The Public Utility Commission of Texas (commission) adopts an amendment to §25.84, relating to Reporting of Affiliate Transactions for Electric Utilities, new §25.272, relating to Code of Conduct for Electric Utilities and Their Affiliates, and new §25.273, relating to Contracts Between Electric Utilities and Their Competitive Affiliates, with changes to the proposed text as published in the August 20, 1999, *Texas Register* (24 TexReg 6408). This amendment and new sections are adopted under Project Number 20936. The amendment and new rules are necessary to implement Senate Bill 7 (SB 7), Act of May 21, 1999, chapter 405, 1999 Texas Session Law Service 2543, 2570 (Vernon) (to be codified as an amendment to the Public Utility Regulatory Act (PURA), Texas Utilities Code Annotated §39.157). PURA §39.157, *Commission Authority to Address Market Power,* directs the commission to adopt rules and enforcement procedures by January 10, 2000, to govern transactions or activities between a utility and its affiliates to avoid potential market-power abuses and cross-subsidization between regulated and competitive activities. Section 25.84 establishes the reporting requirements for utilities for transactions with affiliates. Section 25.272 establishes broad safeguards to govern the interaction between utilities and their affiliates, including competitive affiliates. Section 25.273 establishes the fair, competitive bidding process that utilities must use to sell certain assets to and obtain certain products and services from a competitive affiliate or other third party, and establishes requirements for any contracts with competitive affiliates that may result from this competitive bidding process.

Project Number 20936 was opened on June 3, 1999. A previous rulemaking, Project Number 17549, *Code of Conduct for Electric Utilities and their Affiliates*, was initiated on June 6, 1997, and served as a research vehicle to explore various elements of the code of conduct prior to the legislature mandating the commission's development of rules through passage of SB 7. As parties have noted on several occasions, the statutory language found in PURA §39.157 resulted from painstaking negotiations among stakeholders. Certain statutory provisions were spelled out with great specificity and others were left fairly broad, allowing significant commission discretion in the development of rules; additionally, the statute codified many of the provisions that had been proposed by the commission in its draft rules under Project Number 17549. Because the commission staff had spent a significant amount of time developing draft rule language in Project Number 17549, and the statute was fairly consistent with the draft rules developed in that project, staff was able to rapidly develop a draft rule "strawman" by June 23, 1999, to be discussed in workshops prior to publication of proposed rules under Project Number 20936.

Workshops were held on June 28, 1999, and July 12, 1999, to discuss the draft rules. Although standard procedures for rulemaking pursuant to Texas Government Code, Chapter 2001, were used without incorporating formal negotiated rulemaking procedures, the commission staff nevertheless attempted to find areas of agreement among the parties during these workshops. It was a stated goal of staff to develop, through the public workshops, a rule proposal with sufficient agreement among all stakeholders that the volume of formal comments would be minimal, and the rules eventually adopted would resemble those proposed as closely as possible.

To a great extent, the commission staff was successful in its endeavor; the proposed rule language reflected significant agreement among parties. Where it was clear to staff that consensus could not be reached, however, the commission staff listened to and analyzed various arguments posed by the parties and then made the policy decisions identified in the proposed rules, which were approved by the commission for publication on August 5, 1999. The inability of the parties to achieve complete consensus on the proposed rules due to polarized views on several issues is reflected in the significant volume of written and oral comments received. However, almost all of the written comments repeat arguments made by the parties, and considered by the commission staff, in the public workshops.

A public hearing on the proposed amendment and new sections was held at commission offices on October 18, 1999. Representatives from Enron Energy Services, Inc. (Enron), Entergy Gulf States, Inc. (EGSI), and TXU Electric Company (TXU) attended the hearing and provided comments. To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

The commission received comments on the proposed amendment and new sections from Central Power and Light Company, Southwestern Electric Power Company, and West Texas Utilities Company, which are the Texas electric operating companies of Central and Southwest Corporation (collectively CSW or the CSW Companies); Consumers Union; El Paso Electric Company (EPE); Enron; EGSI; NewEnergy Texas, L.L.C. (NewEnergy); Nucor Steel (Nucor); Office of Public Utility Counsel (OPC); PG&E Corporation (PG&E); Reliant Energy HL&P

(Reliant); Shell Energy Services Company, L.L.C. (Shell Energy); Southwestern Public Service Company (SPS); Texas Independent Energy, LP (TIE); Texas Industrial Energy Consumers (TIEC); Texas-New Mexico Power Company (TNMP); and TXU.

§25.84

Enron questioned whether the reporting under §25.84(e) requires the utility to include all transactions between the regulated utility and its affiliates. If not, then the reporting should be expanded to include individual transactions, including the provision of discounts, rebates, fee waivers, and alternative tariff terms and conditions. Enron further explained that §§25.272(e)(2) and 25.272(f)(2) already require the utility to maintain a contemporaneous record of all transactions and a record of all discounts, rebates, and fee waivers, and therefore the information is available. As the rule is currently written, the commission would have to request the records to ensure compliance.

TXU stated that the expanded requirements proposed by Enron would be burdensome to both the utility and the commission, and noted that the utility must keep a record of all affiliate transactions for audit purposes. EGSI also argued against Enron's proposed changes, noting that some transactions will be governed by commission-approved tariffs while many others will be with a service company governed by allocation formulas approved by the Securities and Exchange Commission (SEC), and furthermore, discounts, fee waivers, etc., will be contemporaneously posted.

The commission concludes that no changes to the proposed paragraph are necessary. The format in which records of transactions must be reported on an annual basis will be specified in the reporting form the commission adopts pursuant to §25.84(d). The extent to which records of transactions must be maintained by the utility is directed by §25.272(e) and (f), under the general authorities provided by PURA §14.154 and §36.058.

TXU commented that the reporting requirements of §25.84(f) do not parallel the enabling wording of the proposed affiliate rule at §25.272(d)(3) in two respects. One concerned the use of "and" versus "or" in reference to transmission and distribution system operations. Second, TXU contended that the inclusion in the tracking and reporting requirements of "persons … who … have knowledge of information that is intended to be protected under PURA §39.157(d)" is beyond the scope of what is authorized in §39.157(d)(10).

Consumers Union stated that SB 7 language regarding employee migration tracking should not be limited to transmission and distribution employees of the utility, but rather that the reporting rule should be expanded to report migration of all employees from the transmission and distribution utility.

TXU and EGSI disagreed, stating that the proposal is consistent with the provisions of SB 7 on reporting of employee transfers and need not be changed. EGSI went on to state that the

Consumers Union proposal is not feasible in the interim period as the utilities transition from being integrated utilities to fully unbundled organizations.

The commission adopts the suggestion by TXU that subsection (f) references to persons engaged in "transmission and distribution" system operations be changed to "transmission or distribution" in order to directly track the language of proposed §25.272(d)(3) (now §25.272(d)(4)). The commission disagrees with TXU and EGSI that its authority to require reports of employee migration is limited solely by proposed §25.272(d)(3) or by PURA §39.157(d)(10), and agrees with Consumers Union that the authorities granted by the title are more expansive. The commission finds that PURA §39.157(d)(10) establishes "information that is intended to be protected under this section" as the threshold, and the opening directives of PURA §39.157(d) grant the commission both the authority and the duty to ensure that such knowledge is not transferred from utilities to competitive affiliates. Therefore, as a tool necessary to accomplish that directive, the commission may require the reporting of the migration of all employees, or certain persons in the corporate services affiliate, with knowledge intended to be protected by §39.157. However, at this time, the commission chooses to closely parallel the language of proposed §25.272(d)(3) in §25.84(f). It is not clear that a broader tracking requirement would enhance competition, and it would increase the administrative burden of complying with the rule.

Enron recommended expansion of the reporting requirement in §25.84(g) to include all new, resolved, and pending complaints, not just the "resolution of informal complaints." CSW responded that Enron's proposal calls for the reporting of formal complaints already filed with

the commission. CSW stated that if the informal resolution process is drawn out over an extensive period of time, then there may be some public-information deficiency; however, the proposed rule provides ample protection for complaint resolution. TXU stated no objection to reporting new and pending complaints if the information required to be filed is appropriately "modified."

TXU agreed that the reporting of complaints is essential, but expressed concern regarding the open reporting of some of the information, such as the complainant's name, relevant dates, and companies and employees involved, and therefore recommended that the annual report be afforded protection as confidential information not subject to disclosure under Chapter 552, Government Code.

The commission concludes that the parties are correct in their assertions that reporting (1) should include a summary of all complaints in the informal resolution process, including the new and pending complaints subject to the process in the given year rather than just the complaints fully resolved by that process, and (2) should not include the status of formal complaints filed with the commission. The commission therefore makes wording changes to reflect the distinction between these two complaint processes and to make the reporting requirement more precisely track the language in §25.272(i)(4). On the issue of confidentiality, the commission concludes that existing rules and procedures concerning the handling of confidential information are sufficient to address the concerns raised by TXU. Utilities may request that those procedures

apply to certain sections of the report, but utilities should not have the expectation that the entire report will routinely qualify as confidential.

In its comments on §25.84(h), PG&E noted that a viable competitive market is dependent on timely enforcement of the Code of conduct. The company stated that an annual reporting requirement regarding deviations from the rules is insufficient, and therefore recommended reporting deviations within 30 days of the deviation as well as in the annual report. Similarly, Enron suggested that reporting the deviations within 24 hours is required to ensure that utilities do not engage in discriminatory conduct.

In reply, TXU stated that a 24-hour reporting requirement is not reasonable. Deviations from the code of conduct would occur in instances when the focus of the utility must be to ensure safety and system reliability rather than preparing a report to the commission. TXU stated that if annual reporting is inadequate, then PG&E's proposed 30-day reporting is more reasonable. EGSI agreed that reporting deviations in 24 hours is unrealistic.

The commission agrees with parties that annual reporting is inadequate for timely evaluation of adherence to the code of conduct and that 24-hour reporting is too onerous a task, particularly because the only instance where deviation is allowed is when jeopardy to public safety or system reliability is at issue, pursuant to §25.272(d)(3). The commission adopts the 30-day reporting time period that was recommended by parties as an acceptable compromise. The commission also requires the information to be posted electronically to facilitate market deterrence to

disallowed deviations. Recognizing that the 30-day reporting provision is not encompassed by the current section title, the commission deletes the word "Annual" from the title of §25.84 and from the purpose statement in subsection (a).

With respect to §25.84(i), PG&E asserted that requiring annual reporting of the creation of new affiliates is insufficient, and thus recommended adding a requirement that utilities report the creation of new affiliates within 60 days. Enron concurred with PG&E's comments on this section.

In their replies, CSW and TXU noted that rapid updating of the compliance plan is unnecessary because the proposed code of conduct would apply immediately to all newly created affiliates. Additionally, there is a provision for immediate notification to the commission when a new affiliate is created. EGSI also disagreed with PG&E and Enron, stating that some affiliates will not have any bearing on the competitive energy affiliate.

The commission agrees with CSW and TXU that, regardless of how soon the creation of a new affiliate is reported to the commission, the utility and the new affiliate are bound by the code of conduct immediately upon creation of the affiliate. The commission amends §25.272(i)(2) to include a clarifying statement to this effect. In §25.84(i), the commission makes amendments to clarify that several types of notices need to be made when a new affiliate is created. First, upon creation of the new affiliate, pursuant to the revised §25.272(i)(2), the utility shall immediately post a conspicuous notice on the Internet or other public electronic bulletin board, and the utility

shall, within 30 days, file for commission approval an update to its compliance plan to reflect all related changes. Finally, in making its annual report, a utility shall include a summary of all approved changes to its compliance plan that have occurred in the given year, including those resulting from the creation of new affiliates.

§25.272

Shell Energy commented that the language in §25.272(b)(2), relating to the prohibition on circumvention of the code of conduct, should more directly state that the utility is prohibited from providing information to or conducting a transaction with the corporate services company, and that the corporate services company is prohibited from forwarding that information or the benefits of that transaction to a competitive affiliate. TXU replied that Shell Energy's proposed language should be rejected, as it is confusing and does not track the statutory language of SB 7.

The commission concludes that no change to this paragraph is necessary. SB 7 allows a utility to share information and engage in transactions with its corporate support services company to the extent specified in the statute. The commission agrees with TXU that Shell Energy's proposed change is confusing and does not track the statutory language.

EGSI commented that §25.272(b)(3), relating to petition for waiver, should be modified to state that a utility shall notify the commission of any provision in this section that affects or modifies FERC or SEC regulations, not that conflicts with such regulations, in order to comply with the

statute. OPC replied that this modification is not necessary, as the proposed language merely strengthens the intent of the statutory language.

CSW stated that the requirement relating to notification of such regulatory conflicts goes beyond the intent of the Legislature and should be deleted. Any deviations from the code can be addressed through audits and compliance plans. CSW further stated that if the commission retains the notification procedure, there may be substantial conflicts reported by the CSW Companies. Additionally, it would be difficult to identify every situation where there was a conflict. If the commission retains this language, the subsection heading should be restyled to state "Notice of conflict and/or petition for waiver." OPC disagreed that the notification requirement is unnecessary. OPC argued that the notification would alert the commission and other parties to potential conflicts without having to wait for the company to file an audit report.

OPC commented further that all petitions for a waiver to the code of conduct should be docketed, allowing full participation by any interested party. OPC expressed concern that "alleged" conflicts with other jurisdictions may create opportunities to avoid the requirements of the code, and warrant the participation of consumer interests. CSW responded that the most efficient way to address docketing petitions for waiver is to evaluate how utilities' codes of conduct filed with the commission incorporate the statutory deference to Federal Energy Regulatory Commission (FERC) and Securities and Exchange Commission (SEC) orders and regulations. EGSI replied that OPC's proposal for docketing notices of conflict goes beyond the requirements SB 7 and

should be rejected. EGSI noted that the commission could docket these petitions at its discretion, but they should not be automatically docketed.

PG&E commented that any utility, regardless of its corporate structure or whether it is subject to the Public Utility Holding Company Act (PUHCA), should be required to comply with the code of conduct. PG&E also suggested adding additional language to §25.272(b)(3) that would require a utility to file for a good-cause exception if it has difficulty implementing the code of conduct during the transition period.

The commission concludes that the section as written is consistent with statutory language, and therefore declines to make the change recommended by EGSI. The requirement for notification of conflict with SEC and FERC orders and regulations is consistent with the language in SB 7. Further, providing the commission notice of a conflict will facilitate the commission's understanding of utilities' federal obligations. The commission declines, at this time, to include provisions in this rule regarding how the utilities' petitions for waiver will be processed, and does not include provisions for automatically docketing these cases as suggested by OPC. The commission finds that it is more appropriate to develop procedures for processing these cases at the time of filing, on a case-by-case basis. While the commission declines to delete the provision for notification of conflict with SEC or FERC orders or regulations as suggested by the CSW Companies, the commission agrees with CSW's suggestion that the heading of this section be changed for clarity, and therefore changes it to "Notice of conflict and/or petition for waiver."

EGSI recommended both orally and in writing that the commission add new §25.272(b)(4), allowing for the sharing of information and resources necessary to ensure public safety or system reliability, including but not limited to the response or prevention of emergency situations. Such sharing would allow utilities to work to prevent power outages before they occur. OPC noted that if the commission accepted this proposal, the commission should clarify that the cross-utilization of employees and equipment should be allowed to restore power only in the event of a *major* service interruption, and that the commission should be notified immediately of any deviations, not only when the annual report is filed. Further, OPC argued that if employees and equipment are used by affiliates of the utility, the commission should ensure that the utility is properly reimbursed for those costs.

The commission concludes that restoration of power is addressed in §25.272(d)(3), Employee Transfers and Temporary Assignments, and therefore declines to make a change to this subsection. The commission recognizes that prevention of outages is certainly an important customer concern, but the commission expects that utilities will have sufficient employees and resources in place to maintain sufficient reliability and avert potential outages without having to share employees, equipment, or other resources with their competitive affiliates.

SPS recommended that the commission add new §25.272(b)(4) to the rules, allowing a phased-in approach to compliance, with a detailed plan to be filed in the Business Separation Plan. NewEnergy and Enron did not support SPS' phase-in proposal.

The commission concludes that adding a provision to this rule for a phase-in period is unnecessary. Utilities have had ample time to prepare themselves for the application of affiliate rules. In addition, the requirement for initial compliance plans to be included as an element of the Business Separation Filing plans, in combination with the internal code of conduct requirement in §25.272(i), provides sufficient flexibility for the commission to address individual utility circumstances on a case-by-case basis.

In its comments on §25.272(c)(1), relating to arm's length transactions, Shell Energy recommended adding the word "reasonable" before "unrelated parties" in the definition of arm's length transaction in order to adopt a reasonable-actor standard. In reply comments, Nucor agreed with this suggestion, and TXU stated that it did not disagree. No other parties commented on this point.

TXU proposed modifying the definition to ensure that the conditions and circumstances of the transaction are taken into account when assessing whether it is an arm's length transaction. TXU recommended that the assessment should take into account the quantity, terms, date of contract, and place of delivery. In reply comments, OPC agreed that the terms TXU identified may be important in assessing many transactions, but it argued that adopting TXU's language would hamstring the commission since there may be many other factors not cited by TXU that the commission may want to consider in evaluating a particular transaction. NewEnergy, Nucor, and PG&E also opposed TXU's suggestion to add language to the definition concerning terms and conditions.

TXU also recommended adding "similarly situated" before "third party" in the definition of "arm's length transaction," arguing that PURA §39.157(d)(1) contains a standard that limits application of the definition to "similarly situated" entities. In reply comments, OPC did not object to adding "similarly situated," but Nucor opposed it. Nucor argued that the wording would narrow the protections against cross-subsidization and market-power abuse. It did not agree that PURA §39.157(d)(1) limits the definition of "arm's length transaction" with the term "similarly situated."

First, the commission notes that this definition, as proposed, was adapted from Black's Law Dictionary, to ensure that "arm's length" as used in this rule would have the usual legal meaning. The commission declines to incorporate a reasonableness standard as recommended by Shell Energy, as it is unnecessary and does not improve the definition. The commission also declines to narrow the definition by adding "similarly situated," as proposed by TXU; the commission disagrees that PURA §39.157(d)(1) would limit "arm's length" behavior to transactions only between entities that are "similarly situated." In addition, the commission rejects TXU's suggestion to add to the definition an assessment of factors including the quantity, terms, date of contract, and place of delivery. The commission agrees with OPC that TXU's recommended changes might prevent the commission from considering all relevant factors in determining whether a transaction was at arm's length.

PG&E commented that the definition of "competitive affiliate" in §25.272(c)(2) should be expanded to include any affiliate that *intends* (emphasis added) to provide services or sell products in this state. PG&E was concerned that a utility could share proprietary or other information during the transition period with an out-of-state affiliate that would subsequently begin operating in Texas after the introduction of customer choice.

The commission declines to make the change recommended by PG&E. The intention to provide services or sell products in the state could change at any time, and it would be virtually impossible for the commission to determine if a particular entity had such an intention at a particular time. Furthermore, protection is provided through §25.272(b)(2) of the rule, which prohibits circumvention of the code of conduct through use of *any affiliate* as a conduit for improper sharing of information, services, products, or subsidies between a utility and a competitive affiliate.

TIEC supported the proposed definition of "confidential information" in §25.272(c)(3), but Consumers Union commented that it provides utilities with too much discretion to define the type of information that is confidential. PG&E commented that the definition incorporates a subjective standard that could lead to inconsistent treatment of information across different service territories and create barriers to market entry. Consumers Union and PG&E recommended revisions that would define confidential information by reference to applicable law.

In reply comments, EGSI disagreed with Consumers Union and PG&E, arguing that non-utility competitors like PG&E are not required to disclose their commercially sensitive information based on whether it qualifies for protection under law. Utilities and their affiliates should have the same ability to protect business information as their non-utility competitors.

The commission declines to make the change recommended by PG&E and Consumers Union. Each time it appears in the proposed rule, the term "confidential information" is used in essentially the same context; that is, the rule intends to prevent the transfer of confidential information from a utility to an affiliate. This context does not lend itself to a broad interpretation of confidential information by a utility since that would only increase the amount of information that the utility could not transfer to its affiliate.

In the preamble of the proposed rules, the commission specifically requested comment on the definition of "corporate support services" in §25.272(c)(4). In particular, the commission was concerned about whether the proposed definition provides sufficient flexibility for utilities subject to PUHCA during the transition to competition.

The CSW Companies, which are subject to PUHCA, supported the definition as proposed. EGSI, another PUHCA-jurisdictional company, commented that the proposed definition for corporate support services in §25.272(c)(4) would prohibit EGSI's service company, Entergy Services, Inc. (ESI), from providing certain services to EGSI during the transition if ESI provided similar services to the unregulated side of EGSI. EGSI argued that cost allocation for these

services should not be an issue because of the rate freeze during the interim period and because the service companies use SEC-approved allocation formulae and billing methods that are subject to review by the SEC and the commission. In addition, EGSI argued that concerns regarding information flows are covered by other portions of the proposed rule, and they will be further addressed by the internal code of conduct. Therefore, EGSI recommended adding language that would allow service companies to provide services as authorized by the SEC and in accordance with PURA §39.157(g) and applicable SEC and FERC orders and regulations.

Enron and OPC opposed EGSI's proposed modifications. OPC argued that EGSI's current service company structure was chosen by EGSI, not required by the SEC. OPC suggested that EGSI could file for a formal waiver if it believes there is a conflict with SEC regulations. Alternatively, EGSI could consider a modification to its corporate structure that would not conflict with either SEC or commission rules.

Shell Energy commented that disputes might arise as to whether a particular affiliate was created "to perform corporate support services." It recommended adding explanatory language saying that an affiliate is created to perform corporate support services to the extent that it "provides all its services at cost solely to affiliate entities and not to third parties."

In reply comments, CSW, TXU, and EGSI opposed Shell Energy's proposed modification. CSW and TXU argued that there is no requirement in SB 7 that an affiliate created to perform corporate support services should be limited to providing services only to affiliates and only at

cost. Further, they argued that there are other provisions in the proposed rule that limit transactions among affiliates. EGSI noted that its service company is authorized by the SEC to provide services to unregulated affiliates at fully allocated cost plus 5.0%, and is also authorized by the SEC to provide services to certain third parties.

Shell Energy further commented that corporate support services should not include procurement of non-administrative services. Specifically, they should not include procurement of energy, power, fuel, energy-related contracts or services, fuel options or hedging services, or energy instruments. In reply comments, TXU noted that SB 7 specifically identifies procurement as a permissible corporate service, although it limits this sharing by excluding the purchase of electric transmission.

TXU disagreed with the definition of "corporate support services" to the extent that it prohibits the sharing of research and development (R&D) services related to "business development for the competitive affiliate regarding its services or products." Since the principal function of an R&D organization is the development of innovative products and services, TXU argued that the proposed rule would effectively preclude the sharing of R&D. It further argues that other provisions in the rules relating to cost allocation and auditing provide protections.

Enron, PG&E, and Shell Energy disagreed with TXU's recommendation. Enron described as "overstated" TXU's assertion that all R&D effectively would be precluded. PG&E argued that the principal function of business R&D - the development of innovative products and services –

is practically indistinguishable from marketing R&D. OPC also commented that business development and marketing are closely aligned, and noted that TXU's proposed modifications would allow a transmission and distribution (T&D) utility to exploit its unique position as a monopoly provider of T&D services to share market-related information with its affiliate simply by labeling it "business development R&D." Shell Energy noted that TXU's suggestion would allow a utility, its corporate support services provider, and its competitive affiliates to jointly coordinate their market data, intelligence, analysis, marketing, and products and services promotions.

The commission declines to make the change proposed by EGSI. EGSI's proposed language would result in EGSI, and possibly other utilities, facing few, if any, limitations on the sharing of corporate support services. The SEC approval of EGSI's service company activities did not contemplate the development of competition in the industry and the unbundling of regulated utilities into competitive and noncompetitive entities. The commission agrees with OPC that EGSI should petition for a waiver if it perceives a possible conflict with SEC regulations.

The commission also declines to make Shell Energy's recommended change regarding affiliates created to perform corporate support services. The potential for disputes about whether a particular affiliate was created to perform corporate support services does not seem to be significant enough to justify imposing the recommended limitations.

The commission also declines to make the change recommended by Shell Energy regarding procurement. Shell Energy does not provide adequate justification for its recommendation. To the extent that SB 7 permits sharing of corporate support services, it is consistent that SB 7 would also permit sharing the procurement of those services.

The commission further declines to make the change recommended by TXU regarding R&D business development. The commission agrees that marketing and business development regarding products and services are virtually the same activity. Therefore, it is appropriate to prohibit the sharing of business development for the competitive affiliate's products and services. However, the commission does not agree that all R&D is marketing activity, and therefore the proposed rule does not prohibit sharing of *all* R&D.

TXU believed that the proposed definition of "proprietary customer information" in §25.272(c)(5) is unclear and confusing because it does not clearly identify the types of customer information that cannot be released. In addition, the proposed definition creates an unworkable standard because a utility cannot know for certain whether it is impossible for all third parties to identify a customer from redacted and aggregated information. TXU proposed language that would limit proprietary customer information to the specific list of items included in the definition, and would not consider the effect of other information taken in conjunction with the specific list of items.

TIEC disagreed with TXU and supported the definition as currently proposed. It argued that limiting proprietary information to a specific list of information does not consider the effect of other information that, when taken in conjunction, makes the customer's identity known. Any information that can be used to determine a customer's identity should be proprietary customer information. TIEC also argued that there are circumstances, such as when a utility has a small number of large industrial customers on its system, in which simply redacting the name and characteristics of the customer will not prevent release of the customer's identity.

PG&E believed that the proposed definition is sufficiently clear. It argued that under TXU's modifications, a utility could disclose information to its affiliate retail electric provider (REP) that would allow identification of the customer.

The commission agrees with the arguments set forth by TIEC and PG&E and declines to make TXU's proposed change. The types of information listed in the proposed definition were not intended to be exhaustive of customer proprietary information, nor did the commission intend to exclude the consideration of other information that would reveal a customer's identity if taken in conjunction with the specific list of items. Although the use of the term "impossible" may appear to set an unattainable standard, as a practical matter data can be successfully aggregated, provided there are a sufficient number of customers for each type of information.

TXU and EGSI commented that the proposed definition of "similarly situated" in §25.272(c)(6) is too broad. TXU believed that the definition would make everyone in the market similarly

situated. It argued that assessing whether certain entities are similarly situated involves looking at the circumstances involved, not just whether the entities are both market participants. TXU recommended an alternative version based on Texas Railroad Commission (RRC) rules that would require the commission to evaluate the significance of 13 relevant conditions in determining whether two market players are similarly situated.

EGSI argued that the definition places an unreasonable burden on regulated utilities for two reasons. First, utilities would not have knowledge of "all nonaffiliates…proposing to serve," particularly "fly-by-night" entities who do not have verifiable credentials. EGSI proposed that only entities who are certified or registered pursuant to Chapter 39 of PURA should be considered similarly situated. Second, the use of the term "same market" is too broad. EGSI argued that the definition should follow the FERC standard, which, for example, requires the utility to offer the same discount for the same time period on all unconstrained transmission paths that go to the same point of delivery on the utility's system. EGSI proposed that the commission replace "same market" with more precise language, namely "same services and in the same manner."

In reply comments, Enron, NewEnergy, PG&E, Shell Energy, and OPC opposed the changes recommended by TXU and EGSI. Enron argued that TXU ignored the actual wording of the rule that says "the same market"; whether a party is similarly situated is case specific and does not mean everyone in the market. There are, for example, a wholesale market, a retail market, an energy market, a capacity market, a residential market, and an industrial market. Additionally,

Enron stated that TXU's proposed definition based on the RRC's standards of conduct could not be applied to the electric industry (although it did not explain why), and, if adopted, would result in no two parties being similarly situated.

NewEnergy argued that TXU's intent is to create room for a T&D utility to treat each entity in a different manner and thereby discriminate. PG&E argued that TXU's alternative definition would give utilities the chance to argue that any unaffiliated REP was not similarly situated.

Shell Energy supported the definition as proposed. It argued that the "proposing to serve" language protects prospective competitors who could be harmed by a utility denying them access to information. However, utilities should not be allowed to define "proposing to serve." If the commission is concerned about the "proposing to serve" language, it could require entities who have not yet received REP certification to execute an agreement to follow certain requirements.

OPC supported the proposed definition and opposed EGSI's suggested changes. It argued that EGSI's changes would narrow the definition to include only certified or registered non-affiliates providing the same services in the same manner as the utility's competitive affiliate. For all practical purposes, EGSI's changes would allow the exclusion of every competitor because it is highly unlikely that any competitor will offer the same services in the same manner as the utility's competitive affiliate.

OPC also opposed the addition of TXU's set of 13 conditions. It argued that TXU's proposal is so onerous that it would make it virtually impossible to find a situation where two entities were similarly situated. For example, two firms that are located in different parts of a city might not be similarly situated simply because of their location. Or, two entities might not be similarly situated because one is considered more creditworthy than the other.

The commission declines to change the definition of "similarly situated" as proposed by TXU. The commission disagrees with TXU and EGSI that the proposed definition would make everyone in the market similarly situated. The commission agrees with Enron that the definition of the relevant market will limit the number of entities that are similarly situated. The commission also agrees with Enron, NewEnergy, OPC, PG&E, and Shell Energy that TXU's 13-part test for the determination of "similarly situated" would make it likely that no two entities would be found to be similarly situated.

The commission does not agree with EGSI that it will be burdensome for utilities to identify nonaffiliates who are proposing to serve the same market, since it will be incumbent on these entities to make themselves known in order to receive the same benefit that utilities grant to their competitive affiliates. Furthermore, the commission does not agree with EGSI that "similarly situated" should be limited to entities who are certified or registered pursuant to PURA Chapter 39, Subchapter H. Although such certification or registration would be an indicator that an entity is "proposing to serve," requiring certification or registration inappropriately narrows the definition.

Shell Energy commented that the definition of "transaction" in §25.272(c)(7) should include the transfer of information. Nucor agreed with Shell Energy's recommendation, noting that a broad definition of "transaction" would help ensure that the objectives of the statute and the rule are met.

CSW, TXU, and EGSI disagreed with Shell Energy's recommendation. CSW argued that the addition of "information" to the definition is unnecessary because the code of conduct specifically addresses information exchanges in §25.272(d)(2) and (3), §25.272(g), and other provisions. TXU and EGSI argued that the inclusion of "information" is unworkable and overly burdensome, and that "information" was omitted from the definition after debate in the workshops. EGSI noted, for example, that utilities would have to contact their competitive affiliates to ensure that they are in compliance with PURA's energy efficiency goal, and Shell Energy's proposed revision would require extensive documentation of these communications.

TXU, Reliant, and EGSI recommended deleting "or other item" from the definition of "transaction" because it makes the definition too broad, and therefore unenforceable as a practical matter.

NewEnergy, Shell Energy, and OPC opposed the recommendation to delete "or other item." NewEnergy argued that a "catch all" provision is needed to allow scrutiny of any transaction that goes beyond the limited functions of a T&D utility. Shell Energy argued that PURA

§39.157(d)(16) requires that each transaction between a utility and its affiliate be at arm's length, and without the "other item" phrase, the code of conduct cannot meet this requirement. Shell Energy believed that "other item" includes information, as well as utility business opportunities and development ideas. OPC was concerned that deleting "other item" could result in the inappropriate exclusion of a transaction for purposes of code of conduct compliance. It noted that a utility could seek clarification from the commission on whether a particular transaction falls under the definition.

The commission declines to add "information" to the definition of "transaction." Subsection (g) of the proposed rule addresses information safeguards and includes a broad prohibition against sharing information with competitive affiliates unless the utility can prove to the commission prior to any such sharing that the sharing will not compromise the public interest.

The commission also declines to make the recommended deletion of "or other item." Use of the phrase "or other item" is not inconsistent with the terminology used in PURA §36.058 relating to affiliate transactions, nor is it overly bureaucratic or burdensome. Despite TXU's emphasis on the burdensome nature of the "other item" term, the only example it cited was the possibility that the once-a-year filing of consolidated income tax returns would be treated as a "transaction" that would then be subject to the "arm's length" requirement of §25.272(e)(2).

With respect to §25.272(d)(2), Shell Energy recommended that the commission strike "significant" from the prohibition against information sharing that creates "significant

opportunities for cross-subsidization of affiliates." TXU opposed such a deletion in its reply comments, observing that the term "significant" appears in PURA §39.157(g).

The commission agrees with TXU and declines to make the change proposed by Shell Energy. PURA §39.157(d)(9), on which proposed §25.272(d)(2) is largely based, specifically refers to PURA §39.157(g).

Three utilities objected that §25.272(d)(2) fails to properly distinguish between the requirements in PURA §§39.157(d)(7), 39.157(d)(9), and 39.157(g). EGSI, TXU, and Reliant argued that proposed §25.272(d)(2) improperly requires (or at least may be interpreted to require) prior commission approval for a utility and its competitive affiliate to share "officers and directors, property, equipment, computer systems, information systems, and corporate support services." These companies contended that PURA §39.157(d)(9)(A) allows such sharing so long as "adequate safeguards" are implemented; prior commission approval is not necessary. They noted, in contrast, that PURA §39.157(d)(7) does not allow a utility and its competitive affiliate to share "employees, facilities, information, or other resources, unless the utility can prove to the commission that the sharing will not compromise the public interest." These three utilities proposed striking certain language from proposed §25.272(d)(2) and creating a new paragraph (or new subparagraphs) to more closely track the legislation.

NewEnergy, Enron, Shell Energy, OPC, and PG&E objected to the utilities' proposals, arguing that prior commission approval of safeguards is necessary. Shell Energy stated that under the

utilities' interpretation, "only they could decide whether they implemented 'adequate safeguards.'" As Enron put it, "How can the commission know … whether the utility's safeguards are adequate, if the commission does not review and approve such safeguards?"

In contrast to the utilities, PG&E recommended additional language to strengthen §25.272(d)(2). First, it proposed specifically stating that the sharing of employees, facilities, or resources is prohibited unless the utility proves to the commission that the sharing will not compromise the public interest or in any other way violate PURA §39.157(d). Second, it requested that the "implements adequate safeguards" provision be modified to explicitly require prior commission approval of the utility's proposed safeguards. In its reply comments, PG&E provided language to make this requirement explicit if the commission adopts the utilities' proposal to split this paragraph into two paragraphs.

EGSI recommended rejection of PG&E's proposal, because "PURA clearly allows the sharing of such resources with adequate safeguards, without the necessity of prior commission approval." Nevertheless, EGSI observed that PG&E's proposal may be moot, for the commission probably will review utilities' safeguards proposed in the January 2000 business separation filings.

To better track the statute, the commission will split proposed §25.272(d)(2) into two new paragraphs. (Subsequent references in this preamble to "proposed §25.272(d)(3)," however, are to the provision published in the *Texas Register* on August 20, 1999.) The commission also accepts PG&E's recommended language to explicitly require prior commission approval of the

"adequate safeguards" pertaining to the sharing of officers and directors, property, equipment, computer systems, information systems, and corporate support services. The commission finds that the non-utilities made a valid point about the need for the commission to assess the adequacy of proposed safeguards. The commission notes, as a practical matter, that EGSI is right: the commission will determine the adequacy of the proposed safeguards when it reviews the utilities' separation filings.

Consumers Union and OPC expressed the belief that proposed paragraph (d)(2) may contain a loophole, in that directors (and officers, in Consumers Union's view) may not be captured in the language requiring commission approval of adequate safeguards relating to the sharing of employees. OPC therefore recommended including a code of conduct for directors who are shared between utilities and their competitive affiliates. Consumers Union proposed including the following provision: "In the case of shared directors and officers, a corporate officer from the utility and the holding company shall verify in the utility's compliance plan the adequacy of the specific mechanisms and procedures in place to ensure that the utility or its affiliates are not utilizing shared officers and directors as a conduit to circumvent these rules. In its compliance plan the utility shall list all shared directors and officers between the utility and its affiliates."

CSW opposed OPC's and Consumers Union's proposals. It noted that a company's directors need not be employees, and that the rule should not be revised to expand the definition of "employees" that is inconsistent with the statute and customary usage.

The commission concludes that adding additional language to this paragraph is unnecessary. The proposed language allows directors and officers to be shared "to the extent consistent with the provisions of this section," meaning all of §25.272, including subsection (g), relating to information safeguards. This language, combined with the commission's ability to review utilities' plans in the separation filings, is adequate to address the concerns posed by OPC and Consumers Union.

Several non-utilities recommended changes to make proposed §25.272(d)(3) (now §25.272(d)(4)) more restrictive. Consumers Union opposed limiting the provision to employees in "system operations." Shell Energy condemned as unworkable the "proposed 'safe harbor' in which (a transferred T&D employee) may use proprietary property or information"; apparently, Shell Energy would prefer to eliminate the language "in a discriminatory or exclusive fashion, to the benefit of the competitive affiliate or to the detriment of non-affiliated electric suppliers," which it finds dangerously limiting. Enron supported Shell Energy's criticism in its reply comments. PG&E criticized the provision for lacking a mechanism to ensure that a utility does not transfer or improperly assign an employee who has confidential information or who has engaged in T&D operations. Accordingly, it recommended the inclusion of a tracking requirement regarding the movement of such employees. Nucor supported this recommendation in reply comments. (PG&E also recommended substituting "confidential" for "proprietary," as the rule does not define proprietary property or information. TXU supported this recommendation.) Enron suggested an absolute prohibition on the transfer of utility employees, including clerical employees, engaged in transmission or distribution system operations to a

competitive affiliate. At a minimum, it urged that any transfers from the T&D utility to a competitive affiliate be posted immediately, so that the commission and other parties can assess the likelihood that the person has knowledge of confidential information.

EGSI, CSW, and TXU opposed the additional restrictions advocated by the above commenters. CSW noted that the commission's proposed language properly balances "the competing goals of allowing the employee the opportunity to seek employment where it may be available and restricting the exchange of proprietary property and information, while enforcing the express intent of the Legislature." EGSI opposed Enron's proposed ban on the transfer of a utility's T&D employees. It asserted that an absolute ban is unnecessary and impractical, and would penalize employees lacking knowledge of transmission and distribution system operations, the area with which the Legislature expressed concern. EGSI also claimed that such a ban would effectively stop unbundling efforts, because employee transfers will be needed as new companies are established. TXU also opposed such an absolute ban; in addition, it opposed as unnecessary Enron's proposal to require the immediate posting of the transfer of any T&D employee to a competitive affiliate. TXU opposed as contrary to the statute PG&E's recommendation to delete the qualifier "unless the employee does not have knowledge of confidential information" from the prohibition on temporary assignments. Additionally, TXU denounced Shell Energy's proposed ban on a transferred employee's use of "any" information while employed at a competitive affiliate. Such a ban, it contended, could prevent an employee from sharing knowledge of such matters as using standard computer programs and operating copying machines.

The commission accepts PG&E's recommended substitution of "confidential" for "proprietary," because the proposed rule does not define proprietary property or information. The commission also accepts Enron's suggestion to require the immediate posting to the Internet of any transfers from a T&D utility to its competitive affiliate. The immediate-posting requirement may provide somewhat more protection against anti-competitive information sharing, but should not be burdensome to the utility. The commission declines to adopt the additional restrictions suggested. To be consistent with changes made in §25.84(f), however, the commission replaces "and" with "or" where the rule refers to "transmission and distribution system operations."

EGSI proposed several minor wording changes to proposed §25.272(d)(3), related to transfers of employees, that were intended to better track the statute and proposed §25.84, and to clarify the meaning of one provision. In this last instance, EGSI recommended the description of permissible employee movements be amended to refer to a transfer "of an employee from the utility to an affiliate" by inserting this addition before the phrase "results in the utility bearing no ongoing costs associated with that employee." EGSI opined that not allowing a utility to recover its own employee costs would be contrary to PURA §36.051, which allows the recovery of reasonable and necessary operating expenses.

OPC opposed only one of EGSI's suggested changes: the substitution of "information that is intended to be protected under PURA §39.157(d)" for "transmission and distribution system operations." OPC noted that PURA §39.157(d) does not specifically address the exchange of

information by T&D employees transferring to a competitive affiliate. The proposed language is clearer, according to OPC.

The commission accepts EGSI's clarification on an employee transferring to a utility. The commission agrees with OPC's view on the last point and declines to make EGSI's suggested change. The commission declines to make the other suggested wording changes, as they appear unnecessary.

With respect to proposed §25.272(d)(4) (now §25.272(d)(5)), Shell Energy opined that even if a utility's office space is on a floor different from that of its competitive affiliate, the utility's office space should have secure access, to discourage inappropriate interaction between employees of the utility and those of the affiliate. CSW and TXU opposed this view, on the grounds that it is contrary to PURA §39.157(d)(8).

The commission agrees with CSW and TXU that the statute requires only one of the separation methods (being on separate floors or having separate access), and not both as suggested by Shell Energy. Shell Energy has not made a convincing case that safeguards beyond the minimum standards in the statute are needed. Therefore, the commission declines to make the recommended change to the proposed rule.

Consumers Union urged the commission to reject any recommendation to weaken the provisions in proposed §25.272(d)(5) (now §25.272(d)(6)), as the maintenance of separate books and

records and the commission's access to them are "essential to the prevention of cross subsidy." It also recommended periodic commission audits of these materials.

Two utilities criticized proposed §25.272(d)(5)(C). EGSI contended that the costs of conducting an audit are a reasonable and necessary operating expense; refusing to allow a regulated utility to recover such an expense therefore conflicts with PURA §36.051. EGSI also expressed concern over the possibility of being required to conduct multiple audits in quick succession. It proposed exempting a utility from the audit required under §25.272(i)(3) for a year if the utility has conducted an audit under §25.272(d)(5)(C) or a comparable audit pursuant to the requirements of another regulatory jurisdiction.

CSW asserted that there is no specific statutory authorization for the requirements of this subparagraph. Stating that the subparagraph appears to conflict with the requirements of §25.272(i)(3), it proposed permitting audits no more than once a year. CSW also proposed allowing half of the reasonable audit cost to be borne by ratepayers, as both regulated and unregulated enterprises could benefit from the audit.

OPC, Shell Energy, and NewEnergy recommended that the commission not change the proposed language. OPC stated that a rate case is the proper forum to consider the reasonableness of including audit costs in the utility's recoverable expenses; it observed that, in that context, it may be reasonable for the commission to find that only a portion of an audit's costs should be recovered from ratepayers, as competitive affiliates may benefit from transactions with the

regulated utility. OPC also contended that an audit conducted at the behest of another jurisdiction would likely not be totally appropriate for determining compliance with the Texas code of conduct.

Shell Energy opposed any effort to limit the commission's ability to require audits. It stated that "no utility groundswell has occurred to complain about excessive commission audits"; moreover, it claimed that "the mere ability to perform an audit provides an important deterrent effect."

NewEnergy opposed the utilities' suggestion to include audit costs in recoverable costs of service. It argued that audits are unnecessary for T&D operations, and become necessary only when a utility creates an affiliate to operate in the competitive market. Observing that divestiture is always an option, it stated that utilities are entitled to have competitive affiliates, but the responsibility for conducting and paying for audits comes with this right.

The commission declines to change this paragraph. NewEnergy makes a valid point: the utility's right to have competitive affiliates is accompanied by the responsibility to conduct audits. If a utility has a comparable audit completed for another jurisdiction, it may use that audit as a starting point for the Texas audit, although the burden shall remain on the utility to meet the Texas jurisdictional requirements. Moreover, a utility can always petition for a waiver of the requirement to file an audit pursuant to §25.272(i)(3), if, for example, it has just had an audit performed under §25.272(d)(5)(C). Consequently, this provision need not be overly burdensome.

For proposed §25.272(d)(6)(B) (now §25.272(d)(7)(B)), regarding credit support, Enron recommended that the commission revert to the language it proposed (in Project Number 17549) before the passage of SB 7. The commission's proposal, it said, had been "watered down to a degree that currently invites the utilities to engage in anti-competitive activity." Consumers Union recommended requiring the utility to notify the commission of any shared credit, investment, or financing arrangements.

CSW and EGSI opposed Enron's recommendation. They argued that the Legislature had specifically addressed this matter in PURA §39.157(d)(17), which contains the prohibition on credit support in two situations only: the pledge of a utility's rate-base assets and the pledge of cash reasonably necessary for utility operations. According to EGSI, if the Legislature had wanted to impose additional restrictions, it would have done so.

The commission agrees with the utilities that the language as proposed is consistent with the statute as revised by SB 7, although it disagrees with the utilities' implication that the commission could not impose additional requirements relating to credit support. The commission declines to accept the recommendations of Enron and Consumers Union at this time, although it may consider changes to the rule in the future if necessary to protect competition.

With respect to §25.272(e)(1), Shell Energy commented that the current draft's prohibition on subsidizing affiliates with revenues from a regulated service is inadequate. Shell Energy

recommended the rule be expanded to include prohibition of subsidization from all regulated and tariffed services. TXU, in reply to Shell Energy's comments, stated that the draft rule was consistent with §39.157(d)(11); therefore, the wording should not be modified.

Consumers Union stated that the purpose of the code of conduct is to prevent cross-subsidization of affiliates by the regulated utility, but that there are loopholes in the draft rules. Consumers Union recommended that the rule address all assets, and not be limited to capital assets. In response to Consumers Union, CSW stated that this approach would be costly and would impair customer service. EGSI's reply comments were consistent with CSW's.

The commission declines to revise §25.272(e)(1) as suggested by Shell Energy. No subsidization of affiliates from utility services is allowed in these rules, and tariffed services are already included in the term "regulated services" used in the rule. In addition, the commission agrees with TXU that the language as proposed is consistent with PURA §39.157(d)(11). The commission adopts the recommendation made by Consumers Union by revising the rule where necessary so that it applies to all assets, rather than "jurisdictional capital assets."

Shell Energy recommended clarifying that §25.272(e)(1)(A) requires utilities to make products and services available on the same terms and conditions as provided to affiliates.

The CSW companies, TXU, and EGSI stated that the draft language of this paragraph goes beyond the requirements of SB 7 when the rule proposes that the sale of products and services by

a utility must be governed by a tariff. TXU further argued that requiring tariffs will delay the provision of service, and argued that only regulated utility services offered on a routine and recurring basis should be tariffed.

Several non-utilities disagreed with CSW, TXU, and EGSI on this point. PG&E and NewEnergy stated that the regulated utility cannot provide unregulated services, and that all services provided by a regulated utility should be tariffed. Shell Energy stated that SB 7 does not preclude the commission from requiring a utility to tariff all its services. Shell Energy also noted that the commission has no way to know all the services each utility provides and that the commission's past experience demonstrates that it is difficult to obtain this information from the regulated utilities.

OPC argued that it was not the legislative intent of SB 7 to allow regulated utilities to sell unregulated services. Further, if the commission disagrees with OPC and decides that the regulated utility can sell unregulated services, then the commission should implement an additional rule stating that the revenues from these services may be imputed to the ratepayers.

The commission agrees to make the change suggested by Shell Energy, as it offers greater clarity to the provision. The commission declines, however, to make any additional changes to this paragraph. The commission agrees with the non-utilities that SB 7 does not prohibit the commission from requiring tariffs for services offered by utilities. The specific types of services that may or may not be offered by a utility in a restructured industry, whether described as

"routine," "regulated," "recurring," or any other adjective, are being determined through Project Number 21083, *Cost Unbundling and Separation of Utility Business Activities, Including Separation of Competitive Energy Services and Distributive Generation*. The commission further notes that, contrary to the implication by the utilities otherwise, this paragraph does not preclude the possibility that some services will not be offered through a tariff. However, offering products and services through a tariff is the rule, rather than the exception, and any exceptions to this rule must be approved by the commission. The commission concludes that OPC's issue regarding imputation is also beyond the scope of this rulemaking.

In comments on §25.272(e)(1)(B), Shell Energy stated that the draft rule's provision to price products and services provided to a utility by an affiliate at a level that "reflects" market value should be change to read "at" market value. Shell Energy argued that the intent of the Legislature in SB 7 was to price these transactions at market value even though the bill uses the term "reflect" market value. TXU and EGSI stated that Shell Energy's comments on this section were counter to the provisions of SB 7.

OPC stated that the provisions of this paragraph (purchase of products or services at levels that are fair and reasonable and reflect market value) were inconsistent with the language of PURA §36.058, and recommended changes that conform the section to §36.058.

EGSI commented that the intent of the Legislature in SB 7 was not to alter or modify a utility's compliance with FERC or SEC orders and directives; therefore, EGSI recommended adding

language that would state that SEC and FERC costing methodologies take precedence over commission rules on affiliate transactions. In reply to EGSI, OPC stated that the code already has provisions for waivers if necessary. Further, OPC opined that allowing the regulated utility to follow SEC or FERC pricing methodologies is an attempt to avoid commission scrutiny.

The commission concludes that no change is necessary to this paragraph, as the language is consistent with §39.157(d)(14), relating to services provided between a utility and an affiliate. The commission disagrees with EGSI and declines to make its suggested change. In a previous docketed proceeding the commission has maintained its right to review utility charges under SEC-approved pricing methodologies and to disallow expenses as appropriate. (*Application of Central Power & Light Company for Authority to Change Rates*, Docket Number 14965, *Second Order on Rehearing* at 6, 90 (October 15, 1997): SEC approval of allocation factors does not preclude commission from disallowing affiliate costs to a utility when utility fails to prove that allocated costs paid were necessary, reasonable, not above reasonably approximate cost and not higher than the price the supplying affiliate charges to other affiliates, divisions or unaffiliated companies. The commission has not yet ruled on a similar case involving FERC-approved pricing methodologies.) The adoption of this code of conduct does not alter that right.

Shell Energy recommended that the provisions of §25.272(e)(1)(C) be changed to book all transfers from the utility at the higher of market value or fully allocated cost rather than allow the utility to select which option to use. TXU, in reply to Shell Energy, stated that this same proposal was considered and rejected by the Legislature in passing SB 7. TXU recommended

leaving the Legislature's intent intact. CSW stated that Shell Energy's proposed changes are unnecessary as the proposed rule already includes jurisdictional assets not in the rate base.

OPC was opposed to any provision that allows the transfer of assets at anything other than the higher of market or book value. OPC objected to the provisions that allow for pricing at levels that are "fair and reasonable" and reflect the market value or the fully allocated cost. CSW stated that OPC's recommendation should not be adopted because the price that is just and reasonable is the price that the customers should pay.

EGSI's reply to Shell Energy and OPC was that the language of the proposed rule tracks the statutory language and that Shell Energy's and OPC's recommendations are inconsistent with PURA.

The commission declines to make the recommended changes, and notes that the language as proposed is consistent with PURA §39.157(d)(14), relating to asset transfers between a utility and an affiliate. Moreover, the commission notes that PURA §36.058, including §36.058(c)(2) (requiring that the price charged to the utility not be higher than the prices charged by the supplying affiliate to other affiliates or divisions or to a nonaffiliated person), still applies to a utility seeking recovery in a rate case of payments to affiliates.

TXU argued against the requirement for a contemporaneous record of affiliate transactions in §25.272(e)(2). TXU stated that this requirement would create an onerous and costly

administrative burden. TXU argued that PURA and the proposed rules already require the creation and retention of a record of all affiliate transactions. This provision would require the filing of additional information to accompany each specific transaction. TXU recommended deletion of the proposed contemporaneous record of affiliate transactions from this subsection.

Shell Energy countered that the contemporaneous written record of all transactions with affiliates will facilitate audits and enforce the code of conduct. PG&E replied that TXU's proposal to eliminate the contemporaneous record of affiliate transactions would undermine the commission's ability to detect code of conduct violations. PG&E rejected TXU's claim that this requirement would create an onerous and costly administrative burden. PG&E stated that the contemporaneous record will deter creative, post-hoc record keeping. PG&E also argued against TXU's position to keep the annual report of affiliate transactions confidential.

The commission agrees that maintaining the contemporaneous record of affiliate transactions will assist in detecting violations of the code of conduct, and declines to change the provision.

OPC stated that the provisions of §25.272(e)(2)(B) (purchase of products or services above $75,000 per unit or $1 million total value threshold) were inconsistent with the language in PURA §36.058, and recommended that the section be modified to incorporate this language.

The commission concludes that no changes to this subparagraph are necessary. The protections afforded by PURA §36.058 still apply. To be considered for the regulated utility's cost of

service, all affiliate transactions must meet the affiliate standards. Further, the process provided in this subparagraph (fair, competitive bidding process) will allow scrutiny to review whether the affiliate is obtaining a competitive advantage.

Shell Energy suggested that the rule clearly state that the assets covered under §25.272(e)(2)(C) include capital assets that are not in the rate base. This statement would ensure that ratepayers would realize the benefits when the utility transfers those assets.

TXU Electric's reply to Shell Energy's comments was that the wording should remain as written in the proposed rule. EGSI stated that depreciated assets remain within the rate base offset by an accumulated depreciation account; therefore, depreciated assets are already within the scope of the provision as written.

OPC was opposed to any provision that allows the transfer of assets at anything other that the higher of market or book value. OPC took exception to the provisions that allow for a fair, competitive bidding process. OPC stated that there is no provision in PURA §39.157(d)(9)(B) that transfer be a result of fair and competitive bidding. EGSI replied that transferring assets at the greater of cost or market is inconsistent with PURA §39.157(d)(14).

As noted previously, the commission clarifies that the rule should apply to all assets, rather than only jurisdictional capital assets. PURA §39.051 addresses the transfer of assets during the

unbundling effort. Furthermore, PURA §39.157(d)(9)(B) allows the commission to require contracts or competitive solicitations for certain classes of transactions.

CSW recommended that §25.272(e)(1)(B), (C), and (D) and §25.272(e)(2)(C) be amended to address securitization as provided in PURA, Chapter 39, Subchapter G. CSW argued that securitization will require the utility to create a special-purpose affiliate. These rules should not conflict with financing orders that will address securitization. Therefore, CSW proposed that subparagraphs (e)(1)(B) and (C) and (e)(2)(C) should not include transfers of assets pursuant to Chapter 39, Subchapter G and that subparagraph (e)(1)(D) include transfers of assets pursuant to the same subchapter. Reliant, EGSI, and TXU concurred.

The commission concurs with the recommendations made by the utilities regarding securitization. Accordingly, the commission makes appropriate changes to §25.272(e)(i)(c) and (d) and §25.272(e)(2)(c).

PG&E commented on §25.272(f)(1) relating to availability of products and services on a non-discriminatory basis, suggesting that the rule require each utility to post contemporaneously a conspicuous notice on its Internet site indicating that it has provided certain products or services to a competitive affiliate. In its reply comments, EGSI objected to the recommendation by PG&E and stated that the language proposed by PG&E to be included in paragraph (f)(1) would be unduly burdensome and impractical. Additionally, EGSI stated that there are already adequate reporting requirements in the draft rule to ensure that there is no competitive advantage afforded

to competitive affiliates. TXU also replied to PG&E's comments and noted that PG&E's suggestion is unnecessary and unworkable. For example a T&D utility will be providing T&D services to an affiliated REP 24 hours a day, seven days a week, and contemporaneous posting of provision of such services would be neither practical nor beneficial to competition.

The commission agrees with the utilities that there is no need to post all of the services including tariffed services routinely provided to the affiliates, and declines to make the changes proposed by PG&E. Other provisions in the rule specifying information to be posted electronically provide sufficient safeguards to prevent anti-competitive behavior.

Shell Energy and Enron commented on §25.272(f)(2) relating to discounts, rebates, and fee waivers or alternative tariff terms and conditions. Shell Energy stated that the term *benefit* used in this paragraph is not defined and suggested revising the language to clarify what a benefit may constitute. EGSI and TXU objected to Shell Energy's proposed revision to the language in paragraph (f)(2) to include the term *economic benefit*. EGSI stated that Shell Energy's proposal would create ambiguity by including an ill-defined term.

Enron recommended that a utility should be required to post the information within 24 hours prior to provision of such benefits to a competitive affiliate. EGSI replied that such a requirement was proposed during the workshops in this project, but was not adopted and would simply impose non-statutory requirements to inhibit utility affiliates' ability to compete. TXU also objected, stating that this revision is unnecessary since the T&D utility must already make

such products or services contemporaneously available. According to TXU, Enron's suggestion would result in a requirement that similarly situated non-affiliates have "advance" availability rather than just contemporaneous availability, which requirement would be inconsistent with SB 7 and could unnecessarily delay transactions.

First, the commission notes that this language was drafted by a "task force" of stakeholders led by Shell Energy, and was agreed to by the parties at the July 12 workshop. The commission concludes that the term "benefits" is used in §25.272(c)(6) and that the meaning of the term is clear in this context. Therefore, the commission declines to change the proposed language. Additionally, the commission agrees with the utilities that there is no need to revise the language as proposed by Enron, as a requirement for contemporaneously available information is sufficient.

Consumers Union, EGSI, and TXU commented on §25.272(f)(3) relating to the prohibition on tying arrangements. Consumers Union urged the commission to retain the language in this paragraph. EGSI stated that the rule as drafted differs from the statutory language and therefore introduces uncertainty. TXU commented that the proposed rule goes beyond the prohibition against tying arrangements found in SB 7 and might be read to prohibit bundling of distribution service and energy during the transition period, contrary to its obligation-to-serve requirements. Both EGSI and TXU suggested revising the language to limit the scope of the prohibition on tying arrangements. EGSI proposed to limit it to tying of transmission and distribution products or services to the purchase of any other good or service from the utility or its affiliate. TXU

suggested limiting it to tying of any *regulated* product or service with any *unregulated* good or service.

OPC disagreed with EGSI's reading of SB 7. OPC stated that although SB 7 makes specific reference to transmission and distribution services in §39.157(d)(3), this reference was not meant to exclude other types of goods and services from the tying arrangement prohibition. OPC stated that PURA §39.157(a) makes it clear that any type of discrimination, tying arrangement, or other behavior by a firm possessing market power that unreasonably restricts, impairs, or reduces the level of competition is prohibited. In reply to TXU's proposal to limit the prohibition to tying the sale of any *regulated* good or service with an *unregulated* good or service, OPC stated that TXU never explained why the language as proposed is contrary to PURA and inconsistent with antitrust law and did not present any compelling arguments proving that it is inconsistent with an (unidentified) 1996 commission order and other provisions of PURA.

PG&E stated that TXU erroneously assumes that utilities will be permitted to engage in unregulated services after the implementation of customer choice. PG&E commented that TXU's revisions contravene the letter and spirit of SB 7 and should be rejected. Shell Energy stated that ample authority and justification exists to prohibit tying any utility product or service to any other utility or affiliate product or service. Shell Energy noted that an outright ban on tying arrangements would fulfill the requirements of PURA §§39.157(d), 39.101(a)(9), 39.101(b)(6), and 39.101(b)(1), and therefore the commission should reject proposals to limit the scope of tying arrangements.

Although the commission agrees with the non-utilities that improper tying should not be allowed, the commission modifies the paragraph to clarify that as long as utilities operate as integrated utilities prior to unbundling, they may be allowed to offer bundled service. Any such offering must be through a rule or tariff approved by the commission, however.

TIEC supported §25.272(g) as proposed. Several commenters, however, including Enron, PG&E, Shell Energy, and NewEnergy, objected to the portion of §25.272(g)(1) that would permit utilities to release proprietary customer information to a utility's affiliated REP or the provider of last resort prior to the date of retail customer choice in January 2002. These commenters generally contended that this provision would permit release of proprietary customer information without the prior consent of the affected customer and would also provide affiliated REPs or providers of last resort with an unfair competitive advantage.

Enron stated that customers who choose a supplier other than the affiliated REP should not have the proprietary customer information transferred without their permission. Enron also noted that customers should have a reasonable opportunity to choose another supplier before their proprietary customer information is transferred to a default provider. Enron suggested that the release of proprietary customer information prior to January 1, 2002, be limited to those customers who will definitely be served by the affiliated REP or provider of last resort after January 1, 2002. At the public hearing on October 18, Enron, in response to reply comments on this issue, agreed that release of this information to affiliated REPs was acceptable under certain

limited conditions. Enron acknowledged that utilities should be permitted to release this information to their affiliated REPs in order to prepare for competition provided such information was not released before June 1, 2001 (the start date for the customer choice pilot programs pursuant to PURA §39.104). In addition, Enron stated a preference that utilities not be permitted to release proprietary customer information to their affiliated REPs until approximately 30 days before competition begins in January 1, 2002. Enron also stated that the type of information to be released is currently being considered by one of the ERCOT policy subcommittees and need not be addressed in this rule.

PG&E also suggested that utilities should be permitted to release proprietary customer information to a competitive affiliate only for those customers who have not chosen another REP. PG&E added that this release of information should be a one-time exception applicable only until January 1, 2002, which would provide an adequate opportunity for transition to customer choice.

NewEnergy proposed that §25.272(g)(1) should be clarified to allow the release of proprietary customer information to an affiliated REP or provider of last resort only after issuance of a commission order approving such transfer. NewEnergy also proposed limiting this subsection to the release of "certain" proprietary customer information, but does not elaborate on the scope of this proposed restriction.

Shell Energy suggested that the language permitting an affiliated REP and provider of last resort access to proprietary customer information should be deleted. In the alternative, Shell Energy proposed that these entities be able to obtain the customer's name, address, phone number, and type of service only if the release of this information is authorized by the affected customer and is simultaneously made available to all competitors. In reply comments, EGSI disagreed with Shell Energy's suggestion to require customer authorization prior to the release of customer proprietary information. EGSI suggested that release of this information without prior customer consent is necessary for utilities to prepare for their role as the provider of last resort.

In their reply comments, CSW and TXU generally agreed with Enron and PG&E that release of proprietary customer information should be limited to those customers who will remain with the affiliated REP or provider of last resort as of January 1, 2002. In reply comments, TIEC also agreed with this proposal. TXU proposed that "to the extent practical" release of this information should be limited to those that have not chosen an unaffiliated REP at the time the information is transferred to an affiliated REP. However, TXU noted that because utilities will need to prepare for competition, the release of this information should occur before December 31, 2001. TXU suggested that 30 days might not be enough time for utilities to prepare for the transition to competition and proposed that the timing of the release of this information be addressed as part of each utility's unbundling plan.

The commission disagrees with those who suggest that release of this information be prohibited altogether or that it be permitted only after issuance of a commission order requiring such

disclosure. Release of this information is proper under limited circumstances. Requiring issuance of a commission order as a prerequisite to release is cumbersome, time consuming, and unnecessary. The commission concludes that release of proprietary customer information to affiliated REPs or providers of last resort prior to January 1, 2002, without prior customer authorization should be permitted as a one-time event. The timing of release of this information is appropriately addressed in this rule and need not wait for the filing of utility unbundling plans. To allow utilities to prepare for competition, utilities will be allowed to release this information to affiliated REPs or providers of last resort during the period September 1, 2001, through December 31, 2001. Release of proprietary customer information on or after January 1, 2002, will be permitted only upon prior written authorization by the affected customer. The commission agrees with Enron that the type of information to be released is being considered by an ERCOT subcommittee, and any attempt to specify that information in this rule would be premature. Finally, any accommodations to this provision for the pilot programs will be addressed in Project Number 21407, *Retail Competition Pilot Project*.

Some utility commenters proposed language that would permit broader disclosure of proprietary customer information than that contemplated under §25.272(g)(1) as proposed. CSW concluded that §25.272(g)(1) as proposed was sufficient for now, but suggested that this provision may need to be modified in the future to allow the release of proprietary customer information in connection with other Texas electric industry restructuring proceedings, such as the implementation of transaction settlement processes directed by the ERCOT independent system operator (ISO). Similarly, TXU Electric suggested this subsection be expanded to permit

disclosure of proprietary customer information where authorized or requested by an independent organization (which would include the ERCOT ISO).

In the initial comments of Consumers Union and the reply comments of TIEC, these commenters recommended that the commission add language, applicable to the code of conduct generally, that specifically provides that the code of conduct supercedes any procedures or protocols of an ISO or similar body that conflict with any of the provisions of this rule. Shell Energy expressed similar concerns in reply comments. PG&E stated in its reply comments that authorizing release of proprietary customer information to the ERCOT ISO would be premature until the ISO actually determines this information will be required and the commission has reviewed and approved any such procedures to ensure that the confidentiality of this information will be maintained.

TXU further suggested that §25.272(g)(1) be broadened to permit the release of proprietary customer information where release is required by law, regulation, or legal process. TXU stated that utilities are often served with subpoenas requiring the production of customer information and should be expressly permitted to release such information as required to comply with laws, regulations, or legal process. TXU also recommended that utilities be allowed to release proprietary customer information to a "federal, state or local governmental entity or in connection with a court or administrative proceeding involving the customer or the utility." At the hearing on October 18, TXU further clarified the difference between its proposed "legal process" and "governmental agency" exceptions. The legal process exception is intended to address situations

in which a utility is served with a subpoena requesting this information. The governmental agency exception is intended to address instances in which a governmental agency requests proprietary customer information in the context of locating individuals. TXU cited several examples of such requests, including one in which the Federal Bureau of Investigation contacted TXU for customer information in order to evacuate customers living near a house where a bank robber was, to protect such customers from potential harm.

In reply comments, TIEC, Nucor, and PG&E raised various objections to TXU's proposed changes to §25.272(g)(1). Both TIEC and PG&E observed that any proprietary customer information released to a federal, state, or local governmental agency in connection with a legal proceeding involving the customer or the utility can and should be made pursuant to a confidentiality agreement or protective order. PG&E apparently would object to release of this information at all unless such release were in a legal proceeding involving the affected customer. TIEC further argued that release of proprietary customer information in legal proceedings involving the customer or the utility should only be made to entities with jurisdiction over the utility. Without this limitation, TIEC averred that governmental entities without authority over a utility may nevertheless be able to obtain proprietary customer information. TIEC and PG&E both urged that a utility be required to notify the affected customer when its proprietary customer information is provided in connection with a legal proceeding. PG&E stated that TXU's proposal that would permit utilities to release proprietary customer information if required to do so by law was reasonable provided utilities were required to either file such information under seal or give the affected customer a reasonable opportunity to do so. Nucor generally objected to TXU's

proposed amendments to this subsection, but offered no specific changes to TXU's proposed language.

The commission agrees with those commenters who suggested that the restrictions against disclosure should apply to the ISO or other similar organizations. This requirement will ensure that proprietary customer information is not inadvertently released. The commission also agrees with Consumers Union's suggestion, and adds a provision (in §25.272(i)(8)) to this rule that states that this rule supercedes any requirements developed by an ISO in the event that such requirements conflict with this rule.

The commission agrees with TXU that it is appropriate to allow disclosure of proprietary customer information if required by law, regulation, or legal process, or to a federal, state, or local governmental entity or in connection with a court or administrative proceeding involving the customer or the utility. However, the commission generally agrees with TIEC that utilities should be required to take all reasonable actions to protect the confidentiality of such information and should promptly notify the affected customer in writing that this information has been requested. This modification is intended to provide affected customers the opportunity to assert their rights against disclosure. The commission does not believe it is necessary to add language limiting the release of this information to entities with jurisdiction over the utility as suggested by TIEC. The commission concludes that the "legal proceeding" and "governmental agency" exceptions included in the rule as adopted are sufficient to ensure that courts or governmental agencies without jurisdiction over utilities cannot require the release of proprietary customer

information. To improve clarity, the commission reorganizes these exceptions into subparagraphs.

Regarding §25.272(g)(2), PG&E suggested that if a utility aggregates non-proprietary customer information in response to a specific request from an affiliate, it should also be required to aggregate non-proprietary customer information on the same terms and conditions for non-affiliates. PG&E reasoned that tailored aggregation of information by a utility is a service and as such should be provided to non-affiliates on a non-discriminatory basis.

EGSI argued that §25.272(g)(2) should be consistent with the requirements of §25.272(g)(1). Specifically, EGSI proposed that when a utility provides a competitive affiliate with aggregated customer information, it should also provide notice on its Internet site contemporaneously with the release of such information rather than 24 hours in advance as proposed. EGSI also suggested that the corporate support services exception of §25.272(e)(2)(A) be incorporated into §25.272(g)(2).

The commission agrees with PG&E's suggested change to §25.272(g)(2) and modifies language accordingly. The commission disagrees with EGSI's proposal to change the notice requirement in §25.272(g)(2) from 24 hours prior notice to contemporaneous notice. To ensure that competitors have some time to react to the release of aggregated customer information, utilities should be required to provide some advance notice, and 24 hours' advance notice is not unduly burdensome. The commission agrees with EGSI's suggestion that the corporate support services

exception of §25.272(e)(2)(A) be incorporated into §25.272(g)(2) and modifies the rule accordingly.

Shell Energy contended that the phrase "preferential access" in §25.272(g)(3) was vague, and suggested language that would prohibit a utility from providing any information concerning its transmission or distribution system to its affiliate REP unless it made such information available contemporaneously to similarly situated non-affiliates on the same terms and conditions. In reply comments, TXU and EGSI disagreed with Shell Energy's contention that the phrase "preferential access" is vague. TXU argued that this language is taken from PURA §39.157(d)(3)(C) and is sufficiently clear. TXU further observed that Shell Energy's suggested revisions would actually disadvantage non-affiliates by requiring provision of the "same" information to non-affiliates even though non-affiliates would not likely find such information useful. EGSI noted that no one raised this objection at any of the workshops on this rule.

The commission disagrees with Shell Energy that the phrase "preferential access" is vague. As noted by TXU, this language is taken from PURA §39.157(d)(3)(C) and needs no further clarification.

Section 25.272(g)(5), as proposed, prohibits utilities from sharing information with their competitive affiliates unless such sharing is specifically authorized in §25.272(g) or is otherwise approved by the commission. Reliant and TXU argued that this prohibition is overly broad. Both Reliant and TXU asserted that because the term "other information" is not defined, it could

prohibit utilities from sharing any information, no matter how trivial, with their competitive affiliates. TXU argued that various provisions of the proposed code of conduct provide all of the protections necessary against improper sharing of information between utilities and their affiliates, and that §25.272(g)(5) is unnecessary and should be deleted. In the alternative, TXU proposed that this subsection be modified to prohibit utilities from "preferentially" sharing "confidential and competitively sensitive information obtained by the utility in the course of providing service to its customers." Reliant suggested that utilities be required to implement internal codes of conduct to ensure that information in not improperly shared with affiliates.

PG&E opposed TXU's proposal to delete §25.272(g)(5). PG&E contended that §25.272(g)(5) is not restrictive enough and urged that this paragraph also require that sharing of other information not otherwise violate PURA §39.157(d).

In reply comments, TXU argued that PG&E's proposed change would preclude the commission from allowing sharing of other information with a competitive affiliate if it would violate §39.157(d) even if the commission had found that such sharing would not compromise the public interest. TXU argued that if §25.272(g)(5) remains in the rule as adopted, PG&E's proposed change is overly restrictive and unnecessary and should not be adopted.

In reply comments, Shell Energy argued that §25.272(g)(5) is not overly broad and that any problems with interpreting the scope of this provision could be addressed in utility business separation plans or by utility requests for a waiver of this provision. In its reply comments, OPC

commented that utility assertions that §25.272(g)(5) was too broad were overstated. OPC noted that this subsection is necessary "to ensure that potentially sensitive information does not inadvertently escape code of conduct restrictions."

The commission concludes that §25.272(g)(5) should be adopted with a clarifying amendment. The commission is sympathetic to concerns that the phrase "other information" may seem overly broad. However, PURA §39.157(d)(7) is explicit that sharing of information between utilities and affiliates should be the exception, rather than the rule. Reliant's concern about utility and affiliate employees sharing non-business, public information is overblown. Section 25.272(g)(5) is intended to prohibit all inappropriate sharing of information between utilities and their affiliates. Some common sense and good judgment is required in drawing the line between permissible and impermissible conduct. A conversation between a utility employee and an affiliate employee concerning the kick-off time for a Rice Owls football game would not be prohibited under §25.272(g)(5), as that information is publicly available and as such is not subject to the restrictions of this rule. Again, the commission believes that most of the concerns of the utilities regarding the potential breadth of subsection (g)(5) are overstated. In order to improve clarity, however, the commission adds language indicating that public information and information unrelated to utility business may be shared without violating the code of conduct. Moreover, as noted by Shell Energy, specific concerns regarding this subsection may also be addressed in the internal codes of conduct in the business separation plan filings to be made in 2000.

PG&E commented that the disclaimer for the corporate name in §25.272(h)(1) should be required at the first instance of the name's use to eliminate customer confusion and ensure that a competitive affiliate does not gain an unfair advantage. In reply comments, TXU and EGSI objected to PG&E's proposal. TXU replied that the provision requiring the disclaimer to be written in bold and conspicuous language is sufficient to address potential customer confusion and that PG&E's proposal would not be practical on business cards. EGSI replied that requiring the disclaimer to be located at the first instance may confuse the recipient by interrupting a simple and understandable flow of information. EGSI argued that requiring the disclaimer to be clearly audible or printed in a bold and conspicuous manner provides sufficient safeguards. Reliant commented that the disclaimer regarding the use of the logo was discussed in detail at the workshops, even though PG&E now raises the issue in comments.

The commission concludes that it is not necessary to require the disclaimer to be located at the first instance. The commission finds that the proposed language, requiring that the disclaimer be clearly audible or printed in a bold and conspicuous manner, provides adequate customer safeguards.

Shell Energy commented that §25.272(h)(2) does not address a utility's community affairs or economic development activities consistent with the proposal in Project Number 21083, *Cost Unbundling and Separation of Utility Business Activities, Including Separation of Competitive Energy Services and Distributive Generation*. Shell Energy proposed adding language to this subsection stating that when a utility communicates with a person as part of its community affairs

or economic development activities, the utility should record the communication and make the record available to the commission and third parties. In reply comments, CSW urged the commission to reject Shell Energy's proposal, arguing that this issue is unrelated to affiliate activities, and is most properly addressed in the unbundling project. TXU replied that the commission should not accept Shell Energy's proposal and obligate the utility to make record of any contact with potential developers or new customers arising from community affairs or economic development activities. TXU argued that the proposed rules already prohibit this type of information exchange between utilities and their competitive affiliates, and that this type of reporting would result in the provision of leads to other non-affiliated competitors.

The commission rejects Shell Energy's proposal to add language relating to economic development contacts because this issue is more properly addressed in the unbundling project and its related filings.

Enron requested that the commission insert a provision in §25.272(h)(2)(A) that would prohibit a utility from requesting authorization from its customers to pass on information exclusively to its competitive affiliate. In reply comments, TXU supported Enron's suggestion to add language prohibiting the transmission and distribution utility from making requests to customers for authorization to provide information solely to its competitive affiliates.

The commission concludes that it is appropriate to add language to subsection (h)(2)(A) prohibiting a transmission and distribution utility from making requests to customers for authorization to provide information solely to its competitive affiliates.

Enron commented that the commission should delete the portion of the joint marketing provision in §25.272(h)(2)(B) that refers to conducting these activities "in a manner that favors the affiliate." Enron argued that utilities should not be allowed to engage in any joint marketing or advertising with its competitive affiliate. In reply comments, TXU disagreed with Enron's proposal to delete the phrase "in a manner that favors the affiliate," because it contends that this deletion would be contrary to the language in SB 7.

TXU and Reliant argued for modification of §25.272(h)(2)(C) to allow for joint sales meetings between the utility and competitive affiliates, by eliminating the restriction to non-sales meetings. TXU commented that the proposed restriction limits customers' choice to determine who they would like to attend sales meetings. TXU contends that large, sophisticated customers are unlikely to get confused about their ability to purchase products and services in the competitive market from non-affiliated companies. TXU further argued that this issue is an example of non-affiliated competitors attempting to use the affiliate rules to gain a competitive advantage. Reliant commented that the rules should not limit a customer's ability to receive information in an efficient manner.

In reply comments, Shell Energy, NewEnergy, PG&E, and OPC argued against TXU's proposal and supported the rule's prohibition on joint sales meetings between the utility and the competitive affiliate. Shell Energy replied that this section should remain as written. NewEnergy replied that allowing this type of activity would violate the intent of the code of conduct and that a potential customer could look to the utility's tariffs if it had any questions about the rates. PG&E replied that joint meetings would create confusion over the separation between the REP and the utility, and that there is an inability to monitor joint sales meetings, which offer an opportunity for tying and bundling of services. OPC replied that the rule should not be changed because these meetings offer the opportunity for anti-competitive behavior and may result in the conveyance of sensitive information specifically disallowed under the code of conduct. OPC further argued that any inconvenience to customers is outweighed by the long-term public interest benefits.

The commission determines that it is not appropriate to allow utilities and their competitive affiliates to attend joint sales meetings. The proposed prohibition is necessary to avert potential bundling and tying opportunities between regulated and unregulated business activities. Further, it is not necessary to change the language relating to "in a manner that favors the affiliate," as that phrase is consistent with the provisions in SB 7. To ensure that all retail electric providers are on equal footing, however, the commission amends the language to prohibit the utility from participating in sales meetings with any competitive affiliate or any non-affiliated retail electric provider.

TXU commented that the prohibition on Internet links should be limited to direct links between a utility and a competitive affiliate. TXU argued that the commission should allow a parent holding company to provide direct links to all of its subsidiaries because the parent company's right to provide such links is protected by the First Amendment.

The commission determines that the restriction in §25.272(h)(2)(B)(vi) does not preclude a holding company from providing links to its various affiliates, and therefore does not need to be modified.

Shell Energy commented that the commission should revise §25.272(h)(3) to eliminate the word "promote" and instead place an outright prohibition on utilities providing information about their competitive affiliates to potential customers. Shell Energy argued that the term "promote" invites the opportunity for utilities to argue that the information they provided about their affiliates was neutral and not promotional. Enron supported Shell Energy's comments. TXU replied that §25.272(h)(3) does not need to be revised because it already addresses Shell Energy's concern, in that the utility can only provide information on how to contact the affiliate; it cannot transfer a customer to or promote the competitive affiliate. PG&E commented that §25.272(h)(3) should allow the utility to direct a potential customer to a telephone directory or list of suppliers maintained by the commission. PG&E argued that utilities should not be given the discretion to determine which customer requests are specific and unsolicited. Shell Energy commented that the rule should prohibit the utility from discussing the competitive affiliate beyond providing contact information.

The commission declines to change the language in proposed §25.272(h)(3). The provisions in this section balance the needs of customers requesting information regarding a competitive affiliate with the potential for anti-competitive conduct in referring a customer to the affiliate. By limiting the information that the utility can provide to the customer, the language in this subsection achieves the appropriate balance.

The commission asked a question in the preamble regarding how the code of conduct should apply during the transition period to competition. The commission sought comment on its tentative conclusion that it is in the public interest to require each utility to implement an internal code of conduct, through implementation of proposed §25.272(i), to ensure functional separation of regulated and competitive activities during the transition period.

EPE commented that it is unclear how the code applies to EPE, in general, because it is exempt from PURA Chapter 39 through the expiration of its rate freeze in 2005. Further, EPE does not have any affiliates, although it may form affiliates in the future to comply with the new requirements in the law. To recognize its unique circumstances, EPE suggested that the commission add a new sentence to the end of §25.272(i)(1) stating that a company exempt from Chapter 39 shall adopt an internal code of conduct that is consistent with its continued provision of bundled utility service during the period of its exemption. EPE commented that it will file a proposed internal code of conduct, and although it will not include implementation of every

provision of the code, it will attempt good-faith implementation within the context of its existing integrated utility structure.

The commission agrees with EPE's recommendation and adds EPE's proposed language.

Consumers Union, OPC, Enron, PG&E, and Shell Energy supported internal codes of conduct during the transition period and urged enhancement of certain provisions. Consumers Union commented that the "spirit and intent" of SB 7 and the rules should not be narrowly interpreted. Consumers Union argued that all competitive services should be treated as if they are provided by competitive affiliates. OPC commented that asset transfers from utilities to affiliates should be priced at the higher of market value or book value because most of the assets were paid for by utility customers through traditional cost of service methods, so the customers should be entitled to the monetary benefits from the sale. OPC suggested that the commission should require the interim rules to be docketed and subject to participation by all interested parties. Enron commented that the commission should carefully monitor advertising that promotes safety and reliability during the transition period. PG&E commented that the initial compliance plan should include internal plans to comply fully with the proposed business separation requirements during the transition period. Shell Energy commented that internal codes of conduct must be applicable at the earliest possible date, must provide for enforcement, and should be filed with and approved by the commission. Enron supported Shell Energy's proposal in its reply comments. In reply to Shell Energy, Reliant objected to implementing internal compliance plans at the earliest possible date, arguing that it would be impossible to devise an internal policy to comply with a rule that

has not yet passed, and the transformation to a competitive world will take time. EGSI replied that it is not sure how utilities can reasonably be expected to implement an interim internal code of conduct until the commission provides more guidance in the context of the January 2000 separation proceedings.

The commission finds that Consumers Union's concern regarding competitive services, Enron's concern regarding advertising that promotes safety, and the concerns of OPC, PG&E, and Shell Energy regarding valuation of transferred assets, party participation in dockets concerning approval of transition and unbundling plans, and development and approval of internal codes of conduct during the transition period, are all addressed in Project Number 21083, *Cost Unbundling and Separation of Business Activities, Including Separation of Competitive Energy Services and Distributed Generation.* Accordingly, the commission declines to modify the proposed language in this rule.

CSW comments that the rules are flexible enough to be applied both before and after the implementation of customer choice. In its reply comments Enron agreed with CSW. CSW commented further, however, that the rule requirements should be dependent upon the commission approving these proposed rules before January 10, 2000.

The commission is adopting the code of conduct so that it will be effective before the January 10, 2000, date on which utilities must file their unbundling plans, so CSW's concern is moot.

TIE supported internal codes if combined with a reasonable standard for determining violations. TIE argued that the ability to use Section One of the Sherman Act (15 U.S.C. §1) to deal with anti-competitive conduct by an integrated utility may be impaired under current antitrust law. Accordingly, TIE suggested that the burden of proof be on the utility to establish that the competitive business justification of the utility's action outweighs the anti-competitive consequences to competition and the public interest. In reply comments, TXU stated that there is no authority in PURA or antitrust law to impose such a burden of proof and that the unique circumstances associated with the transition period must be addressed from a more pragmatic view.

The commission declines to adopt TIE's suggestion based upon issues of authority as noted by TXU. The commission concludes that an integrated utility is prohibited from engaging in anti-competitive activity and is subject to the remedies and enforcement provisions of §25.272(i), which include penalties authorized by PURA.

Reliant, TNMP, EGSI, and SPS expressed concern that the transition period requires more flexibility than allowed under the proposed rules. Reliant commented that internal codes of conduct must work within the confines of that utility's evolving organization. TNMP commented that there are certain communication and information transfers necessary among areas of its business that are not yet functionally separated and are necessary to provide bundled electric service to its customers through January 1, 2002. TNMP argued that an orderly transition must not be rushed and that the separation plans should specify how the utility intends to meet the goal

of the rule on an interim basis while continuing to meet its obligations to provide bundled service to its customers. EGSI argued that internal codes of conduct should be proposed in the unbundling plan and then implemented consistent with the commission's order regarding that filing. EGSI also commented that the code may impair the ability of PUHCA holding companies to do business. OPC replied that EGSI does not need a special exception in the rule, pointing out that the utility can petition the commission for a waiver of any conflicting provisions. SPS also argued that the business separation plan filing is the appropriate forum to detail compliance schedules for the code of conduct, because many decisions will be made by the commission and utilities between now and the unbundling date. SPS suggested a gradual phase-in of compliance with the code of conduct that includes full compliance between June and September 2001. In reply comments, PG&E objected to the comments of utilities seeking greater flexibility in the effective date of the code of conduct. Enron and NewEnergy objected to SPS' phased-in approach, and Enron disagreed with the delayed schedule proposed by TNMP.

The commission declines to modify the rule as proposed by Reliant, TNMP, EGSI, and SPS. The commission agrees with CSW that the rule has adequate flexibility and that utilities can update the internal codes of conduct as more information becomes available. The provisions for internal codes of conduct attempt to balance competing interests of the parties. Internal codes of conduct provide commission oversight and competitive safeguards, while at the same time allowing utilities some flexibility for unique circumstances during the transition period. The commission agrees with OPC that PUHCA holding companies do not need a special exception in

the rule because a utility can petition the commission for a waiver of conflicting provisions or for other good cause.

TXU argued that the legislative intent was that the code of conduct provisions should not apply prior to January 1, 2002. In support of this argument, TXU commented that the code of conduct in SB 7 governs transactions between a transmission and distribution utility and its competitive affiliates, and a transmission and distribution utility will not exist until after unbundling and the applicable power region is qualified pursuant to PURA §39.152. In reply comments, NewEnergy disagreed with TXU's interpretation that it was not the intent of the Legislature that the statutory code of conduct apply prior to January 1, 2002, based upon PURA §39.157(d) which dictates that the code of conduct apply before the introduction of competition. In reply comments, Shell Energy objected to TXU's assertion that the affiliate rule must precisely track PURA §39.157(d). TIE argued in its reply comments that the adoption of TXU's proposed language would make it almost impossible to hold a utility responsible for its improper actions during the transition period because the language masks the standard that should be applied in evaluating improper behavior. TXU also suggested adding language in the policy statement in §25.272(a) of this section, to ensure that the rules do not create obstacles to unbundling and other aspects of the transition to retail competition.

The commission disagrees with TXU's contention that it was not the legislative intent for the code of conduct to apply before competition, because, as noted by NewEnergy, PURA §39.157(d) clearly dictates that the code of conduct apply both during the transition to

competition and after the introduction of competition. The commission further declines to add TXU's proposed language for the policy statement in §25.272(a). The commission finds that the purpose of these rules is to establish competitive safeguards, and exceptions to the rule are allowed with commission approval.

Enron commented on §25.272(i)(2) that a utility should be required to file an update to its compliance plan when it creates a new affiliate and to explain how the affiliate will comply with the code of conduct. Enron argued that if the update is filed annually, the commission would not be able to effectively monitor the utility's interaction with its newly created affiliate.

The commission agrees with Enron's suggestion and adds the requirement that a utility shall immediately post a conspicuous notice on its Internet site or other public electronic bulletin board of newly created affiliates for at least 30 days. In addition, the utility shall file related updates to its compliance plan on a timely basis and ensure that its annual "Report of Affiliate Activities" reflects all approved changes to its compliance plans.

Consumers Union and Shell Energy commented that the compliance audits required in §25.272(i)(3) should be conducted more frequently then once every three years. Consumers Union recommended annual audits by independent auditors. Consumers Union further commented that relying on complaints is not the best practice because consumers and competitors may not know when the code of conduct is violated. Shell Energy noted that the commission has recognized that a three-year period for fuel reconciliation alone, for some

utilities, constitutes far too much information to review effectively. In addition, Shell Energy commented that a utility's obtaining a favorable review in a compliance audit should not prevent the commission from disallowing an affiliate expense in a subsequent transmission and distribution rate proceeding.

TXU, EGSI, and CSW objected in reply comments to audits more frequently than once every three years, arguing that the commission reserved authority to require independent audits at any time. TXU stated that the existing requirement is more than sufficient. EGSI replied that audits can be extremely expensive, time consuming, and disruptive, so the commission must reasonably balance the benefits and burdens of audits, as well as impose some reasonable limitation on their scope. EGSI noted that the three-year requirement is a reasonable balance. CSW alternatively suggested that annual audits during the first three years that the rule is in effect would be adequate.

Reliant, EGSI, and TNMP argued that audit expenses are required to meet regulatory requirements; therefore, the expenses are reasonable and necessary and should be included in the utility's cost of service and charged to utility ratepayers. Shell Energy replied that utilities should pay for the audits because they chose to organize in complex affiliate structures. OPC replied that the rule language does not necessarily preclude companies from recovering audit expenses from ratepayers, but rather, if ratepayers are to pay for any audit costs the decision must be made pursuant to commission review during a rate case. CSW proposed a compromise position in

which half of the reasonable audit costs would be assigned to the regulated enterprises and borne by ratepayers.

The commission declines to modify this provision. Compliance audits within the first year after the integrated utility has unbundled and then once every three years thereafter is a compromise position. This requirement does not prevent the commission from requiring audits more frequently if deemed necessary. To address the concerns of Reliant, EGSI, and TNMP, the commission agrees with OPC and finds that utilities are not prohibited from attempting to recover reasonable audit expenses through rate cases.

EGSI commented that a utility should be able to use a comparable audit completed for another jurisdiction if it occurred within one year preceding the time an audit is required. OPC replied that the applicability and usefulness of another jurisdiction's audit to Texas regulators and Texas regulations is questionable and that time and expenses would be incurred during extensive commission review before it could be decided whether the audit was truly comparable.

The commission declines to incorporate EGSI's proposed language, but determines that if a utility has a comparable audit completed for another jurisdiction, it is not prevented from using that audit as a starting point for the audit required by this provision. However, the burden shall remain on the utility to meet the Texas jurisdictional requirements.

Shell Energy commented that §25.272(i)(4), regarding informal complaint procedures, should be modified to ensure that informal complaint procedures are not a prerequisite to filing a complaint with the commission. Shell Energy argued that such a prerequisite may delay a commission investigation, and that a utility may not informally resolve significant violations anyway. In reply comments, Nucor supported Shell Energy's argument that utilities may be able to use the complaint procedure to delay the filing of meritorious claims with the commission and establish procedures that may preclude later pursuit of more tangible remedies. However, Nucor suggested striking this provision entirely, contending that once a procedure is required, it ceases being informal.

In reply comments, TXU objected to Shell Energy's argument. TXU stated that the informal complaint process would be undermined if filing an informal complaint were not a prerequisite to filing a formal complaint with the commission. TXU replied that the commission has authority pursuant to PURA §39.157(a) to monitor for market-power abuses, and it need not wait until a formal complaint is filed to conduct an investigation.

The commission agrees with Shell Energy that attempting informal resolution should not be a prerequisite for filing a complaint with the commission, and clarifies the rule language accordingly. The commission disagrees with TXU's assertion that this change will undermine the informal complaint process, but agrees with TXU that the commission need not wait until a formal complaint is filed to conduct an investigation. The commission rejects Nucor's suggestion that a procedure is not informal simply because it is required.

EGSI, TXU, and TIE argued that the phrase in §25.272(i)(5) regarding violations that are "reasonably likely to materially impair" is difficult to define and should be deleted. EGSI objected to the phrase because it offers no readily recognizable standard to which a utility is expected to comply. TXU and EGSI further argued in reply comments that the phrase goes beyond statutory authority. Shell Energy replied that the phrase is necessary because if it is absent, utilities and their competitive affiliates may argue that the commission has no authority to seek an injunction or otherwise restrain a utility from actions that have not impaired competition, but almost certainly will in the future. CSW commented that the text of §25.272(i)(5) should be deleted as unnecessary and confusing because violation of the rules' provisions should be considered in deciding if an enforcement action is necessary, not some extraneous definition of "abuse of market power."

The commission declines to remove the phrase "or is reasonably likely to materially impair" because it is necessary for the commission to be proactive in instances when it is reasonably certain than an abuse of market power will occur. PURA §39.157(d) directs the commission to adopt rules to *avoid potential* market-power abuses and cross-subsidization between regulated and competitive activities both during the transition to and after the introduction of competition. The commission further declines to modify this section as suggested by CSW because the commission's authority granted in PURA §39.157 is to address market power, so the stated relationship between market-power abuses and penalties is appropriate.

TXU commented that the code of conduct expands the circumstances in which market-power abuse penalties may be imposed by the commission and argues for modification of this section to reflect only what is authorized in SB 7. In their reply comments, PG&E and Shell Energy objected to this argument, noting that PURA authorizes the commission to adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction and as necessary to address conduct by an electric utility that tends to restrict or impair competition.

Enron and TIE commented that, in light of the commission's authority to revoke a certificate, the rule should not be limited to severe penalties, but should also include penalties to terminate the transaction or restrict the value of the transaction. TIE concluded that the commission has the requisite authority to adopt enforcement provisions and impose penalties that fit the violation. In reply comments, Nucor agreed with additional penalties and suggested additional enforcement options, including referral to the Texas Attorney General or the Antitrust Division of the Untied States Department of Justice. Enron also requested additional language that would trigger a one-year prohibition on transactions between a utility and competitive affiliate if the commission finds, in two separate orders, that a utility violated this chapter more than twice in a 12-month period. In reply comments, TXU disagreed, noting its original comments that the commission has no implied power to impose a penalty not authorized by PURA.

The commission concludes that the penalties that may be imposed for violation of the rule should be those explicitly authorized by PURA, and therefore declines to modify this provision.

PG&E, Nucor, and TIE objected to the sentence in §25.272(i)(5) that excepted from penalties those transactions that may result in an abuse of market power because the transactions are allowed under the code of conduct. PG&E and Nucor argued that utilities should never be permitted to interact with competitive affiliates in ways that constitute an abuse of market power, regardless of whether the transaction is allowed under the code of conduct. TIE replied that transactions between a utility and its competitive affiliate that involve potential market-power abuses or cross-subsidization, even if otherwise addressed in the rules, should nonetheless be deemed a violation of the rules. In reply comments, EGSI argued that an entity that follows the established rules should not be subject to penalty.

The commission concludes that PURA §39.157(a) describes the commission's authority to address market power abuses, defines "market power abuses" (for the purpose of PURA §39.157), and sets out possible commission-ordered mitigation measures. Deletion of the first sentence in §25.272(i)(5) will reduce confusion by leaving market power abuses and their remedies to be addressed by PURA §39.157(a). In any event, compliance with the code of conduct does not affect a claim of market power abuse under PURA §39.157(a).

TIE commented that §25.272(i)(5) should reflect the broader authority granted to the commission by SB 7, or the commission should adopt another rule reflecting this broader authority. In its reply comments, TIE argued that the commission should monitor market power and impose sanctions for market-power abuses and other violations set forth in PURA §39.157(a). TIE argued that PURA §39.157(a) addresses more than market-power abuses, noting that the

commission can take action upon finding either "market-power abuse or *other violations* of this section," thus allowing the commission to also address predatory pricing, withholding of production, precluding entry, or collusion (emphasis added by TIE). TIE contended that the Legislature directed the commission to promulgate a code of conduct to govern utilities' transactions with their competitive affiliates "to avoid *potential* market-power abuses and cross-subsidization between regulated and competitive activities" (emphasis added by TIE).

The commission declines to modify the language as suggested by TIE, because under this section an abuse of market power is defined as a violation or set of violations that materially impairs, or is reasonably likely to materially impair, the ability of a person to compete in a competitive market. This definition addresses TIE's concerns of predatory pricing, withholding of production, precluding entry, or collusion.

EGSI commented that the language in §25.272(i)(6) regarding no immunity from antitrust enforcement is improper because it appears to take away the antitrust immunity defense, or the "state action doctrine," which immunizes conduct that is compelled or approved by the state. EGSI requested that the section be deleted or modified to reflect that the language is not intended to affect the application of state and federal antitrust laws.

The commission declines to modify this section. The commission does not intend to, nor does it conclude that this language does, remove the "state action doctrine" as an antitrust immunity

defense, but rather holds that sanctions by the commission will not affect or preempt antitrust liability or remedies that may be sought in federal or state court.

§25.273

PG&E stated that proposed §25.273 requires the utility to make available to interested parties all requests for competitive bidding, which action ultimately would lead to greater competition. However, PG&E stated that, to achieve this result, the draft rule should be amended to provide for broad notification of the bidding process. To this end, PG&E recommended that §25.273(d)(3) be amended by adding the phrase "by conspicuously posting the request on its Internet site or other public electronic bulletin board."

Consumers Union commented on this section by stressing the importance of the rule's provisions. However, Consumers Union did not make any recommendations for changes to the draft rule. In its comments, Consumers Union pointed out the importance of protecting ratepayers against cross-subsidy and anti-competitive practices through the use of a fair and open bidding process.

The commission agrees with PG&E that requiring broad notification for requests for proposals is appropriate. Notification through posting to the Internet is already required in §25.273(d)(1)(C), but we clarify that the request for proposals should be made available electronically by adding such language to §25.273(d)(3).

EGSI stated that the commission should recognize that some information in filed contracts will be confidential and must be treated as such. EGSI recommended the addition of a lengthy paragraph to §25.273(e) detailing how confidential materials will be identified and treated.

The commission declines to adopt EGSI's suggested language. If a utility wishes to assert that some portion of a contract is confidential, the commission has procedures in place to do so. However, utilities should not presume that all contracts will be designated as confidential as a matter of course.

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

This amendment and these new sections are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated (Vernon 1999) (PURA), and Act of May 27, 1999, 76th Legislature, Regular Session, Senate Bill 7, §39 (to be codified at Texas Utilities Code Annotated §§39.251-39.265) (SB 7) §§11.002(a), 14.001, 14.002, 14.003, 14.151, 14.154, 15.023, 31.001(c), 32.101(c), 35.003(b), 35.034, 35.035, 36.003, 36.058, 38.021, 38.022, 39.001, 39.051, 39.101(2), 39.157, 39.356, 39.357, 51.001, 52.001, and 55.006. Section 11.002(a) requires establishment of a comprehensive and adequate regulatory system by the commission to ensure just and reasonable rates, operations, and services. Section 14.001 grants the commission the general power to regulate and supervise the business of each utility within its jurisdiction.

Section 14.002 provides the commission the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. Section 14.003 grants the commission the authority to require submission of information by the utility regarding its affiliate activities. Section 14.151 grants the commission authority to prescribe the manner of accounting for all business transacted by the utility. Section 14.154 grants the commission limited authority over the utility's affiliates, with respect to their transactions with the utility. Section 15.023 grants the commission authority to impose an administrative penalty against a regulated entity for violation of a rule adopted under this title. Section 31.001(c) requires that the commission formulate and apply rules, policies, and principles to protect the public interest in a more competitive electric market place. Section 32.101(c) requires that customer proprietary information be treated as highly sensitive trade secrets. Section 35.003(b) prohibits electric utilities from granting undue preference to a person in connection with the purchase or sale of energy or other services. Section 35.034 grants the commission authority to approve transfers of certain assets between utilities and affiliates. Section 35.035 governs the valuation of assets transferred by a utility to or from an affiliate. Section 36.003 requires the commission to ensure that a utility's rates are just and reasonable, sufficient, equitable, and consistent in application to each class of consumer, and not unreasonably preferential, prejudicial, or discriminatory. Section 36.058 sets forth the circumstances under which the commission may allow payments by a utility to an affiliate. Section 38.021 requires that utilities not grant an unreasonable preference to or impose an unreasonable disadvantage on different persons in the same classification. Section 38.022 requires that utilities not discriminate against competitors or engage in practices that restrict or impair competition in the electric market. Section 39.001 states that it is in the public interest to

protect the competitive process in a manner that ensures the confidentiality of competitively sensitive information during the transition to a competitive market and after the commencement of customer choice. Section 39.051 requires that each electric utility unbundle personnel, information flow, functions, and operations, consistent with the code of conduct. Section 39.101(2) grants the commission authority to ensure that retail customer protections are established to entitle a customer to privacy of customer consumption and credit information. Section 39.157 grants the commission authority to take actions to address market power and adopt rules and enforcement procedures to govern transactions or activities between utilities and their affiliates. Section 39.356 grants the commission authority to suspend, revoke, or amend a retail electric provider's certificate, a power generation company's registration, or an aggregator's registration for significant violations of the rules adopted under this title. Section 39.357 grants the commission authority to impose an administrative penalty as necessary to eliminate or to remedy market-power abuses.

Cross Reference to Statutes: Public Utility Regulatory Act §§11.002(a), 14.001, 14.002, 14.003, 14.151, 14.154, 15.023, 31.001(c), 32.101(c), 35.003(b), 35.034, 35.035, 36.003, 36.058, 38.021, 38.022, 39.001, 39.051, 39.101(2), 30.157, 39.356, and 39.357.

§25.84. Reporting of Affiliate Transactions for Electric Utilities.

(a) **Purpose.** This section establishes reporting requirements for transactions between utilities and their affiliates.

(b) **Application.** This section applies to:

(1) electric utilities operating in the State of Texas as defined in the Public Utility Regulatory Act (PURA) §31.002(6), and transactions or activities between electric utilities and their affiliates, as defined in PURA §11.003(2); and

(2) transmission and distribution utilities operating in a qualifying power region in the State of Texas as defined in PURA §31.002(19) upon commission certification of a qualifying power region pursuant to PURA §39.152, and transactions or activities between transmission and distribution utilities and their affiliates, as defined in PURA §11.003(2).

(c) **Definitions.** Any terms defined in §25.272 of this title (relating to Code of Conduct for Electric Utilities and Their Affiliates) have the same meanings herein.

(d) **Annual report of affiliate activities.** A "Report of Affiliate Activities" shall be filed annually with the commission. Using forms approved by the commission, a utility shall report activities among itself and its affiliates in accordance with the requirements in this

section. The report shall be filed by June 1, and shall encompass the period from January 1 through December 31 of the preceding year.

(e) **Copies of contracts or agreements.** A utility shall reduce to writing and file with the commission copies of any contracts or agreements it has with its affiliates. The requirements of this subsection are not satisfied by the filing of an earnings report. All contracts or agreements shall be filed by June 1 of each year as attachments to the Report of Affiliate Activities required in subsection (d) of this section. In subsequent years, if no significant changes have been made to the contract or agreement, an amendment sheet may be filed in lieu of refiling the entire contract or agreement.

(f) **Tracking migration of employees.** A utility shall track and document the movement between the utility and its competitive affiliates of all employees engaged in transmission or distribution system operations, including persons employed by a service company affiliated with the utility who are engaged in transmission or distribution system operations on a day-to-day basis or have knowledge of transmission or distribution system operations. Employee migration information shall be included in the utility's Report of Affiliate Activities. The tracking information shall include an identification code for the migrating employee, the respective titles held while employed at each entity, and the effective dates of the migration.

(g) **Annual reporting of informal complaint resolution.** A utility shall report to the commission information regarding the nature and status of informal complaints handled in accordance with the utility's procedures developed pursuant to §25.272(i)(4) of this title (relating to Code of Conduct for Electric Utilities and Their Affiliates). The information reported shall include the name of the complainant and a summary report of the complaint, including all relevant dates, companies involved, employees involved, the specific claim, and any actions taken to address the complaint. Such information on all informal complaints that were initiated or remained unresolved during the reporting period shall be included in the utility's Report of Affiliate Activities.

(h) **Reporting of deviations from the code of conduct.** A utility shall report information regarding the instances in which deviations from the code of conduct were necessary to ensure public safety and system reliability pursuant to §25.272(d)(4) of this title. The information reported shall include the nature of the circumstances requiring the deviation, the action taken by the utility and the parties involved, and the date of the deviation. Within 30 days of each deviation, the utility shall report this information to the commission and shall conspicuously post the information on its Internet site or a public electronic bulletin board for 30 consecutive calendar days. Such information shall be summarized in the utility's Report of Affiliate Activities.

(i) **Annual update of compliance plans.** Initial plans for compliance with §25.272 of this title (relating to Code of Conduct for Electric Utilities and Their Affiliates) shall be

supplied as a part of the utility's unbundling plan filed pursuant to PURA §39.051. The utility shall post a conspicuous notice of newly created affiliates and file any related updates to the utility's compliance plan on a timely basis pursuant to §25.272(i)(2) of this title. Additionally, the utility shall ensure that its annual Report of Affiliate Activities reflects all approved changes to its compliance plans, including those changes that result from the creation of new affiliates.

§25.272. Code of Conduct for Electric Utilities and Their Affiliates.

(a) **Purpose.** The provisions of this section establish safeguards to govern the interaction between utilities and their affiliates, both during the transition to and after the introduction of competition, to avoid potential market-power abuses and cross-subsidization between regulated and unregulated activities.

(b) **Application.**

(1) **General application.** This section applies to:

(A) electric utilities operating in the State of Texas as defined in the Public Utility Regulatory Act (PURA) §31.002(6), and transactions or activities between electric utilities and their affiliates, as defined in PURA §11.003(2); and

(B) transmission and distribution utilities operating in a qualifying power region in the State of Texas as defined in PURA §31.002(19) upon commission certification of a qualifying power region pursuant to PURA §39.152, and transactions or activities between transmission and distribution utilities and their affiliates, as defined in PURA §11.003(2).

(2) **No circumvention of the code of conduct**. An electric utility, transmission and distribution utility, or competitive affiliate shall not circumvent the provisions or the intent of PURA §39.157 or any rules implementing that section by using any affiliate to provide information, services, products, or subsidies between a competitive affiliate and an electric utility or a transmission and distribution utility.

(3) **Notice of conflict and/or petition for waiver.** Nothing in this section is intended to affect or modify the obligation or duties relating to any rules or standards of conduct that may apply to a utility or the utility's affiliates under orders or regulations of the Federal Energy Regulatory Commission (FERC) or the Securities and Exchange Commission (SEC). A utility shall file with the commission a notice of any provision in this section that conflict with FERC or SEC orders or regulations. A utility that is subject to statutes or regulations in any state that conflict with a provision of this section may petition the commission for a waiver of the conflicting provision on a showing of good cause.

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

(1) **Arm's length transaction** — The standard of conduct under which unrelated parties, each acting in its own best interest, would carry out a particular transaction. Applied to related parties, a transaction is at arm's length if the transaction could have been made on the same terms to a disinterested third party in a bargained transaction.

(2) **Competitive affiliate** — An affiliate of a utility that provides services or sells products in a competitive energy-related market in this state, including telecommunications services, to the extent those services are energy-related.

(3) **Confidential information** — Any information not intended for public disclosure and considered to be confidential or proprietary by persons privy to such information. Confidential information includes but is not limited to information relating to the interconnection of customers to a utility's transmission or distribution systems, proprietary customer information, trade secrets, competitive information relating to internal manufacturing processes, and information about a utility's transmission or distribution system, operations, or plans for expansion.

(4) **Corporate support services** — Services shared by a utility, its parent holding company, or a separate affiliate created to perform corporate support services, with its affiliates of joint corporate oversight, governance, support systems, and personnel. Examples of services that may be shared, to the extent the services comply with the requirements prescribed by PURA §39.157(d) and (g) and rules

implementing those requirements, include human resources, procurement, information technology, regulatory services, administrative services, real estate services, legal services, accounting, environmental services, research and development unrelated to marketing activity and/or business development for the competitive affiliate regarding its services and products, internal audit, community relations, corporate communications, financial services, financial planning and management support, corporate services, corporate secretary, lobbying, and corporate planning. Examples of services that may not be shared include engineering, purchasing of electric transmission facilities and service, transmission and distribution system operations, and marketing, unless such services are provided by a utility, or a separate affiliate created to perform such services, exclusively to affiliated regulated utilities and only for provision of regulated utility services.

(5) **Proprietary customer information** — Any information compiled by an electric utility on a customer in the normal course of providing electric service that makes possible the identification of any individual customer by matching such information with the customer's name, address, account number, type or classification of service, historical electricity usage, expected patterns of use, types of facilities used in providing service, individual contract terms and conditions, price, current charges, billing records, or any other information that the customer has expressly requested not be disclosed. Information that is redacted or organized in such a way as to make it impossible to identify the

customer to whom the information relates does not constitute proprietary customer information.

(6) **Similarly situated** — The standard for determining whether a non-affiliate is entitled to the same benefit a utility offers, or grants upon request, to its competitive affiliate for any product or service. For purposes of this section, all non-affiliates serving or proposing to serve the same market as a utility's competitive affiliate are similarly situated to the utility's competitive affiliate.

(7) **Transaction** — Any interaction between a utility and its affiliate in which a service, good, asset, product, property, right, or other item is transferred or received by either a utility or its affiliate.

(8) **Utility** — An electric utility as defined in PURA §31.002(6) or a transmission and distribution utility as defined in PURA §31.002(19). For purposes of this section, a utility does not include a river authority operating a steam generating plant on or before January 1, 1999, or a corporation authorized by Chapter 245, Acts of the 67th Legislature, Regular Session, 1981 (Article 717p, Vernon's Texas Civil Statutes). In addition, with respect to a holding company exempt under the Public Utility Holding Company Act (PUHCA) §3(a)(2), the term "utility," as used in this section, means the division or business unit through which the holding company conducts utility operations and not the holding company as a legal entity.

(d) **Separation of a utility from its affiliates.**

(1) **Separate and independent entities.** A utility shall be a separate, independent entity from any competitive affiliate.

(2) **Sharing of employees, facilities, or other resources.** Except as otherwise allowed in paragraphs (3), (4), (5), or (7) of this subsection, a utility shall not share employees, facilities, or other resources with its competitive affiliates unless the utility can prove to the commission prior to such sharing that the sharing will not compromise the public interest. Such sharing may be allowed if the utility implements adequate safeguards precluding employees of a competitive affiliate from gaining access to information in a manner that would allow or provide a means to transfer confidential information from a utility to an affiliate, create an opportunity for preferential treatment or unfair competitive advantage, lead to customer confusion, or create significant opportunities for cross-subsidization of affiliates.

(3) **Sharing of officers and directors, property, equipment, computer systems, information systems, and corporate support services.** A utility and a competitive affiliate may share common officers and directors, property, equipment, computer systems, information systems, and corporate support services, if the utility implements safeguards that the commission determines are adequate to preclude employees of a competitive affiliate from gaining access to information in a manner that would allow or provide a means to transfer confidential information from a utility to an affiliate, create an opportunity for

preferential treatment or unfair competitive advantage, lead to customer confusion, or create significant opportunities for cross-subsidization of affiliates.

(4) **Employee transfers and temporary assignments.** A utility shall not assign, for less than one year, utility employees engaged in transmission or distribution system operations to a competitive affiliate unless the employee does not have knowledge of confidential information. Utility employees engaged in transmission or distribution system operations, including persons employed by a service company affiliated with the utility who are engaged in transmission system operations on a day-to-day basis or have knowledge of transmission or distribution system operations and are transferred to a competitive affiliate, shall not remove or otherwise provide or use confidential property or information gained from the utility or affiliated service company in a discriminatory or exclusive fashion, to the benefit of the competitive affiliate or to the detriment of non-affiliated electric suppliers. Movement of an employee engaged in transmission or distribution system operations, including a person employed by a service company affiliated with the utility who is engaged in transmission or distribution system operations on a day-to-day basis or has knowledge of transmission or distribution system operations from a utility to a competitive affiliate or vice versa, may be accomplished through either the employee's termination of employment with one company and acceptance of employment with the other, or a transfer to another company, as long as the transfer of an employee from the utility to an affiliate results in the utility bearing no ongoing

costs associated with that employee. Transferring employees shall sign a statement indicating that they are aware of and understand the restrictions and penalties set forth in this section. The utility also shall post a conspicuous notice of such a transfer on its Internet site or other public electronic bulletin board within 24 hours and for at least 30 consecutive calendar days. The exception to this provision is that employees may be temporarily assigned to an affiliate or non-affiliated utility to assist in restoring power in the event of a major service interruption or assist in resolving emergency situations affecting system reliability. Consistent with §25.84(h) of this title, however, within 30 days of such a deviation from the code of conduct, the utility shall report this information to the commission and shall conspicuously post the information on its Internet site or other public electronic bulletin board for 30 consecutive calendar days.

(5) **Sharing of office space.** A utility's office space shall be physically separate from that of its competitive affiliates, where physical separation is accomplished by having office space in separate buildings or, if within the same building, by a method such as having offices on separate floors or with separate access, unless otherwise approved by the commission.

(6) **Separate books and records.** A utility and its affiliates shall keep separate books of accounts and records, and the commission may review records relating to a transaction between a utility and an affiliate.

(A) In accordance with generally accepted accounting principles or state and federal guidelines, as appropriate, a utility shall record all transactions with its affiliates, whether they involve direct or indirect expenses.

(B) A utility shall prepare financial statements that are not consolidated with those of its affiliates.

(C) A utility and its affiliates shall maintain sufficient records to allow for an audit of the transactions between the utility and its affiliates. At any time, the commission may, at its discretion, require a utility to initiate, at the utility's expense, an audit of transactions between the utility and its affiliates performed by an independent third party.

(7) **Limited credit support by a utility.** A utility may share credit, investment, or financing arrangements with its competitive affiliates if it complies with subparagraphs (A) and (B) of this paragraph.

(A) The utility shall implement adequate safeguards precluding employees of a competitive affiliate from gaining access to information in a manner that would allow or provide a means to transfer confidential information from a utility to an affiliate, create an opportunity for preferential treatment or unfair competitive advantage, lead to customer confusion, or create significant opportunities for cross-subsidization of affiliates.

(B) The utility shall not allow an affiliate to obtain credit under any arrangement that would include a specific pledge of any assets in the rate base of the utility or a pledge of cash reasonably necessary for utility

operations. This subsection does not affect a utility's obligations under other law or regulations, such as the obligations of a public utility holding company under §25.271(c)(2) of this title (relating to Foreign Utility Company Ownership by Exempt Holding Companies).

(e) **Transactions between a utility and its affiliates.**

(1) **Transactions with all affiliates.** A utility shall not subsidize the business activities of any affiliate with revenues from a regulated service. In accordance with PURA and the commission's rules, a utility and its affiliates shall fully allocate costs for any shared services, including corporate support services, offices, employees, property, equipment, computer systems, information systems, and any other shared assets, services, or products.

(A) **Sale of products or services by a utility.** Unless otherwise approved by the commission and except for corporate support services, any sale of a product or service by a utility shall be governed by a tariff approved by the commission. Products and services shall be made available to any third party entity on the same terms and conditions as the utility makes those products and services available to its affiliates.

(B) **Purchase of products, services, or assets by a utility from its affiliate.** Products, services, and assets shall be priced at levels that are fair and reasonable to the customers of the utility and that reflect the market value of the product, service, or asset.

(C) **Transfers of assets.** Except for asset transfers implementing unbundling pursuant to PURA §39.051, asset valuation in accordance with PURA §39.262, and transfers of property pursuant to a financing order issued under PURA, Chapter 39, Subchapter G, assets transferred from a utility to its affiliates shall be priced at levels that are fair and reasonable to the customers of the utility and that reflect the market value of the assets or the utility's fully allocated cost to provide those assets.

(D) **Transfer of assets implementing restructuring legislation.** The transfer from a utility to an affiliate of assets implementing unbundling pursuant to PURA §39.051, asset valuation in accordance with PURA §39.262, and transfers of property pursuant to a financing order issued under PURA, Chapter 39, Subchapter G will be reviewed by the commission pursuant to the applicable provisions of PURA, and any rules implementing those provisions.

(2) **Transactions with competitive affiliates.** Unless otherwise allowed in this subsection, transactions between a utility and its competitive affiliates shall be at arm's length. A utility shall maintain a contemporaneous written record of all transactions with its competitive affiliates, except those involving corporate support services and those transactions governed by tariffs. Such records, which shall include the date of the transaction, name of affiliate involved, name of a utility employee knowledgeable about the transaction, and a description of the transaction, shall be maintained by the utility for three years. In addition to the

requirements specified in paragraph (1) of this subsection, the following provisions apply to transactions between utilities and their competitive affiliates.

(A) **Provision of corporate support services**. A utility may engage in transactions directly related to the provision of corporate support services with its competitive affiliates. Such provision of corporate support services shall not allow or provide a means for the transfer of confidential information from the utility to the competitive affiliate, create the opportunity for preferential treatment or unfair competitive advantage, lead to customer confusion, or create significant opportunities for cross-subsidization of the competitive affiliate.

(B) **Purchase of products or services by a utility from its competitive affiliate.** Except for corporate support services, a utility may not enter into a transaction to purchase a product or service from a competitive affiliate that has a per unit value of $75,000 or more, or a total value of $1 million or more, unless the transaction is the result of a fair, competitive bidding process formalized in a contract subject to the provisions of §25.273 of this title (relating to Contracts Between Electric Utilities and Their Competitive Affiliates).

(C) **Transfers of assets.** Except for asset transfers facilitating unbundling pursuant to PURA §39.051, asset valuation in accordance with PURA §39.262, and transfers of property pursuant to a financing order issued under PURA, Chapter 39, Subchapter G, any transfer from a utility to its

competitive affiliates of assets with a per unit value of $75,000 or more, or a total value of $1 million or more, must be the result of a fair, competitive bidding process formalized in a contract subject to the provisions of §25.273 of this title.

(f) **Safeguards relating to provision of products and services.**

(1) **Products and services available on a non-discriminatory basis**. If a utility makes a product or service, other than corporate support services, available to a competitive affiliate, it shall make the same product or service available, contemporaneously and in the same manner, to all similarly situated entities, and it shall apply its tariffs, prices, terms, conditions, and discounts for those products and services in the same manner to all similarly situated entities. A utility shall process all requests for a product or service from competitive affiliates or similarly situated non-affiliated entities on a non-discriminatory basis. If a utility's tariff allows for discretion in its application, the utility shall apply that provision in the same manner to its competitive affiliates and similarly situated non-affiliates, as well as to their respective customers. If a utility's tariff allows no discretion in its application, the utility shall strictly apply the tariff. A utility shall not use customer-specific contracts to circumvent these requirements, nor create a product or service arrangement with its competitive affiliate that is so unique that no competitor could be similarly situated to utilize the product or service.

(2) **Discounts, rebates, fee waivers, or alternative tariff terms and conditions**. If a utility offers its competitive affiliate or grants a request from its competitive affiliate for a discount, rebate, fee waiver, or alternative tariff terms and conditions for any product or service, it must make the same benefit contemporaneously available, on a non-discriminatory basis, to all similarly situated non-affiliates. The utility shall post a conspicuous notice on its Internet site or public electronic bulletin board for at least 30 consecutive calendar days providing the following information: the name of the competitive affiliate involved in the transaction; the rate charged; the normal rate or tariff condition; the period for which the benefit applies; the quantities and the delivery points involved in the transaction (if any); any conditions or requirements applicable to the benefit; documentation of any cost differential underlying the benefit; and the procedures by which non-affiliates may obtain the same benefit. The utility shall maintain records of such information for a minimum of three years, and shall make such records available for third party review within 72 hours of a written request, or at a time mutually agreeable to the utility and the third party. A utility shall not create any arrangement with its competitive affiliate that is so unique that no competitor could be similarly situated to benefit from the discount, rebate, fee waiver, or alternative tariff terms and conditions.

(3) **Tying arrangements prohibited.** Unless otherwise allowed by the commission through a rule or tariff prior to a utility's unbundling pursuant to PURA §39.051, a utility shall not condition the provision of any product, service, pricing benefit, or

alternative terms or conditions upon the purchase of any other good or service from the utility or its competitive affiliate.

(g) **Information safeguards.**

(1) **Proprietary customer information.** A utility shall provide a customer with the customer's proprietary customer information, upon request by the customer. Unless a utility obtains prior affirmative written consent or other verifiable authorization from the customer as determined by the commission, or unless otherwise permitted under this subsection, it shall not release any proprietary customer information to a competitive affiliate or any other entity, other than the customer, an independent organization as defined by PURA §39.151, or a provider of corporate support services for the sole purpose of providing corporate support services in accordance with subsection (e)(2)(A) of this section. The utility shall maintain records that include the date, time, and nature of information released when it releases customer proprietary information to another entity in accordance with this paragraph. The utility shall maintain records of such information for a minimum of three years, and shall make the records available for third party review within 72 hours of a written request, or at a time mutually agreeable to the utility and the third party. When the third party requesting review of the records is not the customer, commission, or Office of Public Utility Counsel, the records may be redacted in such a way as to protect the customer's identity. If proprietary customer information is released to an independent

organization or a provider of corporate support services, the independent organization or entity providing corporate support services is subject to the rules in this subsection with respect to releasing the information to other persons.

(A) **Exception for law, regulation, or legal process.** A utility may release proprietary customer information to another entity without customer authorization where authorized or requested to do so by the commission or where required to do so by law, regulation, or legal process.

(B) **Exception for release to governmental entity.** A utility may release proprietary customer information without customer authorization to a federal, state, or local governmental entity or in connection with a court or administrative proceeding involving the customer or the utility; provided, however, that the utility shall take all reasonable actions to protect the confidentiality of such information, including, but not limited to, providing such information under a confidentiality agreement or protective order, and shall also promptly notify the affected customer in writing that such information has been requested.

(C) **Exception to facilitate transition to customer choice.** In order to facilitate the transition to customer choice, a utility may release proprietary customer information to its affiliated retail electric provider or providers of last resort without authorization of those customers only during the period from September 1, 2001, through December 31, 2001, or during a different period prescribed by the commission.

(D) **Exception for release to providers of last resort.** On or after January 1, 2002, a utility may provide proprietary customer information to a provider of last resort without customer authorization for the purpose of serving customers who have been switched to the provider of last resort.

(2) **Nondiscriminatory availability of aggregate customer information.** A utility may aggregate non-proprietary customer information, including, but not limited to, information about a utility's energy purchases, sales, or operations or about a utility's energy-related goods or services. However, except in circumstances solely involving the provision of corporate support services in accordance with subsection (e)(2)(A) of this section, a utility shall aggregate non-proprietary customer information for a competitive affiliate only if the utility makes such aggregation service available to all non-affiliates under the same terms and conditions and at the same price as it is made available to any of its affiliates. In addition, no later than 24 hours prior to a utility's provision to its competitive affiliate of aggregate customer information, the utility shall post a conspicuous notice on its Internet site or other public electronic bulletin board for at least 30 consecutive calendar days, providing the following information: the name of the competitive affiliate to which the information will be provided, the rate charged for the information, a meaningful description of the information provided, and the procedures by which non-affiliates may obtain the same information under the same terms and conditions. The utility shall maintain records of such information for a minimum of three years, and shall make such records available for third

party review within 72 hours of a written request, or at a time mutually agreeable to the utility and the third party.

(3) **No preferential access to transmission and distribution information.** A utility shall not allow preferential access by its competitive affiliates to information about its transmission and distribution systems.

(4) **Other limitations on information disclosure.** Nothing in this rule is intended to alter the specific limitations on disclosure of confidential information in the Texas Utilities Code, the Texas Government Code, Chapter 552, or the commission's substantive and procedural rules.

(5) **Other information**. Except as otherwise allowed in this subsection, a utility shall not share information, except for information required to perform allowed corporate support services, with competitive affiliates unless the utility can prove to the commission that the sharing will not compromise the public interest prior to any such sharing. Information that is publicly available, or that is unrelated in any way to utility activities, may be shared.

(h) **Safeguards relating to joint marketing and advertising.**

(1) **Utility name or logo.** Before September 1, 2005, a utility shall not allow the use of its corporate name, trademark, brand, or logo by a competitive affiliate, on employee business cards or in any written or auditory advertisements of specific services to existing or potential residential or small commercial customers located within the utility's certificated service area, whether through radio or television,

Internet-based, or other electronic format accessible to the public, unless the competitive affiliate includes a disclaimer with its use of the utility's corporate name, trademark, brand, or logo. Such disclaimer of the corporate name, trademark, brand, or logo in the material distributed must be written in a bold and conspicuous manner or clearly audible, as appropriate for the communication medium, and shall state the following: "{Name of competitive affiliate} is not the same company as {name of utility} and is not regulated by the Public Utility Commission of Texas, and you do not have to buy {name of competitive affiliate}'s products to continue to receive quality regulated services from {name of utility}."

(2) **Joint marketing, advertising, and promotional activities.**

(A) A utility shall not:

(i) provide or acquire leads on behalf of its competitive affiliates;

(ii) solicit business or acquire information on behalf of its competitive affiliates;

(iii) give the appearance of speaking or acting on behalf of any of its competitive affiliates;

(iv) share market analysis reports or other types of proprietary or non-publicly available reports, including, but not limited to, market forecast, planning, or strategic reports, with its competitive affiliates;

(v) represent to customers or potential customers that it can offer competitive retail services bundled with its tariffed services; or

(vi) request authorization from its customers to pass on information exclusively to its competitive affiliate.

(B) A utility shall not engage in joint marketing, advertising, or promotional activities of its products or services with those of a competitive affiliate in a manner that favors the affiliate. Such joint marketing, advertising, or promotional activities include, but are not limited to, the following activities:

(i) acting or appearing to act on behalf of a competitive affiliate in any communications and contacts with any existing or potential customers;

(ii) joint sales calls;

(iii) joint proposals, either as requests for proposals or responses to requests for proposals;

(iv) joint promotional communications or correspondence, except that a utility may allow a competitive affiliate access to customer bill advertising inserts according to the terms of a commission-approved tariff so long as access to such inserts is made available on the same terms and conditions to non-affiliates offering similar services as the competitive affiliate that uses bill inserts;

(v) joint presentations at trade shows, conferences, or other marketing events within the State of Texas; and

(vi) providing links from a utility's Internet web site to a competitive affiliate's Internet web site.

(C) At a customer's unsolicited request, a utility may participate in meetings with a competitive affiliate to discuss technical or operational subjects regarding the utility's provision of transmission or distribution services to the customer, but only in the same manner and to the same extent the utility participates in such meetings with unaffiliated electric or energy services suppliers and their customers. The utility shall not listen to, view, or otherwise participate in any way in a sales discussion between a customer and a competitive affiliate or an unaffiliated electric or energy services supplier.

(3) **Requests for specific competitive affiliate information.** If a customer or potential customer makes an unsolicited request to a utility for information specifically about any of its competitive affiliates, the utility may refer the customer or potential customer to the competitive affiliate for more information. Under this paragraph, the only information that a utility may provide to the customer or potential customer is the competitive affiliate's address and telephone number. The utility shall not transfer the customer directly to the competitive affiliate's customer service office via telephone or provide any other electronic link whereby the customer could contact the competitive affiliate through the

utility. When providing the customer or potential customer information about the competitive affiliate, the utility shall not promote its competitive affiliate or its competitive affiliate's products or services, nor shall it offer the customer or potential customer any opinion regarding the service of the competitive affiliate or any other service provider.

(4) **Requests for general information about products or services offered by competitive affiliates and their competitors.** If a customer or potential customer requests general information from a utility about products or services provided by its competitive affiliate or its affiliate's competitors, the utility shall not promote its competitive affiliate or its affiliate's products or services, nor shall the utility offer the customer or potential customer any opinion regarding the service of the competitive affiliate or any other service provider. The utility may direct the customer or potential customer to a telephone directory or to the commission, or provide the customer with a recent list of suppliers developed and maintained by the commission, but the utility may not refer the customer or potential customer to the competitive affiliate except as provided for in paragraph (3) of this subsection.

(i) **Remedies and enforcement.**

(1) **Internal codes of conduct for the transition period.** During the transition to competition, including the period prior to and during utility unbundling pursuant to PURA §39.051, each utility shall implement an internal code of conduct

consistent with the spirit and intent of PURA §39.157(d) and with the provisions of this section. Such internal codes of conduct are subject to commission review and approval in the context of a utility's unbundling plan submitted pursuant to PURA §39.051(e); however, such internal codes of conduct shall take effect, on an interim basis, on January 10, 2000. The internal codes of conduct shall be developed in good faith by the utility based on the extent to which its affiliate relationships are known by January 10, 2000, and then updated as necessary to ensure compliance with PURA and commission rules. A utility exempt from PURA Chapter 39 pursuant to PURA §39.102(c) shall adopt an internal code of conduct that is consistent with its continued provision of bundled utility service during the period of its exemption.

(2) **Ensuring compliance for new affiliates.** A utility and a new affiliate are bound by the code of conduct immediately upon creation of the new affiliate. Upon the creation of a new affiliate, the utility shall immediately post a conspicuous notice of the new affiliate on its Internet site or other public electronic bulletin board for at least 30 consecutive calendar days. Within 30 days of creation of the new affiliate, the utility shall file an update to its internal code of conduct and compliance plan, including all changes due to the addition of the new affiliate. The utility shall ensure that any interaction with the new affiliate is in compliance with this section.

(3) **Compliance Audits**. No later than one year after the utility has unbundled pursuant to PURA §39.051, and, at a minimum, every third year thereafter, the

utility shall have an audit prepared by independent auditors that verifies that the utility is in compliance with this section. The utility shall file the results of each audit with the commission within one month of the audit's completion. The cost of the audits shall not be charged to utility ratepayers.

(4) **Informal complaint procedure.** A utility shall establish and file with the commission a complaint procedure for addressing alleged violations of this section. This procedure shall contain a mechanism whereby all complaints shall be placed in writing and shall be referred to a designated officer of the utility. All complaints shall contain the name of the complainant and a detailed factual report of the complaint, including all relevant dates, companies involved, employees involved, and the specific claim. The designated officer shall acknowledge receipt of the complaint in writing within five working days of receipt. The designated officer shall provide a written report communicating the results of the preliminary investigation to the complainant within thirty days after receipt of the complaint, including a description of any course of action that will be taken. In the event the utility and the complainant are unable to resolve the complaint, the complainant may file a formal complaint with the commission. The utility shall notify the complainant of his or her right to file a formal complaint with the commission, and shall provide the complainant with the commission's address and telephone number. The utility and the complainant shall make a good faith effort to resolve the complaint on an informal basis as promptly as practicable. The informal complaint process shall not be a prerequisite for filing a formal

complaint with the commission, and the commission may, at any time, institute a complaint against a utility on its own motion.

(5) **Enforcement by the commission.** A violation or series or set of violations of this section that materially impairs, or is reasonably likely to materially impair, the ability of a person to compete in a competitive market shall be deemed an abuse of market power.

(A) In addition to other methods that may be available, the commission may enforce the provisions of this rule by:

(i) seeking an injunction or civil penalties to eliminate or remedy the violation or series or set of violations;

(ii) suspending, revoking, or amending a certificate or registration as authorized by PURA §39.356; or

(iii) pursuing administrative penalties under PURA, Chapter 15, Subchapter B.

(B) The imposition of one penalty under this section does not preclude the imposition of other penalties as appropriate for the violation or series or set of violations.

(C) In assessing penalties, the commission shall consider the following factors:

(i) the utility's prior history of violations;

(ii) the utility's efforts to comply with the commission's rules, including the extent to which the utility has adequately and physically separated its office, communications, accounting

systems, information systems, lines of authority, and operations from its affiliates, and efforts to enforce these rules;

(iii) the nature and degree of economic benefit gained by the utility's competitive affiliate;

(iv) the damages or potential damages resulting from the violation or series or set of violations;

(v) the size of the business of the competitive affiliate involved;

(vi) the penalty's likely deterrence of future violations; and

(vii) such other factors deemed appropriate and material to the particular circumstances of the violation or series or set of violations.

(6) **No immunity from antitrust enforcement.** Nothing in these affiliate rules shall confer immunity from state or federal antitrust laws. Sanctions imposed by the commission for violations of this rule do not affect or preempt antitrust liability, but rather are in addition to any antitrust liability that may apply to the anti-competitive activity. Therefore, antitrust remedies also may be sought in federal or state court to cure anti-competitive activities.

(7) **No immunity from civil relief.** Nothing in these affiliate rules shall preclude any form of civil relief that may be available under federal or state law, including, but not limited to, filing a complaint with the commission consistent with this subsection.

(8) **Preemption.** This rule supersedes any procedures or protocols adopted by an independent organization as defined by PURA §39.151, or similar entity, that conflict with the provisions of this rule.

§25.273. Contracts Between Electric Utilities and Their Competitive Affiliates.

(a) **Purpose.** This section establishes the requirements for the implementation of contracts between utilities and their competitive affiliates resulting from a fair, competitive bidding process.

(b) **Application.**

(1) **General application.** This section applies to:

(A) electric utilities operating in the State of Texas as defined in the Public Utility Regulatory Act (PURA) §31.002(6), and transactions or activities between electric utilities and their affiliates, as defined in PURA §11.003(2); and

(B) transmission and distribution utilities operating in a qualifying power region in the State of Texas as defined in PURA §31.002(19) upon commission certification of a qualifying power region pursuant to PURA §39.152, and transactions or activities between transmission and distribution utilities and their affiliates, as defined in PURA §11.003(2).

(2) **No circumvention of the code of conduct**. An electric utility, transmission and distribution utility, or competitive affiliate shall not circumvent the provisions or the intent of PURA §39.157 or any rules implementing that section by using any affiliate to provide information, services, products, or subsidies between the electric utility, transmission and distribution utility, and a competitive affiliate.

(3) **Notice of conflicts and/or petition for waiver**. Nothing in this section is intended to affect or modify the obligation or duties relating to any rules or standards of conduct that may apply to a utility or the utility's affiliates under orders or regulations of the Federal Energy Regulatory Commission (FERC) or the Securities and Exchange Commission (SEC). A utility shall file with the commission a notice of any provision in this section that conflicts with FERC or SEC orders or regulations. A utility that is subject to statutes or regulations in any state that conflict with a provision of this section may petition the commission for a waiver of the conflicting provision on a showing of good cause.

(c) **Definitions.** Any terms defined in §25.272 of this title (relating to Code of Conduct for Electric Utilities and Their Affiliates) have the same meanings herein.

(d) **Competitive bidding required.** A utility shall conduct competitive bidding, as required by §25.272 of this title, to procure products and services, other than corporate support services, that are offered by an competitive affiliate or to sell to any competitive affiliate assets that have a per unit value of more than $75,000, or a total value of more than $1

million. This section does not apply to transfers that facilitate unbundling under PURA §39.051 or asset valuation under PURA §39.262.

(1) **Notice**. The utility shall provide reasonable notice of any request for proposals required pursuant to this section. Such notice shall include:

(A) notice by publication in trade journals or newspapers as appropriate;

(B) notice by mail to persons who previously requested to be notified of the request for proposals; and

(C) conspicuous notice on the utility's Internet site or other public electronic bulletin board.

(2) **Independent evaluator**. The utility shall use an independent evaluator when a competitive affiliate's bid is included among the bids to be evaluated. If an independent evaluator is required, the utility shall maintain a record of communications with the independent evaluator. The independent evaluator shall identify in writing the bids that are most advantageous and warrant negotiation and contract execution, in accordance with the criteria set forth in the request for proposals. The utility retains responsibility for final selection of products or services.

(3) **Competitive bidding procedures.** The utility shall make a request for proposals available to interested persons by conspicuously posting the request on its Internet site or other public electronic bulletin board.

(A) The request for proposals must clearly set forth the eligibility and selection criteria and shall specify the weight to be given to any non-cost selection criteria.

(B) The utility shall strictly enforce the criteria specified in the request for proposals.

(4) **Evaluation of bids**. The utility or independent evaluator, as appropriate, shall evaluate each bid submitted in accordance with the criteria specified in the request for proposals. The utility or independent evaluator may not give preferential treatment or consideration to any bid.

(5) **Rejection of bids**. The utility is not required to accept a bid and may reject any or all bids in accordance with the selection criteria specified in the request for proposals.

(e) **Contracts.** A utility shall file with the commission a signed copy of any contracts entered into with a competitive affiliate as the result of the fair, competitive bidding process described in this section. A contract shall include, at a minimum, the following provisions:

(1) the effective date of the agreement and parties to the agreement;

(2) the term of the agreement;

(3) a narrative describing the products or services provided to the utility, including a list by specific service of all the affiliated companies who provide or receive these services, or a narrative describing the assets being sold by the utility to the competitive affiliate;

(4) the obligations of the parties;

(5) the price for those products, services, or assets governed by the contract; and

(6) billing and payment procedures.

This agency hereby certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority. It is therefore ordered by the Public Utility Commission of Texas that rule §25.84 relating to Reporting of Affiliate Transactions for Electric Utilities, §25.272 relating to Code of Conduct for Electric Utilities and Their Affiliates, and §25.273 relating to Contracts Between Electric Utilities and Their Competitive Affiliates are hereby adopted with changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE 23rd DAY OF NOVEMBER 1999.

PUBLIC UTILITY COMMISSION OF TEXAS

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Chairman Pat Wood, III

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Commissioner Judy Walsh

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Commissioner Brett A. Perlman