

The Public Utility Commission of Texas (commission) proposes new §26.229, relating to Requirements Applicable to Chapter 59 Electing Companies. Proposed new §26.229 clarifies the substantive and procedural requirements relating to new services and packaging and pricing flexibility, including customer promotional offerings, offered by incumbent local exchange companies (ILECs) regulated under the Public Utility Regulatory Act (PURA) Chapter 59. Project Number 21159 has been assigned to this proceeding.

The commission staff received comments from parties about the scope and draft rules created in this project at two workshops convened on November 15, 1999, and March 28, 2000. Commission staff coordinated the product of Project Number 21159 with Project Number 21155, *Rulemaking to Implement PURA Chapter 58 Provisions Relating to Customer Specific Contracts, Packing Flexibility, and Promotional Offerings*; Project Number 21156, *Rulemaking to Implement PURA Chapter 58 Withdrawal of Election, Rate Caps, and Rate Adjustments*; Project Number 21157, *Rulemaking to Implement PURA Chapter 58 Provision of New Services*; and Project Number 21161, *Rulemaking to Establish Process for New Services and Promotional Offerings, and Pricing and Packaging Flexibility Provisions for PURA Chapters 52, 58, and 59*.

Ms. Anne McKibbin, Senior Economist, Office of Regulatory Affairs, has determined that for each year of the first five-year period the proposed section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Ms. McKibbin has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing this section will be the clarification of the substantive requirements and procedures relating to the offering of new services and pricing and packaging flexibility, including customer promotional offerings and the filing of long run incremental cost (LRIC) studies by Chapter 52 and 59 companies. There will be no effect on small businesses or micro-businesses resulting from the enforcement of this section. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Ms. McKibbin has also determined that for each year of the first five years the proposed section is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act §2001.022.

The commission staff will conduct a joint public hearing on this rulemaking and Project Numbers 21155, 21156, 21157, and 21161 under Government Code §2001.029 at the commission's offices, located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701, on Tuesday, June 27, 2000, at 9:30 in the Commissioners Hearing Room.

Comments on the proposed new section (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Reply comments may be submitted within 45 days after publication. Parties are also requested to e-mail an electronic copy of comments to [Anne.McKibbin@puc.state.tx.us](mailto:Anne.McKibbin@puc.state.tx.us), if possible. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the proposed section. The commission also invites comments on whether it is appropriate that proposed subsection (c)(1)(D) and (d)(2)(D) contain an anti-competitive pricing standard, or whether such a standard should be developed through the facts determined in individual contested cases. All comments should refer to Project Number 21159 and Proposed Rule §26.229.

This new section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2000) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §59.030, regarding new services for Chapter 59 electing companies; §59.031, regarding pricing and packaging flexibility for Chapter 59 electing companies; and §59.032, regarding customer promotional offering requirements for Chapter 59 electing companies.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 59.030, 59.031, and 59.032.

**§26.229. Requirements Applicable to Chapter 59 Electing Companies.**

- (a) **Application.** This provision applies to electing companies as defined in the Public Utility Regulatory Act (PURA) §59.002(1).
  
- (b) **Purpose.** This section establishes the substantive and procedural requirements for a Chapter 59 electing company to introduce new services and to exercise pricing and packaging flexibility, including customer promotional offerings, and for complaints regarding service offerings introduced by informational notice offerings.
  
- (c) **New services.** The term "new services" has the meaning assigned in §26.5 of this title (relating to Definitions) and shall include services for which no rate was in effect on September 1, 1999. An electing company may file an informational notice to introduce a new service. An electing company filing an informational notice pursuant to this subsection shall file the appropriate information in accordance with subsection (g)(2) of this section.
  - (1) **Pricing standards.**
    - (A) An electing company shall price each new service at or above the service's long run incremental cost (LRIC).
    - (B) The price of a new service may not be preferential, prejudicial, discriminatory, predatory, or anticompetitive.

- (C) A price that is set at or above the service's LRIC is presumed not to be predatory.
- (D) There is a rebuttable presumption that the price of a new service is anticompetitive against a competitor if an electing company's retail price for a new service is less than the sum of the total element long run incremental cost (TELRIC)-based wholesale prices of components needed to provide the new service.
- (2) **LRIC studies.** An electing company may establish a service's LRIC by submitting a LRIC cost study, as specified in subsection (g)(2)(D)(ix) of this section that conforms to the requirements of §26.214 of this title (relating to Long Run Incremental Cost (LRIC) Methodology for Services Provided by Certain Incumbent Local Exchange Companies (ILECs)).
- (3) **LRIC adoption.** An electing company serving fewer than one million access lines in Texas may establish a service's LRIC by adopting the commission-approved cost studies of a larger company for the same service.
- (4) **Rate adoption.** In lieu of filing a LRIC study or adopting the LRIC studies of a larger company, an electing company with less than one million access lines may adopt a rate that is identical to or higher than a larger company's tariffed rate for the same service.

- (5) **Packaging of new services.** If an electing company offers a new service as a component of a package, the electing company shall also offer the new service as a separately tariffed service.
- (d) **Pricing and packaging flexibility.** An electing company may file an informational notice to exercise pricing and packaging flexibility by filing the appropriate information in accordance with subsection (g)(2) of this section.
- (1) **General requirements.**
- (A) Pricing flexibility includes:
- (i) customer specific contracts;
  - (ii) packaging of services;
  - (iii) volume, term, and discount pricing;
  - (iv) zone density pricing, with a zone defined as an exchange; and
  - (v) other promotional pricing.
- (B) A discount or other form of pricing flexibility may not be preferential, prejudicial, discriminatory, predatory, or anticompetitive.
- (C) An electing company may exercise pricing flexibility, including the packaging of any regulated services with any other regulated or unregulated services or any service of an affiliate.
- (2) **Pricing standards.**

- (A) An electing company shall price each regulated service offered separately or as part of a package at either the service's tariffed rate or at a rate not lower than the service's LRIC.
  - (B) An electing company shall price each service at or above the service's LRIC.
  - (C) A price that is set at or above the service's LRIC is presumed not to be predatory.
  - (D) There is a rebuttable presumption that the price of the service or package is anticompetitive against a competitor if an electing company's retail price for the service or package of services is less than the sum of the TELRIC-based wholesale prices of components needed to provide the service or package of services, respectively.
  - (E) The price of a package of services that includes unregulated products or services or an affiliate's products or services shall recover the cost, to the electing company, of acquiring and providing the unregulated products or services or the affiliate's products or services.
- (3) **LRIC studies.** An electing company may establish a service's LRIC by submitting a LRIC cost study, as specified in subsection (g)(2)(D)(ix) of this section that conforms to the requirements of §26.214 of this title.

- (4) **LRIC adoption.** An electing company serving fewer than one million access lines in Texas may establish a service's LRIC by adopting the commission-approved cost studies of a larger company for the same services.
  - (5) **Rate adoption.** In lieu of filing a LRIC study or adopting the LRIC studies of a larger company, an electing company with less than one million access lines may adopt a rate that is identical to or higher than a larger company's tariffed rate for the same service.
- (e) **Customer promotional offerings.** An electing company may file an informational notice to offer customer promotional offerings by filing the appropriate information in accordance with subsection (g)(2) of this section.
- (1) An electing company may offer a promotion for a regulated service for not more than 90 days in any 12-month period.
  - (2) Customer promotional offerings may consist of:
    - (A) waiver of installation charges or service order charges, or both, for not more than 90 days in a 12-month period; or
    - (B) a temporary discount of not more than 25% from the tariffed rate for not more than 60 days in a 12-month period.
  - (3) Although electing companies are not required to file LRIC studies with informational notices regarding these customer promotional offerings, the

offerings are subject to the standards for pricing flexibility in subsection (d) of this section, in the event of a complaint.

(f) **Requirements for customer specific contracts.** An electing company may enter into customer-specific contracts for certain services as provided in §26.211 of this title, (relating to Rate-Setting Flexibility for Services Subject to Significant Competitive Challenges). For all services not addressed in §26.211 of this title, an electing company must offer customer-specific contracts pursuant to this section.

(g) **Procedures related to the filing of informational notices and associated tariffs.** The provisions of this subsection apply to electing companies choosing to introduce new services and exercise pricing and packaging flexibility including customer promotional offerings through informational notice filings.

(1) **Notice requirements.** An electing company shall provide the informational notice in compliance with this section to the commission, to the Office of Public Utility Counsel (OPUC), and to any person who holds a certificate of operating authority in the electing company's certificated area or areas, or who has an effective interconnection agreement with the electing company.

(2) **Filing requirements:**

(A) At the time the informational notice is filed in Central Records, a copy of the informational notice, including confidential information, shall be

delivered to both OPUC and the commission's Director – Policy Analysis, Telecommunications Industry Analysis Division.

- (i) The commission shall assign each informational notice a unique control number and shall stamp the tariff sheets "received".
  - (ii) Staff of the commission's Office of Regulatory Affairs (ORA) shall file any notice of deficiencies (including deficiencies in LRIC studies submitted) for incomplete filings not in compliance with this section or pleading alleging that the service offering is inappropriately filed as an informational notice filing within three working days after the date of the filing of the informational notice.
  - (iii) Within two working days after the date of ORA's filing, the applicant shall file an explanation of the actions it has taken or intends to take in response to a notice or pleading filed under clause (ii) of this subparagraph.
- (B) Effective date. A service offering shall be effective no earlier than ten days after the electing company files a complete informational notice with the commission.
- (C) Access to confidential information filed with the commission as part of an informational notice filing shall be available to commission staff, upon

execution of a commission approved protective agreement, at the time the informational notice is filed.

(D) Format of filing. An informational notice under this section must include the following elements:

- (i) name of company;
- (ii) PURA chapter under which company operates;
- (iii) date of submission;
- (iv) effective date;
- (v) new and/or revised tariff pages, written in plain language and conforming to the requirements of §26.207 of this title (relating to Form and Filing of Tariffs);
- (vi) proposed implementation date (if different from effective date);
- (vii) affidavit of notice to OPUC, certificate of operating authority holders, and parties to interconnection agreements;
- (viii) type of filing (new service; pricing flexibility; packaging, or promotional offering; customer specific contract);
- (ix) except for customer promotional offerings, relevant LRIC study or LRIC study reference, and relevant support materials (confidential/proprietary/protected materials provided to commission only). When LRIC studies for which commission approval has not been obtained are provided with an

informational notice filing, an application for approval of that LRIC study pursuant to §26.214 of this title to establish a LRIC floor shall be filed before or simultaneously with the informational notice filing. The electing company shall file a notice of intent to file LRIC studies pursuant to §26.214 of this title no later than ten days before the filing of the informational notice filing.

- (x) ~~Except~~except for customer promotional offerings, relevant LRIC study or LRIC study reference, and relevant supporting materials (confidential/proprietary/protected materials provided to commission only), if an electing company chooses to adopt LRIC studies of a larger company pursuant to the requirements of subsection (c)(3) or (d)(4) of this section, as applicable~~;~~
- (xi) ~~Except~~except for customer promotional offerings, relevant tariff rates or specific tariff references, if the electing company chooses to adopt rates of a larger company pursuant to requirements of subsection (c)(4) or (d)(5) of this section, as applicable~~;~~
- (xii) ~~A~~a response of "yes", "no", or "not applicable", with explanatory language, to the following question: "Is the sum of the TELRIC-based wholesale prices of components needed for

provision of the retail service at or below the retail price set forth in this filing?" Except for customer promotional offerings, if the response is "yes" or "no", the filing must identify the components needed for the provision of the retail service, along with a list of relevant wholesale and retail prices;

(xiii) ~~A~~a response of "yes" or "no" to the following question: "Is the service available for resale by a competitor?" If the answer is "no", does the proposed price meet the standards set forth in §26.274(f) – (h) of this title (relating to Imputation)? For purposes of this question, "available for resale" means:

(I) the service is not subject to tariffed resale restrictions;  
and

(II) the electing company is not aware of any constraints that would prevent a competitor from functionally provisioning the service to the competitor's customers in parity with the electing company's provisioning of the service to the electing company's customers;

(xiv) ~~For~~for package offerings that include any unregulated product or service or an affiliate's product or service, an affidavit indicating that the price of the package recovers the cost, to the

electing company, of offering the unregulated product or service  
or an affiliate's product or service;

(xv) description of offering's terms and conditions, including location  
of service or a statement that it is to be provided state-wide;

and

(xvi) a privacy concerns statement.

(E) For customer promotional offerings:

(i) Affidavit that a promotion for this service has not exceeded 90  
days for the previous 12-month period.

(ii) Promotional tariff or letter identifying the promotional service  
and whether it is for a waiver of installation or service order  
charges, or both (90 days) or a discount of 25% or less (60  
days).

(3) Disputes as to sufficiency or appropriateness of informational notice filing.

(A) If the electing company advises the commission by written filing that a  
dispute exists with respect to a notice of deficiency or the  
inappropriateness of an informational notice, and requests the  
assignment of an administrative law judge to resolve the dispute, the  
commission will consider the dispute to be a contested case.

- (B) A contested case will also exist if the commission files a complaint addressing sufficiency or appropriateness of an informational notice filing.
  - (C) Parties other than ORA may not challenge the sufficiency of an informational notice filing.
- (4) Complaints regarding service offerings introduced by informational notice filings.
- (A) Subject to subparagraph (E) of this paragraph, an affected person, OPUC, or the commission may file a complaint at the commission on or after the date the informational notice has been filed. The filing of a complaint will be considered to initiate a contested case.
  - (B) A complaint addressing an informational notice involving pricing flexibility, including customer promotions, may challenge whether the filing is in compliance with PURA and commission substantive rules.
  - (C) A complaint addressing an informational notice involving a new service may challenge whether the tariff is in compliance with the pricing standards of PURA and commission substantive rules. If the complaint is finally resolved in a final order issued by the commission in favor of the complainant, the electing company shall either:
    - (i) not later than the tenth day after the date the complaint is finally resolved, amend the price of the service as necessary to comply with the final resolution; or

- (ii) discontinue the service.
- (D) The commission shall dismiss a complaint filed prior to the filing of an informational notice on the grounds that the commission lacks jurisdiction to hear the complaint.
- (E) The commission shall consider any complaint alleging that the pricing of a regulated service does not meet the pricing standards of PURA and commission substantive rules, which is filed 31 or more days after the implementation date of the tariff, to be untimely.
- (F) All complaints shall be docketed and governed by the commission's procedural rules and shall be filed and reviewed pursuant to the following requirements:
  - (i) Complaints shall be captioned: COMPLAINT BY {NAME OF COMPLAINANT} REGARDING TARIFF CONTROL NUMBER(S) {NUMBER(S)} {STYLE OF TARIFF CONTROL NUMBER}.
  - (ii) Processing. The commission shall assign each complaint filed with respect to an informational notice a unique control number. The presiding officer shall cause a copy of each complaint, bearing the assigned control number, to be filed in the relevant tariff control number(s) for the related informational notice(s).

- (G) The commission's Office of Regulatory Affairs shall have standing in all proceedings related to informational notice filings before the commission and need not file a motion to intervene.
  - (H) A complaint filed pursuant to this section shall be considered to be an exception to the informal resolution requirements of procedural rule §22.242 (c) of this title (relating to Complaints).
- (5) **Interim relief.** A tariff for a new service introduced by an informational notice may not be suspended during the pendency of any complaint. All other tariffs introduced by informational notice filings will remain in effect during the pendency of any complaint unless interim relief suspending the tariff is granted pursuant to this subsection.
- (A) Any request that a tariff be suspended during the pendency of a complaint must meet the following requirements:
    - (i) the pleading must state an appropriate and bona fide cause of action;
    - (ii) the pleading must be verified or supported with affidavits based on personal knowledge; and
    - (iii) the pleading must set forth the following elements: probable right of recovery, probable and irreparable injury in the interim, and no adequate alternative remedy.

- (B) The presiding officer shall schedule a hearing on interim relief in the form of suspension of a tariff on an expedited basis.
- (C) The burden of proof shall be upon the complainant with respect to each element of proof necessary to obtain any interim relief requested by the complainant.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

**ISSUED IN AUSTIN, TEXAS ON THE 4th DAY OF MAY 2000 BY THE  
PUBLIC UTILITY COMMISSION OF TEXAS  
RHONDA G. DEMPSEY**