

The Public Utility Commission of Texas (commission) adopts amendments to §26.109 relating to Standards for Granting Certificates of Operating Authority (COAs) and §26.111 relating to Standards for Granting Service Provider Certificates of Operating Authority (SPCOAs), and adopts new §26.114 relating to Suspension or Revocation of Certificates of Operating Authority (COAs) and Service Provider Certificates of Operating Authority (SPCOAs) with changes to the proposed text as published in the April 7, 2000 *Texas Register* (25 TexReg 2889). The amendments and new rule are necessary to implement provisions of the Public Utility Regulatory Act (PURA) §§17.051-17.053 and §§64.051-64.053 (Vernon 1998, Supplement 2000), which direct the commission to require registration as a condition of doing business in the state of Texas, as well as to establish customer service and protection rules, suspend or revoke certificates or registrations for repeated violations of this chapter or commission rules, and require telecommunications service providers to submit reports concerning any matter over which the commission has authority. This new section and amendments were adopted under Project Number 21456.

A public hearing on the amendments and proposed section was held at commission offices on 9:00 a.m. on May 31, 2000. Representatives from AT&T Communications of Texas, L.P. (AT&T), Southwestern Bell Telephone (SWBT), AT&T Wireless Services, Inc. (AT&T Wireless), Texas Coalition for Cities for Utility Issues (TCCFUI), and Allegiance Telecom of Texas, Inc.; CCCTX, Inc. d/b/a Connect!; JATO Operating Corp.; KMC Telecom Holdings, Inc.; NEXTLINK Texas, Inc.;

Reliant Energy Communications, Inc.; Time Warner Telecom, L.P.; and Z-Tel Communications (collectively the CLEC Coalition) attended the hearing and provided comments. To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

The commission received comments on the proposed new section and proposed amendments from AT&T, TCCFUI, the CLEC Coalition, GTE Southwest Incorporated and GTE Communications Corporation (collectively GTE), and the Telecommunications Resellers Association and Southwest Competitive Telecommunications Association (collectively the Associations).

Generally, comments applied to the corresponding sections of §26.109, Standards for Granting of Certificates of Operating Authority (COAs) and §26.111, Standards for Granting of Service Provider Certificates of Operating Authority (SPCOAs). Both sections are identified in the subheading. Comments applying to both rules are addressed first, followed by the comments specific to a single rule. Additionally, COAs and SPCOAs are collectively identified as competitive local exchange carriers (CLECs).

§26.109, Standards for Granting Certificates of Operating Authority (COAs) and §26.111, Standards for Granting Service Provider Certificates of Operating Authority (SPCOAs).

General comments on the rules:

The CLEC Coalition stated that imposing excessive Texas-specific regulatory burdens on CLECs would discourage providers from entering the Texas market. According to the CLEC Coalition, the costs of complying with excessive regulation will increase costs for providers that are already certificated in Texas.

The Associations also commented that costs associated with complex regulations might preclude market entry for smaller providers.

The commission has responded to a number of specific issues as discussed below, but believes the costs associated with these amendments will not prevent providers from entering the Texas market.

§26.109(a) and §26.111(a):

AT&T objected to the elimination of the term "basic local exchange telephone service," because it believed this exclusion would prevent CLECs from providing many of the same services now provided by the certificate of convenience and necessity (CCN) holder. AT&T recommended the rule follow PURA §54.001 and remove only the word "basic" from the term "basic local exchange telephone service."

The commission agrees with AT&T and only removes the word "basic" from the term "basic local exchange telephone service" in order to reflect the statutory language.

§26.109(c) and §26.111 (c):

AT&T recommended clauses §26.109(c)(1)(C)(ii) and §26.111(c)(1)(D)(ii) be amended to conform to the certification application which requests complaint and/or compliance histories for the past 24 months.

GTE commented these clauses were objectionably vague and requested the term "compliance" be defined and "other relevant regulatory agencies" be clarified to give providers notice of what is required to comply.

The Associations commented the requirements for complaint and/or compliance histories is unclear about the data requested and the detail necessary. The Associations were concerned applicants might devote more time and resources than necessary or may provide insufficient information, resulting in processing delays.

The Associations commented the proposed requirements are of questionable relevance and could impose unnecessary burdens on new applicants and multi-state providers. While the Associations did not generally object to being required to provide a list of all states where a company is registered, they contended that the commission should contact the appropriate state commissions to obtain the same information. Yet, the Associations still argued that a telecommunications service provider's complaint or

compliance history in another state would have little bearing on its performance in Texas. The Associations commented that a more fair and accurate measure of a CLEC's ability to provide quality telecommunications services is to evaluate the documentation demonstrating technical, financial, and managerial ability.

Finally, the Associations recommended clauses §26.109(c)(1)(C)(ii) and §26.111(c)(1)(D)(ii) be eliminated or simplified. The Associations suggested the commission adopt a simple affirmation statement that the applicant and its operations are in full compliance with all applicable regulations and statutes. The Associations contended the documented affirmative statement would compel the applicant to remain in compliance with all applicable regulation and law.

The commission has utilized this form for several years, but amends the published clauses to conform to the certification application and to clarify that complaint and/or compliance histories are only requested for the previous 24 months.

The commission declines to amend the rules by defining "compliance." However, as a point of clarification, the issue of other relevant agencies is clarified in the proposed amended application. New Question 14 requests compliance information from the Texas Comptroller's Office, Secretary of State, and the Texas Universal Service Fund Administrator, which are among the "other relevant regulatory agencies" discussed in clauses §26.109(c)(1)(C)(ii) and §26.111(c)(1)(D)(ii).

In response to the Associations' comments about data and detail, the commission finds no reason to modify published clauses §26.109(c)(1)(C)(ii) and §26.111(c)(1)(D)(ii) further, as the language is clear about the relevant information that must be provided with the complaint and/or compliance histories. However, the amount of time utilized to complete the certification applications is left solely to the discretion of the applicant.

The commission declines to amend the clauses to incorporate the suggestion of the Associations to replace the complaint and/or compliance histories with an affirmation statement. The commission concludes it is necessary to maintain current application procedures, which include a review of complaint and/or compliance histories in other jurisdictions, as this information may be indicative of a provider's performance in Texas. The complaint history in conjunction with technical, financial, and managerial ability is all relevant in helping the commission determine which providers are capable of providing customers with the best service.

AT&T noted that some regulatory or enforcement agencies do not provide notice of an investigation unless action will result from the investigation, and stated the published rules imposed an obligation to provide a statement about investigation for which a certificate holder may not have received notice. AT&T also contended the request of §26.109(c)(1)(C)(v) and §26.111(c)(2)(D)(v) regarding investigations and enforcement actions is covered by §26.109(c)(1)(C)(ii) and §26.111(c)(2)(D)(ii).

The commission agrees with AT&T's contention that some regulatory bodies do not provide notice of investigations. Consequently, §26.109(c)(1)(C)(v) and §26.111(c)(2)(D)(v) are amended to request information on investigations for which a company has received notice. However, the commission does not believe the information requested in §26.109(c)(1)(C)(v) and §26.111(c)(2)(D)(v) is covered by §26.109(c)(1)(C)(ii) and §26.111(c)(2)(D)(ii). §26.109(c)(1)(C)(ii) and §26.111(c)(2)(D)(ii) request information about complaints, while clauses §26.109(c)(1)(C)(v) and §26.111(c)(2)(D)(v) request information regarding investigations and enforcement actions. Complaints do not necessarily result in formal investigations or enforcement actions; therefore, complaint and/or compliance histories may not reveal information about pending enforcement actions.

§26.109(f) and §26.111 (f):

GTE objected to §26.109(f) and §26.111(f) and argued that the commission does not have authority to automatically revoke a certificate for non-use. GTE cited PURA §54.104 in arguing that a certificate holder must only be prepared and able to provide service and is not actually required by the statute to serve customers. GTE also noted the statute was silent on re-qualification, thereby making the published rules' §26.109(f)(2) and §26.111(f)(2) requirements a dubious assertion of commission authority. Finally, GTE commented that re-qualification, if acceptable at all, should not be required unless the carrier demonstrated a questionable ability to comply with the statute, and that withdrawing a provider's opportunity to re-qualify on an arbitrary basis would not be consistent with the statute.

The Associations argued that CLECs should not be required to utilize certificates within a specific time period and that the published rules were inappropriate because the burden of filing an affidavit of non-use within a certain period greatly outweighs the public benefits of such a requirement. The Associations noted that consumers are not harmed if service is not offered immediately. The Associations also noted many reasons for a valid delay, including lack of established systems, lengthy arbitration proceedings, and unforeseen changes in business plans. The Associations stressed that delayed use of a certification should not be viewed as foot-dragging or otherwise intentional.

In addition, the Associations argued that providers with unused certificates should not be required to re-qualify for certification. The Associations considered it unfair to file an annual report and sworn affidavit in the first year, and an annual report and an application for re-qualification in the second year. The Associations suggested the filing of an annual letter of intent in lieu of an annual report. According to the Associations, the commission could then review CLECs on a case-by-case basis if concerns about a CLEC's qualifications arose. The Associations also suggested that if the commission determined that competitors with unused certificates must re-qualify, the time frame should be extended to five years and the same qualification standards that were in place at the time the certification was initially approved should be used. The Associations were also uncertain about the re-qualification process and requested the commission clarify what information should be re-filed, or whether a letter certifying compliance with commission rules would suffice.

The commission disagrees with GTE's assessment that that a certificate cannot be terminated due to non-use. PURA §54.008 states that "the Commission may revoke or amend a certificate of convenience and necessity, a certificate of operating authority or a service provider certificate of operating authority after notice and hearing if the commission finds that the certificate holder has never provided or is no longer providing service in all or any part of the certificated area." The commission recognizes that business plans change over time due to factors outside the control of the company. In this regard, the proposed §26.109(f)(2) and §26.111(f)(2) permit non-use for up to 48 months, a sufficient basis for determining non-use of a certificate. However, the commission asserts that the conditions for technical and financial qualification can deteriorate over time. For example, technical experts may leave the company and financial resources may disappear. These conditions would require providers to re-qualify after 48 months in order to ensure adequate expertise and resources to serve customers.

To clarify the process, the commission amends §26.109(f)(1) and §26.111(f)(1) by deleting subparagraphs (A) and rewriting paragraphs §26.109(f)(1) and §26.111(f)(1) to require certificate holders to affirm yearly during non-use of a certificate that they continue to be technically and financially qualified.

The commission also concludes that re-qualification should be complete and equivalent to the process for certification. A letter requesting reinstatement and certifying compliance is inadequate as regulations

may be subject to change in every legislative session. To clarify its intent and the information that should be filed the commission also rewrites subparagraphs §26.109(f)(2)(A) and §26.111(f)(2)(A).

The commission further asserts that the initial technical and financial qualification of a certificate holder under §26.109(c) and §26.111(c) presumes the timely start-up of a certificate holder after certification is granted. For example, cash flow and accounts receivable forecasts for 24 months after start-up are required to qualify all COAs and SPCOAs, and capital spending forecasts for 36 months after start-up are required to qualify COAs and facilities-based SPCOAs. While business plans may change after certification, the commission believes certificate holders must, nevertheless, continue to be technically and financially qualified to provide service. Furthermore, the commission concludes that a re-qualification for non-use after 48 months is acceptable public policy.

§26.109(g) and §26.111 (g):

TCCFUI commented that as a result of Project Number 20935, *Implementation of HB 1777*, all certificated telecommunications providers (CTPs) are also required to abide by the reporting requirements of §26.465 of this title (relating to Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers) and §26.467 of this title (relating to Rates, Allocation, Compensation, Adjustments and Reporting).

AT&T proposed that the information requested in subsections (g) be required of all certificated providers to insure that CCN holders file the same information in the same format. AT&T cited PURA §17.051 and §64.051 as the commission's authority to require reports from all certificated providers and PURA §52.154 to emphasize that the commission may not "impose on a telecommunications utility a greater regulatory burden than is imposed on a holder of a certificate of convenience and necessity serving the same area."

In reply comments GTE opposed AT&T's proposal. GTE stated that CCN holders are already held to a higher level of regulation than CLECs and are required to file reports that provide the commission with sufficient information so that no other reports are necessary.

The commission responds to the comments of TCCFUI by adding subsection (g)(5) to remind CLECs of their duty to report information in compliance with §26.465 and §26.467. These paragraphs conform §26.109 and §26.111 to §26.114.

In response to the comments of AT&T and GTE, the commission determines that the scope of this project applies only to CLECs. Therefore, the requirements of §26.109(g) and §26.111(g) cannot be placed on CCNs within the scope of this project. The commission further finds the requirements of §26.109(g), §26.111(g) and the annual information report are not more burdensome than the reporting requirements for CCNs and are not in conflict with PURA §52.154.

§26.109(h) and §26.111(h):

TCCFUI recommended that §26.109(h) and §26.111(h) state how enforcement action against the holder of a COA or SPCOA can be initiated and that a notification provision be added so that a municipality will be informed of any compliance or enforcement action taken against a certificate holder serving customers within that municipality.

In reply comments, GTE and AT&T opposed TCCFUI's proposal. GTE noted it was unnecessary since the commission has a complaint process that any party can use. Additionally, §26.461 - §26.467 were adopted to implement the provisions of HB1777 and provide municipalities an avenue to initiate a complaint against a certificated telecommunications provider. GTE also noted that TCCFUI's request for notice of any compliance or enforcement action is unnecessary since notice is provided in the *Texas Register* and/or on the commission's website.

AT&T responded to TCCFUI's suggestion by noting that neither HB1777 nor the Local Government Code authorizes the commission to suspend or revoke certification of a telecommunications utility because of failure to pay compensation or provide reports. AT&T commented that the commission has regulatory authority over the business and property of telecommunications utilities while municipalities have separate authority to enforce the requirement of franchise fee payment. AT&T concluded by stating the commission should ignore the request of TCCFUI.

The commission concludes that amendments requested by TCCFUI are unnecessary. Current procedural rules allow any affected party to file a complaint with the commission. Additionally, enforcement actions taken against any entity are public record and information regarding the enforcement action can be accessed by any interested party.

GTE commented that §26.109(h)(3) and §26.111(h)(3) seemed more appropriate for consumer fraud or antitrust enforcement rather than certification and reporting requirements. GTE suggested that if the commission intended for fraudulent statements on applications or reports to be pursued by the office of the attorney general, the language should be amended to reflect this.

The commission does not intend to indicate that fraudulent statements on an application or report will be pursued solely by the office of the attorney general. The commission finds it appropriate to disclose to applicants that enforcement efforts against fraudulent, unfair, misleading, deceptive, and anti-competitive business practices will be coordinated with the office of the attorney general in accordance with PURA §17.004(d) and §64.004(d).

§26.109, Standards for Granting Certificates of Operating Authority (COAs)

§26.109(b):

GTE stated §26.109(b)(2) is not applicable to all applicants, but only to those with an affiliate which is a holder of a CCN. The language, they stated, should be modified to read, "if applicable, if the applicant and its affiliated holder of a CCN---are not in compliance with PURA §54.102(c)."

The commission finds GTE's proposed language regarding applicability is unnecessary because applicants without an affiliation to a CCN holder would not meet the automatic disqualification conditions of subsection (b). While the commission does not adopt the language proposed by GTE, minor grammatical changes are made to subsection (b)(2) for clarity.

§26.111, Standards for Granting Service Provider Certificates of Operating Authority (SPCOAs).

§26.111(b):

GTE stated the language of §26.111(b)(2) exceeded the scope of PURA §54.102, which does not appear to disqualify a holder of an SPCOA if it is affiliated with a holder of a CCN. GTE recommended the subparagraph be stricken.

The commission finds it would be premature to place in this rule an issue that has yet to be resolved by Project Number 21164, *Rulemaking to Address Affiliate Issues for Telecommunications Services*

Providers, PURA §§54.102, 60.164 and 60.165. As the commission has no desire to restrict the discussion or outcome of that project, the paragraph is removed.

§26.111(c):

GTE commented that PURA §54.102 does not support the requirement of published §26.111(c)(4) for SPCOA applicants.

As previously noted, the commission removes this paragraph because these issues have yet to be resolved in Project Number 21164.

§26.114, Suspension or Revocation of Certificates of Operating Authority (COAs) and Service Provider Certificates of Operating Authority (SPCOAs).

General Comments:

AT&T commented that the proposed amendments go beyond the statutory requirements and impose significant new requirements, obligations, and risks on emerging competitive entities.

The commission determines that PURA §17.052(4) and §64.052(4) support all the amended paragraphs of subsection (c). There are few additional obligations imposed because existing

commission rules are generally cited. The rule simply gives CLECs notice that the commission has authority to suspend or revoke certification and provides examples of the actions that may initiate an investigation that may result in suspension or revocation.

§26.114(c):

GTE questioned the commission's authority to revoke or suspend a certificate holder for non-use. The Associations proposed striking subparagraph (c)(1)(A), but in the alternative, proposed the timing requirement be increased to five years. However, AT&T commented that the commission's authority to suspend or revoke certificates is permitted by PURA §§17.052, 64.052, and §54.008 and allows for subparagraphs (A) and (F) of paragraph (c)(1). In reply comments, GTE noted that AT&T's assessment of the commission's authority to revoke or suspend certificates due to non-use also requires notice and hearing and requested §26.114 be amended accordingly.

As its authority to revoke CLEC certificates for non-use, the commission cites PURA §54.008 which states, "The commission may revoke or amend a certificate of convenience and necessity, a certificate of operating authority, and a service provider certificate of operating authority after notice and hearing if the certificate holder has never provided or is no longer providing service in all or any part of the certificated area." The commission declines to amend §26.114(c)(1)(A) to allow for five years of non-use as requested by the Associations; however a correction is made to §26.114(c)(1)(A) to correlate with §26.109(f)(2) and §26.111(f)(2) by setting 48 months as the maximum time for non-use. Such a

period should adequately reflect delays based on changing business conditions without permitting indefinite non-use of the certificate.

While the commission declines to make GTE's requested amendment to §26.114(c)(1)(A), it amends §26.114(a), as the commission concludes that standards for due process should apply to any investigation that may result in suspension or revocation.

AT&T commented that instead of violations, §26.114(c)(1)(B) would allow the consideration of complaints, including the complaints of other agencies, and did not adhere to the statutory language of "repeated violations" in PURA §17.052(4). GTE suggested that §26.114(c)(1)(B) include the types and numbers of complaints.

To clarify the issue of complaints versus violations, the commission amends §26.114(c)(1)(B) to reflect that only verified complaints are to be considered. A verified complaint is a violation of a commission rule as determined by commission staff and multiple verified complaints meet the statutory standard of "repeated violations." The commission declines to include in the rule the types of verified complaints that would lead to investigations, since a violation of any commission rule can initiate an investigation. The number of complaints to launch an investigation is also excluded from the rule to allow for reasonable discretion of commission staff.

The commission concludes the reference to the office of the attorney general must remain since enforcement efforts against fraudulent, unfair, misleading, deceptive, and anti-competitive business practices must be coordinated with the office of the attorney general in accordance with PURA §17.004(d) and §64.004(d).

According to AT&T, published §26.114(c)(1)(C), (D), (J) and (L) would allow a single violation, rather than the "repeated violations" established by PURA §17.052(4) and §64.052, and added that published §26.114(c)(1)(J) and (L) are superfluous since they are addressed by published §26.114(c)(1)(F). GTE also commented that published §26.114(c)(1)(J) did not address repeated failures.

In reply comments, TCCFUI stated that AT&T's objection to published §26.114(c)(1)(L) was without merit since failure to meet the reporting requirements of §26.465 and §26.467 would constitute a violation of commission rules. TCCFUI also noted that it would be highly unlikely that the commission would suspend or revoke certification unless the violations were repeated.

The commission amends published §26.114(c)(1)(C) to clarify the applicability of this subparagraph to only the certification process. Providing false information to obtain certification renders the application null and void since the applicant must submit an affidavit attesting that the application is truthful. The certification process occurs only once, so a repeated violation could not happen.

The commission finds published §26.114(c)(1)(D) can be deleted because such violations are addressed by new §26.114(c)(1)(E).

The commission also agrees with the parties' comments and amends published §26.114(c)(1)(J) and §26.114(c)(1)(L) as new §26.114(c)(1)(G) and §26.114(c)(1)(H) to indicate investigations for suspension or revocation may be initiated due to repeated failures to meet commission reporting requirements. The commission concludes that the importance of reporting requirements and the requirements of §26.465 and §26.467 merit the existence of these sections in order to distinguish them from the general provision regarding violations of commission rules.

AT&T objected to published §26.114(c)(1)(E) and the published rule's involvement in the ongoing financial stability of certificate holders because such intrusion is beyond the commission's authority under PURA §17.052 and §64.052. According to AT&T, not even highly regulated public utilities are required to maintain solvency.

GTE noted that the revocation of certification based on a bankruptcy filing could run afoul of federal bankruptcy laws. GTE was also concerned about insolvency and the chronic inability to meet financial obligations, and proposed recasting the clause as follows: "Imminent termination of a carrier's ability to provide service as a result of actions of a bankruptcy court or court-appointed receiver, or insolvency as measured by chronic inability to meet financial obligations on a timely basis."

The Associations argued that the phrase "failure to meet financial obligations" was ambiguous. While recognizing that the provision was directed against "deadbeat" providers that regularly fail to pay their bills, the Associations argued that this provision could inadvertently penalize a company involved in a legitimate dispute with a vendor, including the possible suspension or revocation of its certification. GTE also argued that this provision could put providers at risk if they were late on a single payment.

The commission disagrees with AT&T's comment that financial issues are beyond the scope of the commission's authority. In particular, PURA §17.001(a) and §64.001(a) states that "the legislature finds...it essential that customers have safeguards...against businesses that do not have the technical and financial resources to provide adequate service (to customers)." As for public utilities, the commission engages in extensive earnings report monitoring.

In addition, the commission declines to make GTE's proposed amendments to published §26.114(c)(1)(E) because the factors under §26.114(c)(1) will not automatically result in suspension or revocation, nor does the language imply such automatic action. Rather, published §26.114(c)(1)(E) is one factor to alert the commission of developing problems with a CLEC as permitted by PURA §17.052(4) and §64.052(4) which allow the commission to adopt and enforce rules to "suspend or revoke certificates for violations of this chapter (17 or 64) or commission rules." The commission will exercise discretion in suspending or revoking certifications, whatever the factor(s), and will proceed on a case-by-case basis.

Further, the commission recognizes the possibility of a reasonable payment dispute and amends published §26.114(c)(1)(E) (new §26.114(c)(1)(D)) by adding the qualifier "except if reasonably disputed" after the phrase "financial obligations on a timely basis." The commission believes this rewording adequately addresses the concerns of the Associations and GTE.

AT&T commented that published §26.114 (c)(1)(G) attempts to impermissibly expand the commission's authority beyond PURA Chapters 17 and 64 by considering other state and federal laws.

GTE also noted that published §26.114(c)(1)(G) exceeds the commission's authority and was so broad it carried the potential of revocation for minor, inadvertent violations of laws totally unrelated to telecommunications. GTE suggested the published §26.114(c)(1)(G) should be recast to provide detailed notice of violations that would subject carrier to investigations.

The commission amends published §26.114(c)(1)(G) (new §26.114(c)(1)(F)) and deletes the reference to federal law, and clarifies that only violations of state laws affecting the ability of a CLEC to provide telecommunications services will be considered in initiating an investigation for suspension or revocation.

AT&T objected to published §26.114(c)(1)(H) which allows the commission to base its investigations upon actions in other jurisdictions, even if no violations occurred in Texas. GTE noted that revocation for non-use in another state should not be a basis for revocation in Texas and suggested reworking

§26.114(c)(1)(H) to indicate that only revocation in another jurisdiction based on fault and not non-use should be considered.

AT&T also argued that published §26.114(c)(1)(I) would allow the commission to consider matters well beyond its jurisdiction and is more stringent in its treatment of felons than statutes where the legislature has expressly authorized the consideration of criminal records as a factor in consideration of other types of applications.

Finally, AT&T and GTE proposed omitting published §26.114(c)(1)(K), as it is too broad to provide any notice to certificate holders about what is being required or prohibited. AT&T stated it was not arguing these issues were not legitimate concerns; only that the commission has enforcement tools other than suspension or revocation.

Due to the compelling arguments of the parties as summarized above, the commission deletes published §§26.114(c)(1)(H), 26.114(c)(1)(I), and 26.114(c)(1)(K).

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission makes other minor modifications for the purpose of clarifying its intent.

The amendments and new section are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated, §14.002 (Vernon 1998, Supplement 2000) (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, §15.023 which grants the commission authority to impose an administrative penalty against an entity for violation of a rule as necessary or appropriate to establish customer protection standards. PURA §17.051 and §64.051 direct the commission to adopt registration requirements for all telecommunications utilities. PURA §17.052 and §64.052 allow the commission to require registration as a condition of doing business in Texas; establish customer service and protection rules; and suspend or revoke certificates or registrations for repeated violations of this chapter or commission rules. PURA §17.053 and §64.053 allow the commission to require a telecommunications service provider to submit reports to the commission concerning any matter over which it has authority under PURA Chapters 17 and 64. PURA §54.008 grants the commission authority to revoke or amend a certificate of operating authority or a service provider certificate of operating authority after notice and hearing if the commission finds that the certificate holder has never provided or is no longer providing service in all or any part of the certificated area.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 15.023, 17.051, 17.052, 17.053, 54.008, 64.051, 64.052, and 64.053.

§26.109. Standards for Granting Certificates of Operating Authority (COAs).

- (a) **Scope and purpose.** This section applies to the certification of persons and entities to provide local exchange telephone service, basic local telecommunications service, and switched access service as holders of certificates of operating authority established in the Public Utility Regulatory Act (PURA), Chapter 54, Subchapter C. Through this section, the commission strives to protect the public interest against entities that are not qualified to provide local exchange telephone service, basic local telecommunications service, and switched access service. The commission's overall goal is to encourage the development of a competitive marketplace for local exchange telecommunications services, free of unreasonable barriers to entry, that will provide consumers with the best services at the lowest cost.
- (b) **Automatic disqualification.** This section contains reasons an applicant would be prohibited from acquiring a COA. An applicant is automatically disqualified from obtaining a COA:
- (1) if the applicant is a municipality; or
 - (2) if the applicant has not created a proper separation of business between itself and an affiliate holder of a certificate of convenience and necessity as required by PURA §54.102.
- (c) **Standards for granting certification to COA applicants.**

- (1) The commission shall consider the factors listed in subparagraphs (A) - (F) of this paragraph in deciding whether to grant a COA to an applicant proposing to serve an exchange.
 - (A) Whether the applicant has satisfactorily provided all of the information required in the Application for a Certificate of Operating Authority.
 - (B) Whether the applicant is financially qualified to be a facilities-based local service provider. To prove financial qualification as a facilities-based utility, an applicant shall provide evidence sufficient to establish that:
 - (i) Applicant possesses the greater of \$100,000 cash or cash equivalent or sufficient cash or cash equivalent to meet start-up expenses, working capital requirements and capital expenditures, liquid and readily available to meet the applicant's start-up expenses, working capital requirements and capital expenditures for the first two years of its Texas operations; or
 - (ii) Applicant is an established business entity and is able to demonstrate evidence of profitability in existing operations for two years preceding the date of application by submitting a balance sheet and income statement audited or reviewed by a certified public accountant establishing all of the following:
 - (I) A long-term debt to capitalization ratio of less than 60%;
 - (II) A return-on-assets ratio of at least 10%; and,

- (III) The greater of \$50,000 cash or cash equivalent or sufficient cash or cash equivalent to meet start-up expenses, working capital requirements and capital expenditures, liquid and readily available to meet the applicant's start-up expenses, working capital requirements and capital expenditures for a minimum of the first two years of its Texas operations.
- (C) Whether the applicant is technically qualified. The commission shall determine whether an applicant possesses sufficient technical qualifications to be awarded a COA based upon a review of the following information.

 - (i) Prior experience by the applicant or one or more of the applicant's principals or employees in the telecommunications industry or a related industry.
 - (ii) Any complaint and/or compliance history regarding the applicant, applicant's telecommunications or public utility affiliates, predecessors in interest, shareholders, and principals at the Public Utility Commission of Texas, the Office of the attorney general, the Attorney General in other states, and any other relevant regulatory agency for the previous two calendar years. If available, relevant information shall include, but not be limited to, the type of complaint, status of complaint, resolution of complaint and the number of customers in each state where complaints occur.

- (iii) If available, an affirmation that the applicant, its telecommunications or public utility affiliates, predecessors in interest, shareholders, and principals are in good standing at the Texas Comptroller's Office, active in the Texas Secretary of State files, and current in its Texas Universal Service Fund assessment.
 - (iv) A summary of any history of bankruptcy, dissolution, merger or acquisition of the applicant or any predecessors in interest in the two calendar years immediately preceding the application.
 - (v) A statement indicating whether the applicant has been notified that it is currently under investigation, either in this state or in another state or jurisdiction for violation of any deceptive trade or consumer protection law or regulation, and whether the applicant has been fined, sanctioned or otherwise penalized either in this state or in another state or jurisdiction for violation of any consumer protection law or regulation.
- (D) Whether the applicant is able to meet the commission's quality of service standards. Quality of service standards shall include, but not be limited to, 911 compliance and local number portability capability.
- (E) The applicant will be required to meet the customer protection rules and disclosure requirements applicable to certificate holders set forth in Chapter 26, Subchapter B of this title (relating to Customer Service and Protection).
- (F) Whether certification of the applicant is in the public interest.

- (2) If, after considering the factors in this subsection, the commission finds it to be in the public interest to do so, the commission may limit the geographic scope of the COA.
 - (3) If the applicant is an affiliate of a certificate of convenience and necessity (CCN) holder, the applicant must show that the affiliated CCN holder is in compliance with federal law and Federal Communications Commission rules governing affiliates and structural separation. The applicant shall file an affidavit from the affiliated CCN holder attesting to this compliance, and provide reference to the Federal Cost Allocation Manual (CAM) filed with the commission.
- (d) **Financial instruments that will meet the cash requirements established in this section.**
- (1) Applicants for COAs shall be permitted to use any of the financial instruments set out in subparagraphs (A)-(F) of this paragraph to satisfy the cash requirements established in this rule to prove financial qualification.
 - (A) Cash or cash equivalent, including cashier's check or sight draft.
 - (B) A certificate of deposit with a bank or other financial institution.
 - (C) A letter of credit issued by a bank or other financial institution, irrevocable for a period of at least 12 months beyond certification of the applicant by the commission.
 - (D) A line of credit or other loan, issued by a bank or other financial institution, irrevocable for a period of at least 12 months beyond certification of the

applicant by the commission and payable on an interest-only basis for the same period.

(E) A loan issued by a subsidiary or affiliate of applicant, or a corporation holding controlling interest in the applicant, irrevocable for a period of at least 12 months beyond certification of the applicant by the commission, and payable on an interest-only basis for the same period.

(F) A guaranty issued by a shareholder or principal of applicant, a subsidiary or affiliate of applicant, or a corporation holding controlling interest in the applicant, irrevocable for a period of at least 12 months beyond the certification of the applicant by the commission.

(2) To the extent that the applicant relies upon a loan or guaranty provided in paragraph (1)(E) or (F) of this subsection, the applicant shall provide evidence sufficient to establish that the lender or guarantor possesses sufficient cash or cash equivalent to fund the loan or guaranty.

(3) All cash and instruments listed in paragraph (1) (A) - (F) of this subsection shall be unencumbered by pledges as collateral and shall be subject to verification and review by the commission prior to certification of the applicant and for a period of 12 months beyond the date of certification of the applicant by the commission. Failure to comply with this requirement may void an applicant's certification or result in such other action as the commission deems in the public interest, including, but not limited to, assessment

of reasonable penalties and all other available remedies under the Public Utility Regulatory Act.

(e) **Name on certificates.**

- (1) All local exchange telephone service, basic local telecommunications service, and switched access service provided under a COA shall be provided in the name under which certification was granted by the commission. The commission shall grant the certificate in only one name.
 - (A) If the applicant is a corporation, the commission shall issue the certificate in the corporate or assumed name of the applicant.
 - (B) If the applicant is an unincorporated business entity or an individual, the commission shall issue the certificate in the assumed name of the entity or the individual.
 - (C) The commission shall review the requested name to determine if the name is deceptive, misleading, vague, inappropriate, or duplicative of an existing certificated telecommunications utility. If the commission determines that the requested name is deceptive, misleading, vague, inappropriate, or duplicative, it shall notify the applicant and the applicant shall modify the name to alleviate the commission's concerns. If the name is not adequately modified, the application may be denied.

- (2) The holder of a COA may request commission approval to change the name on the certificate by filing an application to amend its certificate with the commission.
- (f) **Non-use of certificates.** Applicants will use their COA certificates expeditiously.
- (1) A COA certificate holder that has not provided service for a period of 12 consecutive months must provide a sworn affidavit to the commission on an annual basis attesting that they continue to possess the technical and financial resources necessary to provide the level of service proposed in their initial application.
 - (2) A COA certificate holder that has not provided service within 48 months of being granted the certificate by the commission, may have its certificate suspended or revoked, as defined by §26.114 of this title (relating to Suspension or Revocation of Certificates of Operating Authority (COAs) and Service Provider Certificates of Operating Authority (SPCOAs)), after due process or undergo certification re-qualification.
 - (A) Certification re-qualification shall consist of an entirely new filing certifying that the certificate holder possesses the technical and financial resources necessary to provide the proposed level of service.
 - (B) Any certification re-qualification must be filed at the commission before the expiration of the 48-month period.
- (g) **Reporting requirements.**

- (1) All COA holders shall file an annual report with the commission by June 30 of each year using the commission-prescribed form Annual Information Reporting Requirements for a Service Provider Certificate of Operating Authority and/or a Certificate of Operating Authority. This form may be obtained from the commission's Central Records and the commission's website.
 - (2) If the certificate holder has any change during the year in the information requested in Section One of the annual report form, then the certificate holder shall file an updated form correcting the information in Section One within 30 days of the change.
 - (3) The completed annual report form shall be filed in the commission's Central Records in a project number designated annually by the Filing Clerk.
 - (4) A certificate holder shall also file annual reports as required by §26.89 of this title (relating to Information Regarding Rates and Services of Nondominant Carriers).
 - (5) A certificate holder shall also file monthly reports as required by §26.465 of this title (relating to Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers) and §26.467 of this title (relating to Rates, Allocation, Compensation, Adjustments and Reporting.)
- (h) **Compliance enforcement.**
- (1) **Administrative penalties.** If the commission finds that a certificate holder has violated any provision of this section, the commission shall order the certificate holder to take

corrective action, as necessary, and the certificate holder may be subject to administrative penalties and other enforcement actions pursuant to PURA, Chapter 15.

- (2) **Revocation or suspension.** If the commission finds that a certificate holder is repeatedly in violation of PURA or commission rules, the commission may suspend or revoke a COA certificate pursuant to PURA Chapter 17.
- (3) **Enforcement.** The commission shall coordinate its enforcement efforts of fraudulent, unfair, misleading, deceptive, and anticompetitive business practices with the Office of the attorney general in order to ensure consistent treatment of specific alleged violations.

§26.111. Standards for Granting Service Provider Certificates of Operating Authority (SPCOAs).

- (a) **Scope and purpose.** This section applies to the certification of persons and entities to provide, local exchange telephone service, basic local telecommunications service, and switched access service as holders of service provider certificates of operating authority, established in the Public Utility Regulatory Act (PURA), Chapter 54, Subchapter D. Through this section, the commission strives to protect the public interest against entities that are not qualified to provide local exchange telephone service, basic local telecommunications service, and switched access service. The commission's overall goal is to encourage the development of a competitive marketplace for local exchange telecommunications services, free of unreasonable barriers to entry, that will provide consumers with the best services at the lowest cost.
- (b) **Automatic disqualification.** This section contains the reasons that an applicant would be prohibited from acquiring an SPCOA. An applicant is disqualified from obtaining an SPCOA:
- (1) if the applicant is a municipality; or
 - (2) if the applicant, together with its affiliates, has more than 6.0% of the total intrastate switched access minutes of use as measured for the most recent 12-month period.
- (c) **Standards for granting certification to SPCOA applicants.**

- (1) The commission may condition or limit the scope of an SPCOA's service in at least the following ways:
 - (A) Facility-based;
 - (B) Resale-only;
 - (C) Data-only;
 - (D) Geographic scope;
 - (E) Some combination of the above, as appropriate.
- (2) The commission shall consider the factors listed in subparagraphs (A) – (H) of this paragraph in deciding whether and how to condition or limit an SPCOA to an applicant proposing to serve an exchange:
 - (A) Whether the applicant has satisfactorily provided all of the information required in the application for an SPCOA.
 - (B) Whether the applicant is financially qualified as a facilities-based SPCOA. To prove financial qualifications as a facilities-based SPCOA, the applicant shall meet the standards set forth in §26.109(c)(1)(B) of this title (relating to Standards for Granting Certificates of Operating Authority).
 - (C) Whether the applicant is financially qualified as a resale-only SPCOA. To prove financial qualifications as a resale-only SPCOA, an applicant shall provide evidence sufficient to establish that:
 - (i) Applicant possesses the greater of \$25,000 cash or cash equivalent or sufficient cash or cash equivalent to meet start-up expenses, working

capital requirements and capital expenditures, liquid and readily available to meet the applicant's start-up expenses, working capital requirements and capital expenditures for the first year of its Texas operations; or

(ii) Applicant is an established business entity and is able to demonstrate evidence of profitability in existing operations for two years preceding the date of application by submitting a balance sheet and income statement audited or reviewed by a certified public accountant establishing all of the following:

(I) A long-term debt to capitalization ratio of less than 60%;

(II) A return-on-assets ratio of at least 10%; and,

(III) The greater of \$10,000 cash or cash equivalent or sufficient cash or cash equivalent to meet start-up expenses, working capital requirements and capital expenditures, liquid and readily available to meet the applicant's start-up expenses, working capital requirements and capital expenditures for the first year of its Texas operations.

(D) Whether the applicant is technically qualified. The commission shall determine whether an applicant possesses sufficient technical qualifications to be awarded a facilities-based SPCOA certification or whether applicant should be restricted

to a resale-only SPCOA certification, based upon a review of the following information.

- (i) Prior experience by the applicant or one or more of the applicant's principals or employees in the telecommunications industry or a related industry.
- (ii) Any complaint and/or compliance history regarding the applicant, applicant's telecommunications or public utility affiliates, predecessors in interest, shareholders, and principals on file at the Public Utility Commission of Texas, the Office of the Texas Attorney General, the Attorney General in other states, and any other relevant regulatory agency for the previous two calendar years. If available, relevant information shall include, but not be limited to, the type of complaint, status of complaint, resolution of complaint, and the number of customers in each state where complaints have occurred.
- (iii) If available, an affirmation that the applicant, its telecommunications or public utility affiliates, predecessors in interest, shareholders, and principals are in good standing at the Texas Comptroller's Office, active in the Texas Secretary of State files, and current in its Texas Universal Service Fund assessment.

- (iv) A summary of any history of bankruptcy, dissolution, merger or acquisition of the applicant or any predecessors in interest in the two calendar years immediately preceding the application.
 - (v) A statement indicating whether the applicant has been notified that it is currently under investigation, either in this state or in another state or jurisdiction for violation of any deceptive trade or consumer protection law or regulation, and whether the applicant has been fined, sanctioned or otherwise penalized either in this state or in another state or jurisdiction for violation of any consumer protection law or regulation.
- (E) Whether the applicant is able to meet the commission's quality of service standards. The quality of service standards shall include, but not be limited to, 911 compliance and local number portability capability.
- (F) The applicant will be required to meet the customer protection rules and disclosure requirements applicable to certificate holders set forth in Chapter 26, Subchapter B of this title (relating to Customer Service and Protection).
- (G) Whether certification of the applicant is in the public interest.
- (H) If the applicant has requested to limit, or has been limited to data-only services, the applicant shall be waived from 911 and local number portability compliance as related to switched voice services. If the applicant intends to add voice services at a future date, the applicant must first file an amendment, subject to

approval of the commission, which shows that the applicant is in compliance with all of the commission's quality of service standards.

- (3) If, after considering the factors in this subsection, the commission finds it to be in the public interest to do so, the commission may limit the geographic scope of the SPCOA.

(d) **Financial instruments that will meet the cash requirements established in this section.**

- (1) Applicants for SPCOAs shall be permitted to use any of the financial instruments set out in subparagraphs (A)-(F) of this paragraph to satisfy the cash requirements established in this rule to prove financial qualification.

(A) Cash or cash equivalent, including cashier's check or sight draft.

(B) A certificate of deposit with a bank or other financial institution.

(C) A letter of credit issued by a bank or other financial institution, irrevocable for a period of at least 12 months beyond certification of the applicant by the commission.

(D) A line of credit or other loan, issued by a bank or other financial institution, irrevocable for a period of at least 12 months beyond certification of the applicant by the commission and payable on an interest-only basis for the same period.

(E) A loan issued by a subsidiary or affiliate of applicant, or a corporation holding controlling interest in the applicant, irrevocable for a period of at least 12

months beyond certification of the applicant by the commission, and payable on an interest-only basis for the same period.

(F) A guaranty issued by a shareholder or principal of applicant, a subsidiary or affiliate of applicant, or a corporation holding controlling interest in the applicant, irrevocable for a period of at least 12 months beyond the certification of the applicant by the commission.

(2) To the extent that the applicant relies upon a loan or guaranty provided in paragraph (1)(E) or (F) of this subsection, the applicant shall provide evidence sufficient to establish that the lender or guarantor possesses sufficient cash or cash equivalent to fund the loan or guaranty.

(3) All cash and instruments listed in paragraph (1) (A) - (F) of this subsection shall be unencumbered by pledges as collateral and shall be subject to verification and review by the commission prior to certification of the applicant and for a period of 12 months beyond the date of certification of the applicant by the commission. Failure to comply with this requirement may void an applicant's certification or result in such other action as the commission deems in the public interest, including, but not limited to, assessment of reasonable penalties and all other available remedies under the Public Utility Regulatory Act.

(e) **Name on certificates.**

- (1) All local exchange telephone service, basic local telecommunications service, and switched access service provided under an SPCOA shall be provided in the name under which certification was granted by the commission. The commission shall grant the certificate in only one name.
 - (A) If the applicant is a corporation, the commission shall issue the certificate in the corporate or assumed name of the applicant.
 - (B) If the applicant is an unincorporated business entity or an individual, the commission shall issue the certificate in the assumed name of the entity or the individual.
 - (C) The commission shall review the requested name to determine if the name is deceptive, misleading, vague, inappropriate, or duplicative of an existing certificated telecommunications utility. If the commission determines that the requested name is deceptive, misleading, vague, inappropriate, or duplicative, it shall notify the applicant and the applicant shall modify the name to alleviate the commission's concerns. If the name is not adequately modified, the application may be denied.
 - (2) The holder of an SPCOA may request commission approval to change the name on the certificate by filing an application to amend its certificate with the commission
- (f) **Non-use of certificates.** Applicants will use their SPCOA certificates expeditiously.

- (1) An SPCOA certificate holder that has not provided service for a period of 12 consecutive months must provide a sworn affidavit to the commission on an annual basis attesting that they continue to possess the technical and financial resources necessary to provide the level of service proposed in their initial application.
 - (2) An SPCOA certificate holder that has not provided service within 48 months of being granted the certificate by the commission, may have its certificate suspended or revoked, as defined by §26.114 of this title (relating to Suspension or Revocation of Certificates of Operating Authority (COAs) and Service Provider Certificates of Operating Authority (SPCOAs)), after due process, or undergo certification re-qualification.
 - (A) Certification re-qualification shall consist of an entirely new filing certifying that the SPCOA holder possesses the technical and financial resources necessary to provide the proposed level of service.
 - (B) Any certification re-qualification must be filed at the commission before the expiration of the 48-month period.
- (g) **Reporting requirements.**
- (1) All certificate holders shall file an annual report with the commission by June 30 of each year using the commission-prescribed form, *Annual Information Reporting Requirements for a Service Provider Certificate of Operating Authority and/or a*

Certificate of Operating Authority. This form may be obtained from the commission's Central Records and the commission's website.

- (2) If the SPCOA holder has any change during the year in the information requested in Section One of the annual report form, then the SPCOA holder shall file an updated form correcting the information in Section One within 30 days of the change.
- (3) The completed annual report form shall be filed in the commission's Central Records in a project number designated annually by the Filing Clerk.
- (4) An SPCOA holder shall also file annual reports required by §26.89 of this title (relating to Information Regarding Rates and Services of Nondominant Carriers).
- (5) A certificate holder shall also file monthly reports as required by §26.465 of this title (relating to Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers) and §26.467 of this title (relating to Rates, Allocation, Compensation, Adjustments and Reporting.)

(h) **Compliance and enforcement.**

- (1) **Administrative penalties.** If the commission finds that an SPCOA holder has violated any provision of this section, the commission shall order the SPCOA holder to take corrective action, as necessary, and the SPCOA holder may be subject to administrative penalties and other enforcement actions pursuant to PURA, Chapter 15.

- (2) **Revocation or suspension.** If the commission finds that a certificate holder is repeatedly in violation of PURA or commission rules, the commission may suspend or revoke an SPCOA certificate pursuant to PURA Chapter 17.
- (3) **Enforcement.** The commission shall coordinate its enforcement efforts of fraudulent, unfair, misleading, deceptive, and anticompetitive business practices with the Office of the attorney general in order to ensure consistent treatment of specific alleged violations.

§26.114. Suspension or Revocation of Certificates of Operating Authority (COAs) and Service Provider Certificates of Operating Authority (SPCOAs).

- (a) **Scope and purpose.** This section addresses the suspension or revocation of COAs and SPCOAs. A COA or an SPCOA may be suspended or revoked by the commission after due process.
- (b) **Definitions.** The following words and terms when used in this section shall have the following meanings unless the context indicates otherwise:
 - (1) **Revocation** – The cessation of all telecommunications business operations in the state of Texas pursuant commission order.
 - (2) **Suspension** – The cessation of all telecommunications business operations in the state of Texas associated with adding new customers.

(c) **Suspension and revocation.**

- (1) The commission may initiate an investigation for suspension or revocation of a COA or SPCOA. Grounds for initiating an investigation that may result in the suspension or revocation may include, but not be limited to the following:
 - (A) Non-use of approved certificate for a period of 48 months, without re-qualification prior to the expiration of the 48-month period;
 - (B) Verified complaints reported to the commission or the Attorney General;
 - (C) Intentionally providing false information to the commission at the time of certification;
 - (D) Bankruptcy, insolvency, failure to meet financial obligations on a timely basis, except if reasonably disputed, or the inability to obtain the financial resources needed to provide adequate service;
 - (E) Repeated violation of the Public Utility Regulatory Act (PURA) or any commission rule or order applicable to the certificate holder;
 - (F) Violation of any state law applicable to the certificate holder that affects the certificate holders' ability to provide telecommunications services;
 - (G) Repeated failure to meet commission reporting requirements; or
 - (H) Repeated failure to meet reporting requirements pursuant to §26.465 of this title (relating to Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers) and §26.467 of

this title (relating to Rates, Allocation, Compensation, Adjustments and Reporting).

- (2) Any certificate holder whose certificate is revoked or suspended by the commission shall comply with the standards for relinquishment in §26.113 of this title (relating to Amendment of Certificate of Operating Authority (COA) or Service Provider Certificate of Operating Authority (SPCOA)).

This agency hereby certifies that the rules, as adopted, have 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 §26.109 relating to Standards for Granting Certificates of Operating Authority (COAs), §26.111 relating to Standards for Granting Service Provider Certificates of Operating Authority (SPCOAs) and §26.114 relating to Suspension or Revocation of Certificates of Operating Authority (COAs) and Service Provider Certificates of Operating Authority (SPCOAs) are hereby adopted with changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE 7th DAY OF JULY 2000.

PUBLIC UTILITY COMMISSION OF TEXAS

Chairman Pat Wood, III

Commissioner Judy Walsh

Commissioner Brett A. Perlman