

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS.

Subchapter J. COSTS, RATES AND TARIFFS.

§26.228. Requirements Applicable to Chapter 52 Companies.

- (a) **Application.** This section applies to incumbent local exchange companies (ILECs), as defined in the Public Utility Regulatory Act (PURA) §51.002(3), which have not elected to be regulated pursuant to PURA Chapters 58 or 59.
- (b) **Purpose.** The purpose of this section is to establish the substantive and procedural requirements for an ILEC to introduce new services and/or to exercise pricing and packaging flexibility, including customer promotional offerings, and for complaints regarding service offerings introduced by informational notice offerings.
- (c) **New services.** The term “new services” has the meaning assigned in §26.5 of this title (relating to Definitions) and shall include services for which no rate was in effect on September 1, 1999. An ILEC may file an informational notice to introduce a new service. An ILEC filing an informational notice pursuant to this subsection shall file the appropriate information in accordance with subsection (g)(2) of this section.
- (1) **Pricing standards.**
- (A) An ILEC shall price each new service at or above the service’s long run incremental cost (LRIC).
- (B) The price of a new service may not be preferential, prejudicial, discriminatory, predatory, or anticompetitive.
- (C) A price that is set at or above the service’s LRIC is presumed not to be predatory.
- (2) **LRIC studies.** An ILEC may establish a service’s LRIC by submitting a LRIC study, as specified in subsection (g)(2)(D)(ix) of this section, that conforms to the requirements of §26.214 of this title (relating to Long Run Incremental Cost (LRIC) Methodology for Services Provided by Certain Incumbent Local Exchange Companies (ILECs)).
- (3) **LRIC adoption.** An ILEC serving fewer than one million access lines in Texas may establish a service’s LRIC by adopting the commission-approved cost studies of a larger company for the same service.
- (4) **Rate adoption.** In lieu of filing a LRIC study or adopting the LRIC studies of a larger company, an ILEC with less than one million access lines may adopt a rate that is identical to or higher than a larger company’s tariffed rate for the same service.
- (5) **Packaging of new services.** If an ILEC offers a new service as a component of a package, the ILEC shall also offer the new service as a separately tariffed service.
- (d) **Pricing and packaging flexibility.** An ILEC may file an informational notice to exercise pricing and packaging flexibility by filing the appropriate information in accordance with subsection (g)(2) of this section.
- (1) **General requirements.**
- (A) Pricing flexibility includes:
- (i) customer specific contracts;
- (ii) packaging of services;
- (iii) volume, term, and discount pricing;
- (iv) zone density pricing, with a zone defined as an exchange; and
- (v) other promotional pricing.
- (B) A discount or other form of pricing flexibility may not be preferential, prejudicial, discriminatory, predatory, or anticompetitive.
- (C) An ILEC may exercise pricing flexibility, including the packaging or joint marketing of any regulated service with any other regulated or unregulated service or any service of an affiliate.

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- (2) **Pricing standards.**
 - (A) An ILEC shall price each regulated service offered separately or as part of a package at either the service's tariffed rate or at a rate not lower than the service's LRIC.
 - (B) An ILEC shall price each service at or above the service's LRIC.
 - (C) A price that is set at or above the service's LRIC is presumed not to be predatory.
 - (D) The price of a package that combines regulated products or services with unregulated products or services shall recover the cost to the ILEC of acquiring and providing the unregulated products or services. In this section, unregulated products or services are products or services provided by an entity that is unaffiliated with the ILEC.
 - (E) The price of a package that combines regulated products or services with the products or services of an affiliate shall recover the cost to the ILEC of acquiring and providing its affiliate's products or services, which shall be greater than or equal to the cost to the affiliate of acquiring and/or providing the products or services. The cost to an ILEC of acquiring or providing the affiliate's products or services shall be valued in a manner consistent with Federal Communications Commission (FCC) requirements, to the extent such requirements are applicable to the ILEC, and with subparagraph (F) of this paragraph. A group of products or services that are jointly marketed by an ILEC in conjunction with one or more of its affiliates shall be priced in a manner consistent with FCC requirements, to the extent such requirements are applicable to the ILEC, and with subparagraph (F) of this paragraph.
 - (F) Consistent with PURA §52.051(1)(C), an ILEC shall not use revenues from regulated monopoly services to subsidize services subject to competition.
 - (3) **LRIC studies.** An ILEC may establish a service's LRIC by submitting a LRIC study, as specified in subsection (g)(2)(D)(ix) of this section, that conforms to the requirements of §26.214 of this title.
 - (4) **LRIC adoption.** An ILEC serving fewer than one million access lines in Texas may establish a service's LRIC by adopting the commission-approved cost studies of a larger company for the same services.
 - (5) **Rate adoption.** In lieu of filing a LRIC study or adopting the LRIC studies of a larger company, an ILEC with less than one million access lines may adopt a rate that is identical to or higher than a larger company's tariffed rate for the same service.
- (e) **Customer promotional offerings.** An ILEC may file an informational notice to offer customer promotional offerings by filing the appropriate information in accordance with subsection (g)(2) of this section.
- (1) An ILEC may offer a promotion for a regulated service for not more than 90 days in any 12-month period.
 - (2) Customer promotional offerings may consist of:
 - (A) a waiver of installation charges or service order charges, or both, for not more than 90 days in a 12-month period; or
 - (B) a temporary discount of not more than 25% from the tariffed rate for not more than 60 days in a 12-month period.
 - (3) Although ILECs are not required to file LRIC studies with informational notices regarding these customer promotional offerings, the offerings are subject to the standards for pricing flexibility in subsection (d) of this section, in the event of a complaint.

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- (f) **Requirements for customer specific contracts.** An ILEC may enter into customer-specific contracts for certain services as provided in §26.211 of this title (relating to Rate-Setting Flexibility for Services Subject to Significant Competitive Challenges). For all services not addressed in §26.211 of this title, an ILEC must offer customer-specific contracts pursuant to this section.
- (g) **Procedures related to the filing of informational notices and associated tariffs.** The provisions of this subsection apply to ILECs choosing to introduce new services and exercise pricing and packaging flexibility including customer promotional offerings through informational notice filings.
- (1) **Notice requirements.**
- (A) An ILEC shall provide the informational notice in compliance with this section to the commission, to the Office of Public Utility Counsel (OPC), and to any person who holds a certificate of operating authority in the ILEC's certificated area or areas, or who has an effective interconnection agreement with the ILEC.
- (B) Unless an interconnection agreement contract specifies otherwise, an incumbent local exchange carrier shall continue to provide to affected resellers of retail services the same notice of rate changes or withdrawal of detariffed services that it was required to provide prior to detariffing.
- (2) **Filing requirements.**
- (A) Filing of informational notice and confidential information. At the time the informational notice is filed in Central Records, a copy of the informational notice, including confidential information, shall be delivered to OPC. In addition to the record copy, an additional copy of any confidential information shall be filed in Central Records for use by the commission staff.
- (i) The commission shall assign each informational notice a unique control number and shall stamp the tariff sheets "received."
- (ii) The commission staff shall file any notice of deficiencies (including deficiencies in LRIC studies submitted) for incomplete filings not in compliance with this section or pleading alleging that the service offering is inappropriately filed as an informational notice filing within three working days after the date of the filing of the informational notice.
- (iii) Within two working days after the date of the commission staff's filing, the applicant shall file an explanation of the actions it has taken or intends to take in response to a notice or pleading filed under clause (ii) of this subparagraph.
- (B) Effective date. A service offering shall be effective no earlier than ten days after the ILEC files a complete informational notice with the commission.
- (C) Access to confidential information. Access to confidential information filed with the commission as part of an informational notice filing shall be available to commission staff and OPC, upon execution of a commission approved protective agreement, at the time the informational notice is filed.
- (D) Format of filing. An informational notice under this section must include the following elements:
- (i) name of company;
- (ii) PURA chapter under which company operates;
- (iii) date of submission;
- (iv) effective date;
- (v) new and/or revised tariff pages, written in plain language and conforming to the requirements of §26.207 of this title (relating to Form and Filing of Tariffs);
- (vi) proposed implementation date (if different from effective date);

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- (vii) affidavit of notice to the Office of Public Utility Counsel, certificate of operating authority holders, and parties to interconnection agreements;
- (viii) type of filing (new service; pricing flexibility; packaging, or promotional offering; customer specific contract);
- (ix) except for customer promotional offerings, relevant LRIC study or LRIC study reference, and relevant support materials (confidential/proprietary/protected materials provided to commission only). When LRIC studies for which commission approval has not been obtained are provided with an informational notice filing, an application for approval of that LRIC study must be filed pursuant to the standards in §26.214 of this title to establish a LRIC floor and shall be filed before or simultaneously with the informational notice filing. The ILEC shall file a notice of intent to file LRIC studies pursuant to §26.214 of this title no later than ten days before the filing of the LRIC study;
- (x) except for customer promotional offerings, relevant LRIC study or LRIC study reference, and relevant supporting materials (confidential/proprietary/protected materials provided to commission only), if an ILEC chooses to adopt LRIC studies of a larger company pursuant to the requirements of subsection (c)(3) or (d)(4) of this section, as applicable;
- (xi) except for customer promotional offerings, relevant tariff rates or specific tariff references, if the ILEC chooses to adopt rates of a larger company pursuant to requirements of subsection (c)(4) or (d)(5) of this section, as applicable;
- (xii) a response of “yes”, “no”, or “not applicable”, with explanatory language, to the following question: “Is the sum of the TELRIC-based wholesale prices of components needed for provision of the retail service at or below the retail price set forth in this filing?” Except for customer promotional offerings, if the response is “yes” or “no”, the filing must identify the components needed for the provision of the retail service, along with a list of relevant wholesale and retail prices;
- (xiii) a response of “yes” or “no” to the following question: “Is the service available for resale by a competitor?” If the answer is “no”, does the proposed price meet the standards set forth in §26.274 (f) - (h) of this title (relating to Imputation)? For purposes of this question, “available for resale” means:
 - (I) the service is not subject to tariffed resale restrictions; and
 - (II) the ILEC is not aware of any constraints that would prevent a competitor from functionally provisioning the service to the competitor’s customers in parity with the ILEC’s provisioning of the service to the ILEC’s customers;
- (xiv) for package offerings that combine regulated products or services with unregulated products or services and/or with the products or services of an ILEC’s affiliate, an affidavit indicating that the price of the package recovers the cost to the ILEC of acquiring and providing the unregulated products or services or the affiliate’s products or services. The affidavit shall also indicate that the cost to the ILEC of acquiring and providing an affiliate’s products or services is greater than or equal to the cost to the affiliate of acquiring and/or providing the products or services. The cost to an ILEC of acquiring or providing the affiliate’s products or services shall be valued in a manner consistent with FCC requirements, to the extent

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- FCC requirements are applicable to the ILEC, and with subsection (d)(2)(F) of this section. For a joint marketing effort that includes regulated products or services and the products or services of an affiliate, an affidavit shall be provided by each affected affiliate attesting that the affiliate's costs are recovered in a manner consistent with subsection (d)(2)(F) of this section and FCC requirements, to the extent FCC requirements are applicable to the ILEC;
- (xv) description of the offering's terms and conditions, including location of service or a statement that it is to be provided state-wide; and
 - (xvi) a privacy concerns statement.
- (E) For customer promotional offerings:
- (i) Affidavit that a promotion for this service has not exceeded 90 days for the previous 12-month period.
 - (ii) Promotional tariff or letter identifying the promotional service and whether it is for a waiver of installation or service order charges, or both (90 days) or a discount of 25% or less (60 days).
- (3) **Disputes as to sufficiency or appropriateness of informational notice filing.**
- (A) If the ILEC advises the commission by written filing that a dispute exists with respect to a notice of deficiency or the inappropriateness of an informational notice, and requests the assignment of an administrative law judge to resolve the dispute, the commission will consider the dispute to be a contested case.
 - (B) A contested case will also exist if the commission files a complaint addressing sufficiency or appropriateness of an informational notice filing.
 - (C) Parties other than the commission staff may not challenge the sufficiency of an informational notice filing.
- (4) **Complaints regarding service offerings introduced by informational notice filings.**
- (A) Subject to subparagraph (E) of this paragraph, an affected person, the OPC, or the commission may file a complaint at the commission on or after the date the informational notice has been filed. The filing of a complaint will initiate a contested case.
 - (B) A complaint addressing an informational notice involving pricing flexibility, including customer promotions, may challenge whether the filing is in compliance with PURA and the commission substantive rules.
 - (C) A complaint addressing an informational notice involving a new service may challenge whether the tariff is in compliance with the pricing standards of PURA and commission substantive rules. If the complaint is finally resolved in a final order issued by the commission in favor of the complainant, the ILEC shall either:
 - (i) not later than the tenth day after the date the complaint is finally resolved, amend the price of the service as necessary to comply with the final resolution; or
 - (ii) discontinue the service.
 - (D) The commission shall dismiss a complaint filed prior to the filing of an informational notice on the grounds that the commission lacks jurisdiction to hear the complaint.
 - (E) The commission shall consider any complaint alleging that the pricing of a regulated service does not meet the pricing standards of PURA and commission substantive rules, which is filed 31 or more days after the implementation date of the tariff, to be untimely.
 - (F) All complaints shall be docketed and governed by the commission's procedural rules and shall be filed and reviewed pursuant to the following requirements:

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- (i) Complaints shall be captioned: COMPLAINT BY {NAME OF COMPLAINANT} REGARDING TARIFF CONTROL NUMBER(S) {NUMBER(S)} {STYLE OF TARIFF CONTROL NUMBER}.
 - (ii) Processing. The commission shall assign each complaint filed with respect to an informational notice a unique control number. The presiding officer shall cause a copy of each complaint, bearing the assigned control number, to be filed in the relevant tariff control number(s) for the related informational notice(s).
- (G) The commission staff shall have standing in all proceedings related to informational notice filings before the commission and may intervene by filing a notice of intervention at any time prior to determination on the merits. No motion is necessary for such intervention.
- (H) A complaint filed pursuant to this section shall be considered to be an exception to the informal resolution requirements of procedural rule §22.242(c) of this title (relating to Complaints).
- (5) **Interim relief.** All tariffs introduced by informational notice filings will remain in effect during the pendency of any complaint unless interim relief suspending the tariff is granted pursuant to this subsection.
 - (A) Any request that a tariff be suspended during the pendency of a complaint must meet the following requirements:
 - (i) the pleading must state an appropriate and bona fide cause of action;
 - (ii) the pleading must be verified or supported with affidavits based on personal knowledge; and
 - (iii) the pleading must set forth the following elements: probable right of recovery, probable and irreparable injury in the interim, and no adequate alternative remedy.
 - (B) The presiding officer shall schedule a hearing on interim relief in the form of suspension of a tariff on an expedited basis.
 - (C) The burden of proof shall be upon the complainant with respect to each element of proof necessary to obtain any interim relief requested by the complainant.