**PUC PROJECT NO. 52796**

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| **REVIEW OF MARKET PARTICIPANT QUALIFICATIONS AND REPORTING REQUIREMENTS** | **§**  **§**  **§** | **PUBLIC UTILITY COMMISSION**  **OF TEXAS** |

**TCPA COMMENTS ON DISCUSSION DRAFT FOR MARKET PARTICIPANT QUALIFICATIONS AND REPORTING REQUIREMENTS**

Texas Competitive Power Advocates (“TCPA”) is a trade association representing power generation companies and wholesale power marketers with investments in Texas and the Electric Reliability Council of Texas (“ERCOT”) wholesale electricity market. TCPA members[[1]](#footnote-1) and their affiliates provide a wide range of important market functions and services in ERCOT, including development, operation, and management of power generation assets, power scheduling and marketing, energy management services, and sales of competitive electricity service to consumers. TCPA members participating in this filing provide nearly ninety percent (90%) of the non-wind electric generating capacity in ERCOT, representing billions of dollars of investment in the state, and employing thousands of Texans.

TCPA appreciates the opportunity to provide comments on the discussion draft filed on April 1, 2022 and focuses the following on comments on the sections addressing power marketers and power generation companies. Comments are organized by sections in order of discussion in the discussion draft. The absence of comment on a provision does not indicate agreement, and TCPA reserves the right to provide comment in the future either in reply comments or as part of future discussions in this project.

**GENERAL COMMENTS**

*Administrative Efficiency of Renewal Requirements*

TCPA generally supports the apparent intent of the renewal requirements proposed for §25.105 and §25.107, which TCPA surmises to be ensuring the Commission has current contact information for power marketers and power generation companies (PGCs). TCPA is aware of at least one recent matter where a PGC had not provided updated contact information to the Commission, but believes the underlying issue to have been identified as a potential enforcement matter and has been subsequently addressed.[[2]](#footnote-2) With 575 registered PGCs and 300 registered power marketers as of April 25, 2022, TCPA respectfully questions whether the additional administrative requirements associated with annually renewing PGC and power marketer registrations (for both market participants and for Staff) will be more cost effective than using the Commission’s enforcement authority to compel and encourage compliance with the existing rules. TCPA does recognize that the proposal would provide for a simplified renewal process for entities that have kept their contact information current, however, and appreciates Staff’s efforts to strike a reasonable balance. TCPA would like to work with Staff and other interested entities to better understand the scope of the issue and explore options to maximize compliance with minimal duplication of effort.

*Unintended Consequences of Subjective Intent*

The other common theme that TCPA wishes to highlight is the potential unintended consequences of the phrase “intends to” in the rule definitions and applicability sections. TCPA appreciates that the Commission rules should allow for – and in some cases require – an entity to register with the Commission prior to engaging in an activity over which the Commission has jurisdiction (such as generating, buying, and/or selling electricity at wholesale). However, there is a risk that including forward-looking language in the Commission’s definitions and applicability statements could entice entities to argue that their subjective intent exempts them from the Commission’s rules.

This is not a hypothetical, and in fact was a central issue in a 2016 contested case where a Transmission and Distribution Utility (TDU) sought “regulatory approvals” to install, own, and operate energy storage on its distribution system.[[3]](#footnote-3) That specific case was dismissed and the legislature has since clarified that “the [C]ommission may not authorize ownership of an electric energy storage facility by a [TDU]” while providing a path to address the issues raised in that proceeding in a manner and scope that is consistent with the state’s restructured electricity regulatory scheme.[[4]](#footnote-4)

The Discussion Draft retains and reinforces the use of “intend,” however. TCPA generally suggests that the Commission utilize verbiage that provides for a clearer bright line test, or at least poses less risk of being challenged by an entity seeking to evade Commission jurisdiction through assertions of subjective intent. TCPA would like to work with Staff and other interested parties to ensure that the Commission’s jurisdiction and regulatory scheme remain consistent and comprehensive.

**§25.105. REGISTRATION AND REPORTING BY POWER MARKETERS**

TCPA generally supports changes to §25.105, that help ensure the Commission has current contact information for power marketers. However, as explained in the General Comments above, TCPA encourages a different approach to the applicability section, which states that registration is required “if the person participates ***or*** ***intends to participate*** in the Electric Reliability Council of Texas (ERCOT) wholesale market.”[[5]](#footnote-5) While this is an adaptation of the existing rule phrasing (“intending to do business in Texas as a power marketer”), TCPA recommends deleting “or intends to participate” to avoid creating a potential loophole in which the subjective intent of a person or entity results in ambiguity and potential for abuse. Instead, TCPA suggests that a simple pre-registration requirement should suffice – the same standard that the Commission applies to PGCs and Retail Electric Providers (REPs).

PURA § 31.002(11)(A) defines a “power marketer” as a person who “becomes an owner of electric energy in this state for the purpose of selling the electric energy at wholesale.” Any person or entity that sells electric energy at wholesale must be required to register as a power marketer, regardless of whether they intend to sell electricity or not. Once a person, who does not own generation or transmission or distribution, sells the energy into the wholesale market, they become a power marketer regardless of their intent and should be required to register prior to that activity commencing. Notably, §25.105 was adopted in 2000, at the dawn of the competitive ERCOT market, and a 30-day grace period for registrations made sense in that context. As a mature market more than two decades later, that provision is no longer necessary. And, by removing the “intent” language, the concerns raised above in the General Comments can be wholly avoided.

For the reasons discussed above, TCPA recommends the following language change to § 25.105(a)(2):

§25.105. Registration by Power Marketers.

(a) Applicability. This section contains the registration and renewal of registration requirements for a person who buys or sells electric energy at wholesale; does not own generation, transmission, or distribution facilities in Texas; and does not have a certified service area.

(1) A person is subject to this section on the date that it first buys or sells electric energy at wholesale in Texas.

(2) A person must register with the commission ~~No~~ no later than ~~30 days after~~ the date a person becomes subject to this section, if the person participates ~~or intends to participate~~ in the Electric Reliability Council of Texas (ERCOT) wholesale market~~, the person must register with the commission~~.

TCPA is also concerned about the administrative efficiency of requiring both interim updates to registration information and an annual renewal requirement for power marketers. As proposed in the Discussion Draft, power marketers would continue to be required to report “a” change (as opposed to the current rule’s “material change” threshold) in its registration information to the Commission within 30 days of the change but would also be required to renew registrations annually “on or before November 1.” TCPA is unaware of any material issues the Commission may have had with out-of-date power marketer registrations but would like to work with Staff to better understand the issue(s) that the annual renewal requirement is intended to solve and determine whether more cost-effective solutions exist.

**§25.109. REGISTRATION OF POWER GENERATION COMPANIES AND SELF-GENERATORS**

TCPA recommends the same change to the applicability section for the registration of Qualifying Facilities (QF) that it recommended for power marketers – removal of the part that requires intent to sell electricity into the wholesale market. TCPA’s recommended changes to § 25.109(a)(2) are reflected below:

(a) Applicability. This section contains the registration and renewal of registration requirements for a power generation company (PGC) as defined by §25.5 of this title (relating to Definitions) and self-generators.

(1) A person is subject to and must register under this section before the first day it generates electricity.

(2) A person that owns a qualifying facility (QF) and ~~intends to~~ sells electricity at wholesale or is an exempt wholesale generator (EWG) must register under this section as a PGC.

Additionally, TCPA notes that the “intent” language is in the 16 TAC § 25.5(82) definition of “power generation company” and the Discussion Draft incorporates that definition by reference. For the same reasons laid out previously, TCPA recommends that the Commission also modify the definition in 16 TAC § 25.5(82) to delete “intended to be” in that rule as well when making a formal Proposal for Publication in this project.

TCPA makes a consistent recommendation to the definition of “self-generator,” requesting removal of the “intent to sell” electricity at wholesale language. Registration should be a bright line based on whether an entity does or does not sell into the wholesale market. Ascertaining whether an entity or person intends to sell or not is at best a murky area for determining compliance and at worst a potential loophole as discussed previously. Additionally, TCPA recommends that a definition of “affiliate” be included, just as the Discussion Draft has proposed for 16 TAC § 25.107. As such, TCPA recommends the following changes to § 25.109(b):

**(b) Definitions.** In this section, the following definitions apply unless the context indicates otherwise.

(1) Affiliate -- As defined in §25.5 of this title (relating to Definitions).

(~~1~~2) Generating facility -- all generating units located at, or providing power to, the electricity-consuming equipment at an entire facility or location.

(~~2~~3) Principal -- an executive officer; partner; owner; director; shareholder of a privately held company; shareholder of a publicly traded company who owns more than 10 % of a class of equity securities; a person that controls the person in question; or any person who has apparent or actual authority to make decisions or direct policy on behalf of a person without seeking approval.

(~~3~~4) Self-generator -- a person that does not ~~intend to~~ sell at wholesale and that owns an electric generating facility rated at one megawatt (MW) or more and is not a PGC, or owns a QF that does not sell electricity or provides electricity only to the purchaser of the facility's thermal output.

One additional concern TCPA has with the definitions portion of the Discussion Draft is the proposed definition of “principal.” The definition for what constitutes a “principal” for a market participant recently went through much comment and debate by ERCOT stakeholders as part of ERCOT Nodal Protocol Revision Request (NPRR) 1073. The final definition, approved by the ERCOT Board and this Commission, has since been memorialized in ERCOT Nodal Protocol Section 16.1.2(1) under Registration and Qualification of Market Participants.[[6]](#footnote-6) While the Discussion Draft’s definition for “principal” is similar to ERCOT Nodal Protocol 16.1.2(1), it differs enough to potentially lead to an overly expansive interpretation. TCPA recommends that this incongruity be avoided by better aligning the definition of “principal” with ERCOT Nodal Protocol 16.1.2 as follows:

**(b) Definitions.** In this section, the following definitions apply unless the context indicates otherwise…

(2) Principal -- an executive officer of a company; a general partner of a general partnership; a sole proprietor of a sole proprietorship; a manager, managing member, or a member vested with management authority of a limited liability company or a limited partnership owner ~~director; shareholder of a privately held company~~; a shareholder of a publicly traded company who owns more than 10% of a class of equity securities of the company; ~~a person that controls the person in question;~~ or ~~any~~ a person who has ~~apparent or actual~~ authority to make decisions or direct policy on behalf of the entity ~~a person~~ without seeking approval.

Regarding proposed § 25.109(c)’s initial registration requirements, TCPA makes one recommendation related to the affidavit that would be required by subsection (c)(4). As currently drafted, the affidavit could not be signed by a principal of an entity whose license was revoked or whose ERCOT standard form market participant agreement (“SFA”) was terminated for misconduct. Although the intent of this prohibition is sound, TCPA recommends delineating a reasonable timeframe for which a principal who may have been affiliated with an entity whose license was revoked or SFA was terminated well after the principal’s time at the entity in question had ended. TCPA understands that such situations may be fact-specific, so rather than proposing changes to the language in the Discussion Draft, TCPA would like to discuss options with Staff for striking an appropriate balance with this proposed rule provision (e.g., the Commission could elaborate on its intent in the preamble of the final order).

The Discussion Draft’s proposed subsection (d) on “Additional registration information” contains the same “intent” language that TCPA has raised concerns about. As such, TCPA recommends “intended to be” be removed from § 25.109(d)(1)(A). That same subsection also requires disclosure of certain additional information not currently required, such as detailed ownership information, affiliate information, and directions to the entity’s emergency operations plan (EOP) filing. TCPA is not conceptually opposed to these provisions but offers a few points of feedback.

First, the Commission could likely replace the proposed percentage ownership information for corporate parent companies with indication of which corporate parents have a controlling interest (if applicable). This would allow the Commission to ascertain the chain of control of a PGC, while avoiding the risk of more frequent but ultimately low-information-value filings for minor changes in upstream ownership percentages that do not yield a material change.

Second, as already noted above, the Commission should incorporate the definition of “affiliate” into 16 TAC § 25.109 to ensure a consistent definition applies across the Commission’s rules, just as it has proposed to do in 16 TAC § 25.105.

Third, TCPA recommends that the proposed reference to the Project and Item numbers for the entity’s EOP be specified as applying to the *initial* EOP submitted at the time of initial registration as required by 16 TAC § 25.53(c)(2). While that filing will be known at the time of registration, the Commission may open additional control numbers to house future EOP updates, and those should be made in accordance with the requirements and timelines of 16 TAC § 25.53(c)(3). Those timelines and requirements should not, as a matter of administrative efficiency, require that a PGC also update its PGC registration simply to update a reference to a filing already in the Commission’s control.

TCPA’s cumulative recommended changes to the Discussion Draft’s §25.109(d) are as follows :

**(d) Additional registration information required for PGC.** In addition to the information required under subsection (c) of this section, a person who is required to register as a PGC must also provide the following information to the commission.

(1) An affidavit signed by a representative, official, officer, or other authorized person with binding authority over the registrant attesting that the registrant:

(A) generates electricity that is ~~intended to be~~ sold at wholesale;

(B) does not own a transmission or distribution facility in this state other than an essential interconnecting facility, a facility not dedicated to public use, or a facility otherwise excluded from the definition of "electric utility" under §25.5 of this section (related to Definitions); and

(C) does not have a certified service area.

(2) Names and types of businesses of the registrant’s corporate parent’s companies ~~with percentages of ownership~~.

(3) The name and corporate relationship of each affiliate that buys and sells electricity at wholesale in Texas, sells electricity at retail in Texas, or is an electric cooperative or municipally owned utility in Texas.

(4) The applicable project and item number the registrant has filed its initial Emergency Operations Plan as required under §25.53(c)(2) of this title (relating to Electric Service Emergency Operations Plans).

(5) As applicable, copies of the registrant’s Federal Energy Regulatory Commission (FERC) registration as a QF or an EWG.

Proposed §25.109(e) would make two significant, administratively onerous, and unnecessary changes to the requirements for updating PGC information. The current rule requires PGCs to report any “material change” to its registration within 45 days of the change. The Discussion Draft would shorten that timeframe to 30 days and would require that all changes be reported. The decrease from 45 days to 30 days is significant, and there is no clear benefit from, or rationale given for making such a reduction. Furthermore, the requirement to report “all” changes would be administratively burdensome and could provide information of little practical use to the Commission. Accordingly, TCPA recommends the following change:

**(e) Update or relinquishment of registration.** A PGC or self-generator must update or may relinquish its registration. An update to or relinquishment of registration must be completed using the commission form and must include the PGC or self-generator's registration number.

(1) An update to the PGC or self-generator's registration must be submitted within ~~30~~ 45 days of a material change to any of the information listed under subsections (c) or (d) of this section, as applicable.

As covered in the General Comments and the comments regarding 16 TAC § 25.105 regarding power marketers, TCPA is also concerned about the administrative efficiency of requiring both interim updates to registration information and an annual renewal requirement for PGCs. As proposed in the Discussion Draft, PGCs would continue to be required to report any material change in its registration information to the Commission within 30 days of the change, but would also be required to renew registrations annually “on or before February 28.” TCPA is only presently aware of one incident in which the Commission may have had with an out-of-date PGC registration,[[7]](#footnote-7) but understands that issue to have been resolved via enforcement action. TCPA would like to work with Staff to better understand the issue(s) that the annual renewal requirement is intended to solve and determine whether more cost-effective solutions exist.

TCPA’s last recommendation on the Discussion Draft is with regards to subsection (h) (“Revocation and administrative penalty”). The Discussion Draft removes the option of suspending a registration as well as the requirement to show “a pattern of failure” to meet the legal and regulatory requirements. PURA §39.356, which is directly referenced in the current rule but absent from the Discussion Draft, states in relevant part “[t]he commission may suspend or revoke a power generation company's registration for significant violations…” and TCPA recommends the Commission reflect that standard in its rule. Revocation continues to be an option available to the Commission, and the Commission could choose to avail themselves of the option to suspend a registration instead as long as the option is retained in the rule. TCPA does not believe there is a reason to limit the options available to the Commission and provides recommended language below.

In addition, TCPA recommends retaining the “pattern of failure” language in the current rule to ensure that a single violation of administrative requirements does not put generation in jeopardy. Application of a single instance standard rather than a “pattern” with respect to certain infractions could be unreasonable. For example, one of the bases for revoking a PGC registration is if the PGC provides “false and misleading information” to the Commission, Commission Staff or ERCOT. While TCPA believes that Market Participants should not knowingly provide false or misleading information to any of the parties covered in the expanded scope, incorrect information can sometimes be inadvertently provided. When that occurs, the information should be corrected as soon as the mistake is discovered. However, by deleting the current rule’s provision relating to a “pattern” of failure to meet the conditions in the revocation section, a singular “failure to meet” standard could result in rule that reads as if PGC would have to be suspended for an isolated mistake. To avoid this potential reading, following are TCPA’s recommended changes:

**(h) Revocation of PGC registration and administrative penalty.** Registration of a PGC under this section is subject to revocation or suspension for violations of statute or Commission rules. The commission may also assess an administrative penalty for ~~a~~ violations of statute or commission rules, including:

(1) failure to comply with the reliability standards and operational criteria duly established by the independent organization certified under PURA §39.151 for the ERCOT power region;

(2) failure to observe any scheduling, operating, planning, reliability, or settlement policy, rule, guideline, or procedure established by ERCOT;

(3) providing false or misleading information to the commission, commission staff, or ERCOT;

(4) engaging in fraudulent, unfair, misleading, deceptive or anti-competitive practices;

(5) a pattern of failure to meet the requirements of statute, this section, or other commission rules, regulations or orders;

(6) suspension or revocation of a registration, certification, or license by any state or federal authority;

(7) failure to operate within the applicable legal parameters established by PURA §39.351; and

(8) failure to timely respond to commission or commission staff inquiries or customer complaints

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**CONCLUSION**

TCPA appreciates the opportunity to comment on the discussion draft and looks forward to working with the Commission, Commission Staff, and other stakeholders as work on the proposed rule changes continues.

Dated: April 29, 2022

Respectfully submitted,

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**EXECUTIVE SUMMARY OF TCPA COMMENTS ON MARKET PARTICIPANT QUALIFICATIONS AND REPORTING REQUIREMENTS**

* TCPA supports the efforts to ensure power marketer (PM) and power generation company (PGC) information is current but would like to work with Staff to explore options to maximize compliance without duplicating efforts.
* TCPA recommends that a “bright line test” be used instead of “intends to” language in defining whether an entity or person is required to register as a power marketer or power generation company to reduce the potential loophole for an entity to assert subjective intent in challenging the requirement to register.
* Once an entity sells power into the wholesale market, they become a power marketer regardless of intent. Therefore, they should be required to register with the Commission.
* TCPA recommends a commensurate requirement to register with the Commission as a PGC or self-generator when the entity or person sells power into the wholesale market, regardless of subjective intent.
* TCPA recommends inclusion of the definition of “affiliate” be included in §25.109(b), just as the Discussion Draft includes for §25.107.
* TCPA recommends the definition of “principal” be revised to better align with the recently adopted definition in ERCOT Nodal Protocol Section 16.1.2(1).
* TCPA would like to discuss options with Staff for striking a balance on who may sign the affidavit for registration requirements to ensure that a principal is not unjustly penalized if their affiliation with an entity whose license is revoked ended well before the revocation.
* TCPA makes recommendations on additional registration information to be required of PGCs.
* TCPA recommends retention of the 45-day update requirement for changes in PGC information and requests the update pertain to material changes as opposed to all changes, which may be administratively onerous to comply with.
* TCPA recommends retention of the Commission’s option to suspend a registration, which is consistent with PURA §39.356, and retain the language referencing a “pattern of failure” which would remain consistent with the same statutory provision regarding suspension or revocation for significant violations.

1. TCPA member companies participating in these comments include: Calpine, Cogentrix, Constellation (formerly Exelon), EDF Trading North America, Luminant, NRG Energy, Inc., Shell Energy North America, Talen Energy, Tenaska, TexGen Power, and WattBridge. [↑](#footnote-ref-1)
2. *See* Docket Nos. 53142, 53147, and 53177; Docket No. 53142 includes reference to outdated contact information being on file with the Commission for Chamon Power, LLC, recommending an administrative penalty of $100 per day, and Docket No. 53177 notes that Chamon Power, LLC’s PGC contact information had not been updated due to an inadvertent oversight (both dockets are currently abated). Docket No. 53147 was an update to Chamon Power, LLC’s PGC registration to reflect a change in ownership and contact information (which was approved on February 8, 2022). [↑](#footnote-ref-2)
3. *See* generally *Application of AEP Texas North Company for Regulatory Approvals Related to the Installation of Utility-Scale Battery Facilities*, Docket No. 46368 (September 15, 2016). For example, see the Joint Parties Motion for Summary Decision (March 31, 2017) at 7: “AEP continually asserts that its proposed facilities are not ‘intended to be used to sell energy or ancillary services.’ AEP apparently makes this statement to declare that the batteries qualify as assets that AEP may lawfully own and operate, rather than as generation assets pursuant to PURA § 35.152. As discussed above, however, whether AEP intends to receive direct compensation from the deployment of its proposed battery facilities is irrelevant to the indisputable fact that its proposal will impact the competitive market in a manner that violates PURA § 39.105. AEP cannot avoid this outcome by exploiting its position as a regulated utility to shift the financial impacts onto the market at large through ‘UFE’ settlement.” [↑](#footnote-ref-3)
4. *See* PURA § 35.153, amended by SB 415 in 2021. [↑](#footnote-ref-4)
5. Discussion Draft, § 25.105(a)(2) (emphasis added). [↑](#footnote-ref-5)
6. *Review of Rules Adopted by the Independent Organization in Calendar Year 2021,* Project No. 52307, Proposed Order Approving ERCOT Revision Requests (Aug. 24, 2021). Although styled as a “Proposed Order”, that appears to have been a typographical error as the order was executed by the Commissioners. [↑](#footnote-ref-6)
7. *See* Supra note 2. [↑](#footnote-ref-7)