

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS.

Subchapter J. COSTS, RATES AND TARIFFS.

§26.211. Rate-Setting Flexibility for Services Subject to Significant Competitive Challenges.

- (a) **Application.** The provisions of this section apply to incumbent local exchange companies (ILECs), as defined by §26.5 of this title (relating to Definitions). This section does not apply to a deregulated company holding a certificate of operating authority or to an exempt carrier under PURA §52.154.
- (b) **Purpose.** The purpose of this section is to establish procedures for pricing flexibility for services subject to competition and a process for the review of pricing flexibility applications.
- (c) **Pricing flexibility.**
- (1) The types of pricing flexibility that an incumbent local exchange company (ILEC) may request are set forth in subparagraphs (A)-(C) of this paragraph.
- (A) **Banded rates.** If an ILEC is granted the authority to charge banded rates, the minimum rates shall yield revenues that are equal to or greater than 105% of the long run incremental cost of the service in the geographic market in which the service will be provided. When an ILEC is granted the authority to charge banded rates, the ILEC shall file a tariff showing the minimum and maximum rates and specifying its current rate. The current rate, as specified in the ILEC's tariff, shall be applied uniformly to all customers of the service in each exchange for which the commission has approved banded rates. If the ILEC desires to charge a rate different from its current rate, but between the minimum and maximum rates, it shall file a revised tariff on or before the effective date of the rate change. The minimum and maximum rates may only be changed as provided for in the Public Utility Regulatory Act, Chapter 53, Subchapters C and D, or G.
- (B) **Detariffing.** If an ILEC is granted the authority to detariff a service, the ILEC shall maintain at the commission a current price list for the service, and the commission shall retain authority to regulate the quality, terms and conditions of the detariffed service, other than rates. The commission may determine the appropriate ratemaking treatment of any revenues from or costs of providing a detariffed service in a proceeding under the Public Utility Regulatory Act, Chapter 53, Subchapters C and D, or G.
- (C) **Other types of pricing flexibility.** If an ILEC is granted the authority to engage in a type of pricing flexibility that the commission finds to be in the public interest other than those specified in subparagraphs (A)-(B) of this paragraph, that pricing flexibility shall be offered under such terms and conditions as the commission orders.
- (2) ILECs have the authority to enter into customer-specific contracts for those services specified in subsection (d) of this section. For those services, ILECs may apply to the commission pursuant to this subsection to obtain a type of pricing flexibility specified in paragraph (1) of this subsection other than customer-specific contracts. For other services, ILECs may apply to the commission pursuant to this subsection to obtain any type of pricing flexibility specified in paragraph (1) of this subsection. However, nothing in this subsection shall permit an ILEC to obtain pricing flexibility for basic local telecommunications service, including local measured service, or for any service that includes as a component a service not subject to significant competitive challenge. Additionally, nothing in this subsection shall permit an ILEC to enter into customer-specific contracts or to obtain detariffing with respect to message telecommunications services, switched access services, or wide area telecommunications service.
- (3) An application for pricing flexibility filed under this paragraph shall:
- (A) include a statement of the ILEC's intention to use the procedures established in this subsection;

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS.

Subchapter J. COSTS, RATES AND TARIFFS.

- (B) specify the type of pricing flexibility requested and, if the type of pricing flexibility requested is either banded rates or some other type of pricing flexibility pursuant to paragraph (1)(C) of this subsection that involves rate-setting;
 - (i) state the proposed rates, and if the type of pricing flexibility is banded rates, state the maximum and minimum rates;
 - (ii) include detailed documentation demonstrating that the minimum rates yield revenues that are equal to or greater than 105% of the long run incremental cost of the service in the geographic market in which the service will be provided;
 - (iii) demonstrate that the rates are not unreasonably preferential, prejudicial or discriminatory;
 - (iv) demonstrate that the rates are such that the service identified pursuant to subparagraph (C) of this paragraph will not be subsidized directly or indirectly by regulated monopoly services; and
 - (v) demonstrate that the rates are not predatory or anticompetitive;
- (C) identify the service for which the ILEC is requesting pricing flexibility, including each component thereof, and provide functional and technical descriptions of the service, including:
 - (i) the functions that the service is intended to perform for the customer;
 - (ii) the types of equipment used to provide the service (including, but not limited to, transmission facilities, switching facilities, customer equipment, software functions, and protocol);
 - (iii) the network configurations used to provide the service; and
 - (iv) schematics;
- (D) identify each service that is not subject to significant competitive challenge but that, at the time the ILEC files its application for pricing flexibility, the ILEC intends to provide as a tariffed adjunct to the service identified in subparagraph (C) of this paragraph and, for each such service, provide:
 - (i) functional and technical descriptions; and
 - (ii) citations to the tariff provisions pursuant to which each such service will be provided;
- (E) designate the exchange(s) as to which the ILEC is seeking pricing flexibility;
- (F) include a map or maps of the exchange(s) designated pursuant to subparagraph (E) of this paragraph that can be coordinated with the official commission boundary maps;
- (G) describe the products or services known to the ILEC that are currently available in the exchange(s) designated pursuant to subparagraph (E) of this paragraph, and that are the same, equivalent, or substitutable for the service identified pursuant to subparagraph (C) of this paragraph, and identify the providers of those products or services;
- (H) with respect to the products or services described pursuant to subparagraph (G) of this paragraph, discuss:
 - (i) the number and size of telecommunications utilities or other persons providing such products or services;
 - (ii) the extent to which such products or services are available;
 - (iii) the ability of customers to obtain such products or services at rates, terms, and conditions comparable to those that the ILEC will offer;

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS.

Subchapter J. COSTS, RATES AND TARIFFS.

- (iv) the ability of telecommunications utilities or other persons to make such products or services readily available at rates, terms, and conditions comparable to those that the ILEC will offer; and
 - (v) the existence of any significant barrier to the entry or exit of a provider of such products or services;
 - (I) demonstrate that the level of competition with respect to all components of the ILEC's service identified pursuant to subparagraph (C) of this paragraph represents a significant competitive challenge within the exchange(s) designated pursuant to subparagraph (E) of this paragraph that warrants the pricing flexibility specified pursuant to subparagraph (B) of this paragraph;
 - (J) demonstrate that the service identified pursuant to subparagraph (C) of this paragraph is not basic local telecommunications service, including local measured service;
 - (K) if the type of pricing flexibility requested pursuant to subparagraph (B) of this paragraph is customer-specific pricing or detariffing, demonstrate that the service identified pursuant to subparagraph (C) of this paragraph is not message telecommunications service, switched access service, or wide area telecommunications service;
 - (L) to prevent the subsidization of the service identified pursuant to subparagraph (C) of this paragraph with revenues from regulated monopoly services, propose mechanisms to recover costs that may not be identified and recovered in a long run incremental cost study, including but not limited to costs associated with advertising, unsuccessful bids, and all items of plant used in the provision of the service;
 - (M) identify and address the impact that approval of the application for pricing flexibility may have on universal service;
 - (N) for any type of pricing flexibility other than detariffing, include proposed tariffs and identify any tariff language that restricts the resale, sharing, or joint use of the service identified pursuant to subparagraph (C) of this paragraph and any component thereof and demonstrate why such restrictive tariff language is consistent with the policy established in the Public Utility Regulatory Act §52.001; and
 - (O) include any other information that the ILEC wants considered in connection with the review of its application.
- (4) The commission shall allow an incumbent LEC that is not a Tier 1 LEC as of September 1, 1995, at that company's option, to adopt the cost studies approved by the commission for a Tier 1 LEC.
- (5) An application for pricing flexibility shall be docketed and assigned to a presiding officer. No later than ten working days after the filing of an application for pricing flexibility, the presiding officer shall issue an order scheduling a prehearing conference for the purposes of determining notice requirements, establishing a procedural schedule, and addressing other matters as may be appropriate. The commission shall make a final decision no later than 180 days after the completion of notice, as ordered by the presiding officer. However, this 180-day period shall be extended two days for each one day of actual hearing on the merits of the case that exceeds 15 days. The presiding officer or commission, upon a showing of good cause relating to the applicant's failure or refusal to prosecute, including but not limited to the applicant's unreasonable resistance to discovery, may further extend the timeline, provided that the order shall specifically identify the facts found to constitute good cause. This deadline may be expressly waived by the applicant.
- (6) For ILECs with less than 31,000 access lines, the commission shall not be limited under paragraph (7)(D)(i)-(x) of this subsection to considering only competition within the

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS.

Subchapter J. COSTS, RATES AND TARIFFS.

- exchange(s) where the ILEC will provide the service. Pursuant to paragraph (3)(O) of this subsection, an ILEC with less than 31,000 access lines may provide information that addresses the criteria of paragraph (3)(G)-(I) of this subsection with respect to products or services available outside the exchange(s) designated in paragraph (3)(E) of this subsection.
- (7) An application for pricing flexibility shall be approved if, after an evidentiary hearing, the commission finds, based on the evidence, that:
- (A) no service for which pricing flexibility is sought is basic local telecommunications service, including local measured service;
 - (B) no service for which the ILEC requests detariffing of rates is message telecommunications service, switched access service, or wide area telecommunications service
 - (C) no service for which pricing flexibility is sought includes a component that is not subject to significant competitive challenge;
 - (D) the grant of pricing flexibility for the service identified pursuant to paragraph (3)(C) of this subsection within the exchange(s) designated pursuant to paragraph (3)(E) of this subsection is appropriate to allow the ILEC to respond to a significant competitive challenge, based upon consideration of the following:
 - (i) the number and size of telecommunications utilities or other persons providing the same, equivalent, or substitutable service within the exchange(s) designated pursuant to paragraph (3)(E) of this subsection;
 - (ii) the extent to which the same, equivalent, or substitutable service is available within the exchange(s) designated pursuant to paragraph (3)(E) of this subsection;
 - (iii) the ability of customers to obtain the same, equivalent, or substitutable services at comparable rates, terms, and conditions within the exchange(s) designated pursuant to paragraph (3)(E) of this subsection;
 - (iv) the ability of telecommunications utilities or other persons to make the same, equivalent, or substitutable service readily available at comparable rates, terms, and conditions within the exchange(s) designated pursuant to paragraph (3)(E) of this subsection;
 - (v) the existence of any significant barrier to the entry or exit of a provider of the same, equivalent or substitutable services within the exchange(s) designated pursuant to paragraph (3)(E) of this subsection;
 - (vi) whether there are mechanisms to minimize potential anti-competitive practices, to the extent that any such practice has been identified in the record;
 - (vii) whether there are mechanisms to prevent the subsidization of the service with revenues from regulated monopoly services;
 - (viii) whether the ability of the ILEC to flexibly price the service within the designated exchange(s) would have any significant impact on universal service;
 - (ix) whether the type of pricing flexibility requested is appropriate in light of the level and nature of competition within the exchange(s) where the ILEC will provide the service; and
 - (x) any other relevant information contained in the record;
 - (E) the rates, if the type of pricing flexibility granted is either banded rates or some other type of pricing flexibility pursuant to paragraph (1)(C) of this subsection that involves rate-setting, are just and reasonable and:
 - (i) yield revenues that are equal to or greater than 105% of the long run incremental cost of the service in the geographic market in which the service will be provided;

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS.

Subchapter J. COSTS, RATES AND TARIFFS.

- (ii) are not unreasonably preferential, prejudicial or discriminatory;
 - (iii) are such that the service will not be subsidized directly or indirectly by regulated monopoly services; and
 - (iv) are not predatory or anticompetitive.
- (8) Nothing in this subsection is intended to prevent the presiding officer from recommending, or the commission from approving based on the record evidence, relief other than that requested in the application.
- (d) **Customer-specific contracts.**
An ILEC shall have the authority to enter into customer-specific contracts for:
 - (1) central office based PBX-type services for systems of 200 stations or more, as those services compete with customer premises equipment provided by PBX vendors;
 - (2) billing and collection services;
 - (3) high-speed private line services of 1.544 megabits or greater;
 - (4) customized services that are unique because of size or configuration, provided that such customized services shall not include basic local telecommunications service, including local measured service, or message telecommunications services, switched access services, or wide area telecommunications service; and
 - (5) any other service for which the commission has authorized the ILEC to enter into customer-specific contracts pursuant to this section.
- (e) **Subsequent review.** The commission may modify, or revoke, upon notice and hearing, the authorization of any type or types of pricing flexibility granted pursuant to this section.
- (f) **Severability.** If any provision of this section or the application thereof to any person or any circumstances is held invalid, such invalidity shall not affect other provisions or applications of this section that can be given effect without the invalid provision or application. It is the intent of the commission that the provisions of this section are severable.