

PROJECT NO. 36622

**RULEMAKING TO AMEND TARIFF § PUBLIC UTILITY COMMISSION
FILING REQUIREMENTS FOR §
TELECOMMUNICATIONS UTILITIES § OF TEXAS**

**ORDER ADOPTING AMENDMENT TO §26.227
AS APPROVED AT THE FEBRUARY 11, 2010 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts an amendment to §26.227, relating to Procedures Applicable to Nonbasic Services and Pricing Flexibility for Basic and Nonbasic Services for Chapter 58 Electing Companies with changes to the proposed text as published in the September 11, 2009 issue of the *Texas Register* (34 TexReg 6221). The amendment streamlines the tariff filing requirements for telecommunications companies required to file switched-access rates concurrent with federal switched-access rates. The amendment also deleted unnecessary and outdated sections related to additional notice requirements that expired in 2003. Additionally, the commission has added language clarifying that this amendment pertains to switched-access tariffs. The amendments to §26.227 are adopted under Project Number 36622.

The commission received initial comments on the amendment from Southwestern Bell Telephone, LP d/b/a AT&T Texas (AT&T Texas) and received reply comments from the Office of Public Utility Counsel (OPC) and AT&T Texas.

Comment

OPC opposed the amendment and asserted that it obscures substantive tariff changes and eliminates §26.207 tariff requirements for those companies electing to incorporate FCC rates by reference.

Commission response

The commission disagrees with OPC that the amendment obscures substantive tariff changes and eliminates tariff requirements for companies electing to incorporate FCC rates by reference. The rule amendment creates an alternative method for telecommunications companies to provide access to Texas intrastate switched-access rates concurrent with federal interstate switched-access rates. The commission concludes that modifying this rule provides a streamlined process for filing an informational notice which provides a direct uniform resource locator (URL or worldwide web address) link to the FCC web page that contains the concurring switched access tariff.

Comment

OPC further stated that it has customer protection concerns because §26.207 requires a utility to make its tariff available to the public for examination upon request and that examination becomes more difficult when the complete tariff is not one document, but a primary document with website links to many secondary documents. OPC recommended requiring the utility to continue to maintain copies of the portion of its FCC tariff to which its Texas tariff refers and to require telecommunications utilities to make those portions available to its Texas customers upon request. According to OPC, this requirement would permit customers to have the ability to review the tariff and lodge a complaint of any perceived ambiguity in those tariffs or any alleged inappropriate charges, pursuant to PURA §58.026.

Commission response

The commission disagrees with OPC and concludes that the amendment does not conflict with or negate the requirements of §26.207(h). Under the rule as amended, Texas customers will continue to have the opportunity to review such concurrent switched-access rates and will also have the opportunity to complain about perceived ambiguities and/or alleged inappropriate charges pursuant to PURA §58.026.

Comment

OPC expressed concerns relating to the FCC's continued Internet practices and any future changes to the relevant FCC URL. OPC stated that should the FCC make network changes that affect the URL for FCC tariff pages incorporated by reference into Texas tariffs, the proposed amendment requires the utility to submit an informational filing that provides the new URL. OPC stated that such a requirement is necessary should incorporation by reference be allowed, but it also increases the number of informational filings at the commission along with the associated administrative burdens. OPC requested that if the commission goes forward with this proposed amendment, the rule should add OPC to the utility's notification requirement relating to any FCC tariffs, interstate rates, or URL changes.

Commission response

The commission agrees that OPC should receive notification of informational filings relating to changes to the referenced interstate rates or URL changes. The commission notes that the general notice requirements of subsection (c)(1)(A) mandate that an electing company shall provide the informational notice in compliance with this section to OPC.

The amendment to this rule does not alter this requirement. Therefore utilities required to file informational notices in compliance with subsection (c)(2)(D)(v) must provide the informational notice to the commission, OPC, and to any person who holds a certificate of operating authority in the electing company's certificated area or areas, or who has an effective interconnection agreement with the electing company as mandated in subsection (c)(1)(A) relating to general notice requirements.

Comment

OPC acknowledged that the amendment, as proposed, requires an informational filing upon changes to the referenced interstate rates or the applicable URL. However, OPC suggested that an informational notice must be submitted with each change of the referenced section of the FCC-approved tariff. Although OPC acknowledged that such changes may be immaterial to the substance of the Texas tariff, OPC asserted that proper version control requires the Texas tariff to account for any change to the reference source when incorporating rates by reference and that the language in the proposed rule amendment should require information notices upon any change to the referenced document.

Commission response

The commission disagrees that an informational notice should be required upon any change to the FCC-approved interstate tariff and declines to make the change suggested by OPC. Changes to the FCC-approved tariff unrelated and immaterial to the Texas tariff would result in unnecessary filings which could possibly confuse customers and increase the associated administrative burden of such filings for telecommunications providers. The

commission finds that the amendment as adopted sufficiently addresses timely notification to the commission upon relevant changes or updates to the relevant URL(s) and upon any changes to the referenced interstate rates.

Comment

OPC recommended that the amended rule include a provision that allows the commission and OPC to request the new or revised tariff pages obviated by incorporation of rates by reference. OPC stated that the future needs of consumers, consumer advocates, or the commission may require the utility to present tariff pages that explicitly list such rates subsequent to an initial finding of sufficiency. OPC recommended further amending the rule to expressly give the commission and OPC such authority.

Commission response

The commission disagrees with OPC's suggested revision. The commission believes that the amended rule provides sufficient access to the switched-access tariff rates. If, in the future, the commission decides that further documentation is necessary for consumers or the commission, an additional amendment to the rule may be considered.

Comment

AT&T Texas recommended that the language in subsection (c)(2)(D)(v) should more clearly distinguish the initial filing for concurrence with the utility's interstate tariff from the subsequent filings that provide notice of changes to the referenced interstate tariff. To address this, AT&T Texas proposed three specific changes: (1) that the rule clarify that the informational notice

portion of the initial filing should reference the uniform resource locator (URL) on the FCC's website specific to the concurring tariff; (2) that the rule state that subsequent informational notice filings should provide in the informational notice portion of the filing the corresponding FCC Transmittal Number, reference the URL on the FCC website specific to the transmittal, and list any rate element(s) that changed; and (3) clarify that utilities should also file informational notices to update any URL(s) referenced in their intrastate tariff should there be any change to the URL.

Commission response

The commission agrees with AT&T Texas' recommendations to clarify the filing requirements that apply to the initial informational notice filing implementing concurrence with interstate tariff(s) and subsequent informational notice filings regarding changes to the referenced interstate tariff. The commission further agrees that AT&T Texas' proposed red-lined changes sufficiently clarify and clearly delineate initial filing requirements and subsequent informational filings, and such changes have been incorporated.

Comment

AT&T Texas recommended modifying subsection (c)(2)(D)(v) so that it does not appear to potentially require that the utility reference the FCC's website in its actual intrastate tariff. AT&T stated that the proposed amendment language references "an informational notice filing that cross-references the FCC's website" and stated that it is not clear whether the cross-referencing of the FCC's website would occur in the informational notice portion or the filing of

the intrastate tariff pages attached to the informational filing. AT&T stated that it believed it was appropriate to reference the FCC's website in the informational notice portion of the filing; however, AT&T suggested that a utility should have the option to reference a website other than the FCC's website in its intrastate tariff if that website contains a more up-to-date version of its intrastate tariff than the FCC's website. AT&T Texas further stated that this is more consistent with the federal practice, as the FCC's rules require incumbent local exchange carriers like AT&T to make its interstate tariffs available on their commercial websites and that AT&T's commercial website version of its interstate tariff is automatically updated whenever a change is made to it at the FCC. AT&T noted that, in contrast, the FCC does not require carriers to file complete versions of their interstate tariff every time it changes, but within the first five business days of the month following the month in which a change is made to it.

Commission response

The commission agrees that subsection (c)(2)(D)(v) should be modified to clarify that the FCC website is included in the informational notice portion of a filing at the commission and has made this change. This modification does not substantively change the intent of the rule, but clarifies that the FCC website is included in the informational notice portion of the filing rather than the attached tariff pages portion of the informational notice filing. Additionally, the commission agrees that providing the utility's commercial website URL for access to the Texas intrastate tariff is consistent with the intent of the rule, which is to provide access to the most up-to-date Texas intrastate switched-access rates and their concurrent federal interstate switched-access rates. Therefore, the commission adds language specifying that both the initial and subsequent filings must contain the utility's

commercial website URL specific to Texas intrastate switched-access tariff rates. This, in combination with the requirements to provide the FCC URL in the initial filing as well as FCC transmittal information in the subsequent filings will allow the public and commission staff to easily locate any changes to the federal interstate switched-access rates and compare them with the concurrent Texas intrastate switched-access rates to confirm that they are in parity as required by PURA §§26.201 - 26.205.

Comment

AT&T suggested deleting the phrase, “governing the form and filing of tariffs” as found in the first sentence of subsection (c)(2)(D)(v) because it is redundant with the parenthetical immediately preceding it.

Commission response

The commission agrees with the suggestion to delete the redundant phrase identified in the first sentence of the subsection and has made this change.

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2009) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction and specifically, §52.251, and PURA Chapter 65, Subchapter E, that relates to the reduction of switched access rates by deregulated companies.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 52.251, and 65.201 - 65.205.

§26.227. Procedures Applicable to Nonbasic Services and Pricing Flexibility for Basic and Nonbasic Services for Chapter 58 Electing Companies.

- (a) **Application.** This section applies to any electing company as the term is defined in the Public Utility Regulatory Act (PURA) §58.002 who chooses to offer nonbasic services and/or exercise pricing flexibility for basic and nonbasic services through informational notice filings. Other sections applicable to an electing company include, but are not limited to, §26.224 of this title (relating to Requirements Applicable to Basic Network Services for Chapter 58 Electing Companies), §26.225 of this title (relating to Requirements Applicable to Nonbasic Services for Chapter 58-Electing Companies) and §26.226 of this title (relating to Requirements Applicable to Pricing Flexibility for Chapter 58 Electing Companies).
- (b) **Purpose.** The purpose of this section is to establish procedures for an electing company to introduce nonbasic services, including new services, and/or to exercise pricing flexibility for basic and nonbasic services, and for complaints regarding service offerings introduced through informational notice filings.
- (c) **Informational notice filing and notice requirements related to pricing flexibility and nonbasic services, including new services.**
- (1) **Notice requirements.**
- General notice requirements. An electing company 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 electing company's certificated area or areas, or who has an effective interconnection agreement with the electing company.

(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 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 electing company 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 with §26.207 of this title (relating to Form and Filing of Tariffs); except that an informational notice filing that cross-references the rates, terms, and/or conditions of the utility's interstate switched-access tariff for an equivalent service may be considered sufficient. To implement concurrence of a utility's federal interstate switched-access tariff and its Texas intrastate switched-access tariff, the utility in the informational notice portion of its initial filing shall reference the uniform resource locator (URL or worldwide web address) on the Federal Communications Commission (FCC) website specific to the interstate switched-access tariff. Additionally, the utility shall

reference the URL on the utility's commercial website specific to the intrastate switched-access tariff either in the informational notice portion of the filing or in the page(s) attached to the informational notice portion of the filing. Thereafter, the utility must notify the commission, in an informational notice filing, within 10 business days of any changes to the referenced concurring interstate rates. In any such filing, the utility shall provide in the informational notice portion of its filing the corresponding FCC Transmittal Number, reference the URL on the FCC website specific to the transmittal, specify which rate elements changed, and reference the URL on the utility's commercial website specific to the intrastate switched-access tariff. The utility must also file an update to any URL(s) referenced in its intrastate tariff within 10 business days of any changes to such URL(s). If switched-access rates are no longer required to concur with federal rates, a new tariff must be filed;

- (vi) proposed implementation date (if different from effective date);
- (vii) affidavit of notice to OPC, COA holders, and parties to interconnection agreements;
- (viii) type of filing (new service; pricing flexibility involving basic service; non-basic only pricing flexibility; packaging, term and volume discount or promotional offering regulated by PURA

§58.004; customer specific contract; customer specific contract regulated by PURA §58.003; promotional offering);

- (ix) relevant Long Run Incremental Cost (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 (relating to Long Run Incremental Cost (LRIC) Methodology for Services Provided by Certain Incumbent Local Exchange Companies (ILECs)) or §26.215 of this title (relating to Long Run Incremental Cost Methodology for Dominant Certificated Telecommunications Utility (DCTU) Services), as applicable, to establish a LRIC floor and shall be filed before or simultaneously with the informational filing. The electing company shall file a notice of intent to file LRIC studies pursuant to §26.214 or §26.215 of this title no later than ten days prior to the filing of the LRIC study;
- (x) a response of "yes", "no", or "not applicable", with explanatory language to the following question: "Is the sum of the Total Element Long Run Incremental Cost (TELRIC)-based wholesale prices of components needed for provision of the retail service at or below the retail price set forth in this filing?" 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;

(xi) 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 electing company 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 electing company's provisioning of the service to the electing company's customers;

(xii) for package offerings that combine regulated products or services with unregulated products or services and/or with the products or services of an electing company's affiliate, an affidavit indicating that the price of the package, in addition to the requirements of §26.226(d)(1) of this title, also recovers the cost to the electing company 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 electing company 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 electing company of acquiring or providing the affiliate's products or services shall be valued in a manner consistent with FCC requirements and with §26.226(d)(5) of this title. 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 §26.226(d)(5) of this title and FCC requirements, if any;

- (xiii) description of the offering's terms and conditions, including location of service or a statement that it is to be provided state-wide; and
- (xiv) a privacy concerns statement.

(d) **Disputes as to sufficiency or appropriateness of informational notice filing.**

- (1) If the electing company 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.
- (2) A contested case will also exist if the commission files a complaint addressing sufficiency or appropriateness of an informational notice filing.

(3) Parties other than the commission staff may not challenge the sufficiency of an informational notice filing.

(e) **Complaints regarding service offerings introduced by informational notice filings.**

An affected person, 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.

(1) A complaint addressing an informational notice filing may challenge whether the filing is in compliance with PURA and/or commission substantive rules.

(2) If a complaint challenging the price of a new service is resolved in a final order issued by this commission in favor of the complainant, the electing company shall either:

(A) 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

(B) discontinue the service.

(3) 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.

(4) All complaints shall be docketed and governed by the commission's procedural rules and shall be filed and reviewed pursuant to the following requirements:

(A) Complaints shall be captioned: COMPLAINT BY {NAME OF COMPLAINANT} REGARDING TARIFF CONTROL NUMBER(S) {NUMBER(S)} {STYLE OF TARIFF CONTROL NUMBER}.

- (B) 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 filings.
- (5) 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.
- (6) A complaint filed pursuant to this section shall be considered to be an exception to the informal resolution requirements of §22.242(c) of this title (relating to Complaints).
- (f) **Interim relief.** A tariff for a new service introduced by an informational notice may not be suspended during the pendency of any complaint. All other 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.
- (1) Any request that a tariff be suspended during the pendency of a complaint must meet the following requirements:
- (A) the pleading must state an appropriate and bona fide cause of action;
- (B) the pleading must be verified or supported with affidavits based on personal knowledge; and

- (C) the pleading must set forth the following elements: probable right of recovery, probable and irreparable injury in the interim, and no adequate alternative remedy.
- (2) The presiding officer shall schedule a hearing on interim relief in the form of suspension of a tariff on an expedited basis.
- (3) 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.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority. It is therefore ordered by the Public Utility Commission of Texas that §26.227, relating to Procedures Applicable to Nonbasic Services and Pricing Flexibility for Basic and Nonbasic Services for Chapter 58 Electing Companies is hereby adopted with changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE 15th DAY OF FEBRUARY 2010.

PUBLIC UTILITY COMMISSION OF TEXAS

BARRY T. SMITHERMAN, CHAIRMAN

DONNA L. NELSON, COMMISSIONER

KENNETH W. ANDERSON, JR., COMMISSIONER