PROJECT NO. 29159

PUC RULEMAKING PROCEEDING TO AMEND PUC SUBST. R. 25.484, RELATING TO TEXAS ELECTRIC NO-CALL LIST	**§ § § §**	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER ADOPTING AMENDMENTS TO §25.484
AS APPROVED AT THE AUGUST 19, 2004 OPEN MEETING

The Public Utility Commission of Texas (commission) adopts amendments to §25.484 (relating to the Electric No-Call List) with changes to the proposed text as published in the March 12, 2004 *Texas Register* (29 TexReg 2512). The proposed amendments: 1) require Retail Electric Providers (REPs) that make non-exempt telemarketing calls to purchase the Electric no-call List; 2) require REPs to provide information, such as call logs or phone records, to the commission to investigate alleged violations of the Electric no-call List; 3) require that such records be maintained by the REP for a period of 24 months; 4) establish presumptions relevant to enforcement of the Electric no-call List; 5) and specify certain types of evidence that are admissible in an action to enforce the Electric no-call List. Project Number 29159 was assigned to this proceeding.

The commission received written comments and reply comments only from the Retail Electric Providers Coalition (REP Coalition), and the Office of Public Utility Commission (OPUC). The commission notes that these commenters cross-referenced their comments with those filed in PUC Project Number 29140 relating to the Texas no-call list (29 TexReg 2514). Thus, some of the comments and commission discussion herein refers to parties who did not file comments in this proceeding.

The commission conducted a public hearing on May 4, 2004, which TXU Energy and Reliant Energy attended.

General Initial Comments

In its general comments, the REP Coalition urged the commission to create a unified Texas no-call list that includes both the consumers listed in the no-call list required by §26.37 of this title and those listed in the Electric no-call list required by §25.484 of this title. The REP Coalition did not provide a specific example, but suggested that a telemarketer unfamiliar with the list required by §26.37 may believe that it needed to comply with only the Electric no-call list.

The commission declines to merge the no-call list required by §26.37 (Texas no-call list) with that required by §25.484 (Electric no-call list). First, the commission notes that the pricing structure for the Electric no-call list is different from the Texas no-call list. Second, each of the lists has different subscription periods. Third, the Electric no-call list is available to business customers, whereas the Texas no-call list is not. Moreover, the commission is not persuaded by the REP Coalition's assertion that a REP acting as a telemarketer would be confused by the existence of a separate Texas no-call list and an Electric no-call list; §25.484(b) clearly states that a REP acting as a telemarketer is also subject to the provisions of §26.37. The commission believes that §25.484, therefore, provides sufficient notice to REPs of the existence and applicability of both no-call lists.

Subsection (a), Purpose

The commission did not receive comments on the proposed amendment to this subsection and, therefore, the commission adopts this section without modification.

Subsection (b), Application

The commission did not propose changes to this subsection and no changes to it were recommended by the commenters. Therefore, the commission adopts this section without modification.

Subsection (c), Definitions

The REP Coalition recommended, for clarity, adding the word "Texas" in front of references to the no-call definitions in this subsection.

The commission disagrees that adding the word "Texas" before the terms "no-call database" and "no-call registrant" serves to clarify or enhance the distinction between the two rules and declines to make that change. The rules relating to the Texas no-call list and the Electric no-call list are in separate chapters of the commission's substantive rules and are, therefore, clearly distinguishable. Further, the definitions contained in subsection (c) of each section clearly distinguish the lists and databases from one another. Accordingly, the commission declines to make the clarifying changes suggested by the REP Coalition.

Subsection (d), Requirement of telemarketers

The REP Coalition asserted that the rule was not enhanced in any regard by adding a requirement for a telemarketer to purchase the Texas no-call list.

The commission believes that requiring telemarketers to purchase the Electric no-call list enhances the rule because of the positive impact it will have on compliance with the no-call

prohibitions and the commission's efforts to enforce those prohibitions. The proposed language will also facilitate a telemarketer's ability to demonstrate that a telemarketing call made to a number on the Electric no-call list was an isolated occurrence.

The REP Coalition stated that many REPs contract with third parties who perform telemarketing services on their behalf rather than engaging in telemarketing themselves. Accordingly, the REP Coalition recommended revising subsection (d) to require that a REP whose services are offered by a telemarketer either purchase the no-call list itself or obtain representations from a third-party telemarketer that the telemarketer is a subscriber to the no-call list.

The Business & Commerce Code §44.002(7) defines a telemarketer as one who makes *or causes to be made* a telemarketing call. Therefore, a REP who contracts with a third-party telemarketer to call consumers on its behalf has *caused to be made* a telemarketing call and must, accordingly, comply with the electric no-call prohibitions, including purchasing the Electric no-call list itself. However, the commission believes it reasonable to allow the REP or other person to discharge their obligations to purchase the current Electric no-call list through contractual obligations with telemarketers. The commission has modified this section and subsection (h)(2)accordingly.

The REP Coalition also suggested replacing the word "telephone" in the proposed additional language of this subsection with the word "telemarketing."

The commission agrees and modifies the proposed language for the second sentence in subsection (d) to change "telephone calls" to "telemarketing calls." Consistent with this

modification, the commissions believes that all references in the rule to "telephone call" should be changed to "telemarketing call."

Finally, the REP Coalition asserted that the prohibition on telemarketing calls to telephone numbers that have been published on the Electric no-call list for more than 60 calendar days is overly restrictive. The REP Coalition stated that telephone numbers are frequently reassigned when, for example, customers change premises. Accordingly, the REP Coalition recommended either not adopting subsection (d) or revising it to permit calls to numbers on the Electric no-call list unless there is a match between both the customer name and the telephone number. In its reply comments, MCI supported the REP Coalition's recommendations.

OPUC disagreed with the REPs' assertion that subsection (d) is overly prescriptive and should be amended to allow calls unless there is a match between the customer name and phone number. Instead, OPUC suggested that the database be updated when numbers are actually reassigned. OPUC stated that this suggestion is consistent with MCI's recommendation to add a new subsection (f)(3)(D). OPUC noted, however, that it disagreed with MCI's suggestion to update the database when disconnections occur because that language provides no buffer zone for customers who are disconnected but then quickly reconnected.

As previously stated, the commission has decided to operate the Electric no-call list in accordance with the requirements of the Texas no-call list found in the Business & Commerce Code. Business & Commerce Code §44.101(c) states that the telephone number of the consumer on the Texas no-call list may be deleted from the list on the consumer's written request or if the telephone number of the consumer is changed. This language is permissive and the commission notes that Public Utility Regulatory Act (PURA) §39.1025

contains no such provision. Considering the amount of resources that would be necessary to implement commenters' request, and the lack of a statutory mandate, the commission declines to modify the rule. The commission acknowledges that commenters would prefer more timely updates to the list, but notes that the published list will be updated quarterly and registration expires after five years.

Subsection (e), Exemptions

OPUC opposed MCI's recommendation, submitted in Project Number 29140 (relating to the Texas No-call List), to extend the period for the established business relationship from one year after termination to eighteen months. OPUC noted that the longer it has been since the relationship has ended, the more likely it is that the customer will consider the relationship to be non-existent. Moreover, OPUC stated, a customer that has been unable to utilize the company's services for an extended period, such as eighteen months, because the relationship has terminated should not expect that one of the consequences of that relationship is for calls to possibly resume a year and one-half later. OPUC concluded that the one-year time frame currently in the rule is a reasonable balance between protecting the peace of the consumer's home and encouraging competition.

The commission is in general agreement with OPUC's reply comments. The commission notes that it did not propose any changes to subsection (e)(2)(B)(ii), and is not persuaded by MCI's comments to do so.

Subsection (f), No-call database

In Project 29140 (relating to the Texas No-call List), MCI urged the commission to adopt new language providing for "ongoing updates" to the no-call list. To maintain the accuracy of the no-call list, according to MCI, ongoing updates are necessary because "the growing need for new telephone numbers for wireless phones, computer modems, pagers, and fax machines results in many changed or disconnected numbers reassigned within only a few months."

In their reply comments, the REP Coalition agreed with MCI's suggestion to add a new subsection (f)(3)(D). The REP Coalition stated it preferred this alternative to its initial suggestion on this issue, as it originally stated in its initial comments on proposed subsection (d). The REP Coalition also noted that the comparison of databases should include updates that result from area code assignments.

In the reply comments it submitted in Project 29140, MCI agreed with the language for subsection (d) that the REP Coalition suggested in its initial comments, with a minor revision. The language MCI adopted in those reply comments focused on requiring compliance with the "latest" Texas no-call list provided that both the telephone number and customer name match those in the Texas no-call database.

As noted by MCI, the commission did not propose any changes to subsection (f) and, for reasons including those here and those above relating to subsection (d), declines to adopt a rule that requires ongoing, *i.e.* continuous, updates to the Electric no-call list. First, PURA §39.1025 requires the commission to establish and provide for the operation of a no-call database, and grants the commission authority to contract with an entity to operate it. Pursuant to the requirements of PURA §39.1025 and the Business & Commerce Code §44.101, the commission contracted with an entity to operate the Texas and Electric no-call

databases. Those databases are operated in accordance with the more specific requirements set forth in Chapter 44, Business & Commerce Code. Section §44.101(c) requires the Texas no-call list, and therefore, the Electric no-call list, to be updated and published on January 1, April 1, July 1, and October 1 of each year. Second, the commission believes the suggestion to mandate an "ongoing" list would create confusion among REPs and telemarketers, the public, regulatory agencies, and the courts when called upon to comply with or to enforce the no-call prohibitions. Third, there could be no reasonable assurance for a REP or telemarketer that a list purchased on Monday would still be applicable on Tuesday. Finally, the commenters failed to propose a rule that addressed either the cost associated with, or method of, purchasing a no-call list that is updated continuously, and the commission declines to propose one now without the benefit of public commentary. The commission, therefore, is not persuaded to initiate the commenters' substantive changes the commission believes are already, and adequately, addressed by statute.

The commission makes a clarifying change to proposed subsection (f)(3)(A) to correct a reference from Chapter 43, Business & Commerce Code, to Chapter 44 of that statute.

Subsection (g), Notice

The commission did not propose any changes to this subsection and no changes to it were recommended by the commenters. Therefore, the commission adopts this section without modification.

Subsection (h), Violations

In Project Number 29140 (relating to the Texas no-call List), most commenters combined their comments for subsection (h) with those for subsection (i). The subject matter of these two subsections is conveniently addressed in combined comments and responses. Therefore, the commission's response to comments relevant to both subsections (h) and (i) are addressed in the commission's responses to comments about subsection (i).

Similarly, for reasons discussed in its responses to subsection (i), the commission believes that the second sentence in proposed subsection (h)(1) is not necessary since it is duplicative of the requirements in subsection (i), as amended. Therefore, the commission modifies the proposed rule accordingly.

Subsection (i), Record retention; Provision of records, Presumptions

Record retention, subsection (i)(1):

The REP Coalition suggested modifying the proposed rule to apply only to *completed* telemarketing calls. Similarly, the REP Coalition contended that a REP or telemarketer should not be obligated to maintain records of multiple attempts of telemarketing calls to the same telephone number.

The commission declines to modify the rule's record-retention requirement such that it applies only to *completed* telemarketing calls. PURA §39.1025 broadly prohibits a call to an electricity customer who has given notice of their objection to receiving telephone solicitations – without regard to whether the telephone solicitation is completed. The commission, however, notes that the Electric no-call list is operated in accord with the requirements specified in Business & Commerce Code Chapter 44. Pursuant to Business &

Commerce Code §44.102(a), a telemarketer may not make a telemarketing call to a telephone number that has been published on the Texas no-call list for more than 60 days. Section 44.003(a) defines a "telemarketing call" as an unsolicited telephone call made for certain purposes. Next, §44.002(9) states that a "telephone call" is a call which is *made to or received at* a telephone number. The commission interprets the phrase "made to" as referring to an incomplete telephone or attempted telephone call. The commission therefore concludes that the statute applies to attempted calls as well as completed calls. Answering an unwanted telephone call is only part of the nuisance; consumers must be free of the annoyance in their own homes of their telephone being caused to ring by unwanted telemarketers. Also, federal regulations recognize that it is an abusive telemarketing act or practice for a telemarketer to cause any telephone to ring and require a telemarketer to maintain certain records establishing it only abandons attempted calls under limited and specific conditions. See, e.g., 16 C.F.R. §310.4(b)(1)(i) and (b)(4). Therefore, records must be maintained of every telemarketing call whether or not that call was completed.

Provision of records (i.e., 21-days), subsection (i)(2)

The REP Coalition suggested modifying subsection (i)(2) to address its concern that the phrase requiring the company to provide "all information" relating to the commission's investigation of complaints regarding the no-call list is not possible. The REP Coalition also argued that the proposed rule is too vague to give REPs sufficient notice of the specific telemarketing records that must be maintained and provided to the commission.

OPUC observed that it is not necessary for the commission to clarify the rule such that the rule defines the scope of the commission's investigation or information request because, since the

information sought by the commission would be determined on a case-by-case basis, the commission would detail the parameters of the request for information in the request itself. OPUC also noted, in its opinion, that the phrase "phone records" as used in this subsection would be limited to those types of records related to the telemarketer's activities as a telemarketer or to the complaint.

The commission addresses these comments below, in its response to comments relating to subsections (i)(3) and (4).

The REP Coalition suggested that the commission specify in subsection (i) that a request for information made pursuant to subsection (i)(2) must be limited to calls made to a complainant's number on a specific date or a period not to exceed ten days. The REP Coalition stated that a specified date range would permit retail electric providers to better implement cost-efficient processes to promptly respond to commission investigations.

OPUC noted that requiring consumers to provide the exact date or dates of unwanted telemarketing calls may be an unreasonable expectation. Some customers, OPUC stated, may not make a complaint until after several unwanted calls have occurred and, therefore, be unable to provide a specific date or date range as proposes by those commenters.

The commission agrees with OPUC and declines to require that a request for information it submits to a telemarketer be limited to a 10-day time period. The consumer may not be able to provide in such a narrow time period its complaint and, consequently, the commission may not be able to limit its investigative efforts to such a narrow time period. Alternatively, the commission's investigation may be initiated *sua sponte* and, therefore, be

unable realistically to limit its investigation to only a 10-day time period. Further, a broader search, whether in response to a complaint or the commission's *sua sponte* investigation, may reveal additional violations. Accordingly, the commission's efforts to protect the public should not be constrained or thwarted in a manner that could obscure a telemarketer's pattern or practice of violating the no-call prohibitions.

The REP Coalition stated that the requirement in subsection (i)(2) to respond to an informal complaint within 21 days is duplicative of §26.30(b)(1)(B) of this title, and, therefore, that it is unclear what benefit is gained by reiterating this deadline.

Subsection (i) is not duplicative of §25.485(d)(1)(C). Those provisions apply to informal complaints and only require the company to "advise" the commission, which, notably, in the context of the cited rules would be a response to the commission's Customer Protection Division (CPD) and not to the commission's Legal & Enforcement Division (LED). The requirement in the proposed rule clarifies that the company must actually provide certain records to the commission in the context of an investigation, including, specifically, an investigation conducted by the LED.

The REP Coalition suggested that subsection (i)(2) should be modified to add the word "alleged" before the phrase "violations of the no-call list," which also appears in subsection (h)(1), because the phrase is, otherwise, unfairly presumptive.

The commission clarifies subsection (i)(2) to address the REP Coalition's concern that the rule appeared presumptive. The commission made other changes to ensure that subsection (i)(2) is consistent with the changes the commission made to proposed subsection (h)(1). As

noted above, the commission modified subsection (h)(1) because it appeared redundant of subsection (i)(2).

Presumptions, subsections (i)(3) and (4):

The REP Coalition suggested that subsections (i)(3) and (4) should be clarified to describe what a telemarketer was required to respond to pursuant to those subsections.

In response to these comments, the commission has modified the phrase "thorough response" in subsections (i)(2), (3), and (4) to require telemarketers to provide "all telemarketing information in their possession and upon which they rely to demonstrate compliance." The commission intends by this provision to prevent telemarketers from providing skeletal, token responses that frustrate the commission's investigative and enforcement efforts. However, it is impossible and unnecessary for the rule to anticipate every possible combination of telemarketing information that could be required for every possible case. The phrase "phone records" as used in this subsection would be limited to those types of records related to the telemarketer's activities as a telemarketer or to the complaint, and specifically, but not limited to, those identified in subsection (i)(1) of the rule.

Finally, the commission clarifies that by use of the phrase "telemarketing information," the commission requires a telemarketer to produce all information in its possession regardless of the source related to all defenses it might raise in response to a complaint alleging a violation of this section.

The REP Coalition argued that no provision of the no-call statute permits designating the failure to provide requested records as a no-call violation. The REP Coalition stated it is both unreasonable and misleading to pursue a no-call violation for an administrative failure such as missing a deadline.

OPUC argued that the commission has authority to designate that a failure to provide requested records results in a no-call violation. OPUC concluded that the proposed rules are a reasonable expression of the commission's authority to make rules, receive and investigate complaints, and enforce the no-call statutes.

The commission disagrees that it lacks authority to designate that a failure to provide requested records results in a no-call violation. The commission agrees with OPUC that the proposed rule is a reasonable expression of the commission's authority to make rules, receive and investigate complaints, and enforce the no-call statutes pursuant to its specific and implied authority granted to the commission by PURA §39.1025 and the Business & Commerce Code §44.102(b) and §44.103(a).

The REP Coalition recommended deleting (i)(3) and (i)(4) in their entirety. Although the REP Coalition asserted that subsection (i)(3) should not be adopted, it proposed, alternatively, deleting the phrase "thorough response" as overly broad and subjective. OPUC disagreed with the REP Coalition that the phrase "thorough response" is too vague. OPUC stated that the phrase is clearly intended to prevent telemarketers from providing skeletal, token responses that frustrate the commission's investigative and enforcement efforts. In addition, OPUC asserted, the rule does not need to anticipate every possible combination of information that could be required for every possible case.

The commission disagrees that the phrases "phone records," "thorough response," and "all information relating to the commission's investigation" are fatally vague. While the phrase "thorough response" has been modified, the commission intends to prevent REPs and telemarketers from providing skeletal, token responses that frustrate the commission's investigative and enforcement efforts. However, it is impossible and unnecessary for the rule to anticipate every possible combination of information that could be required for every possible case. Since the information sought by the commission will be determined on a case-by-case basis, the commission will detail the parameters of the request for information made pursuant to this rule in the request itself. Finally, the phrase "phone records" as used in this subsection would be limited to those types of records related to the telemarketer's activities as a telemarketer or to the complaint.

The REP Coalition asserted it is both unreasonable and misleading to pursue a no-call violation against a company for an administrative failure such as missing a deadline. Failure to provide records in a limited timeframe, the REP Coalition continued, cannot be fairly characterized as a substantive violation of the rule.

The commission clarifies that a company's failure to respond within the time specified by this subsection establishes a violation of subsection (h)(1) (this section's "21-day rule") and also establishes a no-call violation.

The intent of this portion of the proposed rule includes establishing the occurrence of a no-call violation in the event a telemarketer fails or refuses to provide it response within 21 days of the commission's request. In the commission's experience, parties that have

evidence supporting their compliance can, and generally do, provide such information to the commission within 21 days. However, the commission has previously determined that at some point it must be presumed that a company that fails or refuses to provide evidence supporting its compliance must not have such evidence. In its comments during the public hearing in PUC Project Number 28324, *PUC Rulemaking Proceeding to Amend PUC Substantive Rules 26.32 and 26.130*, AT&T acknowledged that it likely did not have such information if it had failed to provide it within 30 days. Moreover, since this evidence is required to be maintained by the company in the regular course of business it can be provided to the commission without imposing an unreasonable burden on the telemarketer.

Because the only two relevant issues in an enforcement hearing are: 1) the occurrence of the violation, and 2) the appropriate amount of monetary penalties, the proposed rule effectively establishes the occurrence of the violation, *unless* the telemarketer presents, during the hearing, evidence that it did, in fact, provide evidence supporting compliance with the no-call rule within the 21-day deadline. If the telemarketer did provide proof of compliance within the deadline, then the issue turns to the validity of the evidence provided. To establish the occurrence of the violation, the commission frequently must rely upon evidence provided by the company during the commission's investigation into alleged events. A telemarketer can hide behind a cloak of secrecy and, by failing to provide the documentation, thwart meaningful enforcement actions and obscure the extent of its culpable actions. The intent of this subsection, therefore, is to discourage telemarketers from withholding relevant information from the commission.

The REP Coalition asserted that subsection (i)(4) conflicts with subsection (h)(2)(B)(i). According to the REP Coalition's argument, subsection (i)(4) imposes a penalty for not producing the information described by subsection (h)(2)(B)(i), the production of which the REP Coalition views as optional.

The commission declines to modify subsection (i)(4) but clarifies that there is not an internal conflict between subsection (i) and subsection (h)(2)(B)(i). Subsection (h)(2)(B) establishes that the burden to prove that a telemarketing call was made in error and was an isolated occurrence rests upon the telemarketer who made the call. To meet its burden, and preserve the availability of an affirmative defense to a potential violation of the no-call rules, the telemarketer must produce evidence of the information listed in subsection (h)(2)(B)(i)-(iv). A telemarketer's failure to do so waives the affirmative defense, which effectively establishes a violation of the no-call rules. Subsection (i)(4) establishes a time period within which the telemarketer must provide the records specified by paragraph (2), and subsection (h)(2)(B), if applicable.

Subsection (j), Evidence

The REP Coalition suggested that the proposed rule may be constitutionally deficient in that it does not appear to contemplate making the customer available for cross-examination. The REP Coalition suggested a consumer affidavit might be admissible if the commission: 1) gave notice that the consumer would not be present at the hearing; 2) established a reasonable basis for the consumer's absence at the hearing; and 3) at the telemarketer's request, made the consumer available for "examination" or deposition prior to the hearing. According to the REP Coalition's argument, these criteria are necessary because the consumer is effectively the commission's

witness. Further, the REP Coalition argued the reasonableness of the time(s) and place(s) of "examination" must be assured so that the telemarketer is not forced to bear unreasonable costs in accessing the consumer.

OPUC suggested including a reference to P.U.C. Procedural Rule 22.221 (relating to Rules of Evidence in Contested Cases) in subsection (j). In its reply comments, OPUC expressed concern that requiring personal appearances by consumers in an administrative enforcement proceeding may create a disincentive to complain legitimately of no-call violations. In addition, OPUC noted, the level of participation required by a complaining consumer who brings his or her own civil action pursuant to Business & Commerce Code §44.102(f) should not be the same as the level of participation required in an administrative enforcement proceeding.

As previously determined in a recent slamming rulemaking under Project Number 28324, adopted by the commission on April 29, 2004, 29 TexReg 4852, the commission disagrees that proposed subsection (j) predetermines the admissibility of a consumer affidavit in a proceeding to enforce the commission's no-call rules. Because a consumer affidavit is not presumptively admitted into evidence against a telemarketer accused of a no-call violation, the proposed rule does not infringe upon such a telemarketer's due process rights.

Consumer affidavits are not presumptively admitted into evidence against a telemarketer in a proceeding to enforce the commission's no-call rules. Subsection (j) specifically identifies consumer affidavits as information the commission believes *may*, and in many situations should, be admissible pursuant to the more expansive approach to evidentiary issues allowed by Administrative Procedure Act (APA) §2001.081. Pursuant to this proposed rule, a consumer affidavit, to be admitted into evidence in the absence at hearing

of the consumer who made the affidavit, must meet the requirements set out in APA §2001.081. Accordingly, the proponent seeking to admit the consumer affidavit must demonstrate that it is: (1) necessary to ascertain facts not reasonably susceptible to proof under the rules of evidence as applied in a nonjury civil case in a district court of Texas; (2) not precluded by statute; and (3) of a type on which a reasonably prudent person commonly relies in the conduct of the person's affairs. Any party opposing admission of the consumer affidavit may argue that one or more of these elements have not been satisfied by the proponent and, if successful, prevent admission of the affidavit.

However, as explained below in more detail, the commission believes that a consumer affidavit is the type of evidence that is appropriate for admission pursuant to APA §2001.081 in a proceeding to enforce the commission's no-call rules.

First, the information described by proposed subsection (j) is necessary to ascertain facts that are not likely to be reasonably susceptible to proof because it is generally too costly for consumers and the commission to require attendance by the consumers at an enforcement proceeding related to alleged no-call violations. The commission interprets the phrase "not reasonably susceptible to proof" as a reference to the ease with which the facts may be proved under the rules of evidence. How long it would take and how much it would cost to prove an issue are, therefore, relevant factors in determining whether some fact at issue is "reasonably susceptible of proof." In most no-call cases, the harm suffered by the consumer will be far outweighed by the cost of attending a hearing in Austin, Texas. Attendance at a hearing in Austin would, in most instances, require the consumer to incur un-reimbursed expenses, including, but not necessarily limited to, lodging, meals, and

travel. In addition, attending a hearing in Austin would require consumers with daytime jobs to take time off from work. The commission does not have budgeted funds to pay witnesses' expenses. Under these circumstances, the commission believes a consumer will rarely choose to come to Austin to testify in a no-call case.

Next, the commission is not aware of any statute that specifically precludes admitting consumer affidavits in no-call cases. Moreover, the commission finds that the due process rights of respondents to complaints are adequately protected because they have an opportunity to engage in discovery on the affiants and compel their attendance at hearing. Finally, Staff experts commonly rely on a variety of information to determine whether a no-call violation occurred, including the consumer's complaint, whether sworn to in the form of affidavit or not, and the telemarketer's response to that complaint. Therefore, the commission believes that a consumer affidavit is the type of evidence that should be admissible as contemplated by APA §2001.081.

Some commenters also suggested that consumer affidavits were not admissible pursuant to APA §2001.081 because the affiant could easily be deposed by the commission or ordered to appear at the hearing by telephone. The commission disagrees. No-call enforcement proceedings share many characteristics of mass litigation (the complainant usually suffers relatively minor, albeit unwanted, "injuries," but the complainant may be one of hundreds or thousands of similarly situated consumers). The commission does not have the budget or manpower necessary to attend and conduct depositions of so many complainants, many of whom may live great distances from Austin. Also, telephonic participation may be reasonable for one or two witnesses, but since no-call proceedings can potentially involve

hundreds of consumers, telephonic participation potentially presents substantial and unreasonable logistical difficulties, for the consumers, the commission, the telemarketer and the Administrative Law Judge (ALJ) relating to scheduling an order of presentation for each consumer, their appropriate contact telephone number and the specific time each consumer will appear. Therefore, the costs to the consumer and to the commission of pursuing such alternatives to attendance at a no-call enforcement proceeding will generally far outweigh any benefit they may provide. Accordingly, the commission disagrees that either of these methods of consumer attendance will be reasonable in all enforcement proceedings related to alleged no-call violations.

Moreover, telemarketers' due process rights are not infringed by proposed subsection (j). First, telemarketers may object and assert that one or more of the elements of APA §2001.081 have not been demonstrated by commission staff. Second, nothing in the proposed rule eliminates a telemarketer's ability to depose a consumer who has submitted an affidavit or, consistent with the Texas Rules of Civil Procedure, to seek compulsory attendance at the proceeding by that consumer. Finally, a telemarketer may conduct discovery, depose, and cross-examine the commission's testifying expert about the basis for that expert's opinion, including the consumer affidavits if such were relied upon by the expert.

The commission also notes that the content of consumer affidavits is admissible through the testimony of the commission's staff expert. Pursuant to Texas Rules of Evidence 703 and 705, the staff expert may rely on consumer affidavits as the basis for his or her testimony and may disclose on direct, or must disclose on cross, the facts or data, including those

affidavits, that form the basis of the commission staff's opinion. Therefore, even if the consumer affidavits are not admitted pursuant to APA §2001.081, those affidavits are properly considered as the subject of the staff expert's testimony pursuant to Texas Rules of Evidence 703 and 705, and the commission's Procedural Rule 22.221 as noted by OPUC.

Based upon the comments, the commission modifies proposed subsection (j) to eliminate the redundant reference relating to the applicability of the Texas Rules of Evidence to no-call enforcement proceedings. The commission adopts the proposed subsection with amendments appropriate to the elimination of that reference.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting these amendments, the commission makes other minor modifications for the purpose of clarifying its intent.

These amendments are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2004) (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; and PURA §39.1025 which provides the commission with the authority to operate the no-call database and prohibits the telephone solicitation of an electricity customer who has previously advised the commission that he/she does not want to receive such solicitations. In addition, these amendments are proposed under the Texas Business & Commerce Code Annotated §§44.101-.104 (Renumbered from §§43.101-.104 by Acts 2003, 78th Leg., ch. 1275, §2(3), eff. Sept 1, 2003) (Vernon 2002 & Supp. 2004) which grants the commission the authority to adopt rules to administer and enforce the Electric no-call list.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 39.1025; and Texas Business & Commerce Code Annotated §§44.101 – 44.104.

§25.484. Electric No-Call List.

(a) **Purpose.** This section implements the Public Utility Regulatory Act (PURA) §39.1025, relating to Limitations on Telephone Solicitation, and the Texas Business & Commerce Code Annotated (Bus. & Comm. Code) §44.103 relating to rules, customer information, and isolated violations of the Texas no-call list.

(b) **Application**. This section applies to retail electric providers (REPs) as defined in §25.5 of this title (relating to Definitions). A REP acting as a telemarketer, as defined by §26.37 of this title (relating to Texas No-Call List), is also subject to the provisions of §26.37 of this title.

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

(1) **Consumer good or service** — For purposes of this section, consumer good or service has the same meaning as Business & Commerce Code §44.002(3) relating to Definitions.

(2) **Electric no-call database —** Database administered by the commission or its designee that contains the names, addresses, telephone numbers and dates of registration for all Electric no-call registrants. Lists or other information generated from the electric no-call database shall be deemed to be a part of the database for purposes of enforcing this section.

(3) **Electric no-call list** — List that is published and distributed as required by subsection (f)(2) of this section.

(4) **Electric no-call registrant** — A telephone customer who has registered, by application and payment of accompanying fee, for the Electric no-call list.

(5) **Established business relationship** — A prior or existing relationship that has not been terminated by either party, and that was formed by voluntary two-way communication between a person and a consumer regardless of whether consideration was exchanged, regarding consumer goods or services offered by the person.

(6) **Telemarketing call** — An unsolicited telephone call made to:

(A) solicit a sale of a consumer good or service;

(B) solicit an extension of credit for a consumer good or service; or

(C) obtain information that may be used to solicit a sale of a consumer good or service or to extend credit for sale.

(7) **Telephone call** — A call or other transmission that is made to or received at a telephone number within an exchange in the state of Texas, including but not limited to:

(A) a call made by an automatic dial announcing device (ADAD); or

(B) a transmission to a facsimile recording device.

(8) **Telemarketer** – A person who makes or causes to be made a telemarketing call that is made to a telephone number in an exchange in the state of Texas.

(d) **Requirement of REPs.**

(1) A REP shall not make or cause to be made a telemarketing call to a telephone number that has been published for more than 60 calendar days on the electric no-call list.

(2) A REP shall purchase each published version of the electric no-call list unless:

(A) the entirety of the REP's business is comprised of telemarketing calls that are exempt pursuant to subsection (e) of this section;

(B) a REP has a written contractual agreement with another telemarketer to make telemarketing calls on behalf of the REP and that telemarketer is contractually obligated to comply with all requirements of this section. In the absence of a written contract that requires the telemarketer to comply with all requirements of this section, the REP and the telemarketer making telemarketing calls on behalf of the REP are both liable for violations of this section.

(e) **Exemptions.** This section shall not apply to a telemarketing call made:

(1) By an electric no-call registrant that is the result of a solicitation by a REP or in response to general media advertising by direct mail solicitations that clearly, conspicuously, and truthfully make all disclosures required by federal or state law;

(2) In connection with:

(A) An established business relationship; or

(B) A business relationship that has been terminated, if the call is made before the later of:

(i) the date of publication of the first electric no-call list on which the electric no-call registrant's telephone number appears; or

(ii) one year after the date of termination; or

(3) To collect a debt.

(f) **Electric no-call database.**

(1) **Administrator.** The commission or its designee shall establish and provide for the operation of the electric no-call database.

(2) **Distribution of database.**

(A) Timing. Beginning on April 1, 2002, the administrator of the electric no-call database will update and publish the entire electric no-call list on January 1, April 1, July 1, and October 1 of each year;

(B) Fees. The electric no-call list shall be made available to subscribing REPs for a set fee not to exceed $75 per list per quarter;

(C) Format. The commission or its designee will make the electric no-call list available to subscribing REPs by:

(i) electronic internet access in a downloadable format;

(ii) Compact Disk Read Only Memory (CD-ROM) format;

(iii) paper copy, if requested by the REP; and

(iv) any other format agreed upon by the current administrator of the no-call database and the subscribing REP.

(3) **Intended use of the electric no-call database and electric no-call list.**

(A) The electric no-call database shall be used only for the intended purposes of creating an electric no-call list and promoting and furthering statutory mandates in accordance with PURA §39.1025 and the Business & Commerce Code, Chapter 44 relating to Telemarketing. Neither the electric no-call database nor a published electric no-call list shall be transferred, exchanged or

resold to a non-subscribing entity, group, or individual, regardless of whether compensation is exchanged.

(B) The no-call database is not open to public inspection or disclosure.

(C) The administrator shall take all necessary steps to protect the confidentiality of the no-call database and prevent access to the no-call database by unauthorized parties.

(4) **Penalties for misuse of information.** Improper use of the electric no-call database or a published electric no-call list by the administrator, REPs, or any other person, regardless of the method of attainment, shall be subject to administrative penalties and enforcement provisions contained in §22.246 of this title (relating to Administrative Penalties).

(g) **Notice.** A REP shall provide notice of the electric no-call list to its customers as specified by this subsection. In addition to the required notice, the REP may engage in other forms of customer notification.

(1) **Content of notice.** A REP shall provide notice in compliance with §25.473 of this title (relating to Non-English Language Requirements) that, at a minimum, clearly explains the following:

(A) Beginning January 1, 2002, customers may add their name, address and telephone number to a state-sponsored electric no-call list that is intended to limit the number of telemarketing calls received relating to the customer's choice of REPs;

(B) When a customer who registers for inclusion on the electric no-call list can expect to stop receiving telemarketing calls on behalf of a REP;

(C) A customer must pay a fee to register for the electric no-call list;

(D) Registration of a telephone number on the electric no-call list expires on the fifth anniversary of the date the number is first published on the list;

(E) Registration of a telephone number on the electric no-call list can be accomplished via the United States Postal Service, Internet, or telephonically;

(F) The customer registration fee, which cannot exceed five dollars per term, must be paid by credit card when registering online or by telephone. When registering by mail, the fee must be paid by credit card, check or money order;

(G) The toll-free telephone number, website address, and mailing address for registration; and

(H) A customer that registers for inclusion on the electric no-call list may continue to receive calls from telemarketers other than REPs, and a statement that the customer may instead or may also register for the Texas no-call list that is intended to limit telemarketing calls regarding consumer goods and services in general, including electric service.

(2) **Publication of notice.** A REP shall include notice in its Terms of Service document or Your Rights as a Customer disclosure. The notice shall be easily legible, prominently displayed and comply with the requirements listed in paragraph (1) of this subsection.

(3) **Records of customer notification.** A REP shall provide a copy of records maintained under the requirements of this subsection as specified by §25.491 of this title (relating to Record Retention and Reporting Requirements).

(h) **Violations.**

(1) **Separate occurrence**. Each telemarketing call to a telephone number on the electric no-call list shall be deemed a separate occurrence.

(2) **Isolated occurrence**. A telemarketing call made to a number on the electric no-call list is not a violation of this section if the telemarketer complies with section (d)(2) and the telemarketing call is determined by the commission to be an isolated occurrence.

(A) An isolated occurrence is an event, action, or occurrence that arises unexpectedly and unintentionally, and is caused by something other than a failure to implement or follow reasonable procedures. An isolated occurrence may involve more than one separate occurrence, but it does not involve a pattern or practice.

(B) The burden to prove that the telemarketing call was made in error and was an isolated occurrence rests upon the REP who made (or caused to be made) the call. In order for a REP to assert as an affirmative defense that a potential violation of this section was an isolated occurrence, the REP must provide evidence of the following:

(i) The REP has purchased the most recently published update to the electric no-call list, unless the entirety of the REP's business is comprised of making or causing to be made telemarketing calls that are exempt pursuant to subsection (e) of this section and the REP can provide sufficient proof of such;

(ii) The REP has adopted and implemented written procedures to ensure compliance with this section and effectively prevent telemarketing calls

that are in violation of this section, including taking corrective actions when appropriate;

(iii) The REP has trained its personnel in the established procedures; and

(iv) The telemarketing call that violated this section was made contrary to the policies and procedures established by the REP.

(i) **Record retention; Provision of records; Presumptions.**

(1) A REP shall maintain a record of all telephone numbers it has attempted to contact for telemarketing purposes, a record of all telephone numbers it has contacted for telemarketing purposes, and the date of each, for a period of not less than 24 months from the date the telemarketing call was attempted or completed.

(2) Upon request from the commission or commission staff, a REP shall provide, within 21 calendar days, all information in its possession and upon which it relies to demonstrate compliance with this section, relating to the commission's investigation of potential violations of the no-call list including, but not limited to, the call logs or phone records described in subsection (i)(1).

(3) Failure by a REP to respond, or to produce all information in its possession and upon which it relies to demonstrate compliance with this section, within the time specified in paragraph (2) of this subsection establishes a violation of this section.

(4) In response to a request from the commission pursuant to paragraph (2) of this subsection, a REP's failure to produce all telemarketing information in its possession and upon which it relies to demonstrate compliance with this section and, if applicable, to establish an affirmative defense pursuant to subsection

(h)(2)(B) of this section, within the time specified in paragraph (2) of this subsection establishes a violation of this section.

(j) **Evidence.** Evidence provided by the customer that meets the standards set out in Texas Government Code §2001.081, including, but not limited to, one or more affidavits from the recipient of a telemarketing call is admissible to enforce the provisions of this section.

(k) **Enforcement and penalties.** The commission has jurisdiction to investigate REP violations of this section, as specified in §25.492 of this title (relating to Non-Compliance with Rules or Orders; Enforcement by the Commission).

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 §25.484, relating to the Electric No-Call List, is hereby adopted with changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE 7th DAY OF SEPTEMBER 2004.

PUBLIC UTILITY COMMISSION OF TEXAS

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JULIE PARSLEY, COMMISSIONER

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PAUL HUDSON, CHAIRMAN

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BARRY T. SMITHERMAN, COMMISSIONER

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