

**PROJECT NO. 24526**

**RULEMAKING TO AMEND USE § PUBLIC UTILITY COMMISSION**  
**RULES REGARDING UNBUNDLED §**  
**NETWORK ELEMENT SHARING §**  
**MECHANISM § OF TEXAS**

**ORDER READOPTING §26.403 AS IT REGARDS THE  
UNBUNDLED NETWORK SHARING MECHANISM**

The Public Utility Commission of Texas (commission) readopts §26.403, relating to the Texas High Cost Universal Service Plan (THCUSP), with changes to the text as adopted in the August 2, 2002 *Texas Register* (27 TexReg 6836). This readoption is in accordance with the Agreed Final Judgment issued October 17, 2002 by the Travis County District Court, *Southwestern Bell Telephone L.P v. Public Utility Commission of Texas et. al*, No. GN2-02654 (345th Dist. Ct., Travis County, Tex., October 17, 2002); therefore, no comments were filed regarding this readoption. This readoption also incorporates the minor changes adopted in Project Number 26135, *Rulemaking Proceeding to Amend Rules Referencing Tel-Assistance* (November 22, 2002 *Texas Register* 27 TexReg 10915). Specifically, the prior allocation formula in §26.403(e)(3)(C) regarding the adjustment for basic local telecommunications service provided solely and partially through the purchase of unbundled network elements (UNEs) is readopted and references to the Tel-Assistance program eliminated as of September 1, 2001 pursuant to House Bill (HB 2156) are deleted from §26.403. These changes are adopted under Project Number 24526.

***Procedural History***

The changes to the allocation formula were originally proposed in the February 8, 2002 *Texas Register* (27 TexReg 851) and adopted at the open meeting on July 11, 2002. The commission adopted amendments to §26.403(e)(3)(C)(i) and (ii) and new subsections (e)(3)(C)(iii) and (iv) relating to the adjustment for basic local telecommunications service provided solely and partially through the purchase of unbundled network elements (UNEs). These amendments to §26.403 became effective on August 8, 2002.

On August 9, 2002, Southwestern Bell Telephone, L.P. (SWBT) filed suit in District Court seeking temporary and permanent injunctive relief and declaratory relief with respect to the adopted amendments to §26.403. The parties and SWBT entered into an agreement on August 21, 2002. In this agreement, SWBT agreed not to go forward with its request for temporary injunction based upon specific conditions regarding the disbursement of its THCUSP support. On October 17, 2002, the District Court issued an Agreed Final Judgment vacating the amendments to §26.403 adopted by the commission without prejudice to reconsideration. The District Court reinstated the USF allocation methodology relating to the UNE sharing mechanism that existed prior to the amendments that became effective on August 8, 2002. The District Court remanded the proceeding back to the commission to consider whether and in what manner the allocation methodology in §26.403(e)(3)(C) should be modified.

Section 26.403 is readopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2003) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; specifically, PURA §56.021 which required the commission to adopt and enforce rules requiring local exchange companies to establish a universal service fund; §56.023 which requires the commission to adopt rules for the administration of the universal service fund; §56.026 which permits the commission to establish an equitable allocation formula for the disbursement of universal service funds if a local end-user customer of an electing company switches to another local service provider that provisions service solely or partially through UNEs; and the Agreed Final Judgment in Cause No. GN2-02654.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 56.021- 56.028.

**§26.403. Texas High Cost Universal Service Plan (THCUSP).**

- (a) **Purpose.** This section establishes guidelines for financial assistance to eligible telecommunications providers (ETPs) that serve the high cost rural areas of the state, other than study areas of small and rural incumbent local exchange companies (ILECs), so that basic local telecommunications service may be provided at reasonable rates in a competitively neutral manner.
- (b) **Definitions.** The following words and terms when used in this section shall have the following meaning unless the context clearly indicates otherwise:
- (1) **Benchmark** — The per-line amount above which THCUSP support will be provided.
  - (2) **Business line** — The telecommunications facilities providing the communications channel that serves a single-line business customer's service address. For the purpose of this definition, a single-line business line is one to which multi-line hunting, trunking, or other special capabilities do not apply.
  - (3) **Eligible line** — A residential line and a single-line business line over which an ETP provides the service supported by the THCUSP through its own facilities, purchase of unbundled network elements (UNEs), or a combination of its own facilities and purchase of UNEs.
  - (4) **Eligible telecommunications provider (ETP)** — A telecommunications provider designated by the commission pursuant to §26.417 of this title (relating to Designation

as Eligible Telecommunications Providers to Receive Texas Universal Service Funds (TUSF)).

- (5) **Residential line** — The telecommunications facilities providing the communications channel that serves a residential customer's service address. For the purpose of this definition, a residential line is one to which multi-line hunting, trunking, or other special capabilities do not apply.
- (c) **Application.** This section applies to telecommunications providers that have been designated ETPs by the commission pursuant to §26.417 of this title.
- (d) **Service to be supported by the THCUSP.** The THCUSP shall support basic local telecommunications services provided by an ETP in high cost rural areas of the state and is limited to those services carried on all flat rate residential lines and the first five flat rate single-line business lines at a business customer's location. Local measured residential service, if chosen by the customer and offered by the ETP, shall also be supported.
- (1) **Initial determination of the definition of basic local telecommunications service.**
- Basic local telecommunications service shall consist of the following:
- (A) flat rate, single party residential and business local exchange telephone service, including primary directory listings;
  - (B) tone dialing service;
  - (C) access to operator services;

- (D) access to directory assistance services;
- (E) access to 911 service where provided by a local authority;
- (F) telecommunications relay service;
- (G) the ability to report service problems seven days a week;
- (H) availability of an annual local directory;
- (I) access to toll services; and
- (J) lifeline service.

(2) **Subsequent determinations.**

- (A) Timing of subsequent determinations.
  - (i) The definition of the services to be supported by the THCUSP shall be reviewed by the commission every three years from September 1, 1999.
  - (ii) The commission may initiate a review of the definition of the services to be supported on its own motion at any time.
- (B) Criteria to be considered in subsequent determinations. In evaluating whether services should be added to or deleted from the list of supported services, the commission may consider the following criteria:
  - (i) the service is essential for participation in society;
  - (ii) a substantial majority, 75% of residential customers, subscribe to the service;
  - (iii) the benefits of adding the service outweigh the costs; and

- (iv) the availability of the service, or subscription levels, would not increase without universal service support.
  
- (e) **Criteria for determining amount of support under THCUSP.** The TUSF administrator shall disburse monthly support payments to ETPs qualified to receive support pursuant to this section. The amount of support available to each ETP shall be calculated using the base support amount available as provided under paragraph (1) of this subsection and as adjusted by the requirements of paragraph (3) of this subsection.
  - (1) **Determining base support amount available to ETPs.** The monthly per-line support amount available to each ETP shall be determined by comparing the forward-looking economic cost, computed pursuant to subparagraph (A) of this paragraph, to the applicable benchmark as determined pursuant to subparagraph (B) of this paragraph. The monthly base support amount is the sum of the monthly per-line support amounts for each eligible line served by the ETP, as required by subparagraph (C) of this paragraph.
    - (A) Calculating the forward-looking economic cost of service. The monthly cost per-line of providing the basic local telecommunications services and other services included in the benchmark shall be calculated using a forward-looking economic cost methodology.
    - (B) Determination of the benchmark. The commission shall establish two benchmarks for the state, one for residential service and one for single-line

business service. The benchmarks for both residential and single-line businesses will be calculated using the statewide average revenue per line as described in clause (i) and (ii) of this subparagraph for all ETPs participating in the THCUSP.

- (i) Residential revenues per line are the sum of the residential revenues generated by basic and discretionary local services, as well as a reasonable portion of toll and access services, for the year ending December 31, 1997, divided by the average number of residential lines served for the same period, divided by 12.
  - (ii) Business revenues per line are the sum of the business revenues generated by basic and discretionary local services for single-line business lines, as well as a reasonable portion of toll and access services for the year ending December 31, 1997, divided by the average number of single-line business lines served for the same period, divided by 12.
- (C) Support under the THCUSP is portable with the consumer. An ETP shall receive support for residential and the first five single-line business lines at the business customer's location that it is serving over eligible lines in such ETP's THCUSP service area.
- (2) **Proceedings to determine THCUSP base support.**
- (A) Timing of determinations.

- (i) The commission shall review the forward-looking cost methodology, the benchmark levels, and/or the base support amounts every three years from September 1, 1999.
    - (ii) The commission may initiate a review of the forward-looking cost methodology, the benchmark levels, and/or the base support amounts on its own motion at any time.
  - (B) Criteria to be considered in determinations. In considering the need to make appropriate adjustments to the forward-looking cost methodology, the benchmark levels, and/or the base support amount, the commission may consider current retail rates and revenues for basic local service, growth patterns, and income levels in low-density areas.
- (3) **Calculating amount of THCUSP support payments to individual ETPs.** After the monthly base support amount is determined, the TUSF administrator shall make the following adjustments each month in order to determine the actual support payment that each ETP may receive each month.
- (A) Access revenues adjustment. If an ETP is an ILEC that has not reduced its rates pursuant to §26.417 of this title, the base support amount that such ETP is eligible to receive shall be decreased by such ETP's carrier common line (CCL), residual interconnection charge (RIC), and toll revenues for the month.

- (B) Adjustment for federal USF support. The base support amount an ETP is eligible to receive shall be decreased by the amount of federal universal service high cost support received by the ETP.
- (C) Adjustment for service provided solely or partially through the purchase of unbundled network elements (UNEs). If an ETP provides supported services over an eligible line solely or partially through the purchase of UNEs, the THCUSP support for such eligible line may be allocated between the ETP providing service to the end user and the ETP providing the UNEs according to the methods outlined below.
- (i) Solely through UNEs.
- (I)  $\text{USF cost} > (\text{UNE rate} + \text{retail cost additive (R)}) > \text{revenue benchmark (RB)}$ . USF support should be explicitly shared between the ETP serving the end user and the ILEC selling the UNEs in the instance in which the area-specific USF cost/line exceeds the sum of (combined UNE rate/line + R), and the latter exceeds the RB. Specifically, the ILEC would receive the difference between USF cost and (UNE rate + R), while the ETP would receive the difference between (UNE rate + R) and RB. Splitting the USF support payment in this way allows both the ILEC and the ETP to recover, on average, the costs of serving the subscriber at rates consistent with the benchmark.

Moreover, this solution is competitively neutral in an additional respect: the ILEC, as the carrier of last resort (COLR), is indifferent between directly serving the average end user and indirectly doing so through the sale of UNEs to a competing ETP. Also, facilities-based competition is encouraged only if it is economic, i.e., reflective of real cost advantages in serving the customer; or

(II)  $USF\ cost > RB > (UNE\ rate + R)$ . The ILEC would receive the difference between USF cost and RB. In this case, where  $USF\ cost > RB > (UNE\ rate + R)$ , giving  $(USF\ cost - RB)$  to the ILEC is necessary to diminish the undue incentive for the ETP to provide service through UNE resale, and to lessen the harm done to the ILEC in such a situation. Allowing the ILEC to recover  $(USF\ cost - RB)$  would minimize financial harm to the ILEC; or

(III)  $(UNE\ rate + R) > USF\ cost > RB$ . The ETP would receive the difference between USF cost and RB. Where  $(UNE\ rate + R) > USF\ cost > RB$ , giving  $(USF\ cost - RB)$  to the ETP is necessary to diminish the undue incentive for the ETP not to serve the end user by means of UNE resale. Allowing the ETP

to recover (USF cost - RB) would minimize financial harm to the ETP.

- (ii) Partially through UNEs. For the partial-provision scenario, THCUSP support shall be shared between the ETP and the ILEC based on the percentage of total per-line cost that is self-provisioned by the ETP. Cost-category percentages for each wire center shall be derived by adding a retail cost additive and the HAI model costs for five UNEs (loop, line port, end-office usage, signaling, and transport). The ETP's retail cost additive shall be derived by multiplying the ILEC-specific wholesale discount percentage by the appropriate (residential or business) revenue benchmark.
- (f) **Reporting requirements.** An ETP eligible to receive support pursuant to this section shall report the following information to the commission or the TUSF administrator.
- (1) **Monthly reporting requirements.** An ETP shall report the following to the TUSF administrator on a monthly basis:
    - (A) information regarding the access lines on the ETP's network including:
      - (i) the total number of access lines on the ETP's network,
      - (ii) the total number of access lines sold as UNEs,
      - (iii) the total number of access lines sold for total service resale,
      - (iv) the total number of access lines serving end use customers, and

- (v) the total number of eligible lines for which the ETP seeks TUSF support;
    - (B) the rate that the ETP is charging for residential and single-line business customers for the services described in subsection (d) of this section; and
    - (C) a calculation of the base support computed in accordance with the requirements of subsection (e)(1) of this section showing the effects of the adjustments required by subsection (e)(3) of this section.
  - (2) **Annual reporting requirements.** An ETP shall report annually to the TUSF administrator that it is qualified to participate in the THCUSP.
  - (3) **Other reporting requirements.** An ETP shall report any other information that is required by the commission or the TUSF administrator, including any information necessary to assess contributions to and disbursements from the TUSF.
- (g) **Review of THCUSP after implementation of federal universal service support.** The commission shall initiate a project to review the THCUSP within 90 days of the Federal Communications Commission's adoption of an order implementing new or amended federal universal service support rules for rural, insular, and high cost areas.

This agency hereby certifies that the rule, as readopted, 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 §26.403 relating to the Texas High Cost Universal Service Plan (THCUSP), as it concerns the adjustment for basic local telecommunications service provided solely and partially through the purchase of unbundled network elements (UNEs), is hereby readopted with changes to the text as adopted in Project Number 26135.

**ISSUED IN AUSTIN, TEXAS ON THE 19th DAY OF DECEMBER 2002.**

**PUBLIC UTILITY COMMISSION OF TEXAS**

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**Rebecca Klein, Chairman**

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**Brett A. Perlman, Commissioner**

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**Julie Caruthers Parsley, Commissioner**