

PROJECT NO. 47668

**RULEMAKING REGARDING § PUBLIC UTILITY COMMISSION
SUBSTANTIVE RULE PURSUANT TO §
S.B. 1476 § OF TEXAS**

**ORDER ADOPTING NEW RULE §26.409
AS APPROVED AT THE SEPTEMBER 12, 2019 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts new rule 16 Texas Administrative Code (TAC) §26.409, relating to the review of Texas Universal Service Fund (TUSF) support received by competitive Eligible Telecommunications Providers (ETPs), with changes to the proposed text as published in the June 28, 2019 issue of the *Texas Register*. The new rule establishes the criteria and process for determining whether TUSF support should be eliminated under the provisions of Public Utility Regulatory Act (PURA) §56.023(p) and (r). This amendment is adopted under Project Number 47668. In adopting this new rule, the commission makes other minor modifications to subsections (e) and (j) for the purpose of clarifying its intent.

The commission received comments on the new rule from AMA TechTel Communications (AMA) and Virgin Mobile USA, L.P. (Virgin Mobile). No party requested a hearing.

General Comments

AMA stated that the costs associated with the rule are minimal but could be further reduced if the commission reviewed the 50% triggered exchanges only once every three years.

Commission Response

The commission understands AMA's concern about the costs of administering the new rule. However, the commission declines to adopt AMA's proposal to limit review of the triggered exchanges to once every three years. PURA §56.023(r) requires the commission to review the per-line support amount at least every three years, but allows the commission the latitude to do so more frequently. Commission resources will not be unduly strained by an annual review of exchanges as described in the new rule. In addition, more frequent review could benefit the state by reducing continuation of support that is not in the public interest.

Virgin Mobile acknowledged that nothing in the proposed rule states that a competitive ETP providing Lifeline service to customers located in exchanges subject to review under the proposed rule will be subject to potential elimination of Lifeline support. Nevertheless, Virgin Mobile expressed concern that unless the rule is clarified, Lifeline support could be eliminated for Lifeline-only ETPs such as itself under the new rule. Virgin Mobile recommended language to clarify that this rule does not apply to loss of Lifeline support. Virgin Mobile explained that its concern is caused by commission staff's position in a pending contested case, Docket No. 48502, *Application of Virgin Mobile USA, L.P. to Amend its Designation as an Eligible Telecommunications Carrier and its Designation as an Eligible Telecommunications Provider for the Limited Purpose of Offering Lifeline Service*, that the Lifeline program is not a distinct program within the TUSF, but is a subset of the two high cost funds.

Commission Response

The commission agrees with Virgin Mobile that Lifeline support is not contemplated in PURA §56.023(p) and (r) and is not under consideration in this rule. The rule is clear on this point and additional clarification is unnecessary.

AMA had concerns about the confidentiality of the number of access lines it serves in a market. AMA argued that the number of access lines that paragraph (d)(1)(A) would require commission staff to report is only relevant for staff's identification of exchanges to be reported under paragraph (d)(1)(B). Therefore, AMA continued that paragraph (d)(1)(A) be eliminated to address these concerns. AMA asserted that the data is subject to Texas law as a trade secret and that the commission typically treats the number of access lines a company serves as proprietary and confidential information and should report this information confidentially.

Commission Response

It is not the commission's intent to expose the number of lines served by individual competitive ETPs. The commission has reorganized section (d)(1)(A) to address AMA's concerns. Filings made under a claim of confidentiality and submitted in accordance with TAC §22.71 will be treated in accordance with the commission's rules and procedures for handling confidential information.

AMA recommended a response period of 30 days for a competitive ETP to respond to commission staff's application, instead of the proposed 20 days in subsection (f)(1). Similarly, AMA

recommended a response period of 20 days for a competitive ETP to respond to commission staff's recommendation, instead of the proposed 10 days in subsection (h). AMA stated that a longer period to develop responses would reduce the likelihood of any affected carrier requesting a hearing, thus reducing administrative costs. AMA also stated that additional time is needed because commission staff's application and recommendation would affect all competitive ETPs serving a specific exchange and that these competitors would have no knowledge of the aggregate reduction in the number of access lines until commission staff has filed its application. AMA indicated that the rule should allow sufficient time for affected carriers to execute necessary nondisclosure agreements or protective orders, evaluate data, and deliver a thoughtful and useful response.

Commission Response

The commission agrees to lengthen the response period to not more than 30 days in subsection (f)(1) and not more than 20 days in subsection (h). To maintain comparable response periods, the commission also increases the time in subsection (g) by which commission staff must file a recommendation to not more than 40 days.

This amendment is adopted under PURA §14.002, which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction and PURA §56.023(r), which directs the commission to adopt rules to establish the criteria to determine whether the TUSF support for certain competitive ETPs should be eliminated.

Cross reference to statutes: PURA §§ 14.002 and 56.023.

§26.409. Review of Texas Universal Service Fund Support Received by Competitive Eligible Telecommunications Providers.

- (a) **Purpose.** This section implements PURA §56.023(p) and (r) and establishes the criteria and process for determining whether Texas Universal Service Fund (TUSF) support under 16 TAC §26.403 to a competitive Eligible Telecommunications Provider (ETP) should be eliminated.
- (b) **Application.** This section applies to exchanges in which an incumbent local exchange company or cooperative is ineligible for support under PURA §56.021(1) and a competitive ETP receives TUSF support under 16 TAC §26.403.
- (c) **Commission review.**
- (1) The commission must review the per-line TUSF support amount for each exchange identified by subparagraph (d)(1)(B) of this section to determine whether support should be eliminated. The first review of an exchange must be completed not later than the end of the year following the year in which the exchange was reported under subparagraph (d)(1)(B) of this section.
 - (2) The commission must base its decision on the following criteria:
 - (A) The total number of access lines in the exchange served by competitive ETPs receiving TUSF support;
 - (B) The number of competitors providing comparable service in the exchange;
and
 - (C) Whether continuing the TUSF support is in the public interest.

- (d) **Identification of exchanges for review.**
- (1) No later than April 30 of each year, commission staff must report:
 - (A) The exchanges in which the number of access lines served by competitive ETPs has decreased by at least 50% from the number of access lines that were served in that exchange by competitive ETPs on December 31, 2016; and
 - (B) The number of access lines served by those competitive ETPs identified in subparagraph (A) of this paragraph on December 31 of the previous year.
 - (2) Commission staff must file its report in central records under a control number designated for that purpose.
- (e) **Initiation of proceeding.** For each exchange identified under subparagraph (d)(1)(B) of this section, commission staff will file an application to initiate a proceeding to review the per-line TUSF support amount for that exchange.
- (1) The application must be supported by an affidavit and describe commission staff's determination that the number of access lines served by competitive ETPs in the exchange decreased by at least 50% compared to the number of access lines served by competitive ETPs in that exchange on December 31, 2016.
 - (2) Commission staff must serve a copy of the application, at the time of filing, to the competitive ETPs receiving TUSF support in the exchange by email, regular mail, and certified mail.

- (f) **Competitive ETP's response to commission staff's application.**
- (1) A competitive ETP serving access lines in an exchange identified under subparagraph (d)(1)(B) may respond to commission staff's application no later than 30 days after the application is filed.
 - (2) A competitive ETP's response must address the criteria listed in subsection (c) of this section.
 - (3) The response must be in writing, supported by affidavit, and filed with the commission as prescribed by 16 TAC §22.71.
- (g) **Commission staff's recommendation.** In accordance with the schedule established by the presiding officer, but no earlier than 40 days after filing the application described in subsection (e), commission staff will file a recommendation, supported by affidavit, on whether the commission should eliminate TUSF support in the identified exchange. In its recommendation, commission staff must address the criteria listed in subsection (c).
- (h) **Competitive ETP's response to commission staff's recommendation.** No later than 20 days after commission staff files its recommendation, a competitive ETP may file a response to commission staff's recommendation. The response must state whether the competitive ETP agrees or disagrees with commission staff's recommendation and may include a request for a hearing.
- (i) **Commission determination.**

- (1) If a competitive ETP does not request a hearing within the time prescribed by subsection (h), the commission will determine whether to eliminate TUSF support for the exchange based on the filings submitted by commission staff and the competitive ETPs.
 - (2) If a competitive ETP requests a hearing, the proceeding will be conducted as a contested case.
- (j) **Further review.** If the commission does not eliminate TUSF support for an exchange after a review conducted under subsections (c) – (i) of this section, the commission must repeat the review of the TUSF per-line support amount for that exchange at least every three years.

This agency 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 §26.409 relating to Review of Texas Universal Service Fund Support Received by Competitive Eligible Telecommunications Providers is hereby adopted with changes to the text as proposed.

Signed at Austin, Texas the _____ day of September 2019.

PUBLIC UTILITY COMMISSION OF TEXAS

DEANN T. WALKER, CHAIRMAN

ARTHUR C. D'ANDREA, COMMISSIONER

SHELLY BOTKIN, COMMISSIONER