installed renewable capacity after September 1, 2005, coming from a renewable energy technology other than a source using wind energy, and that the means exist for the state to achieve a target of 10,000 MW of installed renewable capacity by January 1, 2025;

(2) to provide for a renewable energy credits trading program by which the renewable energy requirements established by the Public Utility Regulatory Act (PURA) §39.904(a) may be achieved in the most efficient and economical manner;

(3) to encourage the development, construction, and operation of new renewable energy resources at those sites in this state that have the greatest economic potential for capture and development of this state's environmentally beneficial resources;

(4) to protect and enhance the quality of the environment in Texas through increased use of renewable resources; and

(5) to ensure that all customers have access to providers of energy generated by renewable energy resources pursuant to PURA §39.101(b)(3).

(b) **Application.** This section applies to power generation companies as defined in §25.5 of this title (relating to Definitions), and retail entities as defined in subsection (c) of this section.

(c) **Definitions.**

(1) **Compliance period** -- A calendar year beginning January 1 and ending December 31 of each year in which renewable energy credits are required of a retail entity.

(2) **Compliance premium** -- A premium awarded by the program administrator in conjunction with a renewable energy credit that is generated by a renewable energy source that is not powered by wind and meets the criteria of subsection (m) of this section. For the purpose of the renewable energy portfolio standard requirements, one compliance premium is equal to one renewable energy credit.

(3) **Designated representative** -- A responsible natural person authorized by the owners or operators of a renewable resource to register that resource with the program administrator. The designated representative must have the authority to represent and legally bind the owners and operators of the renewable resource in all matters pertaining to the renewable energy credits trading program.

(4) **Existing facilities** -- Renewable energy generators placed in service before September 1, 1999.

(5) **Generation offset technology** -- Any renewable technology that reduces the demand for electricity at a site where a customer consumes electricity. An example of this technology is solar water heating.

(6) **Microgenerator** -- A customer who owns one or more eligible renewable energy generating units with a rated capacity of less than 1MW operating on the customer's side of the utility meter.

(7) **New facilities** -- Renewable energy generators placed in service on or after September 1, 1999. A new facility includes the incremental capacity and associated energy from an existing renewable facility achieved through repowering activities undertaken on or after September 1, 1999.

(8) **Off-grid generation** -- The generation of renewable energy in an application that is not interconnected to a utility transmission or distribution system.

(9) **Opt-Out Notice** -- Written notice submitted to the commission by a transmission-level voltage customer pursuant to PURA §39.904(m-1).

(10) **Program administrator** -- The entity approved by the commission that is responsible for carrying out the administrative responsibilities related to the renewable energy credits trading program as set forth in subsection (g) of this section.

(11) **REC aggregator** -- An entity managing the participation of two or more microgenerators in the REC trading program.

(12) **REC offset (offset)** -- A REC offset represents one megawatt-hour (MWh) of renewable energy from an existing facility that is not eligible to earn renewable energy credits or compliance premiums.

(13) **Renewable energy credit (REC or credit) --** A REC represents one MWh of renewable energy that is physically metered and verified in Texas and meets the requirements set forth in subsection (e) of this section.

(14) **Renewable energy credit account (REC account) --** An account maintained by the renewable energy credits trading program administrator for the purpose of tracking the production, sale, transfer, purchase, and retirement of RECs or compliance premiums by a program participant.

(15) **Renewable energy credits trading program (trading program) --** The process of awarding, trading, tracking, and submitting RECs or compliance premiums as a means of meeting the renewable energy requirements set out in subsection (d) of this section.

(16) **Renewable energy resource (renewable resource) --** A resource that produces energy derived from renewable energy technologies.

(17) **Renewable energy technology --** Any technology that exclusively relies on an energy source that is naturally regenerated over a short time and derived directly from the sun, indirectly from the sun, or from moving water or other natural movements and mechanisms of the environment. Renewable energy technologies include those that rely on energy derived directly from the sun, wind, geothermal, hydroelectric, wave, or tidal energy, or on biomass or biomass-based waste products, including landfill gas. A renewable energy technology does not rely on energy resources derived from fossil fuels, waste products from fossil fuels, or waste products from inorganic sources.

(18) **Renewable Portfolio Standard (RPS)** -- The amount of capacity required to meet the requirements of PURA §39.904 pursuant to subsection (h) of this section.

(19) **Repowered Facility** -- An existing facility that has been modernized or upgraded to use renewable energy technology to produce electricity consistent with this rule.

(20) **Retail entity** -- Municipally-owned utilities, generation and transmission cooperatives and distribution cooperatives that offer customer choice; retail electric providers (REPs); and investor-owned utilities that have not unbundled pursuant to PURA Chapter 39.

(21) **Settlement period** -- The first calendar quarter following a compliance period in which the settlement process for that compliance period takes place.

(22) **Small producer** -- A renewable resource that is less than ten megawatts (MW) in size.

(23) **Transmission-level voltage customer** -- A customer that receives electric service at 60 kilovolts (kV) or higher or that receives electric service directly through a utility-owned substation that is connected to the transmission network at 60 kV or higher.

(d) **Renewable energy credits trading program (trading program).** Renewable energy credits may be generated, transferred, and retired by renewable energy power generators certified pursuant to subsection (o) of this section, retail entities, and other market participants as set forth in this section.

(1) The program administrator shall apportion an RPS requirement among all retail entities as a percentage of the retail sales of each retail entity as set forth in subsection (h) of this section. Each retail entity shall be responsible for retiring sufficient RECs as set forth in subsections (h) and (l) of this section to comply with this section. The requirement to retire RECs to comply with this section becomes effective on the date a retail entity begins serving retail electric customers in Texas or, for an electric utility, as specified by law.

(2) A power generating company may participate in the program and may generate RECs and buy or sell RECs as set forth in subsection (l) of this section.

(3) RECs shall be credited on an energy basis as set forth in subsection (l) of this section.

(4) Municipally-owned utilities and distribution cooperatives that do not offer customer choice have no RPS requirement. However, regardless of whether the municipally-owned utility or distribution cooperative offers customer choice, a municipally-owned utility or distribution cooperative possessing renewable resources that meet the requirements of subsection (e) of this section may sell RECs generated by such a resource to retail entities as set forth in subsection (l) of this section.

(5) Except where specifically stated, the provisions of this section shall apply uniformly to all participants in the trading program.

(e) **Facilities eligible for producing RECs and compliance premiums in the renewable energy credits trading program.** For a renewable facility to be eligible to produce

RECs and compliance premiums in the trading program it must be either a new facility, a small producer, or a repowered facility as defined in subsection (c) of this section and must also meet the requirements of this subsection.

(1) A renewable energy resource must not be ineligible under subsection (f) of this section and must register pursuant to subsection (o) of this section.

(2) For a renewable energy technology that requires fossil fuel, the facility's use of fossil fuel must not exceed 25.0% of the total annual fuel input on a British thermal unit (BTU) or equivalent basis.

(3) For a renewable energy technology that requires the use of fossil fuel that exceeds 2.0% of the total annual fuel input on a BTU or equivalent basis, RECs can only be earned on the renewable portion of the production. A renewable energy resource using a technology described by this paragraph shall comply with the following requirements:

(A) A meter shall be installed and periodic tests of the heat content of the fuel shall be conducted to measure the amount of fossil fuel input on a British thermal unit (BTU) or equivalent basis that is used at the facility;

(B) The renewable energy resource shall calculate the electricity generated by the unit in MWh, based on the BTUs (or equivalent) produced by the fossil fuel and the efficiency of the renewable energy resource, subtract the MWh generated with fossil fuel input from the total MWh of generation and report the renewable energy generated to the program administrator;

(C) The renewable energy resource shall report the generation to the program administrator in the measurements, format and frequency prescribed by the program administrator, which may include a description of the methodology for calculating the non-renewable energy produced by the resource; and

(D) The renewable energy resource is subject to audit to verify the accuracy of the data submitted to the program administrator and compliance with this section, to be conducted by the program administrator or an independent third party, as requested by the program administrator. If the program administrator requires a third party audit, the audit shall be performed at the expense of the renewable energy resource.

(4) The output of the facility must be readily capable of being physically metered and verified in Texas by the program administrator. Energy from a renewable facility that is delivered into a transmission system where it is commingled with electricity from non-renewable resources before being metered can not be verified as delivered to Texas customers. A facility is not ineligible by virtue of the fact that the facility is a generation-offset, off-grid, or on-site distributed renewable facility if it otherwise meets the requirements of this section.

(5) For a municipally owned utility operating a gas distribution system, any production or acquisition of landfill gas that is directly supplied to the gas distribution system is eligible to produce RECs based upon the conversion of the thermal energy in BTUs to electric energy in kWh using for the conversion factor

the systemwide average heat rate of the gas-fired units of the combined utility's electric system as measured in BTUs per kWh.

(6) For industry-standard thermal technologies, the RECs can be earned only on the renewable portion of energy production. Furthermore, the contribution toward statewide renewable capacity megawatt goals from such facilities shall be equal to the fraction of the facility's annual MWh energy output from renewable fuel multiplied by the facility's nameplate MW capacity.

(7) For repowered facilities, a facility is eligible to earn RECs on all renewable energy produced up to a capacity of 150 MW. A repowered facility with a capacity greater than 150 MW may earn RECs for the energy produced in proportion to 150 divided by nameplate capacity.

(f) **Facilities not eligible for producing RECs in the renewable energy credits trading program.** A renewable facility is not eligible to produce RECs in the trading program if it is:

(1) A renewable energy capacity addition associated with an emissions reductions project described in Health and Safety Code §382.05193, that is used to satisfy the permit requirements in Health and Safety Code §382.0519; or

(2) An existing facility that is not a small producer as defined in subsection (c) of this section or has not been repowered as permitted under subsection (e) of this section.

(g) **Responsibilities of program administrator.** The commission shall appoint an independent entity to serve as the trading program administrator. At a minimum, the program administrator shall perform the following functions:

(1) Create accounts that track RECs or compliance premiums for each participant in the trading program;

(2) Award RECs or compliance premiums to registered renewable energy facilities on a quarterly basis based on verified meter reads;

(3) Award offsets to retail entities on an annual basis based on a nomination submitted by the retail entity pursuant to subsection (i) of this section;

(4) Annually record the retirement of RECs or compliance premiums that each retail entity submits;

(5) Retire RECs at the end of each REC's compliance life;

(6) Maintain public information on its website that provides trading program information to interested buyers and sellers of RECs;

(7) Create an exchange procedure where persons may purchase and sell RECs or compliance premiums. The exchange shall ensure the anonymity of persons purchasing or selling RECs or compliance premiums. The program administrator may delegate this function to an independent third party, subject to commission approval;

(8) Make public each month the total energy sales of retail entities in Texas for the previous month;

(9) Perform audits of generators participating in the trading program to verify accuracy of metered production data;

(10) Allocate the RPS requirement to each retail entity in accordance with subsection (h) of this section; and

(11) Submit an annual report to the commission. The program administrator shall submit a report to the commission on or before May 15 of each calendar year. The report shall contain information pertaining to renewable energy power generators and retail entities. At a minimum, the report shall contain:

(A) the amount of existing and new renewable energy capacity in MW installed in the state by technology type, the owner/operator of each facility, the date each facility began to produce energy, the amount of energy generated in megawatt-hours (MWh) each quarter for all capacity participating in the trading program or that was retired from service; and

(B) a listing of all retail entities participating in the trading program, each retail entity's RPS requirement, the number of offsets used by each retail entity, the number of RECs retired by each retail entity, the number of compliance premiums retired by each retail entity, a listing of all retail entities that were in compliance with the RPS requirement, a listing of all retail entities that failed to comply with the RPS requirement, and the deficiency of each retail entity that failed to retire sufficient RECs or compliance premiums to meet its RPS requirement.

(h) **Allocation of RPS requirement to retail entities.** The program administrator shall allocate RPS requirements among retail entities. Any renewable capacity that is retired before January 1, 2015 or any capacity shortfalls that arise due to purchases of RECs

from out-of-state facilities shall be replaced and incorporated into the allocation methodology set forth in this subsection. Any changes to the allocation methodology to reflect replacement capacity shall occur two compliance periods after the facility is retired or the capacity shortfall occurs. The program administrator shall use the following methodology to determine the total annual RPS requirement for a given year and the final RPS allocation for individual retail entities:

(1) The total statewide RPS requirement for each compliance period shall be calculated in terms of MWh and shall be equal to the applicable capacity requirement set forth in this paragraph multiplied by 8,760 hours per year, multiplied by the appropriate capacity conversion factor set forth in subsection (k) of this section. The renewable energy capacity requirements for the compliance period beginning January 1, of the year indicated shall be:

(A) 1,400 MW of new resources in 2006;

(B) 1,400 MW of new resources in 2007;

(C) 2,392 MW of new resources in 2008;

(D) 2,392 MW of new resources in 2009;

(E) 3,384MW of new resources in 2010;

(F) 3,384 MW of new resources in 2011;

(G) 4,376 MW of new resources in 2012;

(H) 4,376 MW of new resources in 2013;

(I) 5,000 MW of new resources in 2014; and

(J) 5,000 MW of new resources for each year after 2014.

(2) The final RPS allocation for an individual retail entity for a compliance period shall be calculated as follows:

(A) Beginning with the 2008 compliance period, prior to the preliminary RPS allocation each retail entity's total retail energy sales are reduced to exclude the consumption of customers that opt out in accordance with subsection (j) of this section. Each retail entity's preliminary RPS allocation is determined by dividing its total retail energy sales in Texas by the total retail sales in Texas of all retail entities, and multiplying that percentage by the total statewide RPS requirement for that compliance period.

(B) The adjusted RPS allocation for each retail entity that is entitled to an offset is determined by reducing its preliminary RPS allocation by the offsets to which it qualifies, as determined under subsection (i) of this section, with the maximum reduction equal to the retail entity's preliminary RPS allocation. The total reduction for all retail entities is equal to the total usable offsets for that compliance period.

(C) Each retail entity's final RPS allocation for a compliance period shall be increased to recapture the total usable offsets calculated under subparagraph (B) of this paragraph. The additional RPS allocation shall be calculated by dividing the retail entity's preliminary RPS allocation by the total preliminary RPS allocation of all retail entities. This fraction shall be multiplied by the total usable offsets for that compliance period

and this amount shall be added to the retail entity's adjusted RPS allocation to produce the retail entity's final RPS allocation for the compliance period.

(3) Concurrent with determining final individual RPS allocations for the current compliance period in accordance with this subsection, the program administrator shall recalculate the final RPS allocations for the previous compliance periods, taking into account corrections to retail sales resulting from resettlements. The difference between a retail entity's corrected final RPS allocation and its original final RPS allocation for the previous compliance periods shall be added to or subtracted from the retail entity's final RPS allocation for the current compliance period.

(i) **Nomination and award of REC offsets.**

(1) A REP, municipally-owned utility, G&T cooperative, distribution cooperative, or an affiliate of a REP, municipally-owned utility, or distribution cooperative, may apply offsets to meet all or a portion of its renewable energy purchase requirement, as calculated in subsection (h) of this section, only if those offsets were nominated in a filing with the commission by June 1, 2001.

(2) The program administrator shall award offsets consistent with the commission's actions to verify designations of REC offsets and with this section.

(3) REC offsets shall be equal to the average annual MWh output of an existing resource for the years 1991-2000 or the entire life of the existing resource, whichever is less.

(4) REC offsets qualify for use in a compliance period under subsection (h) of this section only to the extent that:

(A) The resource producing the REC offset has continuously since September 1, 1999 been owned by or its output has been committed under contract to a utility, municipally-owned utility, or cooperative (or successor in interest) nominating the resource under paragraph (1) of this subsection or, if the resource has been committed under a contract that expired after September 1, 1999 and before January 1, 2002, it was owned by or its output was committed under contract to a utility, municipally-owned utility, or cooperative on January 1, 2002; and

(B) The facility producing the REC offsets is operated and producing energy during the compliance period in a manner consistent with historic practice.

(5) If the production of energy from a facility that is eligible for an award of REC offsets ceases for any reason, or if the power purchase agreement with the facility's owner (or successor in interest) that is referred to in paragraph (4)(A) of this subsection has lapsed or is no longer in effect, the retail entity shall no longer be awarded REC offsets related to the facility.

(6) REC offsets shall not be traded.

(j) **Opt-out notice.**

(1) A customer receiving electrical service at transmission-level voltage who submits an opt-out notice to the commission for the applicable compliance period shall have its load excluded from the RPS calculation.

(2) An investor-owned utility that is subject to a renewable energy requirement under this section shall not collect costs attributable to the REC program from an eligible customer who has submitted an opt-out notice. An investor-owned utility whose rates include the cost of RECs shall file a tariff to implement this subsection, not later than 30 days after the effective date of this section.

(3) A customer opt-out notice must be filed in the commission-designated project number before the beginning of a compliance period for the notice to be effective for that period. Each opt-out notice must include the name of the individual customer opting out, the customer's ESI IDs, the retail entities serving those ESI IDs, and the term for which the notice is effective, which may not exceed two years. The customer opting out must also provide the information included in the opt-out notice directly to ERCOT and may request that ERCOT protect the customer's ESI ID and consumption as confidential information. For notices submitted for the 2008 compliance period, a customer may amend a notice to include this information not later than January 15, 2009, if its initial notice did not include the information. A customer may revoke a notice under this subsection at any time prior to the end of a compliance period by filing a letter in the designated project number and providing notice to ERCOT.

(k) **Calculation of capacity conversion factor.** The capacity conversion factor used by the program administrator to allocate credits to retail entities shall be calculated during the fourth quarter of each odd-numbered compliance year. The capacity conversion factor shall:

(1) Be based on actual generator performance data for the previous two years for all renewable resources in the trading program during that period for which at least 12 months of performance data are available.

(2) Represent a weighted average of generator performance; and

(3) Use all actual generator performance data that is available for each renewable resource, excluding data for testing periods.

(l) **Production, transfer, and expiration of RECs.** The program administrator shall administer a trading program for renewable energy credits in accordance with the requirements of this subsection.

(1) The owner of a renewable resource shall earn one REC when a MWh is metered at that renewable resource. The program administrator shall record the energy in metered MWh and credit the REC account of the renewable resource that generated the energy on a quarterly basis. Quarterly production shall be rounded to the nearest whole MWh, with fractions of 0.5 MWh or greater rounded up.

(2) The transfer of RECs between parties shall be effective only when the transfer is recorded by the program administrator.

(3) The program administrator shall require that RECs be adequately identified prior to recording a transfer and shall issue an acknowledgement of the transaction to parties upon provision of adequate information. At a minimum, the following information shall be provided:

(A) identification of the parties;

(B) REC serial number, REC issue date, and the renewable resource that produced the REC;

(C) the number of RECs to be transferred; and

(D) the transaction date.

(4) A retail entity shall surrender RECs to the program administrator for retirement from the market in order to meet its RPS requirement for a compliance period. The program administrator will document all REC retirements annually.

(5) On or after each April 1, the program administrator will retire RECs that have not been retired by retail entities and have reached the end of their compliance life.

(6) The program administrator may establish a procedure to ensure that the award, transfer, and retirement of credits are accurately recorded.

(7) The issue date of RECs created by a renewable energy resource shall coincide with the beginning of the compliance period (calendar year) in which the credits are generated. All RECs shall have a compliance life of three compliance periods, after which the program administrator will retire them from the trading program.

(8) Each REC that is not used in the compliance period in which it was created may be banked and is valid for the next two compliance periods.

(m) **Target for renewable technologies other than wind power.** In order to meet the target of at least 500 MW of the total installed renewable capacity after September 1, 2005, coming from a renewable energy technology other than a source using wind energy as set forth in subsection (a)(1) of this section, the program administrator shall award

compliance premiums to certified REC generators other than those powered by wind that were installed and certified by the commission pursuant to subsection (o) of this section after September 1, 2005. A compliance premium is created in conjunction with a REC.

(1) For eligible non-wind renewable technologies, one compliance premium shall be awarded for each REC awarded for energy generated after December 31, 2007.

(2) Except as provided in this subsection, the award, retirement, trade, and registration of compliance premiums shall follow the requirements of subsections (d), (l) and (n) of this section.

(3) A compliance premium may be used by any entity toward its RPS requirement pursuant to subsection (h) of this section.

(4) The program administrator shall increase the statewide RPS requirement calculated for each compliance period pursuant to subsection (h)(1) of this section by the number of compliance premiums retired during the previous compliance period.

(n) **Settlement process.** The first quarter following the compliance period shall be the settlement period during which the following actions shall occur:

(1) By January 31, the program administrator will notify each retail entity of its total RPS requirement for the previous compliance period as determined pursuant to subsection (h) of this section.

(2) By March 31, each retail entity shall submit credits or compliance premiums to the program administrator from its account equivalent to its RPS requirement for the previous compliance period. If the retail entity does not submit sufficient

credits or compliance premiums to satisfy its obligation, the retail entity is subject to the penalty provisions in subsection (p) of this section.

(3) The program administrator may request the commission to adjust the deadlines set forth in this section if changes to the ERCOT settlement calendar or other factors affect the availability of reliable retail sales data.

(o) **Certification of renewable energy facilities.** The commission shall certify all renewable facilities that will produce either REC offsets, RECs, or compliance premiums for sale in the trading program. To be awarded RECs, or REC offsets, or compliance premiums, a power generator must complete the certification process described in this subsection. The program administrator shall not award offsets, RECs, or compliance premiums for energy produced by a power generator before it has been certified by the commission.

(1) The designated representative of the generating facility shall file an application with the commission on a form approved by the commission for each renewable energy generation facility. At a minimum, the application shall include the location, owner, technology, and rated capacity of the facility and shall demonstrate that the facility meets the resource eligibility criteria in subsection (e) of this section. Any subsequent changes to the information in the application shall be filed with the commission within 30 days of such changes.

(2) No later than 30 days after the designated representative files the certification form with the commission, the commission shall inform both the program administrator and the designated representative whether the renewable facility has

met the certification requirements. At that time, the commission shall either certify the renewable facility as eligible to receive RECs, offsets, or compliance premiums, or describe any insufficiencies to be remedied. If the application is contested, the time for acting is extended for such time as is necessary for commission action.

(3) Upon receiving notice of certification of new facilities, the program administrator shall create a REC account for the designated representative of the renewable resource.

(4) The commission or program administrator may make on-site visits to any certified facility, and the commission shall decertify any facility if it is not in compliance with the provisions of this section.

(5) A decertified renewable generator may not be awarded RECs. However, any RECs awarded by the program administrator and transferred to a retail entity prior to the decertification remain valid.

(p) **Penalties and enforcement.** If by April 1 of the year following a compliance period the program administrator determines that a retail entity has not retired sufficient credits or compliance premiums to satisfy its allocation, the retail entity shall be subject to an administrative penalty pursuant to PURA §15.023, of $50 per MWh that is deficient.

(q) **Microgenerators and REC aggregators.** A REC aggregator may manage the participation of multiple microgenerators in the REC trading program. The program

administrator shall assign to the REC aggregator all RECs accrued by the microgenerators who are under a REC management contract with the REC aggregator.

(1) The microgenerator's units shall be installed and connected to the grid in compliance with P.U.C. Substantive Rules, applicable interconnection standards adopted pursuant to the P.U.C. Substantive Rules, and federal rules.

(2) Notwithstanding subsection (e)(3) of this section, a REC aggregator may use any of the following methods for reporting generation to the program administrator, as long as the same method is used for each microgenerator in an aggregation unit, as defined by the REC aggregator. A REC aggregator may have more than one aggregation and may choose any of the methods listed below for each aggregation unit.

(A) The REC aggregator may provide the program administrator with production data that is measured and verified by an electronic meter that meets ANSI C12 standards and that will be separate from the aggregator's billing meter for the service address and for which the billing data and the renewable energy data are separate and verifiable data. Such actual data shall be collected and transmitted within a reasonable time and shall be subject to verification by the program administrator. REC aggregators using this method shall be awarded one REC for every MWh generated.

(B) The REC aggregator may provide the program administrator with sufficient information for the program administrator to estimate with reasonable accuracy the output of each unit, based on known or observed information that correlates closely with the generation output. REC

aggregators using this method shall be awarded one REC for every 1.25 MWh generated. After installing the unit, the certified technician shall provide the microgenerator, the REC aggregator, and the program administrator the information required by the program administrator pursuant to this paragraph (2) of this subsection.

(C) A generating unit may have a meter that transmits actual generation data to the program administrator using applicable protocols and procedures. Such protocols and procedures shall require that actual data be collected and transmitted within a reasonable time. REC aggregators using this method shall be awarded one REC for every MWh generated.

(3) REC aggregators shall register with the commission and the program administrator and also register to participate in the REC trading program.

(4) A microgenerator participating in the REC trading program individually without the assistance of a REC aggregator shall comply with the requirements of this subsection.

SIGNED AT AUSTIN, TEXAS this the _____ day of DECEMBER 2008.

PUBLIC UTILITY COMMISSION OF TEXAS

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BARRY T. SMITHERMAN, CHAIRMAN

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DONNA L. NELSON, COMMISSIONER

_____

KENNETH W. ANDERSON, JR., COMMISSIONER

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