PROJECT NO. 41608

RULEMAKING TO AMEND SUBSTANTIVE RULES RELATING TO TELECOMMUNICATIONS TO CONFORM TO PURA §56.023	**§ § § §**	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER ADOPTING AMENDMENT TO §§26.403 AND 26.404 AND NEW §26.405 AS APPROVED AT THE DECEMBER 1, 2014 OPEN MEETING

The Public Utility Commission of Texas (commission) adopts an amendment to §26.403, relating to the Texas High Cost Universal Service Plan (THCUSP), and to §26.404, relating to the Small and Rural Incumbent Local Exchange Company (ILEC) Universal Service Plan, and a new §25.405, relating to Financial Need for Continued Support, with changes to the proposed text as published in the June 20, 2014 issue of the *Texas Register* (39 TexReg 4728). The amendments and new rule will conform the commission's Substantive Rules to Senate Bill 583 of the 83rd Legislature, Regular Session, enacted in 2013, which requires the commission to reduce the support from the Texas Universal Service Fund (TUSF) available to certain incumbent local exchange companies (ILECs) that are eligible telecommunication providers (ETPs) from the Texas High Cost Universal Service Plan (THCUSP) and the Small and Rural ILEC Universal Service Plan (SRILEC USP) over a three-year period and establish a procedure for affected ILECs to petition the commission in order to show financial need for continued support from the TUSF. This new section and amendments are adopted under Project Number 41608.

The commission received comments on the proposed amendments and new section from AMA TechTel Communications (AMA TechTel); the CenturyLink ILECs (CenturyLink); Consolidated Communications or Texas Company and Consolidated Communications of Fort

Bend Company (Consolidated); Guadalupe Valley Telephone Cooperative, Inc. (GVTC); the Office of Public Utility Counsel (OPUC); Sprint Communications Company, L.P., tw telecom of Texas, llc, and the Texas Cable Association (collectively, the USF Reform Coalition or the Coalition); TEXALTEL; Texas Statewide Telephone Cooperative, Inc. (TSTCI); and Windstream Communications Southwest, Windstream Communications Kerrville, LP, Windstream Sugar Land, Inc., Texas Windstream, Inc., each d/b/a Windstream Communications (Windstream).

No party requested that a public hearing be held regarding the proposed rules.

General Comments

Windstream noted that the proposed rules are of critical importance to Windstream in light of the fact that Windstream will have realized an almost 30% reduction in its overall TUSF support as a result of Docket No. 40521, *Commission Staff's Petition to Establish a Reasonable Rate for Basic Local Telecommunications Service Pursuant to P.U.C. SUBST. R. 26.403*, and in Docket No. 41097, *Commission Staff's Petition to Establish a Reasonable Rate for Basic Local Telecommunications Service Pursuant to P.U.C. SUBST. R. 26.404*, even before the proposed rules will be implemented. Windstream commented that the proposed rules accomplish the mandate in PURA §56.023 in a manner that is consistent with the policy goal that TUSF disbursements are intended to assist telecommunications providers in providing basic local telecommunications service (BLTS) at reasonable rates in high-cost rural areas. Windstream commented that the process created by the proposed rules provide for an efficient, objective two-

step process by which the commission will establish ongoing monthly per-line support (MPLS) amounts for exchanges with service supported by the TUSF. Windstream also commented that the proposed rules are the result of numerous discussions over the past year among stakeholders and are consistent with the requirements of PURA Chapter 56. Accordingly, Windstream supports the adoption of the proposed rule amendments without change but subject to certain clarifications. Windstream stated that, if the commission desires to significantly modify the proposed rules relative to the published versions, then the commission should adopt a forward-looking cost model method of determining financial need.

CenturyLink commented that it supports adoption of the proposed rules with minor amendments but without significant changes. CenturyLink asked the commission to consider certain facts that support adoption of proposed rule: First, the proposed rules are the product of extensive negotiations over many months between the stakeholders and reflect compromise and concession by the ILEC ETPs that are directly affected by these rules. Second, establishing where TUSF support is needed and the appropriate amount of support can be extremely complex and time consuming, as was experienced in Docket No. 18515, *Compliance Proceeding for the Implementation of the Texas High Cost Universal Service Plan* and in Docket No. 34723, *Petition for Review of Monthly Per Line Support Amounts from the Texas High Cost Universal Plan Pursuant to PURA §56.031 and P.U.C. SUBST. R. 26.403*. CenturyLink further commented that the commission's recent reforms to the TUSF, including in Docket No. 40521 and in Docket No. 41097, have the effect of shifting more of the cost of providing BLTS to the rates paid by end users. By the time these reforms are completed in 2016, over $300 million in TUSF support will have been eliminated from the THCUSP and SRILEC USP compared to 2008 levels.

CenturyLink noted that these reforms have eliminated support in multiple exchanges that had been determined to be less costly to serve in Docket No. 18515, meaning that only the highest cost exchanges continue to have supported service. CenturyLink commented that, in light of these facts, complex, time consuming mechanisms to determine financial need may provide not much benefit relative to the effort expended to implement them. CenturyLink commented that the proposed rule's use of a straightforward competitor test, which can be implemented in a relatively simple case and relies on publicly-available data, reflects these realities, which should be part of the commission's reasoned justification for the rule as a whole. CenturyLink stated that the proposed rule is imperfect and that CenturyLink would prefer the use of a forward-looking cost model, which allows much more granular calculations of cost and targeting of support. CenturyLink stated that, despite its reservations, it supports the proposed rule and believes it is a reasonable balance of administrative efficiency with realistic and reasonable results.

GVTC supports adoption of the proposed rules and commented that the proposed rules reasonably balance the interests of the stakeholders. However, GVTC also commented that rate-of-return-regulated ILECs, such as GVTC, should not be subject to the financial need test in an exchange demonstrated by the presence of an unsubsidized wireline voice provider competitor and the limitation of support to 80% of certain expenses attributable to supported exchanges in addition to the other regulations that are only applicable to rate-of-return-regulated ILECs. In part because the proposed rule excludes a return on capital from the expenses that are attributed to each exchange, GVTC commented that the proposed rule would subject GVTC to an unfairly

high level of scrutiny that is not applicable to other affected ILECs and would put at risk GVTC's ability to meet its provider of last resort (POLR) obligations.

The Coalition responded to GVTC's proposal that rate-of-return-regulated ILECs should not be subject to the 80% limitation, stating that the Coalition does not agree that the proposed rule imposes enhanced regulatory obligations on a rate-of-return-regulated ILEC. The Coalition stated that GVTC's current support amounts were not set in a general rate case but instead were originally established in Docket No. 18516, *Compliance Proceeding for the Implementation of the Small and Rural Incumbent Local Exchange Carrier Universal Service Plan*, at levels reflecting revenues lost due to statutorily mandated reductions in switched access charges.

OPUC commented that it supports the proposed amendments and new rule because the proposals further the legislative goals of assisting telecommunications providers in providing BLTS at a reasonable rate in high-cost rural areas while also maintaining the financial stability of the TUSF through rational reductions in TUSF support and strategic targeting of support.

AMA TechTel noted that the communities it serves are extremely rural and that, without high-cost support from the THCUSP, there would not be a viable business model to serve these communities. AMA TechTel stated that its ability to serve customers as a competitive ETP is also affected by the adjustments to support received by ILECs. AMA TechTel further commented that there appeared to be consensus among the Legislature, the commission, and the stakeholders that the TUSF should continue to provide support in the most rural and high-cost areas of Texas. AMA TechTel encouraged the commission to design additional reductions in

support for these areas with great care to ensure the continued availability of communications service to all of Texas. AMA TechTel further noted that the revenue requirement showing advocated by the Coalition is unnecessary because the proposed rule complies with statutory requirements. AMA TechTel agreed generally with CenturyLink's, Windstream's, and with OPUC's general comments and noted that, unlike many commenters, OPUC does not have a financial interest in the outcome of the rulemaking. Finally, AMA TechTel urged the commission to recognize the level of compromise and support already present for the proposed rule.

The Coalition stated that, on July 28, 2014, Windstream issued a public announcement that it is transferring certain telecommunications assets, including fiber, copper, and other fixed assets into an independent publicly traded real estate investment trust (REIT) and that a long-term master lease will be executed between Windstream and the REIT with Windstream leasing the assets used to operate and maintain its network throughout the United States. The Coalition stated that the ramifications of this transaction are potentially significant and urged the commission to require that Windstream provide additional details in order to permit other parties to this proceeding to understand the financial and operational interplay between Texas ILECs and the REIT. The Coalition stated that the TUSF is not structured to contemplate providing support to tenant lessees but instead is based on an assumption that every ETP funds all or nearly all of its own network. The Coalition stated that this issue is particularly important with respect to Windstream because Windstream receives approximately 76% of the total support that is subject to the financial need provisions of PURA §56.023.

The Coalition also stated that, although the ILECs and AMA TechTel argue that it would be administratively efficient to adopt the procedures set out in the rule as proposed, administrative efficiency may only be considered when an agency chooses between two valid alternatives for fulfilling a statutory mandate. Because the Coalition does not believe that the rule as proposed satisfies the mandate of PURA §56.023, the Coalition stated that administrative efficiency does not support adoption of the proposed rule.

TEXALTEL commented that proxies and surrogates, such as measuring 75% of a geographic area or 80% of certain expenses, are guaranteed to be imprecise. TEXALTEL stated that the debate in this rulemaking is whether there are proxies that are acceptably accurate to meet the objectives of the proceeding. TEXALTEL stated that, due to the diverse circumstances of the ILECs affected by the proposed rule, it is highly unlikely that any proxy is going to produce the right answer for all companies and that there is no evidence in the record that any of the proxies under consideration produce an accurate answer for any of the ILECs involved. TEXALTEL stated that, without access to additional information such as the level of support reductions that would cause ILECs to no longer be able to meet their statutory obligations, TEXALTEL does not support the proposed rule.

TSTCI commented that, while the processes and definitions established in the proposed rules may be appropriate for the specific service areas and companies affected by the proposed rules, these processes and definitions would likely not be appropriately applied to TSTCI's members and could work against the principles of universal service. TSTCI asks that the commission note in the adoption of the proposed rules that the application of the processes and definitions set out

in the proposed rule are explicitly limited to the companies affected by the proposed rules in this project.

Commission response

PURA §56.023(j) authorizes the commission to establish the standards and criteria for an ILEC to demonstrate that it has a financial need for continued support from the THCUSP and the SRILEC USP. PURA §56.023(g) and (i) further require that the commission set the amount of TUSF support for the petitioning ILEC in the same proceeding if the commission determines that the ILEC has demonstrated a financial need for continued support.

The rule, as adopted, is the product of extensive discussions between the stakeholders and reflects compromise on the part of the parties affected by the rule. There are a variety of approaches that could be used to establish financial need and to determine the amount of support. The commission finds that long-run incremental cost models or "rate case" methods are not the only means to consider an ILEC's revenues or operations. The rule adopts a proxy that achieves the legislative goal of limiting the amount of the TUSF support provided to areas in Texas in situations which, without such support, Texans would not have access to basic telecommunications service. While the proposed rule does not examine the specific revenues of an ILEC to establish financial need, it does use a proxy of revenues and expenses in the form of the financial need test.

The commission adopts a two-step process to accomplish the mandate to establish the criteria to determine TUSF support. In the first step, the financial need test, the commission will determine whether a petitioning ILEC has a financial need for continued support in each exchange identified in the petition. This implementation of the financial need test is codified in §26.405(d). The commission's financial need test identifies whether there is an unsubsidized wireline voice provider competitor within a market. Regarding exchanges in which an unsubsidized wireline voice provider competitor offers basic local service—a product that the commission finds is comparable to the BLTS offered by ILECs—in census blocks that exceed 75% of the square miles of an exchange, the commission finds that there exists a business case for the provision of BLTS without TUSF support. Where such a business case exists, there is no financial need for TUSF support in order to accomplish the universal service goals set forth in PURA §56.021. On the other hand, if an unsubsidized wireline voice provider competitor does not offer basic local service in census blocks that exceed 75% of the square miles of an exchange, the commission finds that it is appropriate to continue TUSF support in order to ensure the availability of BLTS at reasonable rates in these exchanges.

The commission finds that this financial need test will eliminate support for those exchanges, such as increasingly urban and suburban exchanges, in which there exists robust competition, while retaining support for high-cost rural areas in which the absence of TUSF support will likely result in customers being unable to obtain BLTS at reasonable rates. This straightforward examination relies on publicly-available information and

provides a valid measure of whether BLTS can be expected to be offered throughout a market at reasonable rates without the support from the TUSF.

The second step, codified in §26.405(e), provides for the adjustment of the support available to a petitioning ILEC in light of the financial need test described above. Specifically, §26.405(e) first eliminates all support in exchanges in which the ILEC has not demonstrated financial need. For those exchanges in which the ILEC has demonstrated financial need, §26.405(e) sets the amount of support for an ILEC by ensuring that the support available to the ILEC does not exceed 80% of certain expenses attributable to providing regulated telecommunications service in the exchanges for which the ILEC has a financial need for continued support. This means that the ILEC must obtain revenues for at least 20% of its expenses. By ensuring that the ILEC's expenses attributable to supported exchanges exceed the support available to the ILEC, it follows that the support provided to the ILEC will be used to assist in the provision of BLTS in high-cost rural areas and will not be used to support the ILEC's commercial efforts in exchanges in which the ILEC does not have a financial need for continued support.

As discussed in more detail below, the commission agrees with several commenters that stated that this two-step process presents a straightforward mechanism to implement a financial need test that complies with the mandate of PURA §56.023. As indicated by AMA TechTel, the commission finds that the adopted rules are tailored to ensure the continued availability of communications service throughout Texas, and the commission finds that

the adopted rules are consistent with the purpose of the TUSF, which is to assist ETPs in the provision of BLTS in high-cost rural areas (PURA §56.021(1)).

The commission notes that several commenters, including CenturyLink, Windstream, and GVTC have stated that the rule, as proposed, is the product of extensive discussions between the stakeholders and reflects compromise and concession on the part of the ILECs affected by the rule. However, these ILECs also expressed concerns with respect to specific provisions of the rule. For the reasons discussed below, the commission disagrees with CenturyLink and Windstream that a forward-looking cost model would be preferable to a competitor test for determining an ILEC's financial need for continued support. The commission finds that a forward-looking cost model is inconsistent with the adoption of a straightforward test that relies on publicly-available information and is unnecessary to establish an ILEC's financial need for continued TUSF support.

Regarding TEXALTEL's argument that a proxy will be imprecise, as discussed in further detail below, the commission finds that the proxies adopted establish valid criteria for determining financial need and for setting ILECs' MPLS amounts in compliance with PURA §56.023.

Further, although several parties have argued that the use of proxy methodologies is supported by consideration of administrative efficiency, the Coalition stated that administrative efficiency may only be considered by an agency when it chooses between two valid alternatives for fulfilling a statutory mandate. Because the Coalition does not

believe that the proxies adopted in this proceeding satisfy the mandate of PURA §56.023, the Coalition contends that it is improper to consider administrative efficiency in the reasoned justification for their adoption. Because the commission finds that the proxies adopted in this proceeding establish valid criteria for determining financial need and for setting MPLS amounts, it is appropriate for the consideration of administrative efficiency to add weight to the commission's reasoned justification for the adoption of the rules.

Further, the commission disagrees with GVTC regarding the applicability of the two-step process to a rate-of-return-regulated ILEC in addition to other regulations that are only applicable to rate-of-return-regulated ILECs. The commission agrees with the Coalition that the rule does not impose enhanced regulatory obligations on a rate-of-return-regulated ILEC because the commission adopts a single test for financial need that is applicable equally to all of the affected ILECs. The commission also notes that, unlike the other affected ILECs, GVTC is permitted to apply for Additional Financial Assistance, as specified in §26.405(i) of the adopted rule, compensating for any additional burden to which GVTC claims it is subject. In light of this remedy and the absence of any enhanced regulatory obligations specifically tied to GVTC's continued TUSF support, the commission finds that the adopted rule does not subject GVTC to an unfair level of regulatory oversight.

The commission finds that it is not necessary to delay adoption of the rule or to require additional information from Windstream regarding the transfer of certain of its telecommunications assets into a REIT, especially in light of the mandate in SB 583 that

this rulemaking be completed by December 1, 2014. Instead, the commission clarifies in this Order that nothing in the rule shall be construed to prevent a party from contesting the accuracy of the summary of expenses and property categories that will be presented by any petitioning ILEC pursuant to §26.405(f) if an ILEC elects to file a petition to show financial need. The commission further clarifies that parties will have the opportunity to conduct discovery to determine the accuracy of the summary of expenses filed by any ILEC, but the commission reiterates that the new support amounts set for a petitioning ILEC will be calculated by limiting the ILEC's total support to 80% of the total expenses that are shown by the ILEC to be attributable to the exchanges in which the ILEC has a continued need for financial support.

Finally, the commission agrees that the proposed rule applies only to the ILECs affected by PURA §56.023(g) and (i). The commission will consider all appropriate criteria if, in the future, the commission conducts a rulemaking that would affect the support amounts available to TSTCI's members.

The commission also makes non-substantive changes in §26.405(d)(1), (d)(2)(B) and (C), (g)(1) and (2).

Comments relating to the published notice of the proposed rules

The Coalition commented that it supports the proposed amendments to §26.403 and §26.404 but that it does not support the proposed new §26.405 because the proposed rule fails to implement

the recent changes to PURA §56.023 and because the proposed rule fails to comply with the Administrative Procedures Act, TEX. GOV'T CODE ANN. §§2001.001–.902 (Vernon 2008 & Supp. 2014) (APA). Specifically, the Coalition commented that APA §2001.023 and §2001.024 require publication of notice in the *Texas Register* at least 30 days before adoption of a rule and that APA §2001.029(a) requires that an interested person be provided a reasonable opportunity to submit comments. Citing *Unified Loans, Inc. v. Pettijohn*, 955 S.W.2d 649 (Tex. App.—Austin 1997, no pet.) (*Pettijohn*) and *Chemical Mfrs. Ass'n v. Environmental Protection Agency*, 870 F.2d 177 (5th Cir. 1989) (*Chemical Manufacturers*), the Coalition stated that notice is adequate only if interested persons can confront the agency's factual suppositions and policy preconceptions and if the agency provides interested parties the opportunity to challenge the underlying factual data relied upon by the agency.

The Coalition commented that nothing in the commission's publication of the proposed rule (Publication) identifies the methodology used to develop the proposal to limit the support awarded to a petitioning ILEC to 80% of the expenses attributable to the ILEC's supported exchanges. The Coalition acknowledges that PURA §56.021(1) states that the TUSF is intended to provide assistance in the provision of BLTS, but the Coalition claimed that the Publication does not provide sufficient notice supporting the 80% limitation as a reasonable interpretation of PURA §56.021(1). Further, the Coalition commented that no publicly-available current information is available that enables interested parties to comment on whether it is appropriate to provide TUSF support at a level up to 80% of an ILEC's reported expenses. The Coalition noted that some relevant information was provided in Project No. 41505, *Compliance Proceeding for Eligible Telecommunications Carriers to Submit Five-Year Plans Pursuant to P.U.C. SUBST. R.*

26.402, but that this information was submitted confidentially and is not available for the Coalition to review. The Coalition argued that, without access to ILECs' current expense data, it would not be possible for interested parties to provide meaningful comments either in support of or against the specific 80% number or regarding any other number.

The Coalition stated that, as a result, it is unable to provide detailed comments on the development of the 80% limitation and that the APA's requirements that interested parties be permitted to provide comments is therefore violated. The Coalition stated that these flaws can only be corrected if the proposed rule is modified to specify that an ILEC's revenues as well as its expenses will be examined in a contested case initiated by the ILEC and that the support awarded to the ILEC will be based on record evidence as to that ILEC's financial need.

The Coalition also claimed that the provision to de-average support awarded to ILECs from the SRILEC USP in the proposed rule did not comply with the APA on the grounds that it is arbitrary, that there is no publicly-available data supporting this portion of the rule, and that there is no explanation for how the proposal was calculated. The Coalition stated that it is impossible for any interested party to provide meaningful comment on the de-averaging methodology. For the same reasons as discussed above with respect to the 80% limitation, the Coalition claimed that the Publication did not comply with APA's notice provisions with respect to the de-averaging provision.

The Coalition further argued that the adoption of the proposed rule as published would be vulnerable to legal challenge on the grounds that the commission's action would be arbitrary and

capricious. APA §2001.033 requires that, as part of a rule's adoption, the commission must set forth the reasoned justification for the rule, demonstrating that it considered the stakeholders' comments. The Coalition, relying on *Gulf Coast Coal. of Cities v. Public Utility Commission*, 161 S.W.3d 706 (Tex. App.—Austin 2005, no pet.) (*Gulf Coast*) and *Lambright v. Texas Parks and Wildlife Dep't*, 157 S.W.3d 499 (Tex. App.—Austin 2005, no pet.) (*Lambright*), argued that an agency's action is arbitrary and capricious if, in making its decision to adopt a rule, it (1) failed to consider the relevant factors the Legislature intended the agency to consider, (2) considered an irrelevant factor, or (3) reached a completely unreasonable result after weighing the relevant factors. Further, relying on a case involving the Federal Communications Commission (FCC), *Texas Office of Pub. Util. Counsel v. Federal Commc'ns Comm'n*, 265 F.3d 313 (5th Cir. 2001), the Coalition claimed that an agency must adequately disclose data it used to reach its conclusions because otherwise the agency will not have considered all relevant factors in adopting the rule. The Coalition claimed that, if the rule is challenged, it will not be sufficient that the commission has access to data that support the 80% limitation while the public does not. The Coalition relied on several cases involving federal agencies, including *Portland Cement Ass'n v. Rickelshaus*, 486 F.2d 375 (D.C. Cir. 1973) (*Portland Cement*), regarding a situation in which an Environmental Protection Agency (EPA) rule was invalidated because the agency had not made relevant information available to affected manufacturers in a timely fashion when that information formed a basis for a rule. The Coalition stated that the 80% figure set out in §26.405(e)(2)(B) appears to have no basis, as no information provided in the published notice sets out a basis for this provision and that the Publication is flawed and fails to substantially comply with the APA.

TEXALTEL agreed with the Coalition regarding the adequacy of the notice provided in the Publication.

In response to the Coalition's comments, GVTC noted that, while the TUSF is designed to provide universal service for all of Texas by having all Texans share in the cost of supporting service in high-cost rural areas, it is in the Coalition's members' best interests if support is reduced for ILECs with POLR obligations while Coalition members are permitted to compete without fulfilling POLR obligations.

In response to the Coalition's comments, CenturyLink noted that an agency's rule is presumed to be valid, and the challenging party bears the burden to demonstrate its invalidity. To the extent that the Coalition challenges the facial validity of the rule if adopted as proposed, CenturyLink stated that the burden would rest with the Coalition to demonstrate that the rule as adopted contravenes specific statutory language, runs counter to the general objectives of the statute, or imposes additional burdens, conditions, or restrictions in excess of, or inconsistent with, the relevant statutory provisions.

Windstream and CenturyLink stated that the Publication complied with all notice requirements of the APA and that nothing in the Publication prevents the Coalition from providing meaningful comments regarding the proposed rule. CenturyLink noted that the Coalition does not appear to argue that the commission has failed to provide any of the specific elements of notice required by APA §2001.024. Windstream and CenturyLink stated that, contrary to the Coalition's arguments, there is no statutory requirement that the published notice of a proposed rule contain

the factual basis or justification for the proposed rule. These ILECs cited *Texas Bd. of Chiropractic Exam'rs v. Texas Medical Ass'n*, 137 S.W.3d 342 (Tex. App.—Austin 2012, no. pet.) (*Texas Medical Association*), in which the Third Court of Appeals stated that no statute requires an agency to provide the factual basis for a rule in the public notice of the proposed rulemaking. GVTC and Consolidated also stated that this factual basis requirement does not exist with respect to publication of proposed rules. Windstream also commented that the Coalition's alternative to the proposed rule lacks any valid standards or criteria for determining financial need in a future contested case and fail to provide sufficient regulatory direction in contravention of the Legislature's unambiguous mandate in PURA §56.023(j), which requires the commission to establish standards and criteria for an ILEC to demonstrate financial need. Windstream also commented that the proposed rule as published satisfies all legal standards under the APA.

Further, Windstream, CenturyLink GVTC, and Consolidated also noted that *Pettijohn*, which the Coalition relies on, was not a case regarding notice required pursuant to APA §2001.024(a)(1), but rather discussed an agency's failure to prepare an analysis regarding the impact of a proposed rule on small businesses, which is required by TEX. GOV'T CODE §2006.002(c) and incorporated into the APA by APA §2001.024(a)(8). TEX. GOV'T CODE §2006.002(c) requires the creation and publication of an economic impact statement when adopting a rule that may have an adverse impact on small businesses. Consolidated noted that, in *Pettijohn*, an agency, when adopting a rule applicable to all pawn shops, had failed to produce an economic impact statement. Consolidated stated that, therefore, *Pettijohn* does not stand for a general principle that all of an

agency's support for a proposed rule be included in the notice of the rule but rather interprets a specific provision applicable to rules affecting small businesses.

CenturyLink also stated that, even if some reasoned justification requirement did apply, it is not clear that the commission would be required to provide a factual basis for its proposed use of a specific number, in this case the 80% limitation as the standard for setting new MPLS amounts. Citing *Chrysler Motors Corp. v. Texas Motor Vehicle Comm'n*, 846 S.W.2d 139 (Tex. App.—Austin 1993, no writ) (*Chrysler*), CenturyLink stated that the reasoned justification requirement applicable to orders adopting a rule was not intended to be applied clause by clause but rather to the rule as a whole and that to hold otherwise would impose a requirement for detailed findings of fact and conclusions of law supporting the adoption of each rule.

GVTC also noted that the proposed de-averaging provisions comply with the APA because they are the result of a collaborative process to evaluate publicly-available information. First, data was gathered regarding the MPLS amounts determined for each exchange included in the commission's order in Docket No. 18515. As these MPLS amounts were developed through systematic, uniform, and data driven processes, GVTC commented that these MPLS amounts are the most accurate representation of costs. Second, the most accurate housing unit density data from the time period examined in Docket No. 18515 was decided for each exchange from the 1997 BLR boundary information and the 2000 census for household data. Because cell phones were not as prevalent in that period, GVTC commented that it is reasonable to equate this housing unit density information to residential line density. The MPLS amounts awarded in Docket No. 18515 were correlated to the housing unit density information for each exchange.

Next, the weighted average of the MPLS for each of the density bands was determined. These weighted average MPLS amounts correspond to the proxy MPLS amounts in the proposed rule. GVTC stated that reviewing the data for each band shows that each one contains approximately 50 or more data points, which allows for a reasonable basis for the calculation of the weighted average. GVTC commented that, absent the development of company-specific cost models, the commission's proxy MPLS amounts are reasonable and appropriate.

Consolidated further replied to the Coalition's comments, stating that it appears that the Coalition have either proposed new tests based on language not found in SB 583, stricken entire subsections of the proposed §26.405 with no meaningful alternative, or proposed to simply delay decisions regarding the criteria to determine financial need by suggesting that the commission address certain matters in the contested case proceedings to be filed at a later time and which must be processed in 330 days or fewer. Consolidated stated that the Coalition's comments are neither consistent with the SB 583's mandate nor constructive in guiding the commission in the development of standards consistent with SB 583's mandate.

AMA TechTel stated that, contrary to the Coalition's concerns regarding adequate notice, that additional notice and comments may be required for the commission to implement many of the Coalition's proposals.

Commission response

Contrary to the Coalition's assertions, the commission finds that its Publication provided notice and opportunity for comment as required by the APA. The commission also

disagrees with the Coalition that the commission's action would be arbitrary and capricious. Citing APA §2001.024, the Third Court of Appeals held in *Texas Medical Association* that, although a statement of factual basis is necessary in an order adopting a rule, "no statute requires the Commission to include that statement of the factual basis for the rule in the public notice of proposed rulemaking." *Texas Medical Association*, 137 S.W.3d at 355. The commission notes that the Coalition did not cite a case that contradicts the interpretation of APA §2001.024 stated in *Texas Medical Association*, but instead relied largely on cases involving statements required by other laws or notice required under federal administrative procedure. As such, the commission finds that *Texas Medical Association* and the plain text of APA §2001.024 indicate clearly that the commission provided all notice in its Publication that is required by law.

The commission notes that all of the stakeholders, including the Coalition and TEXALTEL, have provided meaningful comments regarding the sections of the proposed rule for which the Coalition claimed meaningful comments are not possible. As discussed in further detail below, the Coalition noted correctly that the proposed methodologies for setting ongoing MPLS amounts and for de-averaging support provided by the SRILEC USP do not require explicit findings of financial need but instead rely on the application of proxy formulas to relevant information.

Additionally, the other stakeholders have provided meaningful comments in support or in opposition to these provisions, including several ILECs' proposals to increase the 80% limitation to a higher proportion of an ILEC's reported expenses. For example, GVTC

provided an analysis of the results of Docket No. 18515 in combination with other publicly-available information in order to provide a reasonable factual basis for the proxy MPLS amounts in the de-averaging methodology. These comments are addressed in further detail below.

The Coalition relied principally on *Pettijohn* and *Chemical Manufacturers* to support its contention that the APA requires that the commission disclose the factual basis for proposed rules as part of the notice-and-comment process. The commission disagrees. APA §2001.024 sets out the required contents of a notice of rulemaking and states that the notice must include any other statement required by law. In *Pettijohn*, the Court found that the Consumer Credit Commissioner (CCC) failed to comply with TEX. GOV'T CODE ANN. §2006.002(c)—and consequently, failed to comply with APA §2001.024, which implicitly incorporates §2006.002(c)—because the CCC's notice did not contain a detailed analysis as required by TEX. GOV'T CODE ANN. §2006.002(c). *Pettijohn*, 955 S.W.2d at 653–4. TEX. GOV'T. CODE ANN. §2006.002(c) states that, before adopting a rule that would have an adverse economic effect on small businesses, a state agency must prepare a statement of the effect of the rule on small businesses, including an analysis of the cost of compliance with the rule and a comparison of the cost of compliance for small businesses with the cost of compliance for the largest businesses affected by the rule. The notice at issue in *Pettijohn* contained only a general statement that the rule would have no effect on small businesses even though the revised rule increased costs for some pawnbrokers. *Id.* As indicated by several commenters and unlike the Coalition's concerns in this proceeding, the *Pettijohn* case involved the CCC's failure to provide a detailed analysis when such analysis

was required by a provision found outside the APA. As such, in *Pettijohn*, the CCC's rule was invalidated because of the CCC's failure to provide specific, detailed information explicitly required by TEX. GOV'T CODE ANN. §2006.002(c). By contrast, the only APA provisions the Coalition could be interpreted to rely on are APA §2001.024(1), which requires a brief explanation of the proposed rule, and APA §2001.024(5), which requires a note about the public benefits and costs of the proposed rule. The commission notes that a summary of the rule and an explanation of the rule's benefits were provided in the Publication. Accordingly, the basis of the outcome in *Pettijohn* is distinguishable from the facts of this rulemaking.

Similarly, the Coalition claimed that *Chemical Manufacturers* stands for the principle that fairness requires that an agency afford interested parties an opportunity to challenge the underlying factual data relied on by the agency. While the commission supports this principle, the commission does not find in *Chemical Manufacturers* any holding that would support the contention that the Publication was deficient in this proceeding. In *Chemical Manufacturers*, among other issues, the Fifth Circuit Court of Appeals rejected the petitioner's claim that the EPA failed to provide an opportunity to provide meaningful comments on the basis that the petitioner had in fact filed meaningful comments. *Chemical Manufacturers*, 870 F.2d at 200–202.

In this proceeding, the commission notes that several parties, including the Coalition, have provided meaningful comments regarding the proposed rule. Analogizing from the Court's holding in *Chemical Manufacturers*, because the Coalition has been afforded the

opportunity to provide meaningful comments (and has in fact done so), it has no claim that the adopted rule should be overturned for lack of notice.

To the extent that the Coalition's comments can be interpreted to apply to the adoption stage of the commission's rulemaking process, the commission notes the Coalition attempts to apply a standard that is a more stringent one than is actually applied by Texas courts. The order adopting a rule must only set forth some factual basis that supports adoption of the rule, but is not required to contain every fact considered by the commission. The commission agrees with CenturyLink that the APA does not require detailed findings of fact and conclusions of law regarding every substantive provision. In *Chrysler*, the Third Court of Appeals analyzed an identical "reasoned justification and factual basis" requirement found in the predecessor statute to the APA and held that "a statement of the basis of the entire rule" satisfied the reasoned justification requirement because the requirement is applied to the rule as a whole, not clause by clause. *Chrysler*, 846 S.W.2d at 143; *see also, Reliant Energy Inc. v. Public Utility Commission of Texas*, 62 S.W.3d 833, 843 (Tex. App.—Austin 2001, no pet.) (*Reliant*) (affirming the holding of *Chrysler* with respect to the presently-effective APA).

Similarly, in *Gulf Coast,* the Third Court of Appeals considered petitioners' contention that the commission had failed to include an adequate summary of the factual basis of an adopted rule because the commission's order adopting the rule referred to uncorroborated events not supported by anything in the rulemaking record and not fully developed within the four corners of its order. *Gulf Coast,* 161 S.W.3d at 714. The Court held that, even if

the petitioners' factual assertions were correct, they "had not shown the Commission failed to include a summary of the factual basis of the amendment." *Id.* Accordingly, in *Gulf Coast*, the Court found that even the order adopting a rule is not required to contain the entire factual record supporting adoption of a rule, but merely must contain some factual basis sufficient to show that the rule is not arbitrary.

The commission again notes that these requirements apply to the adoption of a proposed rule, not to the publication of a rule. The commission disagrees with the contention that adoption of the proposed rule without the provision of additional notice would be arbitrary and capricious or that the validity of the adopted rule is impaired because the Publication did not state a factual basis or reasoned justification for the adopted rule. The commission further finds that this Order complies with APA §2001.033 and is consistent with the standard applied in *Gulf Coast* in that it provides a factual basis and reasoned justification for the adoption of the proposed rule and demonstrates that it fully considered the stakeholders' comments.

The commission notes that AMA TechTel observed that additional notice and comments may be required for the commission to implement many of the Coalition's proposals involving the use of ILECs' revenues and earnings to determine their financial need for continued support, as discussed in further detail below. Because the commission does not adopt the Coalition's proposals on these issues, it is not necessary to address whether their adoption would require an additional notice and comment period.

In determining the ILEC's financial need for continued support from the TUSF, to what extent should the commission consider both the expenses incurred by the ILEC, as well as the revenues received by the ILEC?

In its Initial Comments, the Coalition argued that the commission cannot adopt a rule that does not give effect to the term "financial need." The Coalition admits that the statute does not define "financial need" but rather instructs the commission to adopt rules establishing the criteria and standard for financial need. However, the Coalition asserted that the term "financial need" should be interpreted to require more than just an examination of an ILEC's expenses and that the commission should adopt a rule that requires an examination of an ILEC's revenues as well as expenses. The Coalition stated that it appears that the commission intends to implement the statute by: (1) eliminating support for exchanges where an unsubsidized wireline competitor offers service, and (2) for all remaining exchanges, reaffirming that support will continue at existing levels so long as it is no greater than 80% of the ILECs aggregate expenses. However, the proposed rule deviates from the requirements of PURA §56.023 with respect to the remaining exchanges because it only requires an examination of an ILEC's expenses but not its revenues and therefore fails to examine an ILEC's financial need for continued support. The Coalition stated that, if the commission does not examine both expenses and revenues, then it will not know if a company has a financial need for ongoing TUSF support or if that company's costs are being fully recovered from customers.

The Coalition stated that, when administering other programs of public assistance, agencies frequently require a showing of "financial hardship" or "financial need" before such assistance is made available to that person or entity. The Coalition cited a number of examples in which the FCC, Federal Energy Regulatory Commission and other agencies denied a party's requests for

financial assistance because the party failed to submit specific factual information such as a balance sheet, profit and loss statement, and cash flow projections.

The Coalition admitted that CenturyLink and Windstream's statements that revenues are being considered in the proposed rule is true. However, the revenue benchmark referred to by CenturyLink and Windstream included state-wide revenues for only certain ILECs, and Docket No. 18515 was processed using 1997 data. Moreover, Docket No. 18515 was processed before the Internet and broadband were the primary focus for network design and business plans.

Contrary to the Initial Comments of Windstream, CenturyLink, and AMA TechTel, the Coalition asserted that examining the ILEC's revenues would not be burdensome. The Coalition stated that the proposed rule already requires ILEC's expenses to be allocated among exchanges, including revenue from bundled services. An additional requirement for ILECs to submit revenue information would not be burdensome because the ILECs' customer billing records should be able to be used to determine revenues attributable to a specific exchange and identify revenues associated with an affiliate's bundled service. The Coalition further stated that an ILEC would not need to do a comparison of its expenses and revenues by each of the ILEC's services but would only have to perform a comparison of its expenses and revenues on an exchange basis. Additionally, the Coalition asserted that because no ILEC will file a petition prior to 2016, they would have enough time to determine how to allocate their expenses and revenues to comply with the commission's requirements. The Coalition claimed that it is possible to perform a comparison of intrastate revenues and expenses and that such a task is not as complex, convoluted, and daunting as the other commenters have stated. In the 1980s, the

commission conducted over 60 "mini rate cases" for over 60 ILECs in approximately six months. The Coalition stated that it is not acceptable to excuse an ILEC from its burden of demonstrating financial need because the ILECs have commented that the task is complicated.

AMA TechTel stated that PURA does not specify the standards or criteria for an ILEC to demonstrate a financial need for continued support but rather instructs the commission to adopt rules to administer the TUSF. AMA TechTel further stated that considering revenues will complicate this rulemaking and subsequent contested cases beyond any benefit that might be derived from the consideration of revenues and that the added complexity and analysis is not necessary. AMA TechTel commented that the elimination of support in an exchange where there is an unsubsidized competitor is reasonable and appears to have broad support. AMA TechTel also commented that it supports the methodology for determining new MPLS amounts contained in the proposed rule.

Windstream commented that, regardless of whether PURA authorizes the commission to consider revenue in its determination of whether an ILEC has financial need for continued support, the commission should not do so because the standards included in the proposed rule make consideration of revenue unnecessary. Windstream noted that the proposed rule establishes the standards and criteria that demonstrate financial need without unnecessarily implicating a conflict with other PURA provisions or unnecessarily complicating the contested case proceedings. Additionally, Windstream commented that its current support amount from the THCUSP, as calculated in Docket No. 18515 and as reduced through rate-rebalancing, originally reflected statewide average revenue data. Windstream commented that these

benchmark revenue data are conservative because much of the revenue (comprised of intraLATA toll, intrastate access and interstate access) no longer exists and, as such, represent a conservative total amount of support. Lastly, the 80% limitation included in the proposed rule recognizes a reasonable offset to expenses and provides a reasonable and efficient approach to ensure that ongoing TUSF support amounts will only serve to assist in the provision of BLTS in high-cost rural exchanges.

Windstream commented that further consideration of revenues will add complicated issues to the contested cases, including debates over allocation of revenues to various jurisdictions. Moreover, deriving information regarding the revenues assigned to particular services would involve complex cost-of-service studies which could not be completed to meet the statutorily defined 330-day timeline for the contested cases. Because many services are provided using bundles that include services by affiliated entities, Windstream argued that the introduction of revenues into this process has the potential to create a mismatch of revenues and expenses that are reviewed.

Windstream also stated that the Coalition inappropriately tries to twist the "financial need" standard in the statute into a "financial hardship" standard. Windstream argued that the Coalition did not present any examples based on prior commission precedent to support its argument and the examples that it did present involved a waiver or delay of payment of fees. Additionally, the examples from Texas and federal law prove the exact opposite of their argument because the information required to demonstrate financial need only involved "one side of the ledger."

Consolidated stated that given the regulatory construct in proposed new rule §26.405 and Consolidated's comments for other sections of the rule, it is not necessary to examine expenses and revenues of the ILEC.

In its Reply Comments, Consolidated disagreed with the Coalition's interpretation of the statute relating to examining expenses and revenues to determine financial need. Consolidated stated that had the Legislature intended for the commission to examine revenues to determine financial need, it would have included that requirement in S.B. 583.

Consolidated also asserted that a key element of the rule, the "wireline competitor" test, is a reasonable proxy for determining an ILEC's continued financial need for TUSF support in certain exchanges because it presents a reasonable approach to identify those areas that are subject to competition. Consolidated pointed out that the Coalition's complaint about the competitor test appears wanting, given their position in previous cases that "a competitor test is the best proxy for need." Consolidated stated that the commission developed the competitor test as a reasonable proxy to determine whether the ILEC would still be entitled to continued TUSF support whereas the Coalition's suggestions would turn the contested case required under PURA §56.023(i) into either a protracted TELRIC cost study docket or a rate case type proceeding. Consolidated stated that the Coalition asks that the commission commit a double fault, first, by reading "revenues" into S.B. 583 where it doesn't exist and, second, by creating a rate case type process to determine financial need.

CenturyLink stated that the proposed rule is valid and can be legally adopted. CenturyLink asserted that an objective of the proposed rule is to find a reasonable and efficient proxy that would avoid a lengthy and complex contested case to determine the appropriate costs and revenues associated with providing BLTS at a reasonable rate in high-cost areas. CenturyLink stated that ILECs' revenues are implicitly reflected in the commission's determination because the proposed rule modifies the existing TUSF support amounts set in Docket No. 18515, as reduced by Docket Nos. 40521 and 41097, which were set using forward-looking costs and statewide average revenue data. Although the revenue figures used in that proceeding are now dated, they likely overstate ILECs' current revenue because 45% of the revenue benchmark determined in Docket No. 18515 is comprised of intraLATA toll charges, intrastate access charges, and interstate access charges, all of which have declined since 1999. CenturyLink also noted that, although some ILECs' BLTS rates have increased since 1999, these increases were mostly used to offset decreases in TUSF support and do not compensate for declines in other revenues. CenturyLink also asserted that the 80% limitation in the proposed rule constitutes a reasonable offset to expenses from end user revenues. Because revenues are included in the calculation of current support amounts and because of the commission's policy of reducing TUSF support through imputed rate increases, revenues are adequately accounted for as an element of the proposed rule.

CenturyLink also stated that any attempts to incorporate an ILEC's revenues beyond what is stated in the proposed rule would undermine the balance between administrative efficiency, a reasonable test of financial need, and a reasonable screen for adjusting support. Furthermore, determining what revenues would be appropriate to include in the calculation of TUSF support is

a contentious and complicated issue that would require consideration of policy, jurisdictional, network components, and network costs issues in order to assign or allocate revenues appropriately. CenturyLink argued that attempting to answer such questions would be problematic to meet the 330-day statutory timeline for conducting a contested case and issuing a final order. CenturyLink concluded that a deeper examination of revenues is not needed to lawfully implement PURA §56.023(g), (i), or (j).

In addition to its comments concerning administrative efficiency, CenturyLink stated that there is no practical reason to consider an ILEC's revenues unless the consideration of revenues and expenses would be used as a way to look at something similar to the ILEC's earnings. For the commission to examine an ILEC's earnings on a per-exchange basis would be unprecedented, whereas the examination of an ILEC's earnings at a broader level would suggest that the commission endorses cross-subsidization between exchanges. CenturyLink stated that an examination at this broader level would not be in the public interest with the respect to the TUSF or with respect to the competitive nature of the telecommunications market. According to CenturyLink, a commission determination that CenturyLink's TUSF support should be reduced based on the extent of its earnings would first require a proceeding similar to a rate case in order to determine its earnings. CenturyLink commented that this would be problematic in light of the 330-day deadline to conduct a contested case to determine financial need.

In its Reply Comments CenturyLink stated that it disagrees with the Coalition that the commission acted arbitrarily and exceeded its authority by interpreting the requirements to develop a test of "financial need" such that the test does not examine the ILEC's revenues.

CenturyLink noted that even the Coalition concedes that the term "financial need" is not defined in the statute and that the commission was required to establish "standards and criteria for an ILEC to demonstrate" a financial need for continued support. CenturyLink asserted that the terms "financial" and "financial need" are ambiguous terms that do not require the commission to specifically examine an ILECs revenues. Furthermore, CenturyLink argued that nothing in PURA requires the commission to examine both the ILECs revenues and expenses. An examination of just an ILECs expenses or costs can be used to determine that an ILEC "needs money." CenturyLink stated that the FCC's two main high-cost support mechanisms have never factored in any consideration of actual revenues in determining support for high-cost areas. The High Cost Loop and the High Cost Model mechanisms only consider the costs to provide service in high-cost areas and do not factor in revenues. These high-cost support programs instead calculate needed support based on a comparison of the ILEC's costs to national average cost to determine the level of support. CenturyLink pointed out that the fact that the FCC uses cost-based tests of need for universal service support should be more persuasive than what other agencies do to implement a test of financial need. Additionally, when the Legislature intends for revenues (or expenses) to be considered by an administrative agency, the Legislature is capable of making that intent clear with specific references to "revenue" or "expenses." Because the Legislature did not specify an examination of revenues or of expenses, but instead directed the commission the task of developing standards and criteria, then the decision as to what that test should include would be determined by the commission.

GVTC stated that, in light of the methodology in the proposed rule, it is not necessary for the commission to examine GVTC's expenses and revenues. GVTC is subject to rate of return

regulation under PURA Chapters 52 and 53, which provides authority to the commission to examine GVTC's revenues, expenses, and rate of return. GVTC asserted that any review of its expenses, revenues, or rate of return should be performed in the context of PURA Chapters 52 and 53 or in a filing by GVTC under section 26.408 of the commission's rules, relating to Additional Financial Assistance. GVTC also noted that the commission is prohibited from considering the revenues or earnings of an ILEC that has elected to be regulated under PURA Chapters 58, 59, or 65.

GVTC also stated that the Legislature enacts statutes with full knowledge of existing law and that a statute is to be construed in connection with and in harmony with existing law. Had the Legislature wanted the practical equivalent of a rate case, it could have required that but instead left the decision to the commission as to how to determine an ILEC's financial need. GVTC argued that the Coalition's interpretation, which is in direct opposition of the Code Construction Act, TEX. GOV'T CODE §311.011 and common law principles of statutory construction, sets up an irreconcilable difference within PURA. Additionally, GVTC noted that the Coalition has argued in the past for a simple and bright-lined indicator for whether there is a continued financial need for TUSF support and whether an unsubsidized competitor exists is now what the Coalition opposes.

TEXALTEL stated that, without an examination of an ILEC's revenues, the commission must rely on a proxy to determine the appropriate amount of support for a petitioning ILEC or else must guess. TEXALTEL commented that, because of the stark differences between the ILECs affected by SB 583, the adoption of a single methodology to examine all petitions would

inevitably lead to undesirable results. TEXALTEL commented that an examination of each ILEC's revenues presents a clear and precise answer to this concern.

Commission response

The authority to determine an appropriate test to determine financial need is expressly delegated to the commission in PURA §56.023. The commission needs to establish by rule a process that strikes a balance between administrative efficiency and the appropriate level of review. The rule does this by applying proxies to *both* the determination of whether competition exists within an exchange and the appropriate support amounts in exchanges without competition.

In view of the commission's authority to determine appropriate standards and criteria to ascertain an ILEC's financial need for continued support, the commission finds that the presence of an unsubsidized wireline voice provider competitor, as established by the standards set forth in the adopted rule, provides compelling evidence of the ability to offer BLTS in an exchange at reasonable rates without public support. As such, the test supports a finding that there is no financial need for continued TUSF support as required under PURA §56.023(j). The existence of an unsubsidized wireline voice provider in more than 75% of the square miles of an exchange as the threshold for competition is an appropriate proxy for determining whether competition exists in an exchange and further granularity is unnecessary in this rule.

At the same time, by setting the amount of support an ILEC receives at 80% of its expenses in a supported exchange, the commission can ensure that ILECs continue to receive appropriate support in exchanges lacking competition without conducting an examination of an ILEC's revenues and expenses. Thus, an ILEC faces a similar level of scrutiny in establishing the existence of competition in an exchange and setting the amount of support in exchanges where competition does not exist.

The commission agrees with CenturyLink that the term "financial need" as used in PURA §56.023 is susceptible to more than one interpretation. However, the commission finds that the adopted rule addresses the requirement that the commission establish standards for the determination of an ILEC's financial need for continued support.

As indicated by CenturyLink and Windstream, the commission notes that exchanges with robust competition are likely those densely populated markets that were once rural but are now suburban or urban markets. In these exchanges, where a business case exists, the commission finds that both the ILEC and a competitive provider are likely to continue to offer basic local service. With respect to those exchanges for which there is no competitor, the commission finds that it is appropriate to continue the availability of TUSF support in order to ensure that customers in those exchanges will be able to obtain BLTS at reasonable rates.

The commission finds that a comprehensive rate case or a forward-looking cost model is not necessary in order to achieve the goals of PURA §56.023. The commission finds,

contrary to the comments of the Coalition, that the proposed rule establishes a valid process to examine financial need without the need for conducting a rate case in every exchange for which support will be provided. The adopted rule limits the support available to a petitioning ILEC to 80% of certain expenses attributable to those supported exchanges for which the ILEC has demonstrated a financial need for continued support. This means that the ILEC must obtain revenues for at least 20% of its expenses. In setting the support amount at no more than 80% of an ILEC's expenses (and further subject to SB 583's requirement that ILECs can receive no higher support than they are receiving prior to the commission's financial need proceedings), the commission *is* considering an ILEC's revenues through the proxy. As noted by CenturyLink, ILECs' revenues will be implicitly reflected in the commission's determination because the proposed rule modifies the existing TUSF support amounts set in Docket No. 18515, which were set using forward-looking costs and statewide average revenue data and reduced in Docket Nos. 40521 and 41097. The ratio of at least 20% of revenues from customers and 80% from high-cost support is consistent with the commission's findings in those dockets. The limitation of support amounts to 80% of expenses also furthers the overall goal of ensuring robust competition in the state by capping the amount of continuing support for ILECs in supported exchanges at a level that precludes ILECs from using public subsidies from supported exchanges to support their operations in competitive markets. In this way, the commission finds, the rule ensures that the public will only assist ILECs that invest in exchanges in which there is no competition and no business case to operate otherwise.

Finally, the commission agrees with Windstream that the Coalition attempts to conflate the financial need test in PURA §56.023(j) with a "financial hardship" standard applicable to unrelated programs administered by other agencies. The commission acknowledges that several other federal and Texas agencies have adopted tests for financial need or hardship for certain forms of support, some of which directly consider revenues. The commission notes that the FCC's tests for the administration of the Federal Universal Service Fund (FUSF) do not incorporate an ILEC's revenues. In light of the commission's and other agencies' historical use of valid proxies to determine appropriate support amounts and the commission's finding that the presence or absence of an unsubsidized wireline voice provider competitor provides compelling evidence of an ILEC's financial need for continued support in a specific exchange, the commission finds that the proposed rule as modified by this Order establishes appropriate standards and criteria for an ILEC to demonstrate financial need as required under PURA §56.023(j), including by considering a petitioning ILEC's revenues and expenses through the use of the proxy methodologies in both the test for financial need and the determination of the amount of TUSF support.

To what extent does PURA allow the commission to consider the revenue received by the ILEC in a contested case to determine the ILEC's financial need for continued support from the high-cost programs of the TUSF?

CenturyLink stated that there are potential legal issues associated with attempting to examine a Chapter 58 or 59 ILEC's revenues or earnings. PURA §58.025 and §59.026 prohibit any hearing, complaint, or determination under any circumstances regarding the reasonableness of the revenues, return on invested capital, or net income of an ILEC electing under PURA

Chapters 58 and 59 and consequently prohibit the commission from examining the ILEC's overall revenues or earnings as part of a proceeding to implement PURA §56.023

The Coalition commented that the commission has the authority to consider the revenue received by an ILEC in a contested case to determine the ILEC's financial need for continued support. The Coalition stated that, when the Legislature enacted SB 583, PURA §58.025(a) and §59.026(a) were already included in PURA, and the Legislature knew that some of the ILECs affected by SB 583 were electing ILECs under PURA Chapter 58 or 59. The Coalition stated that the commission cannot choose to elevate the pre-existing prohibitions of PURA §58.025 and §59.026 over the directive of SB 583. The Coalition noted that SB 583 also removed the prohibition against requiring a revenue requirement showing when determining disbursements from the TUSF and argued that this indicates that it was the intent of the Legislature that an ILEC's revenues be considered. Further, the Coalition noted that PURA §56.002 states that, if some other provision of PURA conflicts with PURA Chapter 56, that PURA Chapter 56's provisions shall prevail. The Coalition claimed that the term "financial need" clearly requires an examination of an ILEC's revenues and that PURA Chapters 58 and 59 cannot be read to prohibit the commission form implementing PURA §56.023.

The Coalition stated that no legal precedent prevents the commission from considering revenues to determine financial need. The Coalition stated all cases that have examined the scope of PURA §58.025(a) or PURA §59.026 predate the adoption of SB 583. The Coalition claimed that *AT&T Commc'ns of Texas v. Southwestern Bell Tel. Co.*, 186 S.W.3d 517 (Tex. 2006) (*AT&T*) stands for the principle that PURA Chapters 58 and 59 do not prevent the commission from

implementing any of its lawful obligations but only prevented the commission from adjusting the rates of an electing ILEC. Further, the Coalition stated that, in *In re Southwestern Bell Tel. Co.*, 235 S.W.3d 619 (Tex. 2007) (*In re SWBT*), the Supreme Court of Texas considered the interplay of PURA Chapters 56 and 58. The Coalition claimed, based on the holdings of that proceeding, that PURA §56.002 demonstrates a Legislative intent to treat the TUSF and the commission's obligations set out in Chapter 56 as superior to and unencumbered by any conflicting provisions, including PURA §58.025 and §59.026.

The Coalition claimed that, if the commission fails to consider a relevant statutory provision or relies upon an irrelevant legal basis or factor, then its rule should be overturned by the courts. The Coalition stated that the commission cannot adhere to these requirements by adopting a rule that does not give effect to the term "financial need." The Coalition stated that the proposed rule does not examine financial need with respect to all of an affected ILEC's markets. The Coalition stated that if the commission adopts the proposed rule, then it will reflect that the commission has only considered PURA Chapters 58 and 59, but not the changes to the statutory scheme enacted in SB 583. The Coalition concluded that the commission cannot elevate PURA Chapters 58 and 59 in this manner, which would be contrary to PURA §56.002's provision that Chapter 56 must prevail.

CenturyLink stated that the Coalition's argument that an ILEC's revenues or earnings should be examined in the implementation of PURA §56.023 directly contradicts the provisions of PURA Chapters 58 and 59. CenturyLink commented that, regardless of the commission's findings regarding its authority to consider an ILEC's revenues or earnings, there is no need for the

commission to perform such an examination and risk the possibility of litigation over the issue because the commission's proposed rule is valid and can be legally adopted.

CenturyLink disagrees with the Coalition's assertion that there exists a direct conflict between PURA §56.023 and §58.025(a). CenturyLink stated that there is no clear and unavoidable conflict between "financial need" provisions of PURA §56.023(g),(i) and (j) and §58.025(a) because "financial need" does not need to be read to require an examination of a PURA Chapter 58 or 59 ILEC's rates, revenues, or earnings. CenturyLink stated that the two cases that the Coalition cited to support its argument that PURA §58.025(a) does not prohibit the commission from examining an electing ILEC's revenues, *AT&T* and *In re SWBT*, are distinguishable from the instant case and do not provide the commission a clear path towards the authority to examine an electing ILECs rates or overall revenues. In *AT&T*, the Supreme Court of Texas examined a claim that the commission lacked the authority to examine whether an electing ILEC's switched access rates were anticompetitive. The Supreme Court of Texas held that an inquiry into whether certain rates imposed an anticompetitive effect on the market did not require an inquiry into the reasonableness of the ILEC's rates in the sense involved in traditional rate-making. However, the commission was enjoined against even considering the reasonableness of an ILEC's rates when evaluating anticompetitive conduct.

With respect to the Coalition's claims regarding the holding of *In re SWBT*, CenturyLink noted that that proceeding involved an inquiry regarding a rate that was explicitly excluded from the provisions of PURA Chapter 58. Specifically, CenturyLink noted that PURA §58.061 states that PURA Chapter 58's protections do not apply to a charge permitted under PURA Chapter 56,

meaning that an inquiry regarding the TUSF assessment, which is permitted pursuant to PURA §56.022, does not implicate PURA §58.025. CenturyLink stated that, in *In re SWBT*, the Court did not decide the extent of PURA Chapter 58's prohibitions. Accordingly, CenturyLink claimed that both precedents are distinguishable from the facts of this rulemaking.

Lastly, CenturyLink stated that the commission's authority to examine an ILEC's revenue under PURA §56.023 is questionable and contested, and should the commission pursue an examination of revenues it is possible and likely, depending on how the commission attempted to examine and use revenue data, that ILECs would file suit to enjoin the commission from enforcing its rules.

Windstream asserted that the Coalition violates the tenets of statutory construction by arguing that the commission should ignore the protections afforded to ILECs electing pursuant to PURA Chapters 58 and 59. Windstream stated that nothing in SB 583 repealed the protections outlined in PURA §58.025(a). Windstream stated that statutory construction requires a basic assumption that the Legislature intended that the commission devise a rule that does not contravene other provisions of the overall statutory scheme. Windstream stated that it is therefore reasonable and optimal for an agency to adopt a regulation that achieves the aims of a statutory provision without frustrating the intent of other provisions in the same statutory scheme. As such, Windstream stated that an examination of its revenues as part of the determination of its financial need would be improper under PURA. Windstream noted that the proposed rule implements PURA §56.023 without implicating a potential conflict between PURA Chapter 56 and Chapters 58 and 59. However, the manner in which the Coalition has suggested that PURA §58.023(g)

and (i) be implemented to include revenues would create a direct conflict with existing law that would not otherwise exist and should be rejected.

AMA TechTel stated that it is plausible that PURA Chapters 58 and 59 prohibit an examination of an electing ILEC's revenues under any circumstances and that PURA does not state any positive authority for the commission to consider an ILEC's revenues in light of PURA Chapters 58 and 59.

Consolidated agreed that the commission may not consider the revenues or earnings of an ILEC that has elected to be regulated under PURA Chapter 58 or 59.

GVTC stated that the commission has the authority under PURA Chapters 52 and 53 to examine GVTC's revenue, expenses, and rate of return. However, GVTC stated that the commission does not have the authority to examine the revenues or earnings of an ILEC that has elected to be regulated under PURA Chapters 58, 59, or 65.

Commission response

The commission agrees with GVTC that the commission has the authority under PURA Chapters 52 and 53 to examine GVTC's revenue, expenses, and rate of return, as GVTC has not made an election under PURA Chapter 58 or 59, but the commission's authority to consider an ILEC's revenues or earnings when implementing PURA §56.023 is not clear. The commission agrees with CenturyLink that there are potential legal issues associated with examining an electing ILEC's revenues or earnings directly. PURA §58.025 and

§59.026 prohibit any hearing, complaint, or determination under any circumstances regarding the reasonableness of the revenues, return on invested capital, or net income of an ILEC electing under PURA Chapters 58 and 59. CenturyLink, Windstream, Consolidated, GVTC, and AMA TechTel interpret this provision to prohibit the consideration of an electing ILEC's revenues or earnings when determining the ILEC's financial need for continued TUSF support under PURA Chapter 56.

By contrast, the Coalition claimed that the commission has the authority to consider the revenue received by an ILEC in a contested case to determine the ILEC's financial need for continued support. To the extent that these provisions appear to conflict, the commission finds that it is not necessary to provide a definitive answer in this proceeding. Because the commission finds that the examination of the level of competition in a market appropriately addresses the legislative purpose for the adoption of PURA §56.023, the commission finds that it may appropriately and fully implement PURA §56.023 by using a competitor test that examines whether there is an independent business case to offer BLTS in a particular exchange and by using a reasonable proxy for establishing a petitioning ILEC's ongoing MPLS amounts. As such, the commission adopts standards and criteria for the financial need test that do not implicate the prohibitions of PURA Chapters 58 and 59. The commission reserves its authority to review these issues in a later proceeding and may at a later time reach an ultimate conclusion regarding the extent of the authority granted by PURA Chapter 56, which relates to the administration of the TUSF.

Amendments to §26.403(f) and §26.404(g)

CenturyLink commented that the proposed amendments to §26.403(f) and §26.404(g) were nearly identical other than changes in the relevant dates. CenturyLink stated that both sections would call for automatic and incremental reductions in TUSF support for an ILEC that does not file a petition to demonstrate financial need for continued support, and, as such, the reductions are contingent on whether the ILEC does or does not file a petition. CenturyLink commented that the proposed subsections do not clearly reflect this contingency, and the introductory language of both subsections reads as if there is no contingency or qualification to the mandated support reductions. CenturyLink requested that the commission add language to the introduction in both subsections that would clarify that the automatic reductions do not apply to an ILEC that has filed a petition. The Coalition stated that it agrees that this clarification is appropriate.

AMA TechTel commented that the proposed rule should be modified to allocate the company-wide reduction of support among the ILEC ETP's supported exchanges based on occupied household density so that support will be reduced for the most densely populated areas more than it is reduced in smaller, more sparsely populated areas, which are more likely to require continued support. AMA TechTel requested that this modification apply to company-wide reductions of support that would result from the implementation of §26.403(f) and §26.404(g) as well as the company-wide reductions of support that would result from the application of the 80% limitation found in §26.405(e). AMA TechTel stated that this approach is necessary to mitigate the effect that flat percentage reductions have on exchanges with small populations. For example, if support for two exchanges with the same MPLS amount is reduced by the same

percentage, an ETP's total revenue—comprising both rates and TUSF disbursements—would decline by a larger percentage in the exchange with fewer customers. AMA TechTel stated that these small exchanges are more likely to require more, not less, less support. AMA TechTel stated that its proposal could be accomplished by three means: (1) by using an allocation formula to eliminate support in the most dense exchanges until the appropriate total reduction is obtained, (2) by allocating the reduction in support based on relative line density of each exchange, or (3) by stating that support reductions would not be imposed with respect to exchanges with populations under a threshold of 1,000 but would be distributed to other exchanges. AMA TechTel noted that its proposal is consistent with recent commission proceedings, including Docket No. 40521.

Regarding AMA TechTel's recommendation, CenturyLink stated that it would be important to understand where information regarding an exchange's occupied household density would be derived and to understand exactly how support reductions would be weighted this factor. CenturyLink recommended that occupied households should not be considered in any capacity as part of the test to determine financial need. The Coalition opposed AMA TechTel's proposal, stating that there is no reason to determine as part of the rulemaking that an allocation of support reductions is appropriate. The Coalition stated instead that, if an ILEC considers such an allocation to be essential, then it can file a petition that includes all of its exchanges and demonstrate its financial need for support by exchange.

Commission response

The commission agrees with CenturyLink's proposal to clarify §26.403(f)(1) and §26.404(g)(1) and adds the phrase "Subject to the provisions of §26.405(f)(3) of this title," to these subsections. The commission finds that this change clarifies the commission's intent that the automatic support reductions will not apply to a petitioning ILEC after the commission issues a final order regarding the ILEC's petition to show financial need, which is consistent with SB 583.

The commission declines to adopt AMA TechTel's proposal with respect to the allocation of reductions of support that result from the implementation of §26.403(f) and §26.404(g). These subsections, as proposed, stated that the MPLS amount available in each supported exchange will be reduced by 25% each year for three years unless an ILEC files a petition to show financial need for continued support. The commission acknowledges AMA TechTel's concerns that a flat percentage reduction in MPLS amounts across an ILEC's service territory reduces the total revenue earned by an ETP in a smaller exchange by a larger proportion than for one in a larger exchange. However, the commission finds that these reductions are imposed as an incentive for an ILEC to file a petition to show financial need. As such, the commission declines to adopt an allocation methodology on the basis that it may reduce the weight of this incentive for an ILEC to file a petition and may reduce administrative efficiency.

§26.405(d): Determination of financial need

Issues relating to the appropriate test to determine financial need

CenturyLink noted PURA §56.023(g), (i), and (j) require the creation of standards for an ILEC to show a financial need for continued support and require that an ILEC meet this showing in order to continue receiving support. CenturyLink commented that the proposed competitor test accomplishes the specific mandate of PURA §56.023(g), (i), and (j) in a manner that is consistent with the universal service requirements of PURA §56.021(1) and consistent with the policy objectives of PURA §51.001. CenturyLink commented that, by the time any ILEC files a petition using the new rule, the Texas local exchange market will have been fully open to competition for twenty years and that the developments over this time can be used to demonstrate where a business case can be made for providing local exchange service without the need for support. Accordingly, CenturyLink stated that the commission can reasonably conclude that, in an exchange where no wireline voice provider competitor provides service throughout 75% of the exchange, the exchange is a high-cost area where there is a need for continued support. CenturyLink noted that the proposed rule's 75% threshold correlates with data that demonstrate that unsubsidized wireline voice providers are mostly found in CenturyLink's most dense, least costly exchanges. Because a lack of density is a significant driver of cost, it is reasonable to assume that the highest-density exchanges are the least costly to serve on a per-subscriber basis, while lower-density exchanges are more costly to serve. CenturyLink noted that the presence of an unsubsidized wireline voice provider competitor reasonably correlates with CenturyLink's own data indicating which of its exchanges are relatively high-cost to serve. For example, CenturyLink stated that the average density of CenturyLink's exchanges with service supported by the TUSF is 273.02 housing units per square mile, but the average density of CenturyLink's supported exchanges without an unsubsidized wireline voice provider

competitor is only 12.86 housing units per square mile. Similarly, in exchanges served by an unsubsidized wireline voice provider competitor in more than 75% of its area, the unsubsidized wireline voice provider competitor serves on average 87.77% of the exchange, but in supported exchanges that do not have an unsubsidized wireline voice provider competitor throughout the exchange, the unsubsidized wireline voice provider competitor serves on average 12.43% of the exchange. Based on this data, CenturyLink concludes that using the presence of an unsubsidized wireline voice provider competitor represents a reasonable demarcation between exchanges that are on average low cost and that are on average high cost and in which the ILEC has a financial need for continued support. As such, the proposed competitor test is consistent with PURA §56.023(g) and (i). CenturyLink also noted that, since the proposed rule eliminates an ILEC's support in areas where it competes with unsubsidized carriers but allows support where there is little competition, the proposed test also achieves the goal of PURA §51.001(c)(1), which encourages the guaranteeing of affordability of service in a competitively neutral manner. For example, the proposed rule would eliminate all support in CenturyLink's San Marcos exchange, but 94% of that exchange is served by an unsubsidized wireline voice provider competitor. Competitors in exchanges in which the ILEC ETP continues to receive support may apply to become an ETP and receive support on a per-line basis, further demonstrating the competitive neutrality of the process.

Windstream also supports a test for financial need that is based on the presence of an unsubsidized wireline voice provider competitor. Windstream commented that the proposed rules' emphasis on the presence of an unsubsidized wireline voice provider competitor comports with PURA §51.001(c), which states that the policy goals set forth in subsection (b) of that

section are best achieved by guaranteeing the affordability of basic telephone service in a competitively neutral manner. Windstream agreed with CenturyLink that the proposed rule uses a competitively neutral test. Further, Windstream noted that the proposed rule would establish an administratively efficient process that relies on publicly-available data and that is consistent with the 330-day deadline for the consideration of a petition filed pursuant to PURA §56.023(g).

Windstream and CenturyLink both indicated that, if the commission does not adopt the competitor test as proposed, it would be preferable for the commission to instead adopt a forward-looking cost model to determine financial need. CenturyLink stated that it would prefer the use of a forward-looking cost model because it allows much more granular calculations of cost and targeting of support. CenturyLink stated that, given the improvement over time in modeling technology, cost models represent an even sounder policy choice than when the commission originally used them in Docket No. 18515. Further, CenturyLink stated that, unlike the use of simplistic proxies that produce counter-intuitive results, cost models provide a truly in-depth analysis of appropriate factors. CenturyLink stated that, despite its reservations, it supports the proposed rule and believes it is a reasonable balance of administrative efficiency with realistic and reasonable results.

OPUC commented that PURA §56.023 does not mandate what must be considered with regard to determining financial need but, rather, leaves the standards and criteria to the discretion of the commission. OPUC noted that stakeholders and commission staff have considered several alternative ways to discern financial need, including the use of proxies, the use of cost models or benchmarks, the use of competitive business case models, and the use of financial records.

OPUC commented that, after considering the merits of each approach, the proposed methodology for determining financial need incorporates the best aspects of all of the approaches considered. OPUC agreed that, if a competitor can offer a similar service throughout most of an exchange without the need for financial assistance, then a utility should be able to provide service without TUSF support as well.

The Coalition agreed in principle with the idea of eliminating support in exchanges where an unsubsidized wireline voice provider competitor provides voice services, but disagreed that the support should therefore continue in the remaining exchanges. The Coalition commented that the proposed rule does not establish a valid process to examine financial need because it does not examine ILECs' revenues or earnings with respect to exchanges for which support will be continued. For the same reasons as discussed above, the Coalition commented that, although it is not specified in PURA, the term "financial," as it is used in PURA §56.023, should be understood to require consideration of an ILEC's revenues as well as expenses and that this is the common and ordinary meaning of the term "financial." Consequently, the Coalition states that a test that does not measure these factors does not actually measure financial need. The Coalition, citing the Code Construction Act, TEX. GOV'T CODE §311.011, *Crosstex Energy Serv's., L.P. v. Pro Plus, Inc.,* 430 S.W.3d 384, 390 (Tex. 2014), and *City of Round Rock v. Rodriguez,* 399 S.W.3d 130, 139 (Tex. 2013), claimed that the commission is required to but has failed to give effect to the plain meaning of the statute's use of the phrase "financial need" and that it must adopt a rule that considers ILECs' revenues as well as expenses. The Coalition stated that if the Legislature had intended for the commission's determination to be limited to a review only of expenses, the Legislature would have written so instead of requiring a determination of financial

need. The Coalition analogized TUSF support to other forms of government support, including programs administered by the FCC, the Texas Department of Agriculture, and the Texas Commissioner of Insurance, which require examination of a recipient's income or revenues. The Coalition stated that, in these programs, the method of determining financial need varied but never relied on only expenses and other proxy factors. The Coalition stated that, without this examination, it would not be possible to determine whether the ILEC's ongoing costs were fully recovered through its rates, meaning that there would be no financial need for continued support. The Coalition also stated that the proposed rule does not establish a test tailored to each ILEC but instead imposes the same standards on all affected ILECs. The Coalition also disagreed with other parties that stated that a test that does not consider ILECs' revenues or earnings is supported by the goal of administrative efficiency. The Coalition proposed modifying the proposed rule so that the commission would be required to make a determination of financial need after considering a petitioning ILEC's revenues and expenses.

CenturyLink stated that the commission's rule merely has to be reasonable and not contrary to the statute in order to validly implement PURA §56.023 and, citing *Railroad Comm'n of Texas v. Texas Citizens for a Safe Future and Clean Water*, 336 S.W.3d 619 (Tex. 2011), stated that an agency's interpretation of a statute it is charged with enforcing is entitled to serious consideration as long as the construction is reasonable and does not conflict with the statute. Citing *Reliant*, CenturyLink stated that, in reviewing a challenge to the commission's reasoned justification for the adoption of a rule, the courts will use an "arbitrary and capricious" standard, with no presumption that facts exist to support the agency's order. Further, CenturyLink stated that an agency's rule is supported by a reasoned justification if the court is able to find some legitimate

reason underpinning the adoption of the rule, even if the court does not believe that the agency's reason is best or even wise. Citing *Chrysler*, CenturyLink commented that even administrative convenience is a proper justification for a rule.

CenturyLink commented that, when examining an agency's reasoned justification, the court examines whether the agency's explanation of the facts and policy concerns it relied on when it adopted the rule demonstrates that the agency considered all the factors relevant to the objectives of the agency's delegated rulemaking authority and engaged in reasoned decision making. CenturyLink stated that, under this standard, an agency acts arbitrarily or capriciously if it commits any of the following errors: (1) omits from it's a consideration a factor that the Legislature intended the agency to consider in the circumstances, (2) includes in its consideration an irrelevant factor, or (3) reaches a completely unreasonable result after weighing only relevant factors. CenturyLink stated that the proposed rule reflects that the commission appears to have considered all relevant factors, has not considered any unreasonable or irrelevant factors, and has proposed a rule that is in harmony with the objectives of PURA.

Windstream and CenturyLink also commented that the proposed rule examines an ILEC's revenues to the extent it is required by PURA §56.023. Windstream commented that its current support amounts already reflect a consideration of its revenues because they were originally set in Docket No. 18515, in which the commission considered benchmark revenues for each participating ILEC, and were modified in subsequent cases by considering imputed revenue derived from reasonable rate increases. CenturyLink stated that the term "financial need," as used in PURA §56.023, is ambiguous because it is susceptible to more than one reasonable

interpretation, especially because the Legislature has specified elsewhere in PURA where revenues or expenses must be examined but has not done so in PURA §56.023. CenturyLink commented that, in determining legislative intent, neither the commission nor a reviewing court will look only to any one phrase, but must look to the entire act itself. A single word or sentence is not construed in isolation. CenturyLink commented that, because the phrase "financial need" standing on its own does not have a plain meaning that can be applied out of context, the commission could reach several reasonable interpretations of the statute. CenturyLink stated that, as a result, as long as the commission adopts a test that provides some reasonable basis for determining if an ILEC needs TUSF support to provide service, then the commission has crafted a test to determine financial need.

Windstream and CenturyLink stated that the Legislature left to the commission's discretion the creation of a test to show financial need and that the proposed rule, even though it does not explicitly examine ILECs' earnings, is reasonable and in harmony with PURA. Windstream and CenturyLink argued that the Coalition inappropriately twists the term financial need into a "financial hardship" standard and presents a number of irrelevant examples of other agencies' actions and which can be distinguished from the instant rulemaking. For example, Windstream and CenturyLink stated that the FCC orders relied on as examples by the Coalition prove the opposite of the Coalition's contentions because the two main FCC support mechanisms have never factored in any consideration of revenues in determining support for high-cost areas but instead rely on an analysis of providers' costs, much like the proposed rule. Windstream further argued that the Coalition does not provide an example of prior commission precedent to support its argument. Windstream replied that the Coalition advocated for rule amendments that would

result in the elimination of support in exchanges in which carriers cannot justify providing unsupported service. Windstream and CenturyLink commented that it is appropriate for the proposed rule to recognize that support should continue in areas where there is no unsubsidized wireline voice provider competitor in recognition that this absence is proof that the provision of basic voice service requires support.

CenturyLink further commented that, because the unsubsidized wireline voice provider competitor test is essentially a proxy for revenues and expenses, the test provided in the proposed rule arguably does consider revenues and expenses and therefore is consistent with PURA §56.023, even if the Coalition's interpretation is adopted. CenturyLink commented that the absence of an unsubsidized wireline voice provider competitor is used to determine in which areas voice service revenues do not sufficiently offset expenses to economically justify providing service in the area. That is, in areas where it would be economical to provide voice service, one would expect an unsubsidized wireline voice provider competitor would be present. Even though this data is a proxy and not the ILEC's own data, the proposed rule requires the use of publicly-available data which the ILEC must marshal if it chooses to file a petition for continued support in order for the ILEC to demonstrate where continued support is needed.

Consolidated, GVTC, and CenturyLink also responded to the Coalition's comments, stating that the proposed rule contains reasonable standards to address a determination of financial need. GVTC and CenturyLink stated that the Coalition provided no substantive changes to the rule other than to argue that the only satisfactory standard is no standard at all other than a contested case in which all issues are open to discovery and adjudication. GVTC and CenturyLink stated

that the Coalition's proposal amounted to requiring a rate case, which is inconsistent with the Legislature's intention. GTVC and Consolidated noted that the word "revenues" appears over 100 times throughout PURA and that, if the Legislature had intended to require a showing regarding revenues, the statute would have stated so explicitly. Instead, the statute is open ended and only requires that the commission use its discretion to approach the requirements of PURA §56.023. GVTC commented that the proposed rule effectively implements PURA §56.023 while avoiding any potential conflict with PURA Chapters 58 and 59, which prohibit proceedings regarding electing ILECs' revenues. GVTC also noted that the Coalition commented in Project No. 40342, *Rulemaking Proceeding to Amend P.U.C. SUBST. R. 26.403 Relating to the Texas High Cost Universal Service Plan*, that the presence of unsubsidized competition is the proper filter for identifying those Texas exchanges where a financial need for support does not exist because the presence of such a provider is direct evidence of a private-sector business case does, in fact, exist.

In response to comments filed by various ILECs, the Coalition stated that there is no empirical basis for determining that financial need exists in areas where an unsubsidized wireline voice provider competitor is not present throughout the exchange. The Coalition analogized this determination to assuming that, if a town has a Dairy Queen but no McDonalds, then the Dairy Queen must be operating at a loss. The Coalition stated that the arguments provided by the ILECs, including CenturyLink, relate to low residential density in areas without an unsubsidized wireline voice provider competitor but do not actually relate to financial information. The Coalition stated that the commission has not been tasked with determining in which areas construction costs are likely to be high but is directed to adopt standards for determining

financial need. The absence of a new entrant does not mean a mature firm necessarily needs support. The Coalition also noted that, for any exchange in which an ILEC's POLR obligation becomes burdensome, that exchange could likely be deregulated.

The Coalition also disagreed that the proposed rule implicitly accounts for ILECs' revenues by evaluating support amounts set in Docket No. 18515 because the relationship between current support amounts and the cost model and benchmark revenues in Docket No. 18515 is dated and because no such determination was ever reached for ILECs that receive support from the SRILEC USP.

TEXALTEL stated that it did not support using proxies or models to determine financial need and commented that the process of developing proxies or a model to apply to only four ILECs may involve more trouble than applying a direct examination of each ILEC's financial information. TEXALTEL commented that it may be preferable to instead permit the ILECs to file a rate filing package in order to demonstrate that further reductions in TUSF support would destroy their financial integrity. Since there is no opportunity for other affected parties to initiate a proceeding if they believe that the proxies provide higher income to one or more ILECs than is necessary to provide basic services, TEXALTEL urges that the most conservative proxies be selected. TEXALTEL stated that it agrees with the Coalition that, if a competitor test is adopted, it should be the first point of screening, but that further examination of financial information is necessary.

Commission response

The commission finds that the adopted rule fully and validly implements the authority granted to the commission in PURA §56.023(g), (i), and (j). As discussed previously, the commission agrees with Windstream and CenturyLink that the adopted rule, as a whole, considers a petitioning ILEC's revenues because revenues are a component of current support amounts. As such, the commission disagrees with the Coalition that the competitor test and 80% cap of support based on expenses do not adequately address a petitioning ILEC's revenues in light of the Legislature's use of the term "financial need" in PURA §56.023.

As stated in earlier sections, in view of the commission's authority granted by the Legislature to determine appropriate standards and criteria to ascertain an ILEC's financial need for continued support, the commission finds that the disbursement of TUSF support should be ceased with respect to an exchange in which an unsubsidized wireline voice provider competitor offers service in more than 75% of the square miles in an exchange. As a result, the commission finds that the presence of an unsubsidized wireline voice provider competitor in a market is a clear indicator that there is a business case to offer basic local service without the need for support from the TUSF. The implementation of the adopted rule will eliminate support for those exchanges, while retaining support for high-cost rural areas in which the absence of TUSF support will affect a customer's ability to obtain BLTS at reasonable rates. As such, the commission adopts the test to determine financial need as set out in the proposed rule and as modified in this Order.

As discussed above, the commission also agrees with Windstream that the competitor test to show financial need establishes an administratively efficient process that relies on publicly-available data. The commission notes that it is preferable, where possible, to adopt efficient procedures for the administration of the TUSF, which often provide savings to stakeholders and ratepayers. The commission concludes that its definition of criteria for an ILEC to demonstrate financial need is reasonable, administratively efficient, does not conflict with the restrictions on the commission's oversight of electing companies under Chapters 58 and 59, and is consistent with the policy of this state favoring a wide availability of high-quality telecommunications services at reasonable rates.

The commission finds that it is reasonable to presume that the areas unserved by an unsubsidized wireline voice provider competitor are the highest-cost areas to serve and represent markets in which no business case exists to offer basic local service without TUSF support. In accordance with PURA §51.001(b)(3), the commission endeavors to maintain a wide availability of telecommunications service at reasonable rates throughout Texas, particularly in high-cost rural areas that are unserved by an unsubsidized wireline voice provider competitor. Accordingly, the commission agrees with those commenters that stated that the proposed rule accomplishes the specific mandate of PURA §56.032(g), (i), and (j) in a manner that is consistent with the universal service requirements of PURA §56.021(1) and with the policy objectives of PURA §51.001.

As discussed in further detail above, the commission acknowledges that several other federal and Texas agencies have adopted tests for financial hardship or need for certain

forms of support that do consider revenues, but, as stated by several ILECs, the FCC has also implemented tests for the administration of the FUSF that do not incorporate an ILEC's revenues.

The commission declines to adopt the Coalition's and TEXALTEL's proposed revisions to require the commission to reach a determination regarding a petitioning ILEC's financial need for continued support after reviewing information regarding an ILEC's revenues and expenses or to require ILECs to file a rate-filing package. As stated before, the adopted rule's proxies incorporate revenues as a component of current support amounts. As described above, current support amounts were set in Docket No. 18515 using revenue benchmarks and were subsequently modified by accounting for imputed revenues derived from reasonable rate increases. As such, the commission disagrees with the Coalition that the competitor test and cap of support of 80% of expenses do not adequately address a petitioning ILEC's revenues in light of the Legislature's use of the term "financial need" in PURA §56.023.

As stated before, the commission also declines to adopt a forward-looking cost model method of determining financial need as proposed by Windstream and CenturyLink. The commission finds that a cost model would likely yield little additional benefit relative to implementation of the proposed rule, but would yield additional costs. Furthermore, CenturyLink and Windstream stated that, despite their clear preference for the use of a forward-looking cost model, they would support the proposed rule and believe it is a reasonable balance of administrative efficiency with realistic and reasonable results. The

commission acknowledges the spirit of compromise that underpins these ILECs' support for the adopted rule, which presents a reasonable resolution of all of the issues in this proceeding.

Issues relating to the 75% threshold

GVTC and Consolidated commented that an unsubsidized wireline voice provider competitor should serve census blocks covering as much as 90% of an exchange before support should be eliminated for an exchange but also stated that the proposed rule's 75% threshold is the minimum acceptable threshold. GVTC stated that a higher threshold would better ensure that affordable service is available throughout an exchange, instead of cutting off support in rural areas just because an unsubsidized wireline voice provider competitor serves in the denser portions of that area's exchange. Consolidated stated that the 75% threshold would capture the relative dense areas in its service territory but would eliminate support entirely for 66% of Consolidated's exchanges, some of which represent a significant rural population outside of the denser city centers. GVTC and Consolidated commented that, ultimately, the 75% threshold would capture the relatively dense areas in GVTC's service territories.

Similarly, CenturyLink and Windstream commented that it would be preferable to require that competition be present throughout 100% of the exchange but that the proposed rule reflects a compromise of different perspectives on how much competition must be present in order to determine that no support is necessary to ensure that BLTS is provided at reasonable rates throughout the exchange. CenturyLink commented that the use of a 75% threshold is reasonable

because it is large enough to suggest that an unsubsidized wireline voice provider competitor may eventually be able to profitably extend its network throughout all of the remainder of the exchange. However, at the same time, setting the threshold at 75% means that the ILEC ETP may be the only provider operating in as much as 25% of an exchange with obligations to serve all customers without the aid of TUSF support. Further, this remaining 25% is likely the most expensive portion of the exchange to serve. CenturyLink commented that, consequently, while a 100% threshold is preferable, setting the threshold lower than 75% presents an unacceptable risk of eliminating support to the ILEC ETP yet leaving the ILEC ETP with too much of the higher cost portion of the exchange to serve. Based on the data presented by CenturyLink discussed above, CenturyLink recommended that the 75% threshold represents a reasonable demarcation between exchanges that are on average low cost and that are on average high cost and in which the ILEC has a financial need for continued support.

Commission response

The commission agrees with CenturyLink, Windstream, GVTC, and Consolidated that the 75% threshold is an acceptable threshold for the purposes of implementing the financial need test. The commission also agrees with CenturyLink that the 75% threshold is consistent with the mandate in PURA §51.021(1), which requires that the TUSF assist in the provision of BLTS at reasonable rates in high-cost rural areas, and in PURA §51.001, which states that it is the Legislature's policy goals that there be wide availability of telecommunications services at affordable rates, that markets that are not competitive remain protected, and that customers in all regions, including high-cost areas, have access to telecommunications services at reasonable rates.

The commission disagrees with the suggestion of certain ILECs that the threshold should be increased to require coverage of an even larger part of an exchange. The commission finds that the 75% threshold strikes the correct balance, by removing support in areas where there is significant, unsubsidized competition but allowing support to continue where necessary to ensure that Texans in rural areas have access to reasonably priced BLTS.

Issues relating to the determination of area served by an unsubsidized wireline voice provider competitor

CenturyLink supported the use of the National Broadband Map to establish the areas in which unsubsidized wireline voice provider competitors operate. In particular, CenturyLink commented that it also supports the adoption of §26.405(d)(2)(B), which states that the National Broadband Map creates a rebuttable presumption and which explicitly states that nothing in the rule is intended to preclude a party from providing evidence as to the accuracy of the National Broadband Map's data with regard to the presence of an unsubsidized wireline voice provider competitor within a particular census block.

The Coalition commented that the proposed rule should be modified to measure competition using the percentage of homes passed instead of using square miles. The Coalition commented that the rule, as proposed, ignores the most relevant information about what providers seek to serve, which is homes, not geographic space. The Coalition stated that a wireline provider

installs facilities along roads and highways in recognition that most service is received at addresses relatively close to a road. The Coalition stated that focusing on square miles includes lakes, ponds, and other empty spaces in which there are no customers and that are irrelevant. The Coalition stated that cable providers, which will likely comprise most unsubsidized wireline voice provider competitors, have historically measured their market penetration by counting percentages of homes and businesses passed, which the Coalition claimed is a more accurate indicator of the extent to which a competitive alternative is available, is measured by the FCC for certain purposes, and can be calculated from the National Broadband Map. The Coalition proposed modifying §26.405(d)(2) so that the coverage of an unsubsidized wireline voice provider competitor is determined using the percentage of households passed. TEXALTEL agreed that the proposed rule, by relying on the existence or absence of a competitor in a large, sparse census block, may not be a good indicator as to the level of competition that exists for the vast majority of households in that exchange.

The Coalition also commented that it is not clear what methodology is used in the development of the National Broadband Map to determine the square mileage served by an unsubsidized wireline voice provider competitor and whether that methodology is the same methodology that would be used to measure the areas served by both the competitor and the ILEC. The Coalition commented that methodological differences for determining areas served could give rise to discrepancies in the implementation of the rule or overstate the area served by the ILEC.

Windstream, CenturyLink, and AMA TechTel urged rejection of the Coalition's proposal to rely on households passed, stating that publicly-available and recognized data is available regarding

the presence of unsubsidized wireline voice provider competitor by census block and the square mileage represented by each census block. These providers stated that, contrary to the Coalition's assertions, there are no public, recognized data sources that are generally available to ILECs regarding the houses passed by an unsubsidized wireline voice provider competitor. AMA TechTel noted that the Coalition did not provide any data sources, FCC rules, or other sources to substantiate the Coalition's claims and stated that, without better access to data and the ability to analyze the Coalition's proposal, the commission should reject the Coalition's proposal. Consideration of square mileage is fairer because of its reliance on public sources of data, such as the National Broadband Map, and better addresses the "doughnut" effect, which refers to a situation in which competitors serve the dense area in the center of a market but not the outlying higher cost areas. Regarding this phenomenon, Windstream and CenturyLink stated that the proposed rule better reflects the reality that serving a large number of customers in the dense center of an exchange is often cheaper than serving the smaller number of customers in areas outside of the center, meaning that an unsubsidized wireline voice provider competitor could serve 75% of an exchange's customers without serving any truly high-cost customers. Windstream stated that the Coalition's proposal would overstate the penetration of an unsubsidized wireline voice provider competitor that serves only in the small, dense portion of an exchange, ignoring the low density areas where no viable business case exists to serve customers without support. Windstream stated that the average residential density for all of its supported exchanges after rate-rebalancing is 11.1 housing units per square mile, which is much lower than the average residential density of 671 housing units per square mile in areas served by the Coalition's members. Windstream and CenturyLink also noted that the proposed rule contains certain assumptions against the ILECs' favor that counterweight any potential issues

resulting from relying on square mileage. In particular, an unsubsidized wireline voice provider competitor is presumed to serve an entire census block, even if it only serves one customer in the census block, and it is presumed that support should be eliminated in exchanges throughout 25% of which Windstream could potentially be the only BLTS provider without a commission determination regarding whether Windstream is providing stand-alone BLTS at a reasonable rate. CenturyLink stated that a valid test based on homes passed by an unsubsidized wireline voice provider competitor would need a threshold of nearly 100% in order to provide confidence that the competitor's cost of providing service in the exchange is comparable to the ILEC's, thus showing that support is not necessary to serve the majority of the exchange.

GVTC replied to the Coalition's comments, stating that relying on homes passed instead of square mileage would result in the elimination of support in exchanges in which an unsubsidized wireline voice provider competitor only serves the least costly, most dense areas, a strategy commonly referred to as "cherry picking" or "cream skimming." GVTC stated that, if the coverage of any group of providers is overstated, it is the coverage areas of competitive providers, since an unsubsidized wireline voice provider competitor is considered to serve an entire census block if it serves even a single customer in the census block. Consolidated also replied to the Coalition's comments, noting that using square mileage more accurately reflects ILECs' service obligations to cover the entire geographic area of the exchange and noting that unsubsidized wireline voice provider competitors do not have POLR obligations.

GVTC and Consolidated expressed concern because some census blocks can cover large proportions of an exchange, meaning that an unsubsidized wireline voice provider competitor

serving a very small proportion of an exchange can still meet the 75% threshold. GVTC and Consolidated proposed the addition of a requirement that the penetration threshold is not met unless an unsubsidized wireline voice provider competitor serves the same percentage of each census block as the overall penetration threshold. For example, since the proposed rule sets the penetration threshold at 75%, a census block should only count toward meeting the threshold if the unsubsidized wireline voice provider competitor serves 75% of the square miles in the census block. As an alternative solution, Consolidated proposed applying a different test with respect to outlier census blocks, meaning that a census block covering a high proportion of an exchange should only be considered to be served by an unsubsidized wireline voice provider competitor if the competitor serves a high proportion of the census block. GVTC and Consolidated also commented that, rather than permit an ILEC to challenge the National Broadband Map's showing of the presence or non-presence of an unsubsidized wireline voice provider competitor in a census block, an ILEC should also be permitted to challenge the National Broadband Map's data regarding the proportion of the census block served by an unsubsidized wireline voice provider competitor or whether the unsubsidized wireline voice provider competitor provides sufficient coverage of a particular census block.

Consolidated also stated that the National Broadband Map may be interpreted to overstate the availability of service in an exchange because the National Broadband Map's indication of the presence of broadband service does not indicate whether stand-alone basic local service is available in the census block. Consolidated proposed that an ILEC be permitted to challenge the adequacy of the National Broadband Map's data on this ground.

In response to the concerns raised by Consolidated and GVTC regarding accounting for very large census blocks or census blocks in which the unsubsidized wireline voice provider competitor serves a very small proportion of the customers, the Coalition stated that these concerns would be addressed by modifying the proposed rule to consider households passed rather than continue to rely on square mileage because this is a more relevant indicator of the extent to which a competitive alternative is available and is a standard metric. The Coalition provided an estimate of the number of exchanges served by each ILEC for which support would be eliminated and stated that using households passed as the metric is easily implemented.

Commission response

The commission finds that the presence of an unsubsidized wireline voice provider competitor establishes a business case for the provision of basic local service in an exchange without TUSF support if the unsubsidized wireline voice provider competitor offers service to a customer in census blocks that exceed 75% of the total square miles in an exchange.

The commission declines to adopt the Coalition's proposal that the penetration of an unsubsidized wireline voice provider competitor should be measured by the proportion of homes passed by the unsubsidized wireline voice provider competitor. The commission agrees with Windstream, CenturyLink, and AMA TechTel that there are no public, recognized data sources that are generally available to ILECs regarding the houses passed by an unsubsidized wireline voice provider competitor. The commission notes that a determination based on square miles relies on two pieces of information that can be derived with relatively little controversy. Specifically, this determination depends on ascertaining

the census blocks in which the unsubsidized wireline voice provider competitor offers service, as shown on the National Broadband Map, and on the square miles covered by those census blocks. The commission also agrees with Windstream, CenturyLink, and GVTC that the consideration of square miles better addresses the "doughnut" effect, which refers to a situation in which competitors serve the dense area in the center of a market, but not the outlying higher cost areas. ILECs' POLR obligations are tied to geographic areas, and the commission finds that a business case to serve throughout the majority of the geographic area without TUSF support cannot necessarily be inferred from the presence of an unsubsidized wireline voice provider competitor serving a large number of customers in a relatively small geographic area. As such, the commission finds that the use of square miles in the adopted rule allows the commission to appropriately address the level of competition in an exchange.

The commission disagrees with TEXALTEL that relying on the existence or absence of a competitor in a large, sparse census block may not be a good indicator as to the level of competition that exists for the vast majority of households in that exchange. The commission agrees with Windstream and CenturyLink that the proposed rule contains certain assumptions that mitigate any potential issues resulting from relying on square miles. In particular, an unsubsidized wireline voice provider competitor is presumed to serve an entire census block if it offers service in the census block. Further, as discussed below, the commission addresses the Coalition's concerns by establishing an area threshold that is fewer than 100% of the square miles in an exchange, acknowledging that it may be appropriate to eliminate TUSF support in an exchange even if a large section of the

exchange is not served by an unsubsidized wireline voice provider competitor. This consideration lends further weight to the commission's decision not to adopt a test for financial need that relies on homes passed instead of area served by an unsubsidized wireline voice provider competitor.

The commission disagrees with the Coalition's assertions regarding the determination of the square mileage served by an unsubsidized wireline voice provider competitor. The service areas of the ILEC and the unsubsidized wireline voice provider competitor are not compared pursuant to the adopted rule and, as such, it is not relevant whether the area served by the ILEC is overstated. Rather, the total area of an exchange is compared to the area represented by the census blocks in which an unsubsidized wireline voice provider competitor offers service according to the National Broadband Map. The commission finds that §26.405(d), as adopted, sets out this procedure clearly. The commission further notes that §26.405(d)(2)(C) states that the data provided by the National Broadband Map creates a rebuttable presumption but that nothing in the adopted rule is intended to preclude a party from conducting discovery and/or providing evidence as to the accuracy of individual census block data within the National Broadband Map with regard to the presence of an unsubsidized wireline voice provider competitor within a particular census block.

The commission finds that no change to the proposed rule is necessary to address the concerns of GVTC and Consolidated regarding the cases where some census blocks cover large proportions of an exchange, meaning that an unsubsidized wireline voice provider competitor serving a very small proportion of an exchange can still meet the 75%

threshold. The commission finds that the 75% threshold is appropriate, representing a high bar that must be met before the commission will find that a business case exists to offer service in an exchange without TUSF support. The commission also notes that determining the area served by an unsubsidized wireline voice provider competitor at a level more granular than by census block unnecessarily complicates what is designed to be a straightforward process. Rather, the commission finds that the rule as adopted represents an appropriate balance of specificity and administrative efficiency and provides a valid determination of whether an ILEC has a financial need for continued support.

If their recommendations regarding outlier census blocks are adopted, GVTC and Consolidated also proposed amendments to permit parties to challenge the proportion of a census block in which the competitor offers service, rather than only being able to challenge the presence or non-presence of the competitor. Because the commission does not adopt GVTC's and Consolidated's recommendations regarding outlier census blocks, it is not necessary to permit parties to challenge the presumption created by the National Broadband Map regarding the proportion of a census block in which the unsubsidized wireline voice provider competitor offers service. Because, for the purposes of §26.405(d), the commission considers an entire census block to be served by an unsubsidized wireline voice provider competitor if the unsubsidized wireline voice provider competitor offers service in that census block, it is only necessary for parties to contest the presence or non-presence of the unsubsidized wireline voice provider competitor in a particular census block.

Consolidated also noted that the National Broadband Map indicates the presence of broadband service but does not indicate whether stand-alone basic local service is provided by certain competitors in a census block. Consolidated proposed that an ILEC be permitted to challenge the adequacy of the National Broadband Map's data on this ground. The commission again notes that nothing in the adopted rule prevents a party from conducting discovery or presenting evidence as to whether a particular provider meets the definition of an unsubsidized wireline voice provider competitor for the purposes of §26.405(d). To meet this definition under the adopted rule, a competitor must offer basic local service, which entails voice service, to be considered an unsubsidized wireline voice provider competitor. At the same time, it is not necessary for the competitor to offer stand-alone voice service. As discussed below, the commission modifies the definition of an unsubsidized wireline voice provider competitor to indicate the presumption that voice service is offered by a provider if it offers broadband service with at least 3 megabits per second down and 768 kilobits per second up. Accordingly, no modification to the proposed rule is necessary to accommodate Consolidated's proposal.

Issues relating to the definition of an unsubsidized wireline voice provider competitor

GVTC and Consolidated commented that a competitive provider should not be considered to be an unsubsidized wireline voice provider competitor if it provides service at a rate greater than 150% of the BLTS rate charged by the exchange's ILEC. GVTC commented that a competitor offering service at more than double the ILEC's BLTS rate would be nonsensical because a rational consumer would not pay twice the price for the same service. Consolidated agreed with GVTC's proposal and, based on the same reasoning, further recommended that a provider should

only be considered an unsubsidized wireline voice provider competitor if it provides stand-alone basic local service.

AMA TechTel commented that the definition of unsubsidized wireline voice provider competitor should be modified to add the criterion that a provider is an unsubsidized wireline voice provider competitor only if it provides BLTS and uses its own switching and local loop facilities to provide service. AMA TechTel stated that using the term BLTS would better track provisions found in PURA Chapter 56 and would refer to a specific bundle of services that a provider should have to provide in order to qualify as an unsubsidized wireline voice provider competitor. AMA TechTel further stated that, in order to provide a valid demonstration of viable competition, the commission should not allow a provider that relies entirely on resale to qualify as an unsubsidized wireline voice provider competitor.

CenturyLink commented that it does not necessarily oppose AMA TechTel's recommendation that a provider should not be considered an unsubsidized wireline voice provider competitor unless it provides service using its own switching and local loop facilities.

The Coalition responded to GVTC and Consolidated, stating that the Coalition opposes any proposal to specify that a provider is not an unsubsidized wireline voice provider competitor unless it provides service at a rate not more than 150% of the ILEC's tariffed rate. The Coalition noted that PURA has never required that competitors mirror the technology, operations, service operations, or pricing of ILECs for certain services, and, in fact, PURA Chapter 65 permits the deregulation of an exchange if two competitors are present without regard to the delivery

technology they use or the rates they charge. The Coalition is only aware of one instance in which the commission has considered the rates of competitive carriers in this context, and that is the limitation of the rates charged by competitive carriers that wish to become ETPs. The Coalition also stated that a pricing limitation that is tied to an ILEC's rates, which have been kept low using disbursements from the TUSF, would likely understate the presence of legitimate unsubsidized wireline voice provider competitors. The Coalition further commented that the rates charged by the unsubsidized wireline voice provider competitor are irrelevant to the central question answered by the presence of the unsubsidized wireline voice provider competitor, which is whether there is a business case for the provision of voice service in an area without TUSF support. Regardless of the rates charged by the unsubsidized wireline voice provider competitor, the presence of the unsubsidized wireline voice provider competitor indicates that a business case exists to provide service at that price without the need for TUSF support.

The Coalition also responded to AMA TechTel's comments, stating that the Coalition opposes the insertion of the term "basic local telecommunications service" into the definition of an unsubsidized wireline voice provider competitor, as proposed by AMA TechTel. "Basic local telecommunications service" has a specific meaning provided by PURA §51.002(1). The Coalition stated that neither the FCC nor the commission has ruled on whether Voice over Internet Protocol (VoIP) technology is a telecommunications service, meaning that an ILEC could argue that a competitor providing basic local service using VoIP may not be providing basic local telecommunications service even though the competitor is offering basic local service that is substantially comparable to the ILEC's own offerings. The Coalition noted that VoIP

providers are subject to many of the same important regulatory obligations that apply to conventional telephone service providers, including FUSF obligations and 9-1-1 requirements.

The Coalition further commented that it agrees that a competitor should not be considered an unsubsidized wireline voice provider competitor if it provides service entirely through resale. However, the Coalition stated that it did not agree with the language proposed by AMA TechTel to be inserted. Specifically, the Coalition disagreed with the insertion of language referring to switches and loops because the term "switch" presupposes that certain technologies are employed by the unsubsidized wireline voice provider competitor which may not be in use.

The Coalition also commented that the National Broadband Map provides information about broadband penetration that must be translated into information regarding the availability of voice service and proposed specifying that a wireline provider offering broadband service of 3 megabits per second down and 768 kilobits per second up shall be presumed to be offering voice service. The Coalition proposed inserting this modification in §26.405(d)(2)(B).

TEXALTEL commented that failure to consider the presence of quality wireless service in an exchange is a factor overlooked in the proposed rule.

Commission response

The commission finds that the definition of an unsubsidized wireline voice provider competitor should be tailored to include competitors offering service that is comparable to

the service offered by the petitioning ILECs. Accordingly, the commission agrees with the Coalition that the definition of an unsubsidized wireline voice provider competitor should not be modified to include references to BLTS or to consider the rates of the unsubsidized wireline voice provider competitor in relation to the exchange's ILEC's rates. The commission declines to adopt proposals by GVTC, Consolidated, and AMA TechTel on these issues.

With respect to AMA TechTel's comments that a provider should not be considered an unsubsidized wireline voice provider competitor unless it provides BLTS, the commission finds that the proposed definition is too restrictive. The commission agrees with the Coalition that many providers offer service comparable to ILECs' offerings that may not necessarily be labeled as BLTS. The commission notes that "basic local service" is a term that is used in PURA and the commission's rules and represents service, including VoIP, which is comparable to the service offered by ILECs for the purposes of implementing the financial need test adopted in this proceeding. Accordingly, it is appropriate to retain the use of the term "basic local service" in the definition of an unsubsidized wireline voice provider competitor.

Further, the commission agrees with the Coalition that the rates charged by the unsubsidized wireline voice provider competitor are irrelevant to the central question answered by the presence of the unsubsidized wireline voice provider competitor, which is whether there is a business case for the provision of voice service in an area without TUSF support. The commission finds that the presence of an unsubsidized wireline voice

provider competitor throughout more than 75% of the census blocks of an exchange indicates that there is a business case to offer service at the rate charged by the unsubsidized wireline voice provider competitor without the need for TUSF support. The commission declines to adopt GVTC's proposal to consider the rates of the unsubsidized wireline voice provider competitor in relation to the exchange's ILEC's rates.

In addition, the commission disagrees with TEXALTEL that the proposed rule fails to consider the availability of wireless service. The commission has considered the availability of wireless service as part of its determination in this proceeding and concludes that the adopted rule, including the 75% threshold, sets forth an appropriate test to determine whether the extent of competition within a market warrants the discontinuation of support from the TUSF. The commission finds that the adopted rule, including the emphasis on the measuring of wireline service, strikes an appropriate balance between the concerns of the affected ILECs regarding their obligations with respect to exchanges for which support is no longer available and the comments filed by other market participants.

The commission agrees with AMA TechTel that the proposed rule should be modified to add the criterion that a provider is an unsubsidized wireline voice provider competitor only if it offers service in part using its own facilities. The commission agrees that a competitor that offers service entirely through resale does not offer comparable service to the service offered by the ILEC because the ILEC is responsible for maintaining physical facilities throughout the exchange. A competitor offering service entirely through resale implicitly

benefits from other providers' existing networks, many of which are maintained using assistance from the TUSF.

The commission agrees with the Coalition that the proposed rule should be modified to state a presumption that broadband providers offering broadband service at 3 megabits per second down and 768 kilobits per second up should be presumed to also be offering voice service. The commission also finds that this clarification assists in the translation of the National Broadband Map's data regarding broadband availability into information that relates to voice availability, which is the central consideration in the test to determining the presence of an unsubsidized wireline voice provider competitor. The commission finds that it is appropriate to presume that service that is comparable to the service offered by ILECs if the competitor offers basic local service or broadband service of 3 megabits per second down and 768 kilobits per second up using a wireline-based technology. Although the Coalition proposed modifying §26.405(d)(2)(B), the commission finds that clarity is enhanced by implementing this modification in §26.405(d)(2)(A)(ii), which is the subsection that discusses the services that comprise the definition of an unsubsidized wireline voice provider competitor. Accordingly, the commission revises the rule to state "offers basic local service or broadband service of 3 megabits per second down and 768 kilobits per second up using a wireline-based technology" in that subsection.

The commission notes that the Coalition suggested implementing its proposal by inserting a new sentence into §26.405(d)(2)(B) that would read: "A wire-line provider offering broadband service of 3 mbps down and 768 kbps up shall be presumed to be offering voice

service." The language of the Coalition's proposed insertion concerns whether the unsubsidized wireline voice provider competitor offers, rather than provides, service in an area. The commission finds that the rule as proposed is not clear regarding this distinction and, accordingly, clarifies that an unsubsidized wireline voice provider competitor is considered to serve a census block if it offers service in that area, rather than requiring the actual provision of service. As the adopted rule states, no party is precluded from providing evidence to rebut the presumption created by the National Broadband Map with regard to whether an unsubsidized wireline voice provider competitor does or does not offer service in a particular census block. The commission expects that a party attempting to rebut this presumption and establish the presence of an unsubsidized wireline voice provider competitor that is not shown on the National Broadband Map will be required to introduce particularized evidence demonstrating that the putative unsubsidized wireline voice provider competitor is capable of providing service upon the receipt of a reasonable request for service from a potential customer. Conclusory evidence will not be sufficient to rebut the presumption indicated in §26.405(d)(2)(C). Consistent with this clarification, the commission modifies §26.405(d)(2)(C) to state that parties are permitted to challenge whether an unsubsidized wireline voice provider competitor offers service in a particular census block.

§26.405(e): Criteria for determining amount of continued support

Issues relating to the appropriate test to determine the amount of continued support

OPUC commented that, because the determination of the need for support and the actual calculation of specific support amounts would both occur in the same proceeding, the proposed rule complies with the statutory requirement that the amount of support be set in the same proceeding as the petition to determine financial need. Similarly, AMA TechTel commented that the proposed rule's method for determining the amount of continued support is reasonable and prevents the ILEC from receiving support amounts sufficient to cover all of its costs to provide service in a market.

CenturyLink commented that PURA §56.023(g) and (i) require that the commission set the amount of support for an ILEC in the same proceeding as the determination regarding financial need. CenturyLink stated that PURA does not explicitly require that the amount of support be set at the exchange level, but noted that the proposed rule implements the statutory mandate at the exchange level by setting the MPLS amount to zero for exchanges in which the ILEC does not have a financial need for continued support and reducing the MPLS in the remaining supported exchanges by the extent to which the ILEC's support exceeds 80% of certain expenses attributable to the remaining exchanges. CenturyLink and Windstream noted that the method in the proposed rule for determining the new MPLS amounts, including the 80% limitation, ensures that an ILEC will have to use revenues other than TUSF disbursements in order to provide BLTS at reasonable rates in high-cost rural areas, which is consistent with the mandate in PURA §56.021 that the TUSF is intended to assist in the provision of BLTS at reasonable rates in high-cost rural areas. CenturyLink commented that the 80% limitation is a conservative check on the ILEC's financial need for support, meaning that it helps to implement PURA §56.023(g) and (i).

Windstream commented that the proposed rule, including the use of a comparison to a group of expenses, creates an appropriate mechanism for setting ongoing MPLS amounts. Windstream commented that the 80% limitation implicitly accounts for ILECs' revenues already. Specifically, if one were to subtract the $23.50 reasonable rate for BLTS that the commission established for Windstream in Docket No. 40521 from the commission-determined average per-line cost in the final order in Docket No. 18515 for the Windstream exchanges that will remain supported after the end of rate-rebalancing, the resulting implied average support level would be less than 80% of the operating expenses, which in turn do not take into account capital expenses required to operate and maintain the network. Windstream stated that this comparison illustrates that ILECs' revenues are actually considered when making appropriate determinations of ongoing MPLS amounts and that the TUSF support will be used to assist in the provision of BLTS in high-cost rural areas.

CenturyLink and Windstream suggested that, because supported exchanges have particularly low density, the 80% limitation should be raised to an even higher proportion of expenses. CenturyLink commented that the 80% limitation may appear to be a high threshold but that other factors suggest the 80% limitation is conservative and reasonable. Windstream commented that the 80% limitation is reasonable in the context of the rulemaking as a whole and is acceptable to Windstream.

Consolidated commented that the 80% limitation is a reasonable proxy and was comparable to the results determined after extensive analysis in Docket No. 18515, the commission's last comprehensive examination of universal service support. Consolidated noted that most of the

ILECs that will be affected by the proposed rule have elected to be regulated pursuant to PURA Chapters 58 or 59 and whose earnings are not subject to commission inquiry. Consolidated also noted that the 80% limitation is comparable to policy adopted by the FCC regarding certain FUSF policies. Consolidated stated that the FCC has previously limited FUSF support for certain carriers to 80% of certain denominated amounts. Consolidated further commented that the FCC has previously stated, when setting certain benchmarks, that a voice rate will be presumed to be reasonable if it falls within two standard deviations of the national average and that the 80% limitation represents a figure that is between one and two standard deviations of the ILEC's reported costs. Similarly, Windstream commented that the 80% limitation is set at an appropriate level because, if Windstream's reasonable rate of $23.50 calculated in Docket No. 40521 is added to the MPLS amounts calculated in that proceeding, the resulting sum is less than 80% of the operating expenses attributable to supported exchanges as calculated in Docket No. 18515. Thus, ILECs' revenues are actually considered when making appropriate determinations of ongoing MPLS amounts, and TUSF support will actually be used to assist in the provision of BLTS in high-cost rural areas. CenturyLink also commented that the 80% limitation, viewed in conjunction with the reasonable rates set Docket Nos. 40521 and 41097 and in conjunction with the commission's findings in Docket No. 18515, shows that it would be appropriate to permit ILECs to recover support set at 80% of the examined expenses in addition to revenues earned from charging the ILECs' reasonable rates for BLTS.

Consolidated also commented that, when setting new MPLS amounts, only the portion of the exchange that is actually served by an unsubsidized wireline voice provider competitor should no longer be eligible for support. Consolidated stated that this modification would remedy the issue

of the fact that all of the square miles covered by a partially-served census block count toward meeting the 75% threshold.

The Coalition commented that the imposition of an 80% limitation across exchanges does not consider any measure of whether the exchanges are high-cost rural areas or whether the ILEC has a financial need for support at this level because the rule applies regardless of whether or not the expenses attributed to the exchange are particularly low or high. The Coalition stated that the proposed rule imposes an arbitrary standard for determining the amount of continued support. The Coalition proposed, as an alternative method to determine the amount of continued support, eliminating the 80% limitation from §26.405(e)(2)(B) and, instead of tying the new MPLS amounts to an ILEC's reported expenses, provide that the ILEC's support will be determined by the commission and be consistent with its findings regarding the ILEC's financial need.

The Coalition also commented that the 80% limitation is a standard that creates an appearance of scrutiny but would preserve the status quo of any support that was not eliminated by the financial need tests. The Coalition estimated based on historical information that TUSF support amounts for the affected ILECs—even in periods during which the Coalition estimates these ILECs were earning significant returns—ranged from 27% to 64% of operating expenses, meaning that the 80% limitation is not likely to result in any reductions to an ILEC's MPLS in exchanges that remain supported after the application of the financial need test. The Coalition stated that the Publication and the comments filed by the ILECs do not address how the 80% limitation is an indicator of financial need or why it will result in support in accordance with financial need. The Coalition stated that the 80% threshold, which could result in the majority of an ILECs' reported

expenses being recovered through TUSF support does not square with the objective of providing assistance only where there is proven financial need, as it does not identify areas that are high cost and does not identify the level of assistance that should be provided. The Coalition disagreed that any publicly-available data shows that the 80% limitation provides results comparable to the results of Docket No. 18515.

In response to the Coalition's comments, Consolidated agreed that the purpose of the TUSF is not to subsidize all of an ILEC's expenses and stated that that fact explains why the proposed rule limits TUSF support to a proportion of a specific category of expenses.

In response, CenturyLink stated that it is not clear that the commission would be required to provide a factual basis for its proposed use of a specific number, in this case the 80% limitation as the standard for setting new MPLS amounts. Citing *Chrysler*, CenturyLink stated that the reasoned justification requirement applicable to orders adopting a rule was not intended to be applied clause by clause but rather to the rule as a whole and that to hold otherwise would impose a requirement for detailed findings of fact and conclusions of law supporting the adoption of each rule. CenturyLink stated that the proposed method of comparison is reasonable as long as the limitation on support is set at 100% or lower because the statute requires that the TUSF be used to assist in the provision of BLTS, meaning that TUSF disbursements would be providing a portion of the ILEC's cost of service. CenturyLink commented that even setting the limitation at 100% would accomplish this requirement because the list of expenses to be compared does not include all of the ILEC's expenses attributable to its supported exchanges. Under *Chrysler*, it is not necessary for the commission to explain precisely how it came up with

the 80% limitation as the precise level of assistance, but it would be sufficient merely for the commission's reasoned justification to state that the commission chose to devise a simple formula for ensuring that TUSF support serves only to assist in providing BLTS at reasonable rates but that it did not want to set the screen too low and risk eliminating support in exchanges where there is a financial need for continued support in which the ILEC has a POLR obligation. CenturyLink commented that as long as the commission chooses a plausible limitation that accomplishes these goals, the commission does not have to justify choosing, for example, 80% as opposed to 70% or 90%.

TEXALTEL commented that it is unaware of the basis for the selection of the 80% figure as opposed to some other number and urged the commission to provide information as to the basis for that figure and allow an additional comment period.

As part of its comments suggesting that rate-of-return-regulated ILECs should not be subject to the financial need test in addition to the 80% limitation and in light of the fact that a return on capital is not included in the expenses to be compared, GVTC suggested limiting the applicability of §26.405(e)(2)(B) to only ILECs regulated under PURA §58, 59, or 65.

Commission response

The commission adopts the methodology of determining the amount of continued support stated in the proposed rule. As discussed above, the commission disagrees with the Coalition that the adopted methodology provides no linkage to the ILEC's financial need for continued support. The commission finds that the determination of the amount of

continued support is inextricably linked to the commission's findings regarding a petitioning ILEC's financial need for continued support. Pursuant to §26.405(e)(1), the MPLS amount will be reduced to zero for exchanges for which the ILEC has not demonstrated a financial need for continued support.

Further, for exchanges in which the ILEC has demonstrated a financial need for continued support, the commission has provided for the reduction of the ILEC's overall support by comparing the disbursements received by an ILEC to the expenses incurred by the ILEC during a 12-month period prior to the filing of a petition to show financial need. Specifically, the commission will reduce the support available to the ILEC by the extent to which its historical support exceeded 80% of its reported expenses. This methodology ensures that the ILEC's support does not exceed the cost of providing service in the exchange, fulfilling the statutory purpose of assisting in the provision of BLTS in high-cost rural areas while also requiring that an ILEC's other revenues be used to defray a portion of the cost to operate in a supported exchange. This methodology fully complies in an administratively efficient fashion with the requirements of PURA §56.023, which requires the commission to adjust the amount of support available to a petitioning ILEC and authorizes the commission to determine an appropriate methodology to determine the amount of continued support.

The Coalition stated that the adopted method for determining the amount of continued support does not consider any measure of whether the expenses attributable to the supported exchanges are particularly high or whether the ILEC has a financial need for

support. The Coalition proposed, instead of tying the new MPLS amounts to an ILEC's reporting expenses, to provide that the ILEC's continued MPLS amounts will be determined by the commission and be consistent with its findings regarding the ILEC's financial need. The commission notes that the Coalition did not propose any criteria to guide the commission's decision making in this regard. The commission also finds that it is in the public interest to determine in this proceeding a specific methodology to determine the amount of continued support. TUSF support will be eliminated in exchanges for which there is not a financial need for continued support, including increasingly dense suburban exchanges. Further, as discussed above, the commission finds that the adopted methodology is consistent with the specific requirements of PURA §56.023. When PURA §56.026 contained a prohibition on a revenue requirement showing to determine the amount of TUSF disbursements, the commission successfully used several proxy methodologies to determine the appropriate amount of support for various ILECs. The commission finds that it is reasonable to verify the expenses attributable to an ILEC's supported exchanges and ensure that the ILEC's ongoing support in exchanges for which there is a financial need for continued support does not exceed 80% of those expenses.

The commission also declines to adopt the proposal submitted by Consolidated to eliminate from TUSF support eligibility only the portion of the exchange that is actually served by an unsubsidized wireline voice provider when setting new MPLS amounts. Consolidated provided this proposal to serve to remedy the issue that all of the square miles covered by a partially-served census block count toward meeting the 75% threshold. The commission does not intend to set separate MPLS amounts for different areas within an exchange.

Further, as discussed above, the commission notes that, in response to the concerns raised by Consolidated, the 75% threshold is set conservatively high so as to only capture those exchanges in which there is not a financial need for continued support. Accordingly, the commission declines to adopt Consolidated's proposal in order to address these issues.

The commission declines to adopt GVTC's proposal to limit the applicability of §26.405(e)(2)(B) to only ILECs regulated under PURA §58, 59, or 65. As discussed in further detail above, the commission finds that GVTC is not unduly burdened by the adopted rule, that it is appropriate to adopt a consistent test applicable to all affected ILECs, and that GVTC may file a petition to receive Additional Financial Assistance, which is a remedy not available to ILECs electing under PURA Chapters 58 and 59.

The commission agrees with several parties that stated that 80% is a reasonable limitation for the purpose of applying the adopted method to determine the amount of continued support. In particular, the commission agrees with Windstream that the 80% limitation roughly corresponds to the results of similar commission proceedings. As noted by Windstream, the combination of the MPLS amounts and reasonable rates determined for Windstream as part of Docket No. 40521 in total is less than 80% of the expenses attributable to its supported exchanges as calculated in Docket No. 18515. CenturyLink also commented that the 80% limitation is reasonable if the reasonable rates set in Docket Nos. 40521 and 41097 are viewed in conjunction with the commission's findings in Docket No. 18515. Further, Consolidated noted that the 80% limitation is comparable to policy adopted by the FCC regarding certain FUSF policies and that the FCC has previously

limited FUSF support for certain carriers to 80% of certain denominated amounts. Accordingly, the commission finds that the 80% falls within the same zone of reasonableness as previous commission and FCC decisions.

The Coalition commented that the 80% limitation is a standard that would not likely result in any further reductions in support beyond the support eliminated as a result of the presence of an unsubsidized wireline voice provider competitor. The Coalition appears to imply that a test to determine the amount of continued support is not valid unless its application results in further reductions in the amount of TUSF support available to an ILEC. As discussed above, the commission notes that PURA §56.023(g) and (i) require that an affected ILEC's eligibility for continued support with respect to particular exchanges be linked to a showing of financial need, but these sections do not provide guidance regarding how to set the amount of continued support as part of the same contested case. The commission finds that a limitation set at any level that does not exceed 100% of the expenses attributable to an ILEC's supported exchanges satisfies the mandate of PURA §56.021(1), which only requires that the TUSF be used to assist in the provision of BLTS at reasonable rates in high-cost rural areas. The commission finds that the 80% limitation is a simple formula for ensuring that TUSF support serves to assist in providing BLTS at reasonable rates at a cap that is not so low that it would risk eliminating support in exchanges where there is a financial need for continued support.

The commission similarly disagrees with CenturyLink, which stated that although 80% may be reasonable, a higher limitation would be preferable. The commission finds that the

80% threshold is an appropriate check on the support available to a petitioning ILEC to ensure that excess TUSF support is not available to the ILEC to support commercial efforts in markets in which the ILEC does not have a continued need for support. The commission also finds that an award of support not to exceed 80% of the ILEC's expenses attributable to its supported exchanges provides reasonable assistance in the provision of BLTS in high-cost rural areas, as is required by PURA §56.021(1). The commission notes that Consolidated commented that the 80% limitation would be comparable to similar limitations on the amount of FUSF support awarded by the FCC and that an 80% limitation will likely cause results comparable to the commission's findings in Docket No. 18515. The commission agrees with CenturyLink's comment that according to the holding in *Chrysler*, as long as the commission chooses a plausible limitation, the commission is not required to justify choosing, for example, 80% as opposed to 70% or 90%. The commission notes that the holding in *Chrysler* was affirmed in 2005 by the Third Court of Appeals in *Lambright,* which agreed that courts will uphold "administrative rules if they are reasonable." *Lambright,* 157 S.W.3d at 510–511. The commission finds that the 80% limitation falls within a range of reasonable values that are within the commission's authority to adopt and that the adopted rule is supported by a reasoned justification.

The commission disagrees with TEXALTEL, which urged the commission to provide further information as to the basis for proposing the 80% limitation and to allow an additional comment period. For the reasons discussed above, the commission finds that the 80% limitation has been the subject of meaningful comments, is supported by a reasoned

justification, and comports with PURA §56.023. Accordingly, the commission finds that no additional comment period is necessary or required by the APA.

Other issues relating to the determination of continued support amounts

GVTC and Consolidated commented that the first sentence of §26.405(e)(1) should be clarified to read "For each exchange that is served by an ILEC ETP that has filed a petition pursuant to §26.405(f)(1) of this section and for which the commission has determined that the ILEC ETP does not have a financial need for continued support, the commission shall reduce the monthly per-line support amount to zero." GVTC and Consolidated commented that the phrase "for which the commission has not determined that the ILEC ETP has a financial need for continued support" could be read to apply to the ILEC and that this proposal was intended to clarify that the MPLS will not be adjusted while the petition is still pending.

CenturyLink, Windstream, Consolidated, and GVTC proposed to amend §26.405(e)(2)(B) and (f)(1)(C) so that the test to determine the amount of continued support will compare support received by an ILEC with 12-months of expense data concluding with a recently completed quarter. These ILECs commented that ILEC ETPs should be allowed to file 12-months of expense data concluding with the most recently completed calendar quarter because books are kept on a quarterly basis. Accordingly, this modification would ensure that the rule would not require the submission of information for which final accounting data is not available. GVTC proposed, as an alternative solution, that the ILEC be permitted to select an ending date for the 12-month period so long as the filing is made no later than two quarters after the last quarter

included in the 12-month period. The Coalition stated that it agrees that this proposal is appropriate.

As discussed above, AMA TechTel commented that the proposed rule should be modified to allocate the company-wide reduction of support among the ILEC ETP's supported exchanges based on occupied household density so that support will be reduced for the most densely populated areas more than it is reduced for smaller, more sparsely populated areas, which are more likely to require continued support. AMA TechTel requested that this modification apply to company-wide reductions of support that would result from the implementation of §26.403(f) and §26.404(g) as well as the company-wide reductions of support that would result in the application of the 80% limitation found in §26.405(e). AMA TechTel stated that this approach is necessary to mitigate the effect that flat percentage reductions have on exchanges with small populations. AMA TechTel stated that its proposal could be accomplished by three means: (1) by using an allocation formula to eliminate support in the most dense exchanges until the appropriate total reduction is obtained, (2) by allocating the reduction in support based on relative line density of each exchange, or (3) by stating that support reductions would not be imposed with respect to exchanges with populations under a threshold of 1,000 but would be distributed to other exchanges. AMA TechTel noted that its proposal is consistent with recent commission proceedings, including Docket No. 40521.

CenturyLink responded that it does not necessarily oppose AMA TechTel's recommendation but that AMA TechTel's recommendation is not sufficiently clear for CenturyLink to provide unqualified support. CenturyLink stated that it would be important to understand where

information regarding an exchange's occupied household density would be derived and to understand exactly how support reductions would be weighted this factor. CenturyLink recommended that occupied households should not be considered in any capacity as part of the test to determine financial need.

The Coalition opposed AMA TechTel's proposal, stating that there is no reason to determine as part of the rulemaking that an allocation of support reductions is appropriate. The Coalition stated instead that, if an ILEC considers such an allocation to be essential, then it can file a petition that includes all of its exchanges and demonstrate its financial need for support by exchange.

Subsections 26.405(e)(2)(C) and (D) provide limits on the maximum amount of support available from the THCUSP based on the MPLS amounts which the ILEC ETP is eligible to receive when it files its petition to show financial need. AMA TechTel commented that this section does not reflect the statutory language that caps the maximum amount of support based on the support that the ILEC ETP is eligible to receive. AMA TechTel stated that support reductions should be calculated based on the ILEC ETP's total support, not the per-line support awarded for each exchange.

Commission response

The commission disagrees with AMA TechTel that the caps on an ILEC's support listed in §26.405(e)(2)(C) should be stated in terms of the overall total support that the ILEC is eligible to receive as opposed to being based on the MPLS amount awarded for service in

each exchange. PURA §56.023(g) and (i) state that the maximum amount of available support available to an ILEC is limited as a proportion of "the support that the company or cooperative is eligible to receive on December 31, 2016." The support that the affected ILECs will be eligible to receive on December 31, 2016 was awarded in Docket Nos. 40521 and 41097 as an MPLS amount awarded on an exchange-by-exchange basis. Accordingly, the commission interprets PURA §56.023(g) and (i) to limit the amount of support that may be awarded as a proportion of the exchange-specific MPLS amount awarded to each ILEC in each exchange as part of Docket Nos. 40521 and 41097. Accordingly, the commission declines to adopt any modifications to §26.405(e)(2)(C) and (D) based on this issue.

The commission declines to adopt Consolidated and GVTC's proposal to modify §26.405(e)(1) to clarify that the MPLS will not be adjusted while the petition is still pending. The rule as adopted states that the MPLS adjustments calculated pursuant to §26.405(e) will not be imposed while the petition is pending. PURA §56.023(g) and (i) state that, until the commission issues a final order in the proceeding, the petitioning ILEC is entitled to receive the same amount of support the company or cooperative was eligible to receive on the date the company or cooperative filed the petition and that these provisions are reflected in §26.405(f)(2). Further, §26.405(e) states that the new MPLS amounts determined during the contested case proceeding will not be effective until, at the earliest, the first disbursement following a commission order entered pursuant to §26.405(f)(2). Accordingly, the commission finds that the rule indicates that the support available to a petitioning ILEC will not be adjusted during the pendency of the contested case. The commission notes that the phrase "for which the commission has not determined that the

ILEC ETP has a financial need for continued support" is used to describe exchanges served by an ILEC ETP that has filed a petition pursuant to §26.405(f)(1). Accordingly, the commission adopts this subsection as proposed.

The commission agrees with CenturyLink, Windstream, Consolidated, and GVTC, which all commented that the commission should permit a petitioning ILEC to file the information required by §26.405(e)(2)(B) and (f)(1)(C) for a 12-month period ending with the most recently completed calendar quarter. Because ILECs' data is recorded on a quarterly basis, this proposal would permit ILECs to provide final accounting data at the time when the petition is filed. Further, requiring the submission for the most recently completed quarter, as opposed to an earlier quarter, ensures that the information provided is recent enough to be relevant for the purposes of implementing SB 583. Accordingly, the commission modifies §26.405(e)(2)(B) by deleting "twelve months" and instead inserting "twelve month period ending with the most recently completed calendar quarter" and adds a conforming modification to §26.405(f)(1)(C).

AMA TechTel stated that reductions in support that result from the imposition of the 80% limitation should be allocated on a company-wide basis based on a density factor instead of imposing a flat percentage reduction in the MPLS amount for each exchange. The commission finds that, in some cases, it may be preferable for these reductions to be allocated based on a density factor because the revenues available to a competitive ETP, which may only operate in a portion of the ILEC's territory, may be significantly impacted depending on how the reductions are allocated. By contrast, such a modification would not

significantly impact the revenues available to a petitioning ILEC, as the overall reduction in support would be the same. The commission agrees with the Coalition that there is no reason to determine as part of the rulemaking that an allocation of support reductions is appropriate. The commission finds that, instead of determining an allocation methodology as part of this rulemaking, it is preferable to retain the flexibility and discretion to determine, based on the facts of each contested case, whether consideration of various factors, including the impact on certain exchanges, warrants the implementation of an allocation methodology. The commission further retains the discretion and flexibility to devise an appropriate methodology based on the facts of each contested case. Accordingly, the commission deletes the phrase "the same proportion as" from §26.405(e)(2)(B) in order to clarify that the commission retains the discretion to either implement an allocation methodology or apply flat percentage reductions in the MPLS amounts available in supported exchanges. In order to clarify that the commission retains the discretion to consider any appropriate factor, the commission also inserts the following sentence in §26.405(e)(2)(B): "In establishing any reductions to the initial monthly per-line support amounts, the commission may consider any appropriate factor, including the residential line density per square mile of any affected exchanges."

§26.405(f): Proceeding to Determine Financial Need and Amount of Support

As indicated above, CenturyLink, Windstream, and GVTC proposed to amend §26.405(e)(2)(B) and (f)(1)(C) so that ILEC ETPs are allowed to file 12-months of expense data concluding with the most recently completed calendar quarter.

The Coalition commented that the word "intrastate" should be inserted in §26.405(f) to clarify that all financial information required under the new rule would cover only the regulated intrastate component of ILECs' activities. The Coalition also proposed modifying §26.405(f)(1)(D) by moving the second and third sentences into a new subparagraph and by clarifying that a contested case will be initiated to determine "whether the ILEC ETP has a financial need for continued support" rather than to determine "the eligibility of the ILEC ETP to receive continued support." The Coalition further proposed that the rule should state that new MPLS amounts for each exchange shall be consistent with the findings regarding the ILEC ETP's financial needs.

As part of its proposal that ILECs be required to submit information regarding actual revenues when showing financial need, the Coalition proposed modifying §26.405(f)(1)(A) to state that a petition shall include the most current actual expenses and revenue information but at a minimum shall include the revenue and expense information identified in §26.405(f)(1)(C).

Further, CenturyLink recommended against the insertion of the word "intrastate" in §26.405(f). CenturyLink opposed the Coalition's proposal on the basis that it would complicate what is supposed to be an administratively efficient comparison by requiring that ILECs separate intrastate-specific costs from the overall expenses reflected in their regulatory books. CenturyLink also stated that, instead of the Coalition's proposal, the insertion of "total Texas regulated expenses" in §26.405(f) would better reflect the scope of the costs considered in Docket No. 18515, which did not require any allocation of expenses to the interstate and

intrastate jurisdictions. Because support amounts were originally set in Docket No. 18515 to account for interstate expenses and revenues, it would be more accurate to include interstate-specific expenses in the present rulemaking.

In addition, CenturyLink and Windstream commented that the list of expenses to be compared do not allow consideration of capital expenditures, which are also expenditures related to the provision of BLTS because they involve extension of the network to new customer or maintenance of existing facilities.

The Coalition disagreed with CenturyLink and Windstream, stating that this concern is effectively addressed by the consideration of an ILEC's annual depreciation expense because depreciation is the appropriate mechanism to address the recovery of capital expenditures.

The Coalition also commented that the proposed list of expenses to be compared found in §26.405(f)(1)(C) should not include categories—specifically, customer operations expense and corporate operations expense—that are not geographically-driven and are not likely to be higher in high-cost rural areas. The Coalition argued that the purpose of the TUSF is not to guarantee that every expense category is subsidized but, rather, is to assist in the recovery of the unusual cost of serving high-cost rural areas. The Coalition disagrees that these categories of expenses are appropriately used in the comparison used to set petitioning ILECs' new MPLS amounts. The Coalition also proposed including net plant in service as a category of expenses to be reported. The Coalition claimed that, without this category, the rule would not provide for the

analysis of the extent to which ILECs' capital costs have already been recovered through depreciation.

Consolidated responded to the Coalition's comments, stating that customer operations expenses are frequently high per customer in rural areas. Consolidated stated for example that customer operations expenses may be increased if a service truck must be dispatched to particularly remote or rural areas. Consolidated also stated that the inclusion of net plant in service, as proposed by the Coalition, is poorly defined but likely corresponds to an ILEC's net rate base in service. Consolidated stated that the Coalition is likely requesting information that could be used to determine the ILECs' rates of return in the contested case proceedings.

CenturyLink also responded to the Coalition's comments, stating that all relevant expenses should be compared regardless of whether they vary based on geographical factors. CenturyLink noted that the purpose of the TUSF is to assist in the costs of service in high-cost rural areas, not to defray the cost of only expenses that vary by geography. CenturyLink noted that customer operations expenses were considered by the commission for the purposes of setting support amounts as part of Docket No. 18515. CenturyLink also commented that the commission should not include net plant in service in the list of items to be reported. CenturyLink stated that this one-time snapshot of net plant is not reflective of the need for TUSF support in any given year and does not add value to the measure of the need for TUSF support contemplated by the proposed rule. CenturyLink stated that setting MPLS amounts based on current net plant could have the effect of discouraging investment by artificially and inaccurately limiting TUSF support due to an overemphasis on a single data point.

Commission response

As discussed above, the commission has determined that it is proper to ensure that the new MPLS amounts set for a petitioning ILEC do not permit the ILEC to receive TUSF support in excess of the sum of certain expenses that are attributable to the ILEC's supported exchanges. Subsection 26.405(f)(1)(C) of the adopted rule includes a list of expenses that must be provided with a petition to determine financial need for the purposes of permitting this comparison of support to expenses. The purpose of this list of expenses is to ensure that the TUSF is used to assist in the provision of BLTS in high-cost rural areas, but that excess TUSF revenue is not available to support an ILEC's efforts in exchanges where there is not a financial need for continued support. Subsection 26.405(f)(1)(C) also requires the disclosure of the total amounts of certain property categories, which are not used in the comparison of support to expenses, but are included to contextualize the reported expenses and permit intervenors and commission staff to better assess the validity of the ILEC's reported expenses. For the reasons discussed below, the commission adopts the list of expenses and property categories referred to in §26.405(f)(1)(B) and listed explicitly in §26.405(f)(1)(C) as set out in the proposed rule.

The commission declines to adopt Windstream's and CenturyLink's proposal to permit consideration of an ILEC's recent capital expenditures when setting new MPLS amounts. As indicated by the Coalition, capital expenditures are recovered when the ILEC expenses depreciation to its capital property. The list of expenses to be compared already includes a category for depreciation. As such, it would be duplicative to consider capital expenditures

that will be recovered through a future depreciation expense in addition to capital expenditures that have been recovered through depreciation expensed during the 12 months covered by the summary of expenses. Accordingly, the commission declines to insert a new capital expenditures category in addition to the existing depreciation category.

In addition, the commission disagrees with the Coalition, that customer operations expenses and corporate operations expenses should not be used in the comparison used to set petitioning ILECs' new MPLS amounts because these expenses are not geographically driven and are not likely to be higher in high-cost rural areas. The commission notes that Consolidated commented that these expenses can increase in sparser exchanges if, for example, a service truck is dispatched to a rural area. Further, the commission agrees with CenturyLink that the purpose of the TUSF is to assist in the costs of providing service in high-cost rural areas and not to only defray those expenses that vary to a high degree based on geography. The commission finds that customer operations expenses and corporate operations expenses attributable to an ILECs' supported exchanges are relevant to the provision of BLTS in high-cost rural areas and that it is appropriate to consider them when setting the ILEC's new MPLS amounts.

Furthermore, the commission disagrees with the Coalition, which stated that the list of expenses and property categories should include a requirement that a petitioning ILEC provide its total net plant in service. The Coalition claimed that this category permits the analysis of the extent to which ILECs' capital costs have already been recovered through depreciation. As stated above, reporting of the listed property categories is not required to

permit the comparison of support to expenses used to set ILECs' new MPLS amounts, rather they are included to contextualize the reported expenses and permit intervenors and commission staff to better assess the validity of the ILEC's reported expenses. The commission agrees with CenturyLink that this property category represents a one-time snapshot that is not necessarily reflective of the need for TUSF support in any given year. As such, the commission finds that this property category is not necessarily useful for this purpose. However, nothing in the adopted rule should be construed to prevent the discovery of information that is shown by a party to be relevant to the determination of a particular ILEC's financial need for continued TUSF support in exchanges where there is no unsubsidized wireline voice competitor.

The commission also declines to adopt the Coalition's proposal to modify §26.405(f) to indicate that the new MPLS amounts for each exchange served by a petitioning ILEC shall be consistent with the findings regarding the ILEC ETP's financial needs. As discussed above in detail, the commission notes that the determination of financial need and the setting of the new MPLS amounts represent two separate phases of the contested case proceeding, As discussed in more detail above, the commission adopts a methodology of setting the MPLS amounts for a petitioning ILEC based on a comparison of certain disbursements and expenses and declines to adopt the Coalition's proposal that the commission reach a fact-specific determination in each proceeding regarding the appropriate method to determine the new MPLS amounts for a petitioning ILEC. Consistent with this determination, the commission declines to adopt the Coalition's proposal to modify §26.405(f) on this basis.

The commission agrees with several of the Coalition's proposed clarifying modifications to §26.405(f)(1)(D). Specifically, the Coalition proposed modifying §26.405(f) to state that a contested case will be initiated to determine "whether the ILEC ETP has a financial need for continued support" rather than to determine "the eligibility of the ILEC ETP to receive continued support" and also proposed modifying §26.405(f)(1)(D) by moving the second and third sentences into a new subparagraph. The commission notes that PURA §56.023 permits an ILEC to "petition the commission to initiate a contested case proceeding as necessary to determine the eligibility of the company or cooperative to receive support" and that the proposed rule tracks PURA's language in this respect. However, the commission finds that the Coalition's proposed changes clarify the meaning of the adopted rule. Further, the commission finds that the Coalition's proposed modification to split §26.405(f)(1)(D) into two paragraphs reflects a better organization of provisions of that subsection. Accordingly, the commission adopts the Coalition's proposed clarifications, which creates a new subsection (f)(1)(E).

The commission disagrees with the Coalition's comments that the word "intrastate" should be inserted in §26.405(f) to clarify that all financial information required under the new rule would cover only the regulated intrastate component of ILECs' activities. The commission notes that the revenue benchmark used to set ILECs' support in Docket No. 18515 incorporated a mixture of inter- and intrastate revenues. Further, the commission notes the difficulty of allocating certain expenses to each jurisdiction. For example, the Coalition does not discuss by what criteria the commission may determine the

intrastate component of the depreciation of facilities used to provide both inter- and intrastate services. As such, the commission agrees with CenturyLink, which recommended against the insertion of the word "intrastate" in §26.405(f) on the basis that it would complicate what is supposed to be an administratively efficient comparison by requiring that ILECs separate intrastate-specific costs from the overall expenses reflected in their regulatory books. The commission adopts CenturyLink's proposal to insert "total Texas regulated expenses" in §26.405(f)(1)(C), which represents an appropriate measure of the ILEC's cost of providing service while also requiring information that is already readily available to a petitioning ILEC.

§26.405(g): De-averaging of the support received by ILEC ETPs from the SRILEC USP

The Coalition commented that the de-averaging methodology allows ILECs to arbitrarily redistribute TUSF support among their exchanges, effectively allowing ILECs to reset to a higher level the baseline support that they receive in some exchanges before the commission decides whether any financial need exists. The Coalition states that the de-averaging formula does not comport with SB 583's requirements because it has no linkage to a determination of financial need. The Coalition also stated the proposed de-averaging methodology's reliance on the ILEC's residential line count as opposed to the exchange's total number of residential lines could lead to an understatement of the density of exchanges in which most of the residential lines are served by competitors. The Coalition claimed that there is no reason to de-average the TUSF support available from the SRILEC USP to affected ILECs without a showing by the ILEC that de-averaging is supported by the ILEC's demonstration of financial need for continued support.

The Coalition also stated that the de-averaging methodology's reliance on the petitioning ILEC's residential line density is problematic because exchanges in which competitors serve a large proportion of the lines will appear to be sparser than they actually are. The Coalition expressed concerns that this provision could result in an artificial increase in the amount of support available to an ILEC. The Coalition proposed modifying §26.405(g) by eliminating the de-averaging methodology that relies on residential line density categories and instead permitting the commission to reach a finding regarding the appropriate de-averaging amounts as part of the contested case regarding the petition to show financial need.

TEXALTEL commented that it had not been provided with documentation explaining how the proposed proxy MPLS amounts were calculated. TEXALTEL stated that the real issue, however, is whether the de-averaging is performed before or after any support reductions are realized as a result of the financial need test. If the de-averaging is effective before the financial need test is implemented, then it could reduce the total support reductions imposed pursuant to the financial need test, but if de-averaging is effective after the financial need test is implemented, then de-averaging would be revenue neutral. TEXALTEL stated that imprecision in the de-averaging methodology is more acceptable in the latter scenario.

Consolidated noted that the Coalition's alternative proposal for de-averaging sets forth no specific criteria or standards other than an open-ended proposal to consider the issue in a contested case proceeding. GVTC and Consolidated support the de-averaging process outlined in the proposed rule. As stated above, GVTC commented that the de-averaging methodology was determined using sound, data-driven processes. GVTC and Consolidated commented that it

is appropriate to allow ILECs that receive support from the SRILEC USP to receive de-averaged support because of the historical circumstances of the SRILEC USP. Specifically, GVTC and Consolidated stated that, while the THCUSP support was awarded using company-specific and wire center-specific forward-looking cost models, SRILEC support was awarded using proxies to determine average levels of support on a company-wide basis. GVTC and Consolidated stated that the commission has never conducted a proceeding to examine exchange-specific characteristics or costs. Instead, GVTC and Consolidated stated that SRILEC USP support was cross-distributed because support was awarded on a company-wide basis, meaning that support nominally provided in denser exchanges was actually used to support service in less dense exchanges. Consolidated stated that de-averaging is therefore necessary in order for affected ILECs to adequately sustain universal service because competition has eroded significant portions of their "center city" markets, leaving less support for other areas where the cost of service is highest. GVTC and Consolidated stated that, as a result, SRILEC USP support should be de-averaged so that it is representative of the cost characteristics of each exchange and incorporates the costs of serving as the POLR. GVTC and Consolidated commented that the proposed rule's de-averaging mechanism reflected these concerns and comports with PURA §56.023.

Commission response

The commission disagrees with the Coalition, which commented that the de-averaging methodology would allow ILECs to arbitrarily redistribute TUSF support among their exchanges, effectively allowing ILECs to reset to a higher level the baseline support that they receive in some exchanges. The commission also disagrees with the concerns raised by

TEXALTEL that if the de-averaging is effective before the financial need test is implemented, it could reduce the total support reductions imposed pursuant to the financial need test.

The commission finds that the de-averaging methodology is not arbitrary and does not permit the arbitrary redistribution of support. Instead, as indicated by GVTC and as discussed above, the de-averaging methodology was determined using sound, data-driven processes. First, data was gathered regarding the MPLS amounts determined for each exchange included in the commission's order in Docket No. 18515. Second, the most accurate housing unit density data from the time period examined in Docket No. 18515 was decided for each exchange. The MPLS amounts awarded in Docket No. 18515 were correlated to the housing unit density information for each exchange. Next, the weighted average of the MPLS for each of the density bands was determined. These weighted average MPLS amounts correspond to the proxy MPLS amounts in the proposed rule.

Further, the commission finds that this re-allocation is appropriate in light of the historical circumstances of the SRILEC USP. As indicated by GVTC and Consolidated, the commission has never conducted a proceeding to examine exchange-specific characteristics or costs for ILECs that receive support from the SRILEC USP. Instead, SRILEC USP support was awarded on a company-wide basis, meaning that support nominally provided in denser exchanges has historically been used to support service in less-dense exchanges. De-averaging is therefore necessary in order for affected ILECs to adequately sustain universal service because competition has eroded significant portions of their "center city"

markets, leaving less support for other areas where the cost of service is highest. The commission agrees with GVTC and Consolidated that, as a result, SRILEC USP support should be de-averaged so that it is representative of the cost characteristics of each exchange and incorporates the costs of serving as the POLR.

The Coalition stated that the proposed §26.405(g) does not comport with SB 583's requirements. The commission disagrees and finds that the de-averaging provisions are explicitly authorized by SB 583's amendments to PURA §56.023 and §56.031. As indicated in the Publication, the new rule was proposed using the authority granted generally by PURA §14.002 and specifically by SB 583, which amended PURA §56.031 to allow the commission to adjust support from the SRILEC USP any time after September 1, 2007 as long as the commission considers the adequacy of basic rates to support universal service. SB 583 also added a new PURA §56.023(o), which states that, before January 1, 2020, "[n]otwithstanding the provisions of [PURA Chapter 56], the commission has no authority, except as provided by [this section] to reduce support provided to an incumbent local exchange company that is an electing company under Chapter 58 or 59 or is a cooperative that served greater than 31,000 access lines in this state on September 1, 2013" for support provided from the SRILEC USP. Accordingly, SB 583 explicitly grants the commission the authority to adjust the support available from the SRILEC USP as long as the commission considers the adequacy of basic rates to support universal service and, if the support is adjusted before January 1, 2020, as long as the adjustment does not result in a reduction of support to certain ILECs. The new rule's de-averaging provisions will adjust support from the SRILEC USP after September 1, 2007 and before January 1, 2020, but will not result in

a reduction of the support available to requesting ILECs, complying with the timing provisions of SB 583.

As required by PURA §56.031, the commission has also considered the adequacy of basic rates to support universal service. The application of the de-averaging process is revenue neutral, as there will not be a reduction of overall support and as rates will not be adjusted. Accordingly, the de-averaging process does not negatively impact the ILECs' ability to offer service throughout their territory based on their current rates and support amounts. Because the de-averaging provisions do not provide for the reduction of support available to a requesting ILEC and do not provide for the adjustment of an ILEC's basic rates, the commission finds that the new rule appropriately addresses the adequacy of basic rates to support universal service as required by PURA §56.031.

The commission acknowledges the Coalition's concern that the de-averaging methodology's reliance on a petitioning ILEC's residential line density could be problematic because exchanges in which competitors serve a large proportion of customers could appear to be more sparsely populated than they actually are. The commission disagrees with the Coalition's contention that this provision could result in an artificial increase in the amount of support available to an ILEC. First, the commission notes that the de-averaging provision is revenue-neutral and cannot result in an increase in the overall support available to an ILEC before the application of the test to determine financial need. Second, in a situation like the one contemplated by the Coalition, this provision is as likely to negatively impact a petitioning ILEC as it is to benefit the ILEC.

As such, it is likely that all support for an exchange will ultimately be eliminated by the application of the test to determine financial need if the rural nature of that exchange is overstated due to the presence of multiple competitors and if, as a result, the de-averaging methodology results in a higher amount of support being allocated to that exchange. As a result, a larger amount of TUSF support would be eliminated with respect to that exchange than if the ILEC's support had not been de-averaged. Accordingly, the commission finds that no modification to the adopted rule is necessary to address the Coalition's concerns regarding this issue.

The commission agrees with GVTC and Consolidated, which commented that it is appropriate to allow ILECs that receive support from the SRILEC USP to receive de-averaged support because of the historical averaging of the support provided by the SRILEC USP. The commission finds that the de-averaging provision furthers the goals of universal service by ensuring the adequacy of support, in conjunction with ILECs' BLTS rates, to support the provision of BLTS in high-cost rural areas at reasonable rates. Accordingly, the proposed rule comports with the specific provisions of PURA Chapter 56 amended by SB 583.

Finally, the commission disagrees with the modifications to §26.405(g) proposed by the Coalition, which stated that the proposed de-averaging methodology's reliance on the ILEC's residential line count as opposed to the exchange's total number of residential lines could lead to an understatement of the density of exchanges in which most of the residential lines are served by competitors. The de-averaging methodology is designed to use

information accessible and verifiable by the requesting ILEC and that will not be subject to significant evidentiary issues. The Coalition's proposal to use the exchange's total number of residential lines would require the amalgamation of information from a variety of sources, and it is not clear that any benefit would be derived from undertaking this method. For the same reason, the commission declines to adopt the proposal that the commission determine the appropriate de-averaging methodology as part of the contested case proceeding, as proposed by the Coalition. The commission notes that the Coalition has not proposed criteria or guidelines to guide the commission in reaching this determination.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting these sections, the commission makes changes consistent with the above discussion to clarify its intent and to correct nonsubstantive clerical errors.

The amendments and new section are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (West 2007 and Supp. 2014) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, Senate Bill 583 which amended PURA §§56.023, 56.024, 56.026, 56.031, and 56.032.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002, Senate Bill 583 which amended PURA §§56.023, 56.024, 56.026, 56.031, and 56.032.

§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) **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.

(2) **Eligible line** -- A residential line or 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.

(3) **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)).

(4) **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. 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) Initiation 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 commission shall determine the amount of per-line support to be made available to ETPs in each eligible wire center. The amount of support available to each ETP shall be calculated using the base support amount as of the effective date of this section and applying the annual

reductions as described in this subsection. As used in this subsection, "basic local telecommunications service" refers to services available to residential customers only, and "exchange" or "wire center" refer to regulated exchanges or wire centers only.

(1) **Determining base support amount available to ILEC ETPs**. The initial annual base support amount for an ILEC ETP shall be the annualized monthly THCUSP support amount for the month preceding the effective date of this section, less the 2011 amount of support disbursed to the ILEC ETP from the federal universal service fund for High Cost Loop, High Cost Model, Safety Net Additive, and Safety Valve components of the frozen high-cost support as determined by the Universal Service Administration Company pursuant to 47 C.F.R. §54.312(a). The initial per-line monthly support amount for a wire center shall be the per-line support amount for the wire center for the month preceding the effective date of this section, less each wire center's pro rata share of one-twelfth of the 2011 amount of support disbursed to the ILEC ETP from the federal universal service fund for High Cost Loop, High Cost Model, Safety Net Additive, and Safety Valve components of the frozen high-cost support determined by the Universal Service Administration Company pursuant to 47 C.F.R §54.312(a). The initial annual base support amount shall be reduced annually as described in paragraph (3) of this subsection.

(2) **Determination of the reasonable rate**. The reasonable rate for basic local telecommunications service shall be determined by the commission in a contested case proceeding. To the extent that an ILEC ETP's existing rate for basic local telecommunications service in any wire center is less than the reasonable rate, the

ILEC ETP may, over time, increase its rates for basic local telecommunications service to an amount not to exceed the reasonable rate. The increase to the existing rate shall not in any one year exceed an amount to be determined by the commission in the contested case proceeding**.** An ILEC ETP may, in its sole discretion, accelerate its THCUSP reduction in any year by as much as 10% and offset such reduction with a corresponding local rate increase in order to produce rounded rates. In no event shall any such acceleration obligate the ETP to reduce its THCUSP support in excess of the total reduction obligation initially calculated under paragraph (3) of this subsection.

(3) **Annual reductions to THCUSP base support and per-line support recalculation**. As part of the contested proceeding referenced in paragraph (2) of this subsection, each ILEC ETP shall, using line counts as of the end of the month preceding the effective date of this rule, calculate the amount of additional revenue that would result if the ILEC ETP were to charge the reasonable rate for basic local telecommunications service to all residential customers for those services where the price, or imputed price, are below the reasonable rate. Lines in exchanges for which an application for deregulation is pending as of June 1, 2012 shall not be included in this calculation. If the application for deregulation for any such exchanges subsequently is denied by the commission, the ILEC ETP shall, within 20 days of the final order denying such application, submit revised calculations including the lines in those exchanges for which the application for deregulation was denied. Without regard to whether an ILEC ETP increases its rates for basic local telecommunications service to the reasonable rate, the ILEC

ETP's annual base support shall be reduced on January 1 of each year for four consecutive years, with the first reduction occurring on January 1, 2013. The ETP's annual base support amount shall be reduced by 25% of the additional revenue calculated pursuant to this paragraph in each year of the transition period. This reduction shall be accomplished by reducing support for each wire center served by the ETP proportionally.

(4) **Portability**. The support amounts established pursuant to this section are applicable to all ETPs and are portable with the customer.

(5) **Limitation on availability of THCUSP support.**

(A) THCUSP support shall not be provided in a wire center in a deregulated market that has a population of at least 30,000.

(B) An ILEC may receive support from the THCUSP for a wire center in a deregulated market that has a population of less than 30,000 only if the ILEC demonstrates to the commission that the ILEC needs the support to provide basic local telecommunications service at reasonable rates in the affected market. An ILEC may use evidence from outside the wire center at issue to make the demonstration. An ILEC may make the demonstration for a wire center before or after submitting a petition to deregulate the market in which the wire center is located.

(6) **Total Support Reduction Plan**. Within 10 days of the effective date of this section, an ILEC may elect to participate in a Total Support Reduction Plan (TSRP) as prescribed in this subsection, by filing a notification of such participation with the commission. The TSRP would serve as an alternative to the

reduction plan prescribed in paragraph (3) of this subsection. The TSRP will be implemented as follows:

(A) For an ILEC making this election, the ILEC shall reduce its THCUSP funding in accordance with paragraph (3) of this subsection with the exception that THCUSP reductions due to exchange deregulation may be credited against the electing ILEC's annual reduction obligation in the calendar year immediately following such deregulation.

(B) In no event shall an electing ILEC seek or receive THCUSP funding after January 1, 2017 even if it would otherwise be entitled to such funding as of this date.

(f) **Support Reduction**. Subject to the provisions of §26.405(f)(3) of this title (relating to Financial Need for Continued Support), the commission shall adjust the support to be made available from the THCUSP according to the following criteria.

(1) For each ILEC that is not electing under subsection (e)(6) of this section and that served greater than 31,000 access lines in this state on September 1, 2013, or a company or cooperative that is a successor to such an ILEC, the monthly per-line support that the ILEC is eligible to receive for each exchange on December 31, 2016 from the THCUSP is reduced:

(A) on January 1, 2017, to 75 percent of the level of support the ILEC is eligible to receive on December 31, 2016;

(B) on January 1, 2018, to 50 percent of the level of support the ILEC is eligible to receive on December 31, 2016; and

(C) on January 1, 2019, to 25 percent of the level of support the ILEC is eligible to receive on December 31, 2016.

(2) An ILEC subject to this subsection may file a petition to show financial need for continued support, pursuant to §26.405(f)(1) of this title, on or before January 1, 2019.

(g) **Reporting requirements**. An ETP that receives support pursuant to this section shall report the following information:

(1) **Monthly reporting requirement.** An ETP shall report the following to the TUSF administrator on a monthly basis:

(A) the total number of eligible lines for which the ETP seeks TUSF support; and

(B) a calculation of the base support computed in accordance with the requirements of subsection (d) of this section.

(2) **Quarterly filing requirements.** An ETP shall file quarterly reports with the commission showing actual THCUSP receipts by study area.

(A) Reports shall be filed electronically in the project number assigned by the commission's central records office no later than 3:00 p.m. on the 30th calendar day after the end of the calendar quarter reporting period.

(B) Each ETP's reports shall be filed on an individual company basis; reports that aggregate the disbursements received by two or more ETPs will not be accepted as complying with the requirements of this paragraph.

(C) All reports filed pursuant to paragraph (3) of this subsection shall be publicly available.

(3) **Annual reporting requirements.** An ETP shall report annually to the TUSF administrator that it is qualified to participate in the THCUSP.

(4) **Other reporting requirements.** An ETP shall report any other information that is required by the commission of the TUSF administrator, including and information necessary to assess contributions and disbursements from the TUSF.

§26.404. Small and Rural Incumbent Local Exchange Company (ILEC) Universal Service Plan.

(a) **Purpose.** This section establishes guidelines for financial assistance to eligible telecommunications providers (ETPs) that provide service in the study areas of small and rural ILECs in the state so that basic local telecommunications service or its equivalent 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) **Eligible line --** A residential line or a single-line business line over which an ETP provides the service supported by the Small and Rural ILEC Universal Service Plan (SRILEC USP) through its own facilities, purchase of unbundled network elements (UNEs), or a combination of its own facilities and purchase of UNEs.

(2) **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)).

(3) **Small incumbent local exchange company** -- An incumbent local exchange (ILEC) that qualifies as a "small local exchange company" as defined in the Public Utility Regulatory Act (PURA), §53.304(a)(1).

(c) **Application.**

(1) Small or rural ILECs. This section applies to small ILECs, as defined in subsection (b) of this section, and to rural ILECs, as defined in §26.5 of this title (relating to Definitions), that have been designated ETPs.

(2) Other ETPs providing service in small or rural ILEC study areas. This section applies to telecommunications providers other than small or rural ILECs that provide service in small or rural ILEC study areas that have been designated ETPs.

(d) **Service to be supported by the Small and Rural ILEC Universal Service Plan.** The Small and Rural ILEC Universal Service Plan shall support the provision by ETPs of basic local telecommunications service as defined in §26.403(d) of this title (relating to Texas High Cost Universal Service Plan (THCUSP)).

(e) **Criteria for determining amount of support under Small and Rural ILEC Universal Service Plan.** The commission shall determine the amount of per-line support to be made available to ETPs in each eligible study area. The amount of support available to each ETP shall be calculated using the small and rural ILEC ETP base support amount and applying the annual reductions as described in this subsection.

(1) **Determining base support amount available to ETPs.** The initial per-line monthly base support amount for a small or rural ILEC ETP shall be the per-line monthly support amount for each small or rural ILEC ETP study area as specified in Docket Number 18516, annualized by using the small or rural ILEC ETP

access line count as of January 1, 2012. The initial per-line monthly base support amount shall be reduced as described in paragraph (3) of this subsection.

(2) **Determination of the reasonable rate**.

(A) The reasonable rate for basic local telecommunications service shall be determined by the commission in a contested case proceeding. An increase to an existing rate shall not in any one year exceed an amount to be determined by the commission in the contested case proceeding**.**

(B) The length of the transition period applicable to the reduction in support calculated under paragraph (3) of this subsection shall be determined in the contested case proceeding.

(3) **Annual reductions to the Small and Rural ILEC Universal Service Plan per-line support**. As part of the contested case proceeding referenced in paragraph (2) of this subsection, for each small or rural ILEC ETP, the commission shall calculate the amount of additional revenue, using the basic telecommunications service rate (the tariffed local service rate plus any additional charges for tone dialing services, mandatory expanded local calling service and mandatory extended area service) and the access line count as of September 1, 2013, would result if the small and rural ILEC ETP were to charge the reasonable rate for basic local telecommunications service to all residential customers. Without regard to whether a small or rural ILEC ETP increases its rates for basic local telecommunications service to the reasonable rate, the small or rural ILEC ETP's annual base support amount for each study area shall be reduced on January 1 of each year for four consecutive years, with the first reduction occurring on January

1, 2014. The small or rural ILEC ETP's annual base support amount shall be reduced by 25% of the additional revenue calculated pursuant to this paragraph in each year of the transition period, unless specified otherwise pursuant to paragraph (2)(B) of this subsection. This reduction shall be accomplished by reducing support for each study area proportionally. An ILEC ETP may, in its sole discretion, accelerate its SRILEC USP reduction in any year by as much as 10% and offset such reductions with a corresponding local rate increase in order to produce rounded rates.

(f) **Small and Rural ILEC Universal Service Plan support payments to ETPs.** The TUSF administrator shall disburse monthly support payments to ETPs qualified to receive support pursuant to this section.

(1) **Payments to small or rural ILEC ETPs.** The payment to each small or rural ILEC ETP shall be computed by multiplying the per-line amount established in subsection (e) of this section by the number of eligible lines served by the small or rural ILEC ETP for the month.

(2) **Payments to ETPs other than small or rural ILECs.** The payment to each ETP other than a small or rural ILEC shall be computed by multiplying the per-line amount established in subsection (e) of this section for a given small or rural ILEC study area by the number of eligible lines served by the ETP in such study area for the month.

(g) **Support Reduction**. Subject to the provisions of §26.405(f)(3) of this title (relating to Financial Need for Continued Support), the commission shall adjust the support to be made available from the SRILEC USP according to the following criteria.

(1) For each ILEC ETP that is electing under PURA, Chapter 58 or 59 or a cooperative that served greater than 31,000 access lines in this state on September 1, 2013, or a company or cooperative that is a successor to such an ILEC, the monthly per-line support that the ILEC ETP is eligible to receive for each exchange on December 31, 2017 from the SRILEC USP is reduced:

(A) on January 1, 2018, to 75 percent of the level of support the ILEC ETP is eligible to receive on December 31, 2017;

(B) on January 1, 2019, to 50 percent of the level of support the ILEC ETP is eligible to receive on December 31, 2017; and

(C) on January 1, 2020, to 25 percent of the level of support the ILEC ETP is eligible to receive on December 31, 2017.

(2) An ILEC ETP subject to this subsection may file a petition to show financial need for continued support, pursuant to §26.405(f)(1) of this title, on or before January 1, 2020.

(h) **Reporting requirements.** An ETP eligible to receive support under this section shall report information as required by the commission and the TUSF administrator.

(1) **Monthly reporting requirement.** An ETP shall report the following to the TUSF administrator on a monthly basis:

(A) the total number of eligible lines for which the ETP seeks SRILEC USP support; and

(B) a calculation of the base support computed in accordance with the requirements of subsection (e) of this section.

(2) **Quarterly filing requirements.** An ETP shall file quarterly reports with the commission showing actual SRILEC USP receipts by study area.

(A) Reports shall be filed electronically in the project number assigned by the commission's central records office no later than 3:00 p.m. on the 30th calendar day after the end of the calendar quarter reporting period.

(B) Each ETP's reports shall be filed on an individual company basis; reports that aggregate the disbursements received by two or more ETPs will not be accepted as complying with the requirements of this paragraph.

(C) All reports filed pursuant to paragraph (3) of this subsection shall be publicly available.

(3) **Annual reporting requirements.** An ETP shall report annually to the TUSF administrator that it is qualified to participate in the Small and Rural ILEC Universal Service Plan.

(4) **Other reporting requirements.** An ETP shall report any other information that is required by the commission or the TUSF administrator, including and information necessary to assess contributions and disbursements from the TUSF.

§26.405. Financial Need for Continued Support.

(a) **Purpose.** This section establishes criteria to demonstrate financial need for continued support for the provision of basic local telecommunications service under the Texas High Cost Universal Service Plan (THCUSP) and the Small and Rural Incumbent Local Exchange Company Universal Service Plan (SRILEC USP). This section also establishes the process by which the commission will evaluate petitions to show financial need and will set new monthly per-line support amounts.

(b) **Application.** This section applies to an incumbent local exchange company (ILEC) that is subject to §26.403(f) of this title (relating to the Texas High Cost Universal Service Plan (THCUSP)) or §26.404(g) of this title (relating to the Small and Rural Incumbent Local Exchange Company (ILEC) Universal Service Plan).

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

(1) **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.

(2) **Eligible line** -- A residential line or a single-line business line over which an ETP provides the service supported by the THCUSP or SRILEC USP through its own

facilities, purchase of unbundled network elements (UNEs), or a combination of its own facilities and purchase of UNEs.

(3) **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)).

(4) **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.

(d) **Determination of financial need**.

(1) **Criteria to determine financial need**. For each exchange that is served by an ILEC ETP filing a petition pursuant to subsection (f)(1) of this section, the commission shall determine whether an ILEC ETP has a financial need for continued support. An ILEC ETP has a financial need for continued support within an exchange if the exchange does not contain an unsubsidized wireline voice provider competitor as set forth in paragraph (2) of this subsection**.**

(2) **Establishing the existence of an unsubsidized wireline voice provider competitor.** For the purposes of this section, an exchange contains an unsubsidized wireline voice provider competitor if the percentage of square miles served by an unsubsidized wireline voice provider competitor exceeds 75% of the square miles within the exchange. The commission shall determine whether an

exchange contains an unsubsidized wireline voice provider competitor using the following criteria.

(A) For the purposes of this section, an entity is an unsubsidized wireline voice provider competitor within an exchange if it:

(i) does not receive THCUSP support, SRILEC USP support, Federal Communications Commission (FCC) Connect America Fund (CAF) support, or FCC Legacy High Cost support for service provided within that exchange; and

(ii) offers basic local service or broadband service of 3 megabits per second down and 768 kilobits per second up using wireline-based technology using either its own facilities or a combination of its own facilities and purchased unbundled network elements (UNEs).

(B) Using Version 7 of the National Broadband Map, the commission shall determine the census blocks served by an unsubsidized wireline voice provider competitor within a specific exchange and the total number of square miles represented by those census blocks using the following criteria.

(i) The number of square miles served by an unsubsidized wireline voice provider competitor within an exchange shall be equal to the total square mileage covered by census blocks in the exchange in which an unsubsidized wireline voice provider competitor offers service to any customer or customers.

(ii) The commission shall determine the percentage of square miles served by an unsubsidized wireline voice provider competitor within an exchange by dividing the number of square miles served by an unsubsidized wireline voice provider competitor within the exchange by the number of square miles within the exchange.

(C) The data provided by the National Broadband Map creates a rebuttable presumption regarding the presence of an unsubsidized wireline voice provider competitor within a specific census block. However, nothing in this rule is intended to preclude a party from providing evidence as to the accuracy of individual census block data within the National Broadband Map with regard to whether an unsubsidized wireline voice provider competitor offers service within a particular census block.

(e) **Criteria for determining amount of continued support**. In a proceeding conducted pursuant to subsection (f) of this section, the commission shall set new monthly per-line support amounts for each exchange served by a petitioning ILEC ETP. The new monthly per-line support amounts shall be effective beginning with the first disbursement following a commission order entered pursuant to subsection (f)(2) of this section, except that they shall not be effective earlier than January 1, 2017 for an exchange with service supported by the THCUSP or earlier than January 1, 2018 for an exchange with service supported by the SRILEC USP.

(1) **Exchanges in which the ILEC ETP does not have a financial need for continued support.** For each exchange that is served by an ILEC ETP that has

filed a petition pursuant to subsection (f)(1) of this section and for which the commission has not determined that the ILEC ETP has a financial need for continued support, the commission shall reduce the monthly per-line support amount to zero. For each exchange that is served by an ILEC ETP that has filed a petition pursuant to subsection (f)(1) of this section and which is not included in the petition, the commission shall reduce the monthly per-line support amount to zero.

(2) **Exchanges in which the ILEC ETP has a financial need for continued support.** For each exchange that is served by an ILEC ETP that has filed a petition pursuant to subsection (f)(1) of this section and for which the commission has determined the ILEC ETP has a financial need for continued support, the commission shall set a monthly per-line support amount according to the following criteria.

(A) The initial monthly per-line support amounts for each exchange shall be equal to:

(i) the amount that the ILEC ETP was eligible to receive on December 31, 2016 for an ILEC ETP that receives support from the THCUSP;

(ii) the amount that the ILEC ETP was eligible to receive on December 31, 2017 for an ILEC ETP that receives support from the SRILEC USP and that has not filed a request pursuant to subsection (g) of this section; or

(iii) the new monthly per-line support amounts calculated pursuant to subsection (g) of this section for an ILEC ETP that has filed a request pursuant to subsection (g) of this section.

(B) Initial monthly per-line support amounts for each exchange shall be reduced by the extent to which the disbursements received by an ILEC ETP from the THCUSP or SRILEC USP in the twelve month period ending with the most recently completed calendar quarter prior to the filing of a petition pursuant to subsection (f)(1) of this section are greater than 80% of the total amount of expenses reflected in the summary of expenses filed pursuant to subsection (f)(1)(C) of this section. In establishing any reductions to the initial monthly per-line support amounts, the commission may consider any appropriate factor, including the residential line density per square mile of any affected exchanges.

(C) For each exchange with service supported by the THCUSP, monthly per-line support shall not exceed:

(i) the monthly per-line support that the ILEC ETP was eligible to receive on December 31, 2016, if the petition was filed before January 1, 2016;

(ii) 75 percent of the monthly per-line support that the ILEC ETP was eligible to receive on December 31, 2016, if the petition was filed on or after January 1, 2016, and before January 1, 2017;

(iii) 50 percent of the monthly per-line support the ILEC ETP was eligible to receive on December 31, 2016, if the petition was filed on or after January 1, 2017, and before January 1, 2018; or

(iv) 25 percent of the monthly per-line support that the ILEC ETP was eligible to receive on December 31, 2016, if the petition was filed on or after January 1, 2018, and before January 1, 2019.

(D) For each exchange with service supported by the SRILEC USP, monthly per-line support shall not exceed:

(i) the monthly per-line support that the ILEC ETP was eligible to receive on December 31, 2017, if the petition was filed before January 1, 2017;

(ii) 75 percent of the monthly per-line support that the ILEC ETP was eligible to receive on December 31, 2017, if the petition was filed on or after January 1, 2017, and before January 1, 2018;

(iii) 50 percent of the monthly per-line support the ILEC ETP was eligible to receive on December 31, 2017, if the petition was filed on or after January 1, 2018, and before January 1, 2019; or

(iv) 25 percent of the monthly per-line support that the ILEC ETP was eligible to receive on December 31, 2017, if the petition was filed on or after January 1, 2019, and before January 1, 2020.

(E) An ILEC ETP may only be awarded continued support for the provision of service in exchanges with service that is eligible for support from the

THCUSP or SRILEC USP at the time of filing of a petition pursuant to subsection (f)(1) of this section.

(F) **Portability of support.** The support amounts established pursuant to this section are applicable to all ETPs and are portable with the customer.

(f) **Proceeding to Determine Financial Need and Amount of Support.**

(1) **Petition to determine financial need.** An ILEC ETP that is subject to §26.403(f) or §26.404(g) of this title may petition the commission to initiate a contested case proceeding to demonstrate that it has a financial need for continued support for the provision of basic local telecommunications service.

(A) An ILEC ETP may only file one petition pursuant to this subsection. A petition filed pursuant to this subsection shall include the information necessary to reach the determinations specified in this subsection.

(B) An ILEC ETP filing a petition pursuant to this subsection shall provide notice as required by the presiding officer pursuant to §22.55 of this title (relating to Notice in Other Proceedings). At a minimum, notice shall be published in the *Texas Register*.

(C) A petition filed pursuant to this subsection shall include a summary of the following total Texas regulated expenses and property categories, including supporting workpapers, attributable to the ILEC ETP's exchanges with service supported by the THCUSP or SRILEC USP during the twelve month period ending with the most recently completed calendar quarter prior to the filing of the petition:

(i) Plant-specific operations expense;

(ii) Plant non-specific operations expense;

(iii) Customer operations expense;

(iv) Corporate operations expense;

(v) Depreciation and amortization expenses;

(vi) Other operating expenses;

(vii) Total telecom plant in service;

(viii) Total property held for future use; and

(ix) Total telecom plant under construction.

(D) A summary filed pursuant to this subsection shall be filed publicly. Workpapers filed pursuant to this subsection may be filed publicly or under seal.

(E) Upon receipt of a petition pursuant to this section, the commission shall initiate a contested case proceeding to determine whether the ILEC ETP has a financial need for continued support under this section for the exchanges identified in the petition. In the same proceeding, the commission shall set a new monthly per-line support amount for all exchanges served by the ILEC ETP.

(2) The commission shall issue a final order in the proceeding not later than the 330th day after the date the petition is filed with the commission. Until the commission issues a final order on the proceeding, the ILEC ETP shall continue to receive the total amount of support it was eligible to receive on the date the ILEC ETP filed a petition under this subsection.

(3) An ILEC ETP shall not be subject to §26.403(f) or §26.404(g) of this title after the commission issues a final order on the petition.

(4) The ILEC ETP filing a petition pursuant to this subsection shall bear the burden of proof with respect to all issues that are in the scope of the proceeding.

(g) **De-averaging of the support received by ILEC ETPs from the SRILEC USP.** On or before January 1, 2017, an ILEC ETP filing a petition pursuant to subsection (f)(1) of this section and that receives support from the SRILEC USP may include in its petition a request that the commission determine for each exchange served by the ILEC ETP new monthly per-line support amounts that the ILEC ETP will be eligible to receive on December 31, 2017. The new monthly per-line support amounts will be calculated using the following methodology.

(1) The commission shall use per-line proxy support levels based on the following ranges of average residential line density per square mile within an individual exchange. These proxies are used specifically for the purpose of de-averaging and do not indicate a preference that support at these levels be provided from the SRILEC USP.

Residential Line Density Per Square Mile	Proxy Per-Line Support Amount
0 to 2.49	$120.53
2.49 to 4.99	$69.82
5 to 9.99	$46.46

10 to 14.99	$31.45
15 to 19.99	$18.81
20 to 24.99	$14.78
25 to 29.99	$10.51
30 to 49.99	$4.33
50 or greater	$1.83

(2) Using the per-line proxy support amount levels set forth in this subsection, the commission shall create a benchmark support amount for each exchange of a requesting ILEC ETP. The benchmark support amount for each individual supported exchange of a company or cooperative is calculated by multiplying the number of total eligible lines as of December 31, 2016 served by the ILEC ETP within each exchange by the corresponding proxy support amount for that individual exchange based on the average residential line density per square mile of the exchange as of December 31, 2016.

(3) To the extent that the total sum of the benchmark support amounts for all of the supported exchanges of a company or cooperative is greater than or less than the targeted total support amount a company or cooperative would be eligible to receive on December 31, 2017 as a result of the final order in Docket No. 41097, the benchmark per-line support amount for each exchange shall be proportionally reduced or increased by the same percentage amount so that the total support amount a company or cooperative is eligible to receive on December 31, 2017, as

a result of the final order in Docket No. 41097, is unaffected by the de-averaging process.

(4) The per-line support amount that a company or cooperative is eligible to receive in a specific exchange on December 31, 2017, for purposes of a petition filed pursuant to subsection (f)(1) of this section, is the per-line support amount for each exchange determined through the de-averaging process set forth in this subsection.

(h) **Reporting requirements.** An ILEC ETP that receives support pursuant to this section shall remain subject to the reporting requirements of §26.403(g) or §26.404(h) of this title.

(i) **Additional Financial Assistance.** Nothing in this section shall be interpreted to prohibit an ILEC or cooperative that is not an electing company under Chapter 58, 59, or 65 of PURA to apply for Additional Financial Assistance pursuant to §26.408 of this title (relating to Additional Financial Assistance (AFA)).

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 §26.403, relating to Texas High Cost Universal Service Plan (THCUSP), §26.404, relating to Small and Rural Incumbent Local Exchange Company (ILEC) Universal Service Plan, and §26.405, relating to Financial Need for Continued Support, are hereby adopted with changes to the text as proposed.

SIGNED AT AUSTIN, TEXAS the _____ day of DECEMBER 2014.

PUBLIC UTILITY COMMISSION OF TEXAS

DONNA L. NELSON, CHAIRMAN

KENNETH W. ANDERSON, COMMISSIONER

BRANDY MARTY MARQUEZ, COMMISSIONER