

**PROJECT NO. 22187**

<b>RULEMAKING TO ESTABLISH</b>	<b>§</b>	<b>PUBLIC UTILITY COMMISSION</b>
<b>TERMS AND CONDITIONS OF</b>	<b>§</b>	
<b>TRANSMISSION AND</b>	<b>§</b>	<b>OF TEXAS</b>
<b>DISTRIBUTION UTILITIES' RETAIL</b>	<b>§</b>	
<b>DISTRIBUTION SERVICE</b>	<b>§</b>	

**ORDER ADOPTING NEW §25.215 AS APPROVED AT THE  
AUGUST 23, 2001 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts new §25.215, relating to Terms and Conditions of Access by a Competitive Retailer to the Delivery System of a Municipally Owned Utility or Electric Cooperative that has Implemented Customer Choice, with changes to the proposed text as published in the May 25, 2001 *Texas Register* (26 TexReg 3679). The commission also makes changes to the text of the standard Access Tariff (pro-forma Access Tariff) adopted by reference in §25.215. This rule is necessary to implement the Public Utility Regulatory Act, Texas Utilities Code Annotated, §39.203 (Vernon 1998, Supplement 2001) (PURA) as it relates to the establishment of reasonable and nondiscriminatory terms and conditions of open access to the transmission and distribution systems of municipally owned utilities (MOUs) and electric cooperatives (Coops) that have chosen to engage in retail competition. This new rule is adopted under Project Number 22187.

This section incorporates a pro-forma Access Tariff, which contains the terms and conditions of open Access. This pro-forma Access Tariff is adopted by reference and can only be changed through the rulemaking process. Not later than 90 days before the date an MOU or Coop begins offering customer choice, the MOU or Coop shall file with the commission its Access Tariff, using the pro-forma Access

Tariff set forth in subsection (d) of the proposed rule. Chapters 1, 3 and 4 of the pro-forma Access Tariff shall be used as written, except for insertion of the name of the MOU or Coop where called for; however, Chapters 2 and 5 may be added to or modified by the MOU or Coop so as to reflect a description of its certificated service area and rate schedules. The pro-forma Access Tariff is divided into five chapters as follows: Chapter 1 defines various terms used throughout the pro-forma Access Tariff; Chapter 2 describes the particular MOU's or Coop's certificated service area; Chapter 3 sets forth general rules and regulations regarding Access by Competitive Retailers to an MOU's or Coop's Delivery System; Chapter 4 sets forth specific rules and regulations regarding Access by Competitive Retailers to an MOU's or Coop's Delivery System; and Chapter 5 sets forth the particular MOU's or Coop's rate schedules as determined by that MOU or Coop.

Based on numerous prior discussions with a coalition of MOUs and Coops, Staff developed a proposed rule that was published in the *Texas Register* for the purpose of receiving formal, written comment. The commission received written comments on the proposed rule and pro-forma Access Tariff from the following entities: TXU Energy Services (TXU REP), Office of Public Utility Counsel (OPUC), joint comments from Texas Electric Cooperatives (TEC) and Texas Public Power Association (TPPA) (collectively referred to as TEC-TPPA), and South Texas Electric Cooperative (STEC).

Almost all of the written comments received were in response to the pro-forma Access Tariff adopted by reference in subsection (d) of the proposed rule. As a result of changes to the Access Tariff, the

commission modifies subsection (d) to reflect the new effective date of the revised pro-forma Access Tariff.

In the preamble to the proposed rule the commission posed the following questions:

*Question 1: Should the Access Tariff contain an indemnity clause that would require Competitive Retailers to indemnify the Utility for any liability incurred from the Utility's disconnection of a Retail Customer at the Competitive Retailer's request? How might such an indemnity clause affect the competitive market?*

TXU REP believed that an indemnity clause is not necessary or appropriate. TXU REP stated that the MOU/Coop Tariff should remain as similar as possible to the Tariff for Retail Delivery Service approved for Investor Owned Utilities (IOU Tariff) and that there is no difference between the IOU-REP relationship and the MOU/Coop-REP relationship that would merit such a difference between the Tariffs. TXU REP argued that nothing in the MOU/Coop Tariff as proposed prevents MOUs and Coops from pursuing any legal remedy they may have concerning this issue and that it would be unwise to categorically deny customers the ability to receive relief from MOUs/Coops if the facts of a situation show the MOU/Coop to be at fault. For example, TXU REP argued, in the following situation, REPs should not be required to provide blanket immunity from liability to MOUs/Coops: an MOU/Coop might be responsible for improperly disconnecting a customer on a heat advisory day in response to a disconnect request of a POLR made days before.

OPUC and TEC-TPPA stated that the Access Tariff should contain such an indemnity clause, with STEC stating that such an indemnity clause is critical. OPUC noted that MOUs and Coops are required to follow the commission's customer protection rules regarding disconnects and that such an MOU or Coop should not be held liable for acting upon a disconnect notice from a Competitive Retailer. TEC-TPPA noted that PURA provides different statutory treatment for MOUs/Coops than it does for investor-owned utility (IOU) transmission and distribution utilities (TDU) and, therefore, the IOU pro-forma Tariff and the MOU/Coop pro-forma Access Tariff being crafted in the instant rulemaking cannot always be the same, although uniformity may be desired by the commission. TEC-TPPA further noted that MOUs/Coops and IOUs operate under different business structures – the IOU TDUs provide Delivery Service directly to Competitive Retailers, not Retail Customers, whereas MOUs/Coops provide Delivery Service directly to Retail Customers and thus have direct obligations and duties to those customers. TEC-TPPA stated that any indemnity clause should also cover liability arising from a Competitive Retailer's request for temporary suspension or interruption of Delivery Service. To illustrate the need for an indemnity clause, TEC-TPPA posed an example in which a Competitive Retailer mistakenly requests the disconnection of customer B, a manufacturer, instead of customer A, and customer B then sues the MOU/Coop for improperly disconnecting Delivery Service. TEC-TPPA argued that because of the contractual relationship between customer B and the MOU/Coop, the MOU/Coop would most likely be found liable to customer B for breach of contract, despite the fact that the MOU/Coop was simply relying on the Competitive Retailer's request for

disconnection. Further, TEC-TPPA argued that the MOU/Coop would incur substantial legal bills from the lawsuit even if the MOU/Coop was found not to be liable to Customer B.

TEC-TPPA addressed several arguments against adoption of an indemnity clause. First, in response to the argument that an indemnity clause should not be adopted in this rulemaking because a similar clause was not adopted in the IOU terms and conditions rulemaking (P.U.C. Substantive Rule §25.214), TEC-TPPA maintained that an indemnity clause was not needed in the IOU terms and conditions rulemaking because there was no contract for Delivery Service between the TDU and the Retail Customer – the IOU TDUs provide Delivery Service directly to Competitive Retailers. Because of this, TEC-TPPA argued, if a Competitive Retailer mistakenly requested that Delivery Service be disconnected from the wrong customer, that customer does not have a legitimate breach of contract claim against the TDU and is unlikely to have a legitimate tort claim. TEC-TPPA noted that in the instant rulemaking, however, an indemnity clause is needed because of the privity of contract between the MOU/Coop and the Retail Customer, and that an indemnification of the MOU/Coop by the Competitive Retailer would encourage greater care by Competitive Retailers, resulting in more efficient competitive markets in the long run. Second, in response to the argument that an MOU/Coop can simply protect itself from this kind of liability by placing a provision in its Delivery Service Tariff that limits its liability for following the instructions of a Competitive Retailer, TEC-TPPA maintained that for several reasons such a provision might not be effective. MOUs/Coops would incur significant legal expenses defending a lawsuit despite the fact that it ultimately prevails in the suit. Also, for Coops, such a limitation of liability might not withstand a legal challenge in that it might be found by a court to be both

procedurally and substantively unconscionable, procedurally because the customer would have no choice but to accept the Delivery Service Tariff term if it desires to receive service, and substantively because the commission will not have made an independent determination that the Coop's Delivery Service Tariff is just and reasonable since the commission does not have the authority to review and approve the Delivery Service Tariff of Coops.

TEC-TPPA then proposed specific indemnity language to be placed in Access Tariff Section 4.2.1, **LIABILITY BETWEEN (UTILITY) AND COMPETITIVE RETAILERS**. TEC-TPPA stated that such an indemnity provision properly places the market risks of improper decisions on the Competitive Retailer, given that the MOU/Coop has a right in the Access Tariff to rely on a request for disconnection from a Competitive Retailer. TEC-TPPA noted that not including the requested indemnity language will likely lead to the negative result of raising Delivery Service charges to all Retail Customers within the MOU/Coop's certificated service area in that any liability owed by an MOU/Coop to a Retail Customer or any legal expenses incurred will have to be recovered through the Delivery Service Tariff rates set by the MOU/Coop. STEC echoed this comment. Finally, TEC-TPPA noted that if a MOU/Coop believes that the risks, costs and burdens of complying with the Access Tariff are too high, it will not opt into competition. STEC echoed this comment and added that once Retail Customers understand that they must pay more for electric service because the commission has unjustly protected retail competitors from the consequences of their actions, their enthusiasm for competition may disappear.

STEC noted that Access Tariff Section 4.2.2, LIMITATION OF DUTY AND LIABILITY OF COMPETITIVE RETAILER as currently drawn can be interpreted to expressly protect the Competitive Retailer, at the distribution cooperative's expense, from any liability based on the Competitive Retailer's request to disconnect a Retail Customer. This is so because the Access Tariff states that the Competitive Retailer has no duty to (Utility), Retail Customer or other third party regarding the operation of (Utility)'s Delivery System, and because a distribution cooperative's execution of a Competitive Retailer's request to disconnect a customer would most likely be interpreted to fall under the cooperative's operation of its Delivery System. It noted a distribution cooperatives' right under Sections 4.2.7, DUTY TO REVIEW, and 4.3.5.2, NOTICED SUSPENSION NOT RELATED TO EMERGENCIES OR NECESSARY INTERRUPTIONS, to rely upon a notice of disconnect/interruption/suspension from a Competitive Retailer.

STEC argued that in the face of risk without such an indemnity clause, the Rural Utilities Service (RUS) would have significant concerns regarding the protection of federal monies that were borrowed/guaranteed in the past by the distribution cooperatives. Further, STEC argued that failure to include an indemnity provision could bankrupt some small cooperatives that suffer judgments to customers due to interruption of service.

The commission first notes that the difference between the relationship of a TDU and its customers (addressed in the Tariff approved for retail Delivery Service for Investor Owned Utilities (§25.214)) and that of a MOU/Coop and its citizens/constituents (addressed in the instant rulemaking) is

insignificant. Although in the IOU model the TDU is technically delivering electricity at the request of the Competitive Retailer, the TDU still operates under a Tariff to provide Delivery Service for the Retail Customer. Likewise, in the MOU/Coop model, the MOU/Coop is providing Delivery Service for the customer, under a Tariff. In both cases, Tariffs govern the provision of Delivery Service, and the Retail Customer is the beneficiary of the service. The commission did not adopt an indemnity provision in the IOU Tariff and does not believe that the circumstances are sufficiently different to adopt one here. As a first resort, the commission believes that the MOUs/Coops may be able to prevent such anticipated liability (from their just reliance upon a Competitive Retailer's request to disconnect a Retail Customer) by limiting such liability in their individual Delivery Service Tariffs. Further, limiting liability in such a way should allay the fears of the MOUs/Coops over the expenses of defending against customer suits because any suits could be handled expeditiously through the summary judgment process (i.e., no genuine issue of material fact and movant entitled to judgment as a matter of law). Finally, the commission believes that Competitive Retailers will not choose to sell to customers in MOU/Coop service areas if the terms for their doing so are more onerous than the terms of service in IOU areas. The indemnity provision proposed by TEC-TPPA would result in onerous liability rules for Competitive Retailers. Therefore, the commission declines to adopt the proposed indemnity language.

*Question 2: Should Competitive Retailers have the same options for outage reporting that they have in the Tariff for Retail Delivery Service approved for Investor-Owned Utilities (new P.U.C. Substantive Rule §25.214)?*

TXU REP and OPUC stated that Competitive Retailers should have the same options for outage reporting that they have in the Tariff for Retail Delivery Service approved for Investor-Owned Utilities (§25.214). TXU REP stated that it is in the customer's best interest to allow Retail Electric Providers (REPs) to directly handle outages. TXU REP concluded that an outage situation is a time in which a REP should be allowed to help its customers if capable.

STEC stated that the commission does not have jurisdiction over this matter and that Retail Customers should be informed to report outages to the distribution cooperative. STEC further stated that having customers go through the REP to report would simply delay the utility in fixing the problem because the distribution cooperative has the sole responsibility for correcting the outage.

TEC-TPPA stated that Competitive Retailers should not have the same options for outage reporting that they have in the IOU Tariff. They argued that outage reporting is a service issue, not an Access issue. TEC-TPPA stated that it is the legal duty of the MOU/Coop to provide reliable electric service to their customers and that prompt reporting allows companies to restore service as soon as possible in outage situations. TEC-TPPA stated that PURA Chapters 40 and 41 give MOUs/Coops the obligation to enforce service quality in their service area and that adding Competitive Retailers slows the process and increases the probability of inaccurate information.

During the initial period of retail competition, the commission believes that it might be difficult to retrain members of MOUs/Coops to call another company in times of outages. For the sake of maintaining

reliability and to eliminate initial confusion, the commission determines that outages should be reported directly to the Utility and service repair requests should be made with the Utility, unless the Utility and Competitive Retailer agree to use one of the other two options for outage reporting or service requests.

*Question 3: Should the Access Tariff contain an option for the Competitive Retailer to provide a consolidated bill under the same conditions as in the IOU Tariff?*

TXU REP and OPUC stated that the MOU/Coop Access Tariff should contain an option for the Competitive Retailer to provide consolidated billing. TXU REP believed that billing arrangements in MOU/Coop areas should be consistent with arrangements in IOU areas. TXU REP also believed that it should be the customer's choice whether the customer receives a consolidated bill, not the choice of the MOU/Coop. TXU REP stated that customers should be able to receive a consolidated bill from their Competitive Retailer.

STEC stated that the commission does not have authority to allow the Competitive Retailer to provide a consolidated bill as in the IOU Tariff. STEC stated that when Senate Bill 7 (76<sup>th</sup> Legislature) was being drafted, cooperatives insisted that they be able to maintain their billing rights if they were to support Senate Bill 7. STEC stated further that because of the importance of this issue to cooperatives, it would be wrong to assume that it was contemplated by the legislature that Competitive Retailers could be offered the option to provide consolidated billing.

TEC-TPPA asserted that the only two billing options contemplated by PURA are: (1) a single consolidated bill sent by the MOU/Coop for both electric service charges and delivery charges, or (2) a separate bill sent by the Competitive Retailer for electric service charges and a separate bill sent by the MOU/Coop for Delivery Service charges. However, if the Retail Customer chooses to receive a consolidated bill, and if the MOU/Coop determines it wants to outsource its billing function, the provision of consolidated bills by Competitive Retailers at the request of the MOU/Coop should be an available option. TEC-TPPA agree that Section 4.4.3, CONSOLIDATED BILLING BY COMPETITIVE RETAILER, as presently proposed is appropriate as it closely corresponds with the IOU Tariff, thereby facilitating uniform or standardized billing practices for the Competitive Retailer. TEC-TPPA stated that Section 4.4, BILLING AND REMITTANCE, should be changed to more clearly state that it is the customer's choice of whether to receive a consolidated bill or two separate bills.

The commission believes that PURA §40.004 and §40.054 give the commission authority to establish terms and conditions for open access. The commission agrees with TEC-TPPA that PURA §41.057 and §40.057 specifically contemplate two types of billing arrangements at the option of the customer. These sections do not prohibit, however, a third billing option whereby the Competitive Retailer provides a consolidated bill. The commission disagrees with STEC's position that the commission cannot allow the Competitive Retailer to provide a consolidated bill. In fact, this may be the only way to ensure open access to all Competitive Retailers. The commission also notes that it is not removing

the MOU/Coops rights to bill its customer but simply stating an additional option available to MOU/Coops who choose to outsource their billing functions.

The commission believes that it is unlikely that Competitive Retailers will establish billing systems to serve MOU/Coop Delivery Service areas that are different from those they use in IOU service areas. It is more likely that they will simply not compete in areas in which an MOU or Coop does not allow them to issue consolidated bills. The commission believes that MOUs/Coops that want vibrant competition in their service areas will authorize Competitive Retailers to issue consolidated bills, as is done in IOU areas.

Therefore, the commission agrees with TXU REP that the Access Tariff for MOUs/Coops should contain an option for the Competitive Retailer to provide consolidated billing. Further, the commission agrees with TEC-TPPA and TXU REP that it is the Retail Customer's option as to whether it wants to receive a consolidated bill or two separate bills. The commission clarifies this in the tariff.

*Question 4: What should be the default option if a Retail Customer fails to choose to receive either a single or consolidated bill?*

OPUC and TXU REP commented that the default should be separate bills from the Utility and the Competitive Retailer. TXU REP stated that it strongly encourages the default to be separate bills. TXU believed that a consolidated bill encourages anti-competitive billing practices and could require

Competitive Retailers to incur additional costs, such as compliance with MOU or Coop billing requirements and billing fees. TXU stated that MOUs and Coops would have Competitive Retailers' billing information through consolidated bills and could use this information to under-cut the price of the Competitive Retailer. OPUC stated that customers should receive a notice that consolidated billing is available.

STEC and TEC-TPPA concluded that a consolidated bill should be the default option. STEC stated that it is easier and cheaper for customers to pay only one bill and that customers would expressly request separate bills if they wanted to change from the consolidated form they were already receiving. TEC-TPPA believed that this bill should come from the MOU/Coop and that they are the only entity that possesses the right to bill for transmission and distribution services. TEC-TPPA believed that the transition to competition will be seamless with the MOU/Coop continuing to send a consolidated bill.

The commission determines that customers who have not chosen to receive either a consolidated bill or separate bills should receive the same type of bill as they have been receiving, i.e., a consolidated bill, until they choose specifically to receive two separate bills. This is also compatible with the competitive market in that the entity soliciting customers, i.e., the Competitive Retailer, will have the opportunity to include separate bills as part of its service package to Retail Customers. This will help to alleviate concerns about the MOU/Coop charging the Competitive Retailer for billing services and acting in an anti-competitive manner. The commission, therefore, makes no changes to this section.

*Question 5: When the Utility provides a consolidated bill (i.e., one that includes both the Utility's delivery service charges and the Competitive Retailer's charges), how many days should the Utility have to remit payment to the Competitive Retailer for the Competitive Retailer's charges?*

TXU REP stated that Section 4.4.1.5(1) which requires remittance within five Business Days of the due date of the Retail Customer's bill or five days after receipt of payment, whichever is later, is more than reasonable. TXU REP stated that there is no reason for MOUs or Coops to unduly hold onto payments that are due the Competitive Retailer. TXU REP recommended that Competitive Retailers be notified through the use of payment reports about whether or not a bill has been paid, even if payment is not remitted to the REP until later. TXU REP believed that REPs must be aware of whether or not payments have been made, so that they may promptly initiate collection activities and avoid confusion when discussing bills with customers.

STEC stated that it can accept the remittance provision in Section 4.4.1.5, REMITTANCE, but believed it would be less costly if the Coops were given ten Business Days to remit payment to Competitive Retailers after the Coops have received payment from the Retail Customer for the Competitive Retailer's service. STEC stated that many of the smaller Coops might have problems with the five Business Days requirement to remit payment and may have to hire additional staff in order to meet this requirement. STEC stated that problems might arise where areas have many Competitive Retailers. For example, it would take longer to calculate what is owed to twenty Competitive Retailers than it would for three Competitive Retailers.

TEC-TPPA proposed that at least ten Business Days should be provided for MOUs/Coops to remit payment to Competitive Retailers and that more time may be needed if an MOU/Coop has contracted out the billing process to a third party. TEC-TPPA argued that MOUs/Coops have less time to process payments pursuant to this Tariff than the Competitive Retailer has to remit charges to the IOU in the IOU Tariff. Second, they commented that the Competitive Retailer in this Tariff receives money one-third more quickly than does the IOU in the IOU Tariff. OPUC stated that "under a consolidated billing arrangement, the utility should be allowed ten days to remit payment to the Competitive Retailer after the Retail Customer has paid the utility."

The commission disagrees with TEC-TPPA's arguments regarding the unfairness of the time element of processing payment. Since there is no comparable entity in the IOU version that is issuing bills and collecting money that belongs to the Competitive Retailer, these arguments are not relevant. (In the IOU version, the Competitive Retailer has a direct responsibility to pay the non-bypassable charges, whether it gets paid by the Retail Customer or not.) The commission agrees with TXU REP that MOUs/Coops should not be able to hold onto the money from the Retail Customer once payment is received by the MOUs/Coops.

Allowing MOUs/Coop to hold onto Competitive Retailers' money is detrimental to competition in MOU/Coop areas because it increases the working capital requirements and risks for Competitive Retailers. Competitive Retailers are unlikely to serve in areas where they must unduly wait for payment.

The commission understands that MOUs/Coops need sufficient time to process and remit payment, and determines that five Business Days affords such adequate time to process and remit payment to Competitive Retailers and to provide Competitive Retailers with a detailed report of payments.

Additionally, the commission determines that if the MOU/Coop contracts the billing process to a third party, the third party is the agent of the MOU/Coop and shall operate under the same requirements as the MOU/Coop. Further, no extension of time shall be given in cases where the MOU/Coop has contracted out the billing function. The commission amends the Tariff only to clarify that no extension of time will be given in cases where the MOU/Coop has contracted out the billing function.

*Question 6: If the Competitive Retailer provides a consolidated bill, should the Competitive Retailer be allowed to address Retail Customer's billing inquiries?*

TEC-TPPA stated that they believe the Competitive Retailer should be allowed to address customer inquiries in situations where the Competitive Retailer is repackaging the Delivery Service charges. They concluded that the proposed language in Section 4.4.3.8, RETAIL CUSTOMER BILLING INQUIRIES, is appropriately worded. TXU REP agreed that the language in Section 4.4.3.8, RETAIL CUSTOMER BILLING INQUIRIES, correctly allows REPs the option to respond to an inquiry, forward it to the MOU or Coop, or direct the customer to contact the person designated to handle billing inquiries for the MOU/Coop. OPUC stated that under consolidated billing, either the

Competitive Retailer or the MOU/Coop should be allowed to address Retail Customer billing questions related to Delivery Service.

STEC stated that since PURA does not allow Competitive Retailers to provide a consolidated bill, this question is not relevant.

As a matter of ensuring and promoting open access, the commission believes that Competitive Retailers operating in MOU/Coop areas should have the ability to interact directly with their customers. The commission believes that Competitive Retailers, if willing and able, should be allowed to address Retail Customer billing inquiries. STEC's argument regarding consolidated billing was addressed in question four. The commission makes no changes to the Tariff.

*Question 7: If (Utility) provides a Consolidated Bill, should the Competitive Retailer be provided a copy of the entire bill sent to the customer?*

TEC-TPPA commented that a Competitive Retailer is clearly entitled to those portions of a consolidated bill that involve the Competitive Retailer's electric charges and any related charges of the Competitive Retailer. They contended that the charges for Delivery Service/wires service are of limited relevance to the Competitive Retailer and may implicate confidentiality interests. They asserted that customers who have cable television, propane gas, water, sewer and other services billed on the electric bill may not want the Competitive Retailer to have access to the entire bill. Furthermore, they asserted

that industrial or commercial customers might have cogent competitive reasons for protection of their consumption or billing information for the services billed by an MOU/Coop and that Senate Bill 7 guarantees privacy with respect to consumption and credit information. Consequently, TEC-TPPA contended that the entire bill should not be made available to a Competitive Retailer unless the MOU/Coop rendering the bill decides to do so on its own and with the permission of the Retail Customer. STEC stated that it has no problem providing a copy of the entire bill as long as the customer's privacy rights can be protected and the MOU/Coop is paid for providing the copy.

TXU REP and OPUC agreed that the Competitive Retailer should be provided with electronic access to copies of bills sent to the Retail Customer. TXU REP stated that in order to respond to customer's bill inquiries, a Competitive Retailer needs a copy of the entire bill or access to a database containing all billing information. Stating that REPs need information in a timely manner, TXU REP recommended that a time deadline be added to the Tariff to require that billing information be forwarded to REPs within one business day of the day the MOU/Coop receives a request for such information.

The commission concludes that a Competitive Retailer is entitled to access to the portions of the bill that contain the Competitive Retailer's charges, Delivery charges and charges for Discretionary Services, but not charges for non-electric services. There are many reasons that a Competitive Retailer would need to see a copy of the entire electric portion of the bill. First and perhaps foremost, as TXU REP pointed out, a Competitive Retailer will want to provide good customer service. If a Retail Customer calls the Competitive Retailer to discuss a charge on the bill, the Competitive Retailer will need to see what the

customer was billed to determine how to answer the customer's questions. Second, Competitive Retailers are free to make offers to customers based on a flat fee for electric service or a percentage savings off of the total electric bill. In those cases, the Competitive Retailer will need information on the charges for Delivery Services so it can check to verify that it is providing the customer what was promised. Finally, so that it may schedule power, a Competitive Retailer will need as much access to customer demand and usage information as the MOU/Coop has access to.

The commission does not agree with the MOU/Coop argument that commercial or industrial customers will have cogent reasons for protection of consumption and billing information or that Senate Bill 7 provides for privacy from the Competitive Retailer. Once a Competitive Retailer has gained a customer, the commission believes that the Competitive Retailer should have access to all MOU/Coop information that is related to electricity usage, for the reasons described above. The Competitive Retailer, however, pursuant to §25.472, relating to Privacy of Customer Information, may not share with other parties the consumption or credit information it obtains.

The commission understands that privacy issues might restrict a MOU/Coop from releasing billing information for natural gas, sewer or other charges unrelated to electric service. The commission believes that Competitive Retailers do not need this information for the provision of electric service and that the MOU/Coop is not required to provide it.

The commission agrees with TXU REP and OPUC and determines that all information the MOU/Coop has access to regarding charges for electricity usage or demand shall be provided to the Competitive Retailer on request and may be provided in the form of an electronic database or hard copy. This information should be provided to the Competitive Retailer in a straightforward manner at the lowest cost practicable. While the commission does not have the ability to set fees for this service, it notes that the level of the fees the MOU/Coop charges to the Competitive Retailer affects the willingness of Competitive Retailers to compete in MOU/Coop areas. The commission also notes that anti-competitive concerns could be implicated if the MOU/Coop were to treat its competitive affiliate preferentially with regard to obtaining this information.

*Comments on specific sections of the pro-forma Access Tariff*

*Chapter 3: General Terms and Conditions of Access Applicability*

*Section 3.5, Changes to Access Tariff*

TEC-TPPA and STEC argued that Discretionary Services are not related to Access but to the provision of Delivery Service, and that the requirement to report rates of Discretionary Services in the Access Tariff should be removed from this section. TEC-TPPA stated that only rates or charges related to Access should be addressed in this Tariff.

Since Discretionary Service rates will be included in the Utility's Delivery Services Tariff, and will be posted on its website for Competitive Retailers to view, it is not necessary to repeat the Discretionary Service rates in this Tariff.

TXU REP suggested that three important sections of the IOU Tariff have been left out of this Tariff: Sections 3.15, Successors and Assigns; 3.16, Exercise of Right to Consent; and 3.17, Waivers.

The exclusion of these three items was inadvertent. The commission also believes that the addition of these items to the Tariff poses no burden to any party. Therefore, the commission makes the requested additions.

***Chapter 4: Specific Rules and Regulations Relating to Access to Delivery System of (Utility)  
by Competitive Retailers***

***Section 4.3.3, Changing of Designated Competitive Retailer***

TXU REP proposed that the Tariff should contain the same prohibition against a Utility charging a switching fee for a change in Competitive Retailers as is contained in the IOU version. TXU REP stated that there is no difference in the IOU-REP and the MOU/Coop-REP relationship. Therefore, this Tariff should also include this prohibition against charging a fee for changing Competitive Retailers.

The commission believes strongly that any fee charged by MOUs/Coops to a Competitive Retailer as a result of that Competitive Retailer being selected by a customer to be its electric provider is a hindrance to Access to the Delivery System of the MOU/Coop, as well as a hindrance to full and fair competition. Accordingly, the commission agrees with TXU REP's comments and, on the basis of its authority to establish terms and conditions for open access, prohibits MOUs/Coops from charging such a switching fee. This change is also consistent with the commission's desire for the IOU Tariff and the MOU/Coop Tariff to be as similar as possible.

*Section 4.3.5, Suspension of Access*

*Sections 4.3.5.1, Suspensions Without Prior Notice For Emergencies or Necessary Interruptions; and Section 4.3.5.2, Noticed Suspension Not Related to Emergencies or Necessary Interruptions*

TXU REP stated that Section 4.3.5.1 does not sufficiently specify when notification should occur. Therefore, TXU REP proposed that a reasonable 24 hour deadline be added for MOUs/Coops to notify REPs of emergency suspension. TXU REP also stated that Section 4.3.5.2 does not state a time deadline for prior notice of suspension and does not expressly state that prior notice should be given. TXU REP proposed that a statement be added to require that notice be given and to specify a time frame for such notice.

No such provision appears in the IOU version and, for the sake of uniformity, the commission declines to make the suggested changes here.

TEC-TPPA stated that it is not practical to provide notice in certain cases, such as emergency situations. TEC-TPPA recommended that the heading of Section 4.3.5.2, NOTICED SUSPENSION NOT RELATED TO EMERGENCIES OR NECESSARY INTERRUPTIONS, be changed to avoid confusion as to when prior notice is or is not to occur. TEC-TPPA recommended that "NOT RELATED TO EMERGENCIES OR NECESSARY INTERRUPTIONS" be deleted from the heading of Section 4.3.5.2. TEC-TPPA suggested a new Section 4.3.8, Discontinuance of Access by Utility, be added to the Tariff. They contended that there are times that Access will be discontinued at the request of an authorized agent or to make repairs, upgrade or install new facilities, or to conduct other activities that may require interruption of Delivery Service.

The commission believes that the notification provided to the Competitive Retailer should be the same regardless of whether the territory is an IOU territory or an MOU/Coop territory. While the commission recognizes that MOUs/Coops determine in their Delivery Service Tariffs when a Retail Customer's service can be suspended, it also recognizes that Access to the Competitive Retailer is suspended simultaneously with suspension of the customer, and that the Competitive Retailer deserves notification so it can provide good customer service and schedule power accordingly.

The commission recognizes that emergencies that pose a threat to the Delivery System of the MOU/Coop may not be able to be noticed beforehand. Consistent with the IOU Tariff, emergencies should not require prior notice. The commission agrees to make this change.

In addressing TEC-TPPA's argument that the location of the suspension of service should not be required to be reported, the commission determines that location is required to be reported (except in cases where the individual customer is being suspended and the affected Competitive Retailer is being notified - in such case the location would be obvious). The commission notes that location is required to be reported in the IOU version at Sections 4.2.5 and 4.3.8.1.

The commission does not believe that the headings are confusing in the Tariff. There are emergency situations, which do not require advance notice, and non-emergency situations, which do require advance notice, just as in the IOU Tariff. The commission declines to make this change suggested by TEC-TPPA.

*Section 4.3.7, Disconnection of Service Requested by Competitive Retailer to Retail Customer's Facilities*

STEC stated that the language in this section should be changed from "as authorized by the commission's Customer Protection Rules" to "as authorized by electric cooperatives' or municipally-

owned utilities' customer protection rules." STEC stated that it is the Coops that adopt, implement, and enforce customer protection rules for the customers served within their certificated service areas.

The commission's customer protection rules for disconnection apply to all REPs regardless of the area they are operating in and for any MOU/Coop retail provider operating outside its certificated area. Therefore, the only entity required to abide by the MOU/Coop's customer protection rules for disconnection is the Competitive Retailer affiliated with the Utility. The commission clarifies this in the Tariff.

TEC-TPPA recommended that this section include language making it clear that the MOU/Coop is not responsible for monitoring or reviewing the appropriateness of the Competitive Retailer's request.

The commission determines that similar language is already included in Section 4.2.7, DUTY TO REVIEW, but agrees that it is appropriately placed here as well.

#### *Section 4.4, Billing and Remittance*

TXU REP recommended that the first paragraph, stating that the Utility may bill Retail Customers directly for all services, should be deleted because it is confusing, unnecessary, restates PURA and addresses the MOU/Coop relationship with customers that do not switch.

The commission agrees that the first paragraph is repetitive of PURA and confusing, especially in its proposed location. Therefore, the commission edits and relocates the statement to make it more easily understood.

*Section 4.4.1, Consolidated Billing by Utility*

TXU REP stated that there should be a time limit on the request for copies of the bill. TXU REP suggested that copies should be provided within one business day of receipt of the request.

The commission understands that the Competitive Retailer needs a copy of the bill to quickly address a customer's billing concerns. The commission determines that it should be technically feasible for the MOU/Coop to process the request and respond by e-mail, facsimile or provide database access within one Business Day, enabling the Competitive Retailer to address its customer's concern in a timely manner.

*Section 4.4.1.4, Billing Cycle*

TEC-TPPA proposed changing the number of days notice required to alter a billing cycle from 30 days notice to 20 days notice. They stated that this will make it consistent with the notice required for a change in meter reading date.

The commission disagrees with the suggestion of TEC-TPPA. The MOU/Coop is required to give these notices in cases where it is billing on behalf of the Competitive Retailer. It is very important that the Competitive Retailer know at least one month in advance about a change that will ultimately affect when it receives its payments from its Retail Customers. Therefore, the commission makes no changes to the Tariff.

*Section 4.4.1.5, Remittance*

TXU REP stated that Competitive Retailers must promptly receive reports from MOUs/Coops performing consolidated billing about payments the MOU/Coop received for energy and power. TXU REP recommended that it should be one Business Day from receipt of payment.

The commission agrees with TXU REP that it is very important for the MOU/Coop to provide the billing reports in a timely manner. The commission recognizes the limited resources of some of the MOUs and Coops and does not want to slow the processing of payments by having such a stringent timeline for the report. The commission determines that the report shall be due on the same date the MOU/Coop is required to remit the payments to Competitive Retailer; therefore, no change to the Tariff is necessary.

*Section 4.4.3, Consolidated Billing By Competitive Retailer*

*Section 4.4.3.2, Calculation and Transmittal of Construction Service*

TEC-TPPA proposed that a statement be added to make clear that income derived from Construction Services is deemed to come from the Retail Customer regardless of who requests the service.

The commission determines that this statement is important to the MOU/Coops for tax purposes. Therefore, the commission makes this change to the Tariff.

STEC argued that the commission should eliminate the calculation and transmittal of Construction Service charges as this rightly belongs in the MOU/Coop's Delivery Service Tariff.

The commission disagrees with STEC and believes that these charges may be billed to the Competitive Retailer by the MOU/Coop and that the calculation is of utmost concern to the Competitive Retailer and should be included in this Tariff.

*Section 4.4.3.5, Remittance of Invoiced Charges*

TEC-TPPA proposed changing this section to require all charges invoiced to the Competitive Retailer, not just Delivery Charges, be paid within 35 Business Days following the transmittal of a valid invoice.

The commission agrees that other charges, such as fees for billing and reports, should also be paid within 35 Business Days following the transmittal of a valid invoice. The commission does not agree that Discretionary Services charges or Construction Service charges should be required to be paid within the 35 Business Days. If a Competitive Retailer has agreed to be billed for any Discretionary Charges on behalf of a Retail Customer, the Competitive Retailer should be extended a payment plan as a Retail Customer would be extended a payment plan under the MOU/Coop's Delivery Service Tariff. Therefore, the commission amends the Tariff consistent with these findings.

*Section 4.5.4, Form of Deposit*

TEC-TPPA stated that a security deposit is required in the event the billing party fails to remit payment as required by the Access Tariff. TEC-TPPA argued that in the IOU Tariff, the Competitive Retailer is always the billing party and has the ability to choose the form of the deposit. Therefore, TEC-TPPA believed that this Tariff should allow the billing party to choose the form of security deposit.

The commission agrees that the party being extended some form of credit, or the billing party in this case, is the party that is required to post the deposit and should be able to choose among authorized options. This Tariff differs from the IOU Tariff in that either party may be the billing party depending on the billing options chosen. Based on the reasoning from the IOU Tariff, the billing party should be the one to choose the form of deposit. The commission makes this change to maintain consistency with the IOU Tariff.

*Section 4.6.1, Delinquency and Default, and Section 4.6.2.2, Default of (Utility) Related to Failure to Provide Meter Reading Data*

TEC-TPPA argued that these provisions are not included in the IOU Tariff. They also pointed out that the ERCOT protocols require the TDU's Meter Reading Data to be provided directly to the Independent Organization, not the Competitive Retailer.

Since the commission regulates the IOU directly, it has the authority to remedy or impose consequences in situations in which IOUs do not provide Meter Reading Data. Since the commission has no such control over MOUs and Coops, and it is imperative to open access and the competitive market that there be consequences for failure to provide the Meter Reading Data, this section will remain in the Tariff. The commission recognizes that the data may be provided to ERCOT or other entities in non-ERCOT areas. Accordingly, the commission modifies the wording to require the MOU/Coop to comply with Section 4.8.1, DATA FROM METER READING, which specifies how the data gets from the MOU/Coop to the Competitive Retailer.

*Section 4.6.3, Default and Remedies on Default of Competitive Retailer*

*Section 4.6.3.2, Default and Remedies Related to Competitive Retailer's Failure to Remit Payment or Maintain Required Security*

TEC-TPPA recommended that paragraph (6) be deleted. TEC-TPPA argued that this paragraph is not germane to the subject matter of this section and is repetitive of Section 4.6.3.4, DEFAULT RELATED TO DE-CERTIFICATION OF A COMPETITIVE RETAILER AS A RETAIL ELECTRIC PROVIDER OR LOSS OF MUNICIPAL REGISTRATION.

The commission agrees with TEC-TPPA that paragraph (6) pertains to a Competitive Retailer that has lost its certification and is not germane to this section. Since this matter is already provided for in 4.6.3.4, the commission agrees to delete Section 4.6.3.2 (6).

TEC-TPPA believed that the last paragraph of this section presents problems if the MOU/Coop chooses the remedy contained in option (5). If Option (5) is chosen by the MOU/Coop and the Competitive Retailer selects (A), the MOU/Coop would be required to assume the billing function. TEC-TPPA recommended that this section be revised to make it clear that the Competitive Retailer can only exercise (A) if it is acceptable to the MOU/Coop. If the Competitive Retailer fails to choose, the Tariff as proposed would require (A) to be selected. TEC-TPPA proposed that the MOU/Coop be allowed to choose (A) or (B).

In the IOU Tariff, option (A) allows for the billing responsibility to be transferred to the POLR. Since the MOU/Coop is allowed by PURA to bill its customers, and previous discussions with the MOUs/Coops indicated that they wanted to assume the billing responsibility, the commission proposed

that the MOU/Coop version differ from the IOU version in this regard. The MOUs/Coops now seem unsure about whether they want to accept responsibility for billing in this situation, so the commission amends the option to allow an MOU/Coop to accept the responsibility for billing under option (A) only if it is willing. If the MOU/Coop is unwilling, the Competitive Retailer must choose one of the other options afforded to it. If the Competitive Retailer fails to choose an option, the Utility may then choose either (A), where it takes over billing and collection, or (B), where payment are automatically placed in a lock-box.

TEC-TPPA recommended that this section require the Competitive Retailer to provide the needed customer information if option (A) is selected.

The commission agrees that this section is unclear. The Competitive Retailer should provide the needed customer information to the party assuming the collection responsibilities if option (A) or (C) is chosen. The commission amends the Tariff accordingly.

*Section 4.6.3.3, Default Related to Competitive Retailer's Failure to Satisfy Material Obligations Under Access Tariff*

TEC-TPPA stated that an additional remedy must necessarily be added that would allow the MOU/Coop to discontinue Access to the Competitive Retailer that is in default, as Access is all that is being provided by the MOU/Coop.

The commission determines that discontinuance of Access has a direct effect on Retail Customers and the competitive market. The commission has established remedies to cure non-compliances and believes that these should be followed prior to the Retail Customer experiencing any direct effect. Therefore, the commission does not believe that the MOU/Coop should be allowed to discontinue Access without following the proper procedures. The commission has provided MOU/Coops in this Tariff and IOUs in the IOU Tariff the ability to request decertification of REPs in cases of default.

If the defaulting Competitive Retailer is not eligible for REP certification, other remedies exist. In the IOU Tariff, the IOU may request that the commission allow the Retail Customers to be transferred to another retail provider or the provider of last resort (POLR). In an MOU area where the municipality has a certification process, the city may follow its procedures for decertification, and after decertification of the defaulting REP, the MOU is free to discontinue Access as the Competitive Retailer is no longer eligible to receive Access under this Tariff. However, in an area not requiring certification, if the defaulting Competitive Retailer is not required to obtain REP certification, this process is not available. The Tariff as proposed has no remedy for this situation. The commission, therefore, agrees that in an area not requiring municipal certification, the MOU or Coop may discontinue Access at its discretion after the REP has been in default 15 days and has failed to cure its non-compliance. The commission makes these changes in the Tariff and also amends the Tariff to make it more clear that the Competitive Retailer is in Default 10 days after failing to cure a delinquency.

*Section 4.6.3.4, Default Related to Decertification of a Competitive Retailer as a Retail Electric Provider or Loss of Municipal Registration*

TXU REP proposed that additional flexibility in the deadline be added to this provision. TXU REP stated that the REP and municipality are stuck with this deadline and may not have enough time to cure a non-compliance, especially if the cure requires municipal review or approval. TXU REP recommended that the phrase "or otherwise allowed by the municipality" be added to allow the parties to adjust their timeline if necessary.

The commission determines that there may be situations in which more time may be needed to cure the non-compliance and, as long as the MOU agrees to the extension of time, the Tariff should contain this flexibility. The commission makes the requested change.

This new section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2001) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. The commission also adopts this rule pursuant to PURA §39.203, which provides that an MOU offering customer choice or a Coop offering customer choice shall provide transmission and/or distribution service at retail in accordance with the commission's rules applicable to terms and conditions of access; §40.004(5), which grants the commission jurisdiction over MOUs to establish terms and conditions for open access to transmission and distribution facilities for MOUs providing customer

choice, as provided by §39.203; §40.054(c), which grants the commission jurisdiction over MOUs participating in customer choice to establish terms and conditions for access by other retail electric providers to the MOU's distribution facilities; §40.058, which provides that before the 90th day preceding the date an MOU offers customer choice, it shall file with the commission both the Tariffs implementing the open access rules established by the commission under §39.203 and the rates for open access on distribution facilities as set by the municipal regulatory authority; §41.004(4), which grants the commission jurisdiction over Coops to establish terms and conditions for open access to distribution facilities for Coops providing customer choice; §41.054(c), which grants the commission jurisdiction over Coops participating in customer choice to establish terms and conditions for access by other electric providers to the Coop's distribution facilities; and §41.058, which provides that before the 90th day preceding the date a Coop offers customer choice, it shall file with the appropriate regulatory authorities having jurisdiction over the transmission and distribution service of the Coop Tariffs implementing the open access rules established by the commission under §39.203.

Cross Reference to Statutes: PURA §§14.002, 39.203, 40.004(5), 40.054(c), 40.058, 41.004(4), 41.054(c), and 41.058.

**§25.215. Terms and Conditions of Access by a Competitive Retailer to the Delivery System of a Municipally Owned Utility or Electric Cooperative that has Implemented Customer Choice.**

- (a) **Purpose.** The purpose of this section is to implement Public Utility Regulatory Act (PURA) §39.203 as it relates to the establishment of non-discriminatory terms and conditions of access by competitive retailers to the delivery systems of municipally owned utilities and electric cooperatives that have implemented customer choice. Retail delivery service, including delivery service to a retail customer at transmission voltage, shall be provided directly to retail customers by a municipally owned utility or an electric cooperative that has implemented customer choice. A municipally owned utility or an electric cooperative that has implemented customer choice shall provide retail delivery service in accordance with the rates, terms and conditions set forth in the delivery service tariffs promulgated by the municipally owned utility or an electric cooperative.
- (b) **Application.** This section and the pro-forma access tariff set forth in subsection (d) of this section govern the terms and conditions of access by competitive retailers at the point of supply to retail customers connected to the delivery systems of municipally owned utilities and electric cooperatives that have implemented customer choice.
- (c) **Access tariff.** Not later than the 90th day before the date customer choice is offered, each municipally owned utility or electric cooperative in Texas shall file with the Public Utility

Commission of Texas (commission) its access tariff governing access by competitive retailers to retail customers connected to the delivery system of the municipally owned utility or electric cooperative using the pro-forma access tariff in subsection (d) of this section. A municipally owned utility or an electric cooperative may add to or modify only Chapters 2 and 5 of the access tariff, reflecting individual characteristics and rates. Chapters 1, 3, and 4 of the pro-forma access tariff shall be used exactly as written; these Chapters can be changed only through the rulemaking process. The access tariff, however, shall contain the name of the municipally owned utility or electric cooperative in lieu of "(Utility)".

- (d) **Pro-forma access tariff.** The commission adopts by reference the form "Tariff for Competitive Retailer Access," effective date of August 23, 2001. This form is available in the commission's Central Records division and on the commission's website at [www.puc.state.tx.us](http://www.puc.state.tx.us).

This agency hereby certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority. It is therefore ordered by the Public Utility Commission of Texas that §25.215, relating to Terms and Conditions of Access by a Competitive Retailer to the Delivery System of a Municipally Owned Utility or Electric Cooperative that has Implemented Customer Choice is hereby adopted with changes to the text as proposed.

**ISSUED IN AUSTIN, TEXAS ON THE 13th DAY OF SEPTEMBER 2001.**

**PUBLIC UTILITY COMMISSION OF TEXAS**

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**Chairman Max Yzaguirre**

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**Commissioner Brett A. Perlman**

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**Commissioner Rebecca Klein**