PROJECT NO. 32334

REQUIREMENTS APPLICABLE TO PURA CHAPTER 65 SUBCHAPTER D TRANSITIONING CARRIERS' INFORMATIONAL NOTICE FILINGS	**§ § § §**	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER ADOPTING NEW §26.230
AS APPROVED AT THE SEPTEMBER 21, 2006 OPEN MEETING

The Public Utility Commission of Texas (commission) adopts new §26.230 relating to Requirements Applicable to Chapter 65 One-day Informational Notice Filings with changes to the proposed text as published in the May 26, 2006, issue of the *Texas Register* (31 TexReg 4305). The rule implements the provisions of Senate Bill 5 (SB 5), 79th Legislature, Regular Session, related to new services and pricing flexibility and procedures for processing of informational notice filings for transitioning ILECs. New §26.230 sets forth substantive and procedural requirements relating to informational notice filings made by transitioning incumbent local exchange carriers (ILECs). PURA Chapter 65, Subchapter D, establishes provisions and requirements for ILECs that are transitioning to a fully competitive market. A "transitioning company" is an ILEC for which at least one, but not all, of the company's markets have been deregulated by the commission. Transitioning companies may exercise pricing flexibility and introduce new services one day after providing an informational notice to the commission pursuant to PURA §§65.151, 65.152 and 65.153 and, as referenced therein, PURA §§58.063 and 58.153. This new section is adopted under Project Number 32334.

First, §26.230 establishes the requirements for a transitioning ILEC to introduce new services, and/or to exercise pricing flexibility for basic and non-basic retail telecommunications services. Second, §26.230 establishes the procedures required of the transitioning ILEC when a one-day

informational notice filing is made. Third and finally, §26.230 establishes the procedure for the handling of insufficient applications and for the processing of any complaint pertaining to any error in such informational notice filings.

Through the adoption of new §26.230, the commission makes its rules consistent with PURA and clarifies the standards and procedures applicable to the transitioning ILECs for exercising flexibility and offering new services. The procedures are necessary to allow an efficient and timely review of such offerings and to ensure fair and equitable handling of complaints. New §26.230 will provide an incentive for transitioning ILECs to introduce new and innovative services and packages of services for telephone customers. As a result, the commission anticipates that telephone customers will benefit from lower prices and a broader selection of service choices.

On June 26, 2006, the commission received written comments on §26.230 from Southwestern Bell Telephone, L.P., dba AT&T Texas (AT&T Texas), United Telephone Company of Texas, Inc. and Central Telephone Company of Texas, Inc. dba Embarq (hereafter collectively referred to as Embarq) and Verizon Southwest (Verizon). On July 7, 2006, reply comments were received from AT&T Texas and on July 10, 2006, comments were received from the Texas Telephone Association (TTA). On August 31, 2006, the Office of Public Utility Counsel of Texas (OPC) filed a motion for leave to late file reply comments. No party requested a public hearing on the proposed rule. All comments were fully considered by the commission. Parties' comments addressed specific subsections of the new Rule which are summarized in order below.

Comments on §26.230(c)(2)(B)

Proposed §26.230(c)(2)(B) establishes that transitioning ILECs in deregulated markets shall price their retail services "…at any price higher than the lesser of the service's LRIC or the tariffed price on the date the market was deregulated, provided that the company does not increase rates for stand-alone residential local exchange voice service…before the date that the commission revises monthly per line support under the Texas High Cost Universal Service Plan (THCUSP) pursuant to PURA §56.031…." AT&T Texas and Embarq argued that the proposed rule narrows the scope of PURA §65.153(b)(2) because the proposed rule does not mirror the statute. PURA §65.153.(b)(2) includes the words "… before the date that the commission has the opportunity to revise the monthly per line support…." The proposed rule reads "…before the date that the commission revises the monthly per line support…." Embarq and AT&T Texas agreed that the language in PURA §65.153(b)(2) permits transitioning companies to raise rates after the commission "*has the opportunity to revise* [emphasis provided] the monthly per line support" under the THCUSP.

Embarq also argued that the modification in the published version of §26.230(c)(2)(B) could indefinitely suspend the right of Chapter 58-electing companies to raise their rates for stand-alone residential local exchange voice service. Embarq noted that even if the Legislature makes no changes with respect to the THCUSP, the commission's authority under PURA §56.031 is discretionary, both as to whether and when the commission may act after September 1, 2007. Embarq concluded that it is inappropriate for proposed §26.230(c)(2)(B) to require that the commission revise the THCUSP before electing companies are allowed to raise rates for stand-

alone residential local exchange voice service. Embarq argued that PURA §65.153 authorizes a transitioning company to raise its rates for stand-alone residential local exchange voice service at some point after September 1, 2007, even if the commission has taken no action pursuant to PURA §56.031. Embarq argued that the "…proposed rule's requirement that the Commission must revise the monthly per line support amounts under the THCUSP before rates can be raised is inappropriately presumptuous and is inconsistent with the statutory scheme."

AT&T Texas and Embarq recommended that §26.230(c)(2)(B) be modified to simply restate the precise statutory language from PURA §65.153(b)(2). However, Embarq recommended that the proposed rule's cross-reference to PURA §65.002(4) be retained.

TTA echoed the concerns of AT&T Texas and Embarq regarding §26.230(c)(2)(B) and noted that the text of the rule did not follow the language of PURA §65.153(b)(2). TTA noted that while the commission is required to provide a report to the Legislature regarding the THCUSP, the Legislature may or may not make changes to the THCUSP. In addition, TTA noted that PURA §56.031 allows the commission authority to act upon the THCUSP only after September 1, 2007 but does not mandate when the commission has to act upon the THCUSP after September 1, 2007. TTA reasoned that the Legislature, or commission, could decide not to revise the monthly per line support under the THCUSP at all, or decide not to make such change until sometime far into the future. TTA posited that by employing the language "has the opportunity to revise" the Legislature anticipated that THCUSP changes and the monthly per line support may or may not change, and should any change be undertaken it could take an extended time at the commission to accomplish. TTA concurred in the recommendations of

AT&T Texas and Embarq that §26.230(c)(2)(B) should be amended to follow the exact language of PURA §65.153(b)(2).

Commission response

The commission disagrees with AT&T Texas, Embarq and TTA that the proposed language of §26.230(c)(2)(B) may inappropriately limit the right of a transitioning company to raise its rates after September 1, 2007. The commission finds that the plain language of PURA §65.153(b)(2) indicates that the Legislature intended to preclude transitioning companies from raising rates for stand-alone residential local exchange voice service until such time as the commission addresses the matter in a proceeding contemplated by PURA §56.031. The commission recognizes that transitioning companies would prefer that the commission be obligated to conduct a review proceeding under PURA §56.031 by a date certain. However, the commission notes that the Legislature in PURA §65.153 could have simply empowered transitioning companies to raise stand-alone residential local exchange voice service rates after a particular date. Instead, the Legislature granted the commission the discretion in PURA §56.031 to revise monthly per line support amounts at the time of the commission's choosing after September 1, 2007, and then only after notice and opportunity to be heard is given to interested parties. Transitioning companies are therefore necessarily precluded from raising stand-alone residential local exchange voice service rates until such time, in the commission's discretion, as a proceeding is conducted to consider monthly per line support amounts available from the THCUSP where interested parties are afforded notice and an opportunity to be heard on the matter.

The commission notes that the proposed language of new §26.230(c)(2)(B) could be construed to mean that monthly per line support amounts from the THCUSP must be revised, rather than reviewed, before transitioning companies could raise stand-alone residential local exchange voice service rates. Accordingly, the commission has revised the language of proposed §26.230(c)(2)(B) to make clear that transitioning companies will be allowed to increase such rates at any time after the commission issues an appropriate order in a proceeding contemplated in PURA §56.031, even if the rates are not revised as a result. Furthermore, the commission notes that while the provisions of PURA §56.031 provide that monthly per line support amounts available from the THCUSP may not be revised before September 1, 2007, a proceeding to consider the adequacy of basic rates to support universal service pursuant to PURA §56.031 may be initiated at any time at the discretion of the commission.

Comments on §§26.230(d)(2), (d)(2)(A) and (d)(2)(B)

Comments on §26.230(d)(2)

Verizon commented on three issues associated with §26.230(d)(2), which establishes the standards for notice. Verizon argued that the language "A transitioning ILEC shall provide the informational notice required by this section…." implies that the informational notice itself is to be provided to the specified parties. Verizon contended that it should not be required to provide the actual informational notice to the indicated parties, but rather it should be required to provide a simple notice that an informational filing is forthcoming. Verizon suggested rewording this

section so to make clear that the actual informational notice filing is made only with the commission with a copy to OPC as §26.230(d)(2)(A) requires. Verizon proposed the following language for §26.230(d)(1):

> Notice Requirements. A transitioning ILEC shall provide notice to the commission, the Office of Public Utility Counsel (OPC), and to any person who holds a certificate of operating authority in the transitioning ILEC's certified area or areas, or who has an effective interconnection agreement with the transitioning ILEC, of an impending informational notice filing.

Commission response

The commission agrees with the premise of Verizon's argument regarding the provision of the informational notice to the specified parties. However, the language proposed by Verizon is not adopted. The commission finds that the text proposed by Verizon could be construed to mean that a transitioning ILEC need only inform the specified parties that an informational notice filing is forthcoming, without informing the specified parties of the nature and terms of the impending informational notice filing. Instead the commission adopts text that will result in the specified parties receiving notice that an informational filing is forthcoming and the nature and material terms of the impending filing. The commission finds that "nature and material terms" as used in the rule means that the notice of the impending filing, at a minimum, shall include a description of the service or services affected, any changes in rates that will result, and the effective dates of such changes. The commission has altered the text of §26.230(d)(1) accordingly.

Comments on §26.230(d)(2)(A)

With regard to §26.230(d)(2)(A) regarding filing of informational notice and confidential information, Verizon argued that a conflict exists between §§26.230(d)(2)(A) and (d)(2)(C) regarding access to confidential information. Verizon noted that §26.230(d)(2)(A) requires that any confidential information accompanying an informational filing "…shall be delivered to OPC." Verizon further noted that §26.230(d)(2)(C) indicates that access to confidential information filed with the commission as part of the informational filing is available to commission staff and OPC upon "…execution of a commission approved protective agreement." Verizon implied that the requirement of making confidential information directly available with OPC was unnecessary as any confidential information would be available to OPC under the provisions of §26.230(d)(2)(C). Verizon recommended removal of the words "including confidential information" from §26.230(d)(2)(A) and proposed the following revised language:

> Filing of informational notice and confidential information. At the time the informational notice is filed in Central Records, a copy of the informational notice shall be delivered to OPC. Copies of confidential information shall be filed in Central Records in accordance with §22.71(d) of this title.

AT&T Texas' reply comments supported Verizon's position with regard to §26.230(d)(2)(A). OPC strongly objected to Verizon's position, stating that the language proposed by the commission was consistent with the intent of PURA Chapter 65, Subchapter D requirements and its protections against anti-competitive behavior. OPC argued that the receipt of notice of the filing alone impeded its necessary review of the one-day informational notice filings and its responsibility to protect the interests of residential and small business customers.

Commission response

The commission appreciates Verizon's desire to avoid unnecessary duplication of informational notice filing materials and is persuaded that the duplication of the confidential materials for OPC review is an unnecessary burden upon the ILECs. While the commission recognizes OPC's concern regarding the expedient review of the ILECs' filings, it does not believe that there is an undue burden placed upon OPC regarding review of the confidential materials should a concern arise after the review of the informational notice. Under Verizon's proposed language OPC will retain full authority to review confidential material subject to the provisions of §26.230(d)(2)(C). Therefore, the commission adopts Verizon's proposed language for §26.230(d)(2)(A).

Comments on §26.230(d)(2)(B)

Verizon objected to the use of the word "affirm" in §§26.230(d)(2)(B)(i)-(ii) addressing the issues of rates, terms and conditions of the filing complying with the requirements of §26.230(c)(4) for retail services provided in a regulated market and §26.230(c)(3)-(4) for retail services provided in a deregulated market. Verizon argued that affirmation is unnecessary and that simply stating in the informational notice that the rates, terms and conditions of the filing comply with §26.230(c)(3) or §§26.230(c)(3)-(4), as the particular rule at issue may require, is sufficient because therein the requirements of PURA §§65.153(c) and (d) are mirrored. Verizon preferred the use of the word "state" in place of the word "affirm" for both §§26.230(d)(2)(B)(i) and (ii). TTA concurred in Verizon's recommendations regarding §§26.230(d)(2)(B)(i) and (ii).

In its reply comments, AT&T Texas supported Verizon's reasoning and proposal to replace the word "affirm" with the word "state" in §§26.230(d)(2)(B)(i) and (ii), arguing that the replacement would avoid any confusion or misinterpretation concerning the intended meaning of the word "affirm" in the given context. AT&T Texas noted that, according to *Webster's Dictionary*, "affirm" could mean "state positively" or it could mean "validate," and that different parties might choose different interpretations.

Commission response

The commission disagrees with the concern expressed by Verizon, TTA and AT&T Texas regarding the use of the word "affirm" and notes that the expedited review of the one-day informational notice filings requires the commission to rely heavily upon the affirmation of the ILEC regarding the statutory requirements set forth in PURA §§65.153(c) and (d) and mirrored in §§26.230(c)(3) and (4). While the commission does not go so far as to require an ILEC to file an affidavit supporting its compliance with the particular provision of §26.230(c) at issue, the commission finds that requiring the ILEC to merely "state" that the rates, terms and conditions comply with §26.230(c)(4) or §§26.230(c)(3)-(4) would not provide the commission with adequate assurance that the ILEC is in fact compliant. In the opinion of the commission, the use of the word "affirm" more accurately indicates the gravity of the assurance that the commission requires. Therefore, the commission retains the language in §§26.230(d)(2)(B)(i) and (ii).

All comments, including any not specifically referenced herein, were fully considered by the commission.

This new section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2005) (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 §§65.152-153 regarding general requirements and rate requirements for one-day informational notice filings provided by transitioning companies.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 65.152, and 65.153.

§26.230. Requirements Applicable to Chapter 65 One-day Informational Notice Filings.

(a) **Application**. This section applies to incumbent local exchange companies (ILECs), as defined in the Public Utility Regulatory Act (PURA) §51.002(3), with markets deregulated pursuant to PURA Chapter 65 who choose to offer services through one-day informational notice filings pursuant to PURA §§65.151-65.153. A transitioning company, as defined in PURA §65.002(5), which does not choose to offer services through a one-day informational notice filing must either offer services through ten-day informational notice filings pursuant to §§26.227-26.229 of this title (relating to Costs, Rates and Tariffs) or through filings pursuant to §§26.207-26.211 of this title (relating to Costs, Rates and Tariffs).

(b) **Purpose.** The purpose of this section is to establish the requirements for a transitioning ILEC to introduce new services, and/or to exercise pricing flexibility for basic and non-basic retail telecommunications services, and to outline the procedures for processing complaints regarding service offerings introduced by such informational notice filings.

(c) **Pricing standards.**

(1) In a market that remains regulated, the transitioning ILEC shall price its retail services in accordance with the provisions as set forth in §§26.224-26.226 of this title (relating to Costs, Rates and Tariffs).

(2) In a deregulated market, the transitioning ILEC shall price its retail services as follows:

(A) for all services, other than basic local telecommunications service, at a price higher than the service's long run incremental costs (LRIC); and

(B) for basic local telecommunications service, at any price higher than the lesser of the service's LRIC or the tariffed price on the date the market was deregulated, provided that the company does not increase rates for stand-alone residential local exchange voice service as defined in PURA §65.002(4) before the date that the commission revises, or declines to revise, monthly per line support under the Texas High Cost Universal Service Plan pursuant to PURA §56.031, regardless of whether the company is an electing company under PURA Chapter 58.

(3) In each deregulated market, a transitioning company shall make available to all residential customers throughout that market the same price, terms, and conditions for all basic and non-basic retail telecommunications services, consistent with any pricing flexibility available to the company on or before August 31, 2005.

(4) In any market, regulated or deregulated, the transitioning ILEC may not:

(A) establish a retail rate, term, or condition that is anticompetitive or unreasonably preferential, prejudicial, or discriminatory;

(B) establish a retail rate for a basic or non-basic service in a deregulated market that is subsidized either directly or indirectly by a basic or non-basic service provided in an exchange that is not deregulated; or

(C) engage in predatory pricing or attempt to engage in predatory pricing.

(5) A rate that meets the pricing requirements of paragraph (2) of this subsection is deemed compliant with paragraph (4)(B) of this subsection.

(d) **Procedures related to the filing of one-day informational notices and associated tariffs.** The provisions of this subsection apply to ILECs choosing to introduce new services and/or exercise pricing and packaging flexibility through one-day informational notice filings.

(1) **Notice requirements.** A transitioning ILEC shall provide notice of an impending informational notice filing to the commission, the Office of Public Utility Counsel (OPC), and to any person who holds a certificate of operating authority in the transitioning ILEC's certificated area or areas, or who has an effective interconnection agreement with the transitioning ILEC. Such notice shall inform the recipient of the nature and material terms of the impending filing.

(2) **Filing requirements.**

(A) **Filing of informational notice and confidential information.** At the time the informational notice is filed in Central Records, a copy of the informational notice shall be delivered to OPC. Copies of confidential information shall be filed in Central Records in accordance with §22.71(d) of this title (relating to Filings of Pleadings, Documents and Other Materials).

(B) **Format of filing.** An informational notice under this section must include the same elements as set forth in §26.227(c)(2)(D) of this title (relating to Procedures Applicable to Nonbasic Services and Pricing Flexibility for Basic and Nonbasic Services for Chapter 58 Electing Companies) and the following:

(i) For retail services offered in regulated markets, the transitioning company must demonstrate that the rates, terms, and conditions comply with the requirements of subsection (c)(1) of this section and affirm that the said rates, terms and conditions comply with requirements in subsection (c)(4) of this section.

(ii) For retail services offered in deregulated markets, the transitioning company must demonstrate that the rates, terms, and conditions comply with the requirements of subsection (c)(2) of this section and affirm that the said rates, terms and conditions comply with requirements in subsection (c)(3)-(4) of this section.

(C) **Access to confidential information.** Access to confidential information filed with the commission as part of an informational notice filing shall be available to commission staff and OPC, upon execution of a commission approved protective agreement.

(D) **Effective date.** A transitioning ILEC's service offering shall be effective one day after the transitioning ILEC files an informational notice with the commission.

(e) **Notice of deficiencies and disputes as to sufficiency or appropriateness of one-day informational notice filings.**

(1) The commission staff may file a notice of deficiency for incomplete filings or non-compliant filings or a pleading alleging that the service offering is inappropriately filed as a one-day informational notice.

(2) Within five working days after the date of the commission staff's filing, an applicant shall file an explanation of the actions it has taken or intends to take in response to the notice or pleading filed under paragraph (1) of this subsection.

(3) Disputes as to sufficiency or appropriateness of one-day informational notice filings shall be subject to the provisions of §26.227(d) of this title.

(f) **Complaints.** Complaints filed by an affected person, OPC or commission staff regarding service offerings introduced by one-day informational notice filings shall be subject to the provisions of §26.227(e) of this title.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority. It is therefore ordered by the Public Utility Commission of Texas that §26.230 relating to Requirements Applicable to Chapter 65 One-day Informational Notice Filings is hereby adopted with changes to the text as proposed.

SIGNED AT AUSTIN, TEXAS the 26th day of SEPTEMBER 2006.

PUBLIC UTILITY COMMISSION OF TEXAS

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PAUL HUDSON, CHAIRMAN

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JULIE PARSLEY, COMMISSIONER

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BARRY T. SMITHERMAN, COMMISSIONER

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