PROJECT NO. 41612

RULEMAKING TO AMEND P.U.C. SUBST. R. §26.111 RELATING TO CERTIFICATE OF OPERATING AUTHORITY (COA) AND SERVICE PROVIDER CERTIFICATE OF OPERATING AUTHORITY (SPCOA) CRITERIA	**§ § § § § § §**	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER ADOPTING AMENDMENT TO §26.111
AS APPROVED AT THE MARCH 6, 2014 OPEN MEETING

The Public Utility Commission of Texas (commission) adopts an amendment to §26.111, relating to Certificate of Operating Authority (COA) and Service Provider Certificate of Operating Authority (SPCOA) Criteria with changes to the proposed text as published in the October 18, 2013 issue of the *Texas Register* (38 TexReg 7231). The amendment implements a renewal process for each holder of a COA and each holder of a SPCOA as required by Public Utility Regulatory Act (PURA) §52.1035 (Relating to the Renewal of Certain Certificates). Failure to comply with the renewal process for a COA or SPCOA will result in the COA or SPCOA being invalidated after the end of an automatic extension period. This amendment is adopted under Project Number 41612.

No public hearing on this rulemaking project was held.

The commission received comments on the proposed amendment from AT&T Texas, Verizon Southwest, TEXALTEL, and Birch Communications, Cbeyond Communications LLC, TW Telecom of Texas, LLC, and the Texas Cable Association (collectively known as Joint Commenters). The commission also received reply comments from Verizon Southwest and Joint Commenters.

Due date of first renewal filing

Joint Commenters proposed the delay of the date for the first renewal filing until after April 30, 2014 to allow the commission time to initiate a project to determine whether there are other rules that are impacted by changes to this rule which should be revised.

Commission response

The commission agrees with Joint Commenters that the date for the first renewal filing should be after April 30, 2014. The commission has modified subsection (k)(2) to clarify that the first renewal filing shall be filed on or before June 1, 2014. While the commission agrees with delaying the date for the first renewal filing, the commission does not anticipate, at this time, the need for a project to determine whether other rules will be impacted by the renewal filing.

Senate Bill 259 (S.B. 259)

While Verizon did not oppose all of the proposed amendments, they requested additional changes be made to implement S.B. 259, and suggested republishing the Proposal for Publication in order to accomplish these changes. Verizon argued that PURA §65.101(c) provides that a deregulated company holding a COA is a nondominant carrier. Section 5 of S.B. 259 added PURA §65.102(b) which provides an exclusive list of statutory provisions which apply to deregulated companies. In addition, Verizon noted that section 2 of S.B. 259 amended PURA §52.154 to provide that the commission may not impose on a nondominant telecommunications utility (NTU) greater regulatory burdens than are imposed on a deregulated company under certain circumstances. Therefore, Verizon argued that any rule in Chapter 26 that applies to a

NTU that is not authorized by one of the listed statutory provisions must be revised to state that it does not apply to a deregulated company or to another NTU exempted by PURA §52.154. It was Verizon's belief that several provisions in this rulemaking would impose obligations on a deregulated company seeking a COA that the commission is no longer authorized to require. Verizon suggested revisions be made to clarify that sections do not apply (in whole or in part, as applicable) to deregulated companies or NTUs exempted under PURA §52.154. Specifically, Verizon suggested adding the word "applicable" to subsections (g)(4)(A) and (g)(4)(B). In addition, Verizon stated subsections (m) and (n) should be modified to state "[t]his subsection does not apply to a deregulated company holding a certificate of operating authority or to a qualified nondominant telecommunications utility under PURA §52.154," as both subsections are authorized by PURA §54.253 which does not apply to deregulated companies.

Commission response

The commission declines to adopt Verizon's proposal to modify subsections (g), (m), and (n). The commission understands Verizon's reasoning for suggesting these changes but determines that editing the rule to implement S.B. 259 is beyond the scope of this rulemaking. This rulemaking is specifically intended to implement PURA §52.1035 and the commission does not agree that edits to subsection (g), (m), and (n) are a logical outgrowth of the intended purpose of this rulemaking. Therefore, the commission declines to adopt Verizon's requested changes.

AT&T Texas proposed amendments designed to reflect the impact of S.B. 259 – now incorporated into PURA §52.154. AT&T Texas noted that such changes might be outside of the

scope of this particular rulemaking and therefore believes that either the rule should be re-published to include the proposed amendments or that a new rulemaking should be initiated. Specifically, AT&T Texas proposed that subsection (g)(4)(A) be modified to read "[t]he applicant must affirm that it will meet the commission's applicable quality-of-service standards…" and subsection (g)(4)(B) should likewise read "[t]he applicant must affirm that it is aware of and will comply with the applicable customer protection rules…." Additionally, AT&T Texas proposed amending subsection (k)(5) so it would read: "[a] certificate holder shall file all reports to the extent required by PURA…." AT&T Texas proposed adding "[t]his section (l) does not apply to a deregulated company holding a certificate of operating authority or to a qualified nondominant telecommunications utility under PURA §52" to subsection (l). Finally, AT&T Texas argued subsection (m) should be amended to read "[t]his section (m) does not apply to a deregulated company holding a certificate of operating authority or to a qualified nondominant telecommunications utility under PURA §52.154."

Verizon agreed with AT&T Texas' recommendation that the commission amend proposed subsection (l)(5) to provide that certificate holders must file all reports "to the extent" required by PURA. Verizon argued this change is required by S.B. 259 because deregulated companies and qualified NTUs under PURA §52.154 are subject only to the statutory provisions listed in PURA §65.102(b), which this provision is not.

Joint Commenters disagreed with the modifications AT&T Texas and Verizon proposed to subsections (g), (m), and (n) regarding implementation of S.B. 259. Specifically, Joint Commenters argued these changes are outside of the scope of this rulemaking because they were

not included in the notice published in the *Texas Register*. Joint Commenters argued that nothing in the published notice indicated that a change to these provisions is being considered and therefore cannot be considered under the Administrative Procedure Act (APA). Under the APA, Joint Commenters argued that when an agency revises a rule in response to comments received, an agency is required to republish the proposed rule for comment if the altered rule is not a logical outgrowth of the original rule. Joint Commenters argued that the published notice for this rule was narrowly focused and only included amendments to implement a specific statutory change altering reporting and recertification obligations. Joint Commenters classified AT&T Texas and Verizons' proposed changes as extending beyond this scope. Joint Commenters argued that if these changes are to be adopted the commission must republish.

Commission response

The commission declines to republish this rule to include AT&T Texas' proposed amendments to subsections (g), (k), and (l). The commission agrees with Joint Commenters that the proposed changes by AT&T Texas and Verizon regarding the implementation of S.B. 259 are outside of the scope of this rulemaking. AT&T Texas admits that its edits to subsections (g), (k), and (l) fall outside of the scope of this specific rulemaking which is intended to implement PURA §52.1035. AT&T Texas further acknowledges that in order to make their suggested edits the commission would most likely be required by the APA to republish the rule. The commission agrees with Joint Commenters that the changes proposed by AT&T Texas and supported by Verizon are not logical outgrowths of the proposed rule. The commission will consider opening a rulemaking to address S.B. 259's impact on §26.111 when this rulemaking is complete.

Joint Commenters argued that the rule changes proposed by AT&T Texas and Verizon run afoul of PURA's prohibition against discriminatory regulation. Joint Commenters also argued that once AT&T Texas and Verizon become fully deregulated, Competitive Local Exchange Carriers (CLECs) that provide service in the territory of these deregulated companies cannot be subjected to any regulatory burden not also applicable to AT&T Texas and Verizon. Joint Commenters stated that under the terms of PURA §52.154, the competing CLECs serving within these Incumbent Local Exchange Carriers' (ILECs) territory will be exempt from any regulatory requirement not listed there as well. Specifically, Joint Commenters took issue with AT&T Texas and Verizons' proposed changes to subsection (m) and (n) of the rule which are designed to free deregulated ILECs from compliance with portions of the rule, while leaving the obligations of CLECs untouched. Joint Commenters further argued that by implementing this proposed language the rule will impose a regulatory burden on CLECs in excess of the burden on ILECs and therefore would violate PURA.

Commission response

Because the commission declines to accept the edits of AT&T Texas and Verizon as they are outside the scope of this rulemaking, the commission finds the arguments presented by the Joint Commenters to be moot. This rulemaking project is intended to implement PURA §52.1035.

Subsection (k)(2)

TEXALTEL asserted that annual recertification is unnecessary and would result in unnecessary work for certificate holders and the commission. TEXALTEL argued that the pace of entry to the market is slow and therefore annual recertification is not needed to purge inactive CLECs from the commission's list of active certificate holders. TEXALTEL noted that the Legislature gave the commission flexibility in the implementation of the renewal schedule by stating that the renewal process may be performed on a one-time or more regular basis. TEXALTEL therefore recommended that a recertification process be used once now and, if in the future circumstances warrant it, possibly additional recertification no more often than every five years going forward.

Joint Commenters argued that an annual renewal is unnecessary and that the proposed language rejects the Legislature's option to require only a one-time recertification. Additionally, Joint Commenters stated that the commission is required to articulate a reason for requiring an annual filing and failed to meet this requirement because the commission provided no rationale for rejecting a one-time submission. Joint Commenters reasoned that the commission failed to identify a purpose that may only be fulfilled by imposing a filing requirement once a year as opposed to any other time period. Joint Commenters pointed out that the commission has been processing certifications since 1995, and has therefore been dealing with the fact that some CLECs ceased operations in Texas during the ensuing years. Joint Commenters therefore argued that due to these circumstances it is difficult to understand why there now exists a need for an annual filing, as opposed to a one-time filing, or a filing every ten years, in order to purge the database of inactive CLECs.

Joint Commenters proposed requiring recertification no more often than once every ten years. In the alternative, Joint Commenters argued that once AT&T Texas and Verizon become fully deregulated within the next few years, neither they, nor the CLECs that operate in these ILECs' territories, will be required to comply with the proposed amendments. Therefore, Joint Commenters concluded the commission should not adopt a rule that imposes more than a one-time filing as compliance with additional filings will not achieve the commission's stated goal of having an accurate list of active COA and SPCOA holders with updated contact information.

Commission response

The commission agrees with TEXALTEL and the Joint Commenters that an annual recertification is not necessary at this time. The commission agrees that annual recertification is not needed to purge inactive CLECs from the commission's list of active certificate holders. The commission also agrees with TEXALTEL that this may be accomplished with certification renewals that are required less frequently than annually or every five years. Accordingly, the commission has revised subsection (k)(2) to require a renewal filing by June 1, 2014 and every ten years thereafter. Though the commission determines that a filing need not occur as frequently as every five years, as TEXALTEL suggested, it may be necessary to require a certification renewal on a one-time basis during the ten-year interim. Accordingly, the commission has modified subsection (k) to provide for the ability of the commission to require each COA and SPCOA holder to file, the following year, a renewal of its certification.

Joint Commenters argued that subjecting CLECs to annual recertification and administrative penalties is inconsistent with Texas' policy of reducing regulatory burdens, and it also adds to an already discriminatory situation in that ILECs are not being subjected to a similar recertification requirement. Joint Commenters alleged this renewal process is anti-competitive.

Commission response

The commission disagrees with the assertion that a renewal process and administrative penalties are burdensome, discriminatory, or anti-competitive. This certification renewal process only requires that a company file minimal additional information from what has been previously required by the commission. Furthermore, the commission currently requires renewals for other types of communications companies, including pay phones, Automatic Dialing and Announcement Devices, and Interexchange Carriers. Though the commission does not find this process burdensome, it acknowledges that an annual filing is unnecessary, at this time, for the stated purpose, and therefore the commission has revised the rule language to require a renewal filing every ten years, or upon commission request.

Joint Commenters argued that an annual renewal will have unintended implications resulting in the interruption of service. Specifically, Joint Commenters argued that every contractual arrangement that requires CLECs to comply with "applicable law" in order to avoid being in default will be impacted.

Commission response

The commission agrees with the assertion that a renewal may have unintended implications resulting in the interruption of service. However, PURA §52.1035 clearly intends to make CLEC certification invalid for companies that fail to comply with the renewal process. Interruption of service can be avoided by complying with applicable rules and statutes which continues to be the obligation of all certificated communications companies.

Subsection (k)(3)

TEXALTEL proposed amending this subsection to move the effective date of decertification to 90 days after the end of the extension so that the necessary customer notice can be given before a certificate holder ceases operations. TEXALTEL expressed concern that the timeline for decertification in the rule will place COA and SPCOA holders, who run unintentionally afoul of the rule, in the predicament of having to continue providing service at the risk of being subject to an enforcement action for providing service without a certificate, or ceasing to provide service in violation of subsection (m)(1)(B), which requires a minimum 61 days' notice to customers.

Joint Commenters argued the extension period is too short. Specifically they argued that the current process for submission and review of a full application for certification is not structured so that a CLEC could expect to cure a contractual default within the time period. More specifically, Joint Commenters argued that many CLEC contracts only provide for a thirty day period during which time the contractual breach shall be cured.

Commission response

The commission agrees with TEXALTEL and the Joint Commenters comments regarding extending the effective date of decertification. Even though the commission determines that no different standard is being used here, the commission recognizes that an extension period shorter than 61 days may pose a challenge for COA and SPCOA holders. Therefore, the commission revised the rule to modify the automatic extension deadline to October 1st.

TEXALTEL recommended amending the proposed rule to state:

> COA and SPCOA holders will have an automatic extension of the filing deadline until May 31 (31 days after initial filing deadline of April 30) to comply with paragraph (1) of this subsection during which time notice will be sent by registered mail to the certificate holder's business address on file with the [c]ommission.

TEXALTEL argued this change is necessary in order to implement the intent of having an effective extension period. TEXALTEL stated that with a 31 day extension period, without notice, the extension period is rendered meaningless because a COA or SPCOA holder would not know that they needed to utilize the extension period.

TEXALTEL further commented that the rule does not provide notice to a COA or SPCOA holder that is about to be decertified because the holder failed to file the necessary report. TEXALTEL noted that the only notice provided would be when the new list of COA and SPCOA holders is published and those who are decertified are absent from this list. TEXALTEL stated this would result in a CLEC, who has unintentionally failed to file this report, deciding

between which law to violate; continuing to serve customers while it gives consumers the required notice that it is terminating service, or immediately terminating service, perhaps without notice. TEXATEL argued that the commission should add language regarding notice stating that the commission shall notify, by certified letter to the last known address, each SPCOA holder that has not timely filed the required renewal reports that it is about to be decertified so that the certificate holder can comply with the rule. TEXATEL argued notice is necessary because, in practice, commission reporting is delegated to mid-level management and changes in personnel, mergers, and reassignment of tasks might result in a company inadvertently forgetting to file routine reports with the commission. TEXALTEL stated that a carrier may be unaware that it has not filed the necessary reports and, without notice, would not know that it needed to correct the deficiency before it loses certification. Additionally, TEXALTEL noted that many larger companies have acquired SPCOAs through their merger history and confusion might exist regarding which reports need to be filed under which names. Finally, TEXALTEL stated that there are situations in which reports have been misfiled at the commission and, absent notice, the COA or SPCOA holder might be decertified even though they fully complied with the rules. For all of these reasons, TEXALTEL concluded notice should be given to COA or SPCOA holders who are at risk of losing their certification due to the failure to file the renewal.

Verizon supported TEXALTEL's proposal that the rule be amended to add a notice requirement to the certificate renewal process for COA and SPCOA holders. Specifically, Verizon supported TEXALTEL's proposal that all COA or SPCOA holders that miss the April 30 filing deadline be notified by registered mail that they failed to comply with the filing requirement. Verizon argued this notice would give those carriers an opportunity to make the required filing by May

31st to prevent the invalidation of their certificates and would help prevent carriers from forfeiting their certificates because of administrative oversight.

Joint Commenters took issue with the lack of notice provided before a certificate is automatically rendered invalid. They argued that voiding a CLEC's certification (its license to do business) without notice and an opportunity for a hearing could be challenged as an unconstitutional violation of due process rights. Instead they urged the commission to adopt a less draconian approach to the implementation of PURA §52.1035.

Commission response

The commission agrees with TEXALTEL and Verizon that the rule should be revised to provide for a longer automatic extension period; however, the commission declines to adopt the specific language proposed by TEXALTEL. The commission has modified subsection (k)(3) to establish an automatic extension of the filing deadline until October 1st. The commission agrees with the comments of TEXALTEL, Verizon, and the Joint Commenters that it is appropriate for the commission to provide notice to COA and SPCOA holders who have not complied with the certification renewal process and before any certificates are invalidated. Therefore, the commission has also modified subsection (k)(3) to provide that commission staff will send COA and SPCOA holders three notices during the automatic extension period. Notice and a longer extension period will allow additional time for certificate holders to come into compliance prior to invalidation.

Subsection (k)(4) and (k)(5)

Joint Commenters argued that the automatic invalidation of a COA or SPCOA for failing to file an annual certification renewal will have unintended consequences. Specifically, Joint Commenters stated that a potential ramification of losing certification would include the termination of any contract (including interconnection agreements) that requires a CLEC to be certified. Joint Commenters stated ILECs may argue that the requirement to be certificated is "material" to a contract and therefore the lack of certification is a default event (where the contract does not expressly state that loss of certification is an event of default, which some contracts make clear), and that in an event of default these companies will have even more of a burden placed upon them. Joint Commenters further argued that the termination of a contract, like an interconnection agreement with one or more of the ILECs on which a CLEC depends for necessary services and the exchange of traffic, would have significant negative consequences that should not be triggered by an inadvertent failure to file information with the commission.

In addition, Joint Commenters argued that even if a contracting party chooses not to declare a CLEC in default due to failure to file the annual certification renewal, the rule's provision for administrative penalties will financially punish any CLEC that opts to continue to serve its customers while rectifying its reporting error. Therefore, Joint Commenters proposed the elimination of penalties and enforcement action with respect to any actively operating CLEC that reapplies for certification within 10 days of receiving notice.

Commission response

The commission understands that the automatic invalidation of a COA or SPCOA for failure to file a certification renewal could have unintended consequences. However, the commission determines that any unintended consequences, due to a short extension period, will be mitigated by the revised longer automatic extension period and notices sent by commission staff to ILECs. The commission revised the automatic extension period to provide ample time for a company to discover their non-compliance with this rule and provides sufficient time for the company to correct any omissions or mistakes before the invalidation of the COA or SPCOA certificate. The commission concludes that it is the responsibility of the certificate holder to fully comply with all commission rules including filing requirements and that the filing of the certification renewal is necessary to maintain a valid certificate.

The commission disagrees with Joint Commenters and will not be adopting their suggestions regarding the removal of a penalty for non-compliance. The commission believes that this rule does not provide for a new penalty; a company has always been subject to penalties for operating in a manner that is not in compliance with commission rules, including operating without a valid certification. Additionally, the commission has clarified its position by amending the rule to make clear that a COA or SPCOA holder that is found to be invalid under this provision will no longer be in compliance with PURA §54.001.

Joint Commenters argued that there is no practical difference between revoking and voiding a certificate and therefore a rule that would void a CLEC's certification (its license to do business) without notice and opportunity for hearing could be challenged as an unconstitutional violation of due process rights.

Commission response

The commission disagrees with the Joint Commenters and concludes that the invalidation of a certificate is distinct from the revocation of a certificate, which does require notice and an opportunity for a hearing. PURA §52.1035 specifically authorizes the commission to immediately invalidate a COA or SPCOA for failure to comply with the certification renewal requirement after the automatic extension deadline has passed.

Joint Commenters took issue with what they argue is a short automatic extension for a late filing tied to a due date rather than the discovery of a failure to file. Joint Commenters argued that the current rule language omits any provision for notice of impending loss of certification and opens the door for administrative penalties and other enforcement actions being imposed on the erring CLEC even if the CLEC has promptly submitted a new application.

Joint Commenters argued that aspects of CLECs' operations and their ability to serve customers are dependent on the maintenance of a valid certificate which the automatic invalidation frustrates. Joint Commenters pointed to an example concerning CLEC's ability to obtain access to commercial property to provide service to tenants in response to tenant request as being an area where the automatic invalidation will have unintended consequences. It was Joint

Commenters' position that CLECs that lose certification (even if only temporarily) will be unable to avail themselves of the right to obtain entry into a commercial building, and potentially lose customers. Joint Commenters also fear that by holding an invalid certificate they may be in default and lose their right to remain in a building if their license agreement with a property owner requires them to maintain certification. Joint Commenters argued that invalidating an active CLEC's certification may prevent CLECs from having access to install or repair service for a customer because lessors may not let a CLEC holding an invalid certificate on the tenant's property.

Commission response

The commission agrees with the Joint Commenters, therefore the rule has been revised to include a longer automatic extension period and states that commission staff will provide three notices to CLECs who have not complied with the certification renewal process prior to invalidation. Though commission staff will provide notice of non-compliance, the commission finds that it is the responsibility of the COA or SPCOA certificate holder to comply with all commission rules and the failure to comply with commission rules has the potential for administrative penalties and the administration of other enforcement actions.

Subsection (f)

AT&T Texas requested that the commission further update the rule by strengthening the financial requirements for obtaining a COA or SPCOA. AT&T Texas argued that the financial requirements are outdated and therefore do not accurately reflect the capital requirements needed to start up a telecommunications business. AT&T Texas stated that stronger capital requirements

will provide consumers the benefit of choosing a provider which is more likely to maintain long-term market presence. AT&T Texas recognized this might be outside of the scope of the rulemaking and therefore recommends a project be opened to further review and update this rule.

Commission response

The commission declines AT&T Texas' proposal to update other subsections of the rule. The commission concludes that any amendments beyond implementation of PURA §52.1035 are beyond the scope of this rulemaking. PURA §52.1035 does not address the subsections of this subchapter which deal with financial requirements for obtaining a COA or SPCOA.

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.

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (West 2007 and Supp. 2013) (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, PURA §52.1035 which grants the commission the authority to create and maintain a renewal process for COAs and SPCOAs.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §52.1035.

§26.111. Certificate of Operating Authority (COA) and Service Provider Certificate of Operating Authority (SPCOA) Criteria.

(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 (COAs) and service provider certificates of operating authority (SPCOA) established in the Public Utility Regulatory Act (PURA), Chapter 54, Subchapters C and D.

(b) **Definitions.**

(1) Affiliate -- An affiliate of, or a person affiliated with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under the common control with, the person specified.

(2) Annual Report -- A report that includes but is not limited to the certificate holder's primary business telephone number, toll-free customer service number, email address, authorized company contact, regulatory contact, complaint contact, emergency contacts (primary and secondary) and migration contacts (operation and policy) which is submitted to the commission on an annual basis. Each provided contact shall include the contact's company title.

(3) Control -- The term control (including the terms controlling, controlled by and under common control with) means the power, either directly or indirectly through one or more affiliates, to direct or cause the direction of the management or policies of a person, whether through ownership of voting securities, by contract, or otherwise.

(4) Executive officer -- When used with reference to a person, means its president or chief executive officer, a vice-president serving as its chief financial officer, or a vice-president serving as its chief accounting officer, or any other officer of the person who performs any of the foregoing functions for the person.

(5) Facilities-based certification -- Certification that authorizes the certificate holder to provide service using its own equipment, unbundled network elements, or E9-1-1 database management associated with selective routing services.

(6) Permanent employee -- An individual that is fully integrated into the certificate holder's business. A consultant is not a permanent employee.

(7) Person -- Includes an individual and any business entity, including and without limitation, a limited liability company, a partnership of two or more persons having a joint or common interest, a mutual or cooperative association, but does not include a municipal corporation.

(8) Principal -- A person or member of a group of persons that controls the person in question.

(9) Shareholder -- The term shareholder means the legal or beneficial owner of any of the equity in any business entity, including without limitation and as the context and applicable business entity requires, stockholders of corporations, members of limited liability companies and partners of partnerships.

(c) **Ineligibility for certification.**

(1) An applicant is ineligible for a COA or SPCOA if the applicant is a municipality.

(2) An applicant is ineligible for a COA if the applicant has not created a proper separation of business operations between itself and an affiliated holder of a certificate of convenience and necessity as required by PURA §54.102 (relating to Application for Certificate).

(3) An applicant is ineligible for a SPCOA 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.

(4) The commission will not grant an SPCOA to a holder of a:

(A) CCN for the same territory; or

(B) COA for the same territory.

(d) **Application for COA or SPCOA certification.**

(1) A person applying for COA or SPCOA certification must demonstrate its capability of complying with this section. A person who operates as a COA or SPCOA or who receives a certificate under this section shall maintain compliance with this section.

(2) An application for certification shall be made on a form approved by the commission, verified by oath or affirmation, and signed by an executive officer of the applicant.

(3) Except where good cause exists to extend the time for review, the presiding officer shall issue an order finding whether the application is deficient or complete within 20 days of filing. Deficient applications, including those without

necessary supporting documentation, will be rejected without prejudice to the applicant's right to reapply.

(4) While an application for a certificate or certification amendment is pending, an applicant shall inform the commission of any material change in the information provided in the application within five working days of any such change.

(5) Except where good cause exists to extend the time for review, the commission will enter an order approving, rejecting, or approving with modifications, a new or amendment application within 60 days of the filing of the application.

(6) While an application for COA or SPCOA certification or certification amendment is pending, an applicant shall respond to a request for information from commission staff within ten days after receipt of the request by the applicant.

(e) **Standards for granting certification to COA and SPCOA applicants.** The commission may grant a COA or SPCOA to an applicant that demonstrates that it is eligible under subsection (c) of this section, has the technical and financial qualifications specified in this section, has the ability to meet the commission's quality of service requirements, and it and its executive officers and principals do not have a history of violations of rules or misconduct such that granting the application would be inconsistent with the public interest. In determining whether to grant a certificate, the commission shall consider whether the applicant satisfactorily provided all of the information required in the application for a COA or SPCOA.

(f) **Financial requirements.** To obtain COA or SPCOA certification, an applicant must demonstrate the shareholders' equity required by this subsection.

(1) To obtain facilities-based certification, an applicant must demonstrate shareholders' equity of not less than $100,000. To obtain resale-only or data-only certification, an applicant must demonstrate shareholders' equity of not less than $25,000.

(2) For the period beginning on the date of certification and ending one year after the date of certification, the certificate holder shall not make any distribution or other payment to any shareholders or affiliates if, after giving effect to the distribution or other payment, the shareholders' equity of the certificate holder is less than the amount required by this paragraph. The restriction on distributions or other payments contained in this paragraph includes, but is not limited to, dividend distributions, redemptions and repurchases of equity securities, or loans or loan repayments to shareholders or affiliates.

(3) Shareholders' equity shall be documented by an audited or unaudited balance sheet for the applicant's most recent quarter. The audited balance sheet shall include the independent auditor's report. The unaudited balance sheet shall include a sworn statement from an executive officer of the applicant attesting to the accuracy, in all material respects, of the information provided in the unaudited balance sheet.

(g) **Technical and managerial requirements.** To obtain COA or SPCOA certification, an applicant must have and maintain the technical and managerial resources and ability to

provide continuous and reliable service in accordance with PURA, commission rules, and other applicable laws.

(1) To obtain facilities-based certification, an applicant must have principals, consultants or permanent employees in managerial positions whose combined experience in the telecommunications industry equals or exceeds five years. To obtain resale-only or data-only certification, an applicant must have principals or permanent employees in managerial positions whose combined experience in the telecommunications industry equals or exceeds one year.

(2) To support technical qualification, applicants must provide the following documentation: the name, title, number of years of telecommunications or related experience, and a description of the experience for each principal, consultant and/or permanent employee that the applicant will rely upon to demonstrate the experience required by paragraph (1) of this subsection.

(3) An applicant shall include the following in its initial application for COA or SPCOA certification:

(A) Any complaint history, disciplinary record and compliance record during the 60 months immediately preceding the filing of the application regarding: the applicant; the applicant's affiliates that provide utility-like services such as telecommunications, electric, gas, water, or cable service; the applicant's principals; and any person that merged with any of the preceding persons;

(i) The complaint history, disciplinary record, and compliance record shall include information from any federal agency including the

U.S. Securities and Exchange Commission; any self-regulatory organization relating to the sales of securities, financial instruments, or other financial transactions; state public utility commissions, state attorney general officers, or other regulatory agencies in states where the applicant is doing business or has conducted business in the past including state securities boards or commissions, the Texas Secretary of State, Texas Comptroller's Office, and Office of the Texas Attorney General. Relevant information shall include the type of complaint, status of complaint, resolution of complaint, and the number of customers in each state where complaints occurred.

(ii) The applicant may request to limit the inclusion of this information if it would be unduly burdensome to provide, so long as the information provided is adequate for the commission to assess the applicant's and the applicant's principals' and affiliates' complaint history, disciplinary record, and compliance record.

(iii) The commission may also consider any complaint information on file at the commission.

(B) A summary of any history of insolvency, bankruptcy, dissolution, merger, or acquisition of the applicant or any predecessors in interest during the 60 months immediately preceding the application;

(C) A statement indicating whether the applicant or the applicant's principals are currently under investigation or have been penalized by an attorney

general or any state or federal regulatory agency for violation of any deceptive trade or consumer protection laws or regulations; and

(D) Disclosure of whether the applicant or applicant's principals have been convicted or found liable for fraud, theft, larceny, deceit, or violations of any securities laws, customer protection laws, or deceptive trade laws in any state.

(4) **Quality of service and customer protection.**

(A) The applicant must affirm that it will meet the commission's quality-of-service standards as listed on the quality of service questionnaire contained in the application. The quality-of-service standards include E9-1-1 compliance and local number portability capability. Data-only providers are not subject to the requirements for E9-1-1 and local number portability compliance as applicable to switched voice services.

(B) The applicant must affirm that it is aware of and will comply with the customer protection rules and disclosure requirements as set forth in Chapter 26, Subchapter B, of this title (relating to Customer Service and Protection).

(5) **Limited scope of COAs and SPCOAs.** If, after considering the factors in this subsection, the commission finds it to be in the public interest to do so, the commission may:

(A) Limit the geographic scope of the COA.

(B) Limit the scope of an SPCOA's service to facilities-based, resale-only, data-only, geographic scope, or some combination of the preceding list.

(h) **Certificate Name.** All local exchange telephone service, basic local telecommunications service, and switched access service provided under a COA or SPCOA must be provided in the name under which certification was granted by the commission. The commission shall grant the COA or SPCOA certificate in only one name.

(1) The applicant must provide the following information from its registration with the Texas Secretary of State or registration with another state or county, as applicable:

(A) Form of business being registered (*e.g.*, corporation, company, partnership, sole proprietorship, etc.);

(B) Any assumed names;

(C) Certification/file number; and

(D) Date business was registered.

(2) Business names shall not be deceptive, misleading, inappropriate, confusing or duplicative of existing name currently in use or previously approved for use by a Certificated Telecommunications Provider (CTP).

(3) Any name in which the applicant proposes to do business will be reviewed for compliance with paragraph (2) of this subsection. If the presiding officer determines that any requested name does not meet the requirements of paragraph (2) of this subsection, the presiding officer shall notify the applicant that the requested name may not be used by the applicant. The applicant will be required to amend its application to provide at least one suitable name in order to be certificated.

(i) **Amendment of a COA or SPCOA Certificate.**

(1) A person or entity granted a COA or SPCOA by the commission shall file an application to amend the COA or an SPCOA in a commission approved format in order to:

(A) Change the corporate name or assumed name of the certificate holder.

(i) Name change amendments may be granted on an administrative basis, if the holder is in compliance with applicable commission rules and no hearing is requested.

(ii) Commission staff will review any name in which the applicant proposes to do business. If staff determines that any requested name is deceptive, misleading, vague, inappropriate, or duplicative, it shall notify the applicant that the requested name may not be used by the applicant. The applicant will be required to provide at least one suitable name or the amendment may be denied.

(B) Change the geographic scope of the COA and SPCOA.

(C) Sell, transfer, assign, or lease a controlling interest in the COA or SPCOA or sell, transfer or lease a controlling interest in the entity holding the COA or the SPCOA. An application for this type of amendment must:

(i) be filed at least 60 days prior to the occurrence of the transaction;

(ii) be jointly filed by the transferor and transferee;

(iii) comply with the requirements for certification; and

(iv) comply with applicable commission rules.

(D) Change Type of Provider from resale-only, facilities-based only or data-only restrictions on a SPCOA certificate.

(E) Discontinuation of service and relinquishment of certificate, or discontinuation of optional services. Such an application is subject to subsections (m) and (n) of this section.

(2) If the application to amend is for corporate restructuring, a change in internal ownership, or an internal change in controlling interest, the applicant may file an abbreviated amendment application, unless the ownership or controlling interest involves an uncertificated company, significant changes in management personnel, or changes to the underlying financial qualifications of the certificate holder as previously approved. If the commission staff cannot make a determination of continued compliance based on the applicable substantive rules from the information provided on the abbreviated amendment application, then a full amendment application shall be filed.

(3) When a certificate holder acquires or merges with another certificate holder (other than a CCN holder), the acquiring entity must file a notice within 30 days of the closing of the acquisition or merger in a project established by staff. Staff shall have 10 business days to review the notice and determine whether a full amendment application will be required. If staff has not filed, within 10 business days, a request to docket the proceeding and determination that a full amendment application is required, a notice of approval may be issued. Notice to the commission shall include but not be limited to:

(A) A joint filing statement;

(B) Certificated entity names, certificate numbers, contact information, and statements of compliance; and

(C) An affidavit from each certificated entity attesting to compliance of COA or SPCOA certification requirements.

(4) No later than five working days after filing an amendment application or amendment notice with the commission, the applicant must provide a copy of the amendment application or notice to all affected 9-1-1 entities and the Commission on State Emergency Communications.

(5) If the application to amend requests any change other than a name change, the factors as set forth in subsections (c) and (d) of this section may be considered by the commission in determining whether to approve an amendment to a COA or SPCOA.

(j) **Non-use of certificates.** Applicants shall use their COA or SPCOA certificates expeditiously.

(1) A certificate holder that has discontinued providing service for a period of 12 consecutive months after the date the certificate holder has initially begun providing service must file an affidavit on an annual basis attesting that it continues to possess the required technical and financial resources necessary to provide the level of service proposed in its initial application.

(2) A certificate holder that has not provided service within 24 months of being granted the certificate by the commission may have its certificate suspended or revoked.

(k) **Renewal of certificates.** Each COA and SPCOA holder is required to file with the commission a renewal of its certification once every ten years. The commission may, prior to the ten year renewal requirement, require each COA and SPCOA holder to file, the following year, a renewal of its certification.

(1) The certification renewal will consist of:

(A) the certificate holder's name;

(B) the certificate holder's address; and

(C) the most recent version of the annual report the commission requires the certificate holder to submit to comply with subsection (l)(1) of this section.

(2) The certification renewal shall be filed on or before June 1, 2014 and every ten years thereafter.

(3) COA or SPCOA holders will have an automatic extension of the filing deadline until October 1st of each reporting year to comply with paragraph (1) of this subsection. The commission staff will send three notices to each COA and SPCOA holder that has not submitted its certification renewal by June 1st. The first notice will be sent on or before July 1st, the second notice will be sent on or before August 1st, and the third notice will be sent on or before September 1st. Failure to send any of these notices by the commission or failure to receive any of these notices by a COA or SPCOA holder shall not affect the requirement to renew a certificate under this section by October 1st of the renewal period.

(4) Failure to timely file the annual renewal required in paragraph (1) of this subsection on or before October 1st of each reporting year will automatically render the certificate of the COA or SPCOA invalid.

(5) COA or SPCOA holders that are found to be invalid are no longer in compliance with PURA §54.001.

(6) COA or SPCOA holders that continue to provide regulated telecommunications services under an invalid COA or SPCOA may be subject to administrative penalties and other enforcement actions.

(7) A certificate holder whose COA or SPCOA certificate is no longer valid may obtain a new certificate only by complying with the requirements prescribed for obtaining an original certificate.

(l) **Reporting Requirements.**

(1) Each COA or SPCOA holder must provide and maintain accurate contact information using the annual report. At a minimum, the COA or SPCOA holder shall maintain a current regulatory contact person, complaint contact person, primary and secondary emergency contact, operation and policy migration contact, business physical and mailing address, primary business telephone number, toll-free customer service number, and primary email address. The COA or SPCOA holder shall submit the required information in the manner established by the commission.

(2) The annual report is due on or before April 30 of each calendar year. The COA or SPCOA holder must electronically submit the required information in a manner established by the commission.

(3) When terminating or disconnecting service to another CTP, COA and SPCOA holders shall file a copy of the termination/disconnection notice with the commission not later than two business days after the notice is sent to the CTP. The service termination/disconnection notice shall be filed under a project number established for that purpose.

(4) COA and SPCOA holders shall file a notice of the initiation of a bankruptcy in a project number established for that purpose. The notice must be filed not later than the fifth business day after the filing of the bankruptcy petition. The notice of bankruptcy must also include, at a minimum, the following information:

(A) The name of the certificated company that is the subject of the bankruptcy petition, the date and state in which bankruptcy petition was filed, type of bankruptcy (*e.g.*, Chapter 7, 11, or 13, and whether it is voluntary or not), the bankruptcy case number; and

(B) The number of affected customers, the type of service being provided to the affected customers, and the name of the provider(s) of last resort associated with the affected customers.

(5) A certificate holder shall file all reports required by PURA and this title, including but not limited to: §26.51 of this title (relating to Reliability of Operations of Telecommunications Providers); §26.76 of this title (relating to Gross Receipts Assessment Report); §26.80 of this title (relating to Annual Report on Historically

Underutilized Businesses); §26.85 of this title (relating to Report of Workforce Diversity and Other Business Practices); §26.89 of this title (relating to Information Regarding Rates and Services of Nondominant Carriers); §26.465 of this title (relating to Methodology for Counting Access Lines and Reporting Requirements for Certified Telecommunications Providers); and §26.467 of this title (relating to Rates, Allocation, Compensation, Adjustments and Reporting).

(m) **Standards for discontinuation of service and relinquishment of certification.** A COA or SPCOA holder may cease operations in the state only if commission authorization to cease operations has been obtained. A COA or SPCOA holder that ceases operations and relinquishes its certification shall comply with PURA §54.253 (relating to Discontinuation of Service by Certain Certificate Holders).

(1) Before the certificate holder ceases operations, it must give notice of the intended action to the commission, each affected customer, the Commission on State Emergency Communications, each wholesale provider of telecommunications facilities or services from which the certificate holder purchased facilities or services, the Texas Universal Service Fund, and the Office of Public Utility Counsel (OPC).

(A) The notification letter shall clearly state the intent of the certificate holder to cease providing service.

(B) The notification letter shall give customers a minimum of 61 days of notice of termination of service, and the date of termination of service shall be clearly stated in the notification letter.

(C) The notification letter shall inform customers of the carrier of last resort or make other arrangements to provide service as approved by the customers.

(2) A COA or SPCOA holder that intends to cease operations shall file with the commission an application to cease operations and relinquish its certificate, which shall provide the following information:

(A) Name, address, and phone number of certificate holder;

(B) COA or SPCOA certificate number being relinquished;

(C) The commission docket number in which the COA or SPCOA was granted;

(D) A description of the areas in which service will be discontinued and whether basic service is available from other certificate holders in these areas;

(E) A description of any contractual arrangements with customers that will not be honored, as a consequence of the cessation of operations; and

(F) A statement regarding the disposition of customer credits and deposits, and a sworn statement stating the authority to relinquish certification, that proper notice of the relinquishment has been provided to all customers, and that the information provided in the application is true and correct.

(3) All customer deposits and credits shall be returned within 60 days of notification to cease operations and relinquish certification.

(4) Any switchover fees that will be charged to affected customers as a consequence of the cessation of operations shall be paid by the certificate holder relinquishing the certificate.

(5) Commission approval of the cessation of operations does not relieve the COA or SPCOA of obligations to its customers under contract or law.

(n) **Standards for discontinuing optional services.** A COA or SPCOA holder discontinuing optional services shall comply with PURA §54.253.

(1) The COA or SPCOA holder shall file an application with the commission to discontinue optional services, which shall provide the following information:

(A) Name, address, and phone number of certificate holder;

(B) COA or SPCOA certificate number being amended;

(C) The commission docket number in which the COA or SPCOA was granted;

(D) A description of the optional services that will be discontinued and whether such services are available from other certificate holders in the areas served by the certificate holder;

(E) A description of any contractual arrangements with customers that will not be honored, as a consequence of the discontinuation of optional services; and

(F) A sworn statement stating the authority to discontinue service options, that proper notice of the discontinuation of service has been provided to all customers, and that the information provided in the amended application is true and correct.

(2) Notification to each customer receiving optional services is required, consisting of the following information:

(A) The notification letter shall clearly state the intent of the certificate holder to cease an optional service and a copy of the letter shall be provided to the commission and OPC.

(B) The notification letter shall give customers a minimum of 61 days of notice of discontinuation of optional services.

(3) All customer deposits and credits affiliated with the discontinued optional services shall be returned within 30 days of discontinuation.

(4) The certificate holder shall maintain the optional services until it has obtained commission authorization to cease the optional services.

(5) Commission approval of the discontinuation of an optional service does not relieve the certificate holder of obligations to its customers under contract or law.

(o) **Revocation or suspension.** A certificate granted pursuant to this section is subject to amendment, suspension, or revocation by the commission for violation of PURA or commission rules or if the holder of the certificate does not meet the requirements under this section to operate as a COA or SPCOA. A suspension of a COA or SPCOA certificate requires the cessation of all COA or SPCOA activities associated with obtaining new customers in the state of Texas. A revocation of a COA or SPCOA certificate requires the cessation of all COA or SPCOA activities in the state of Texas, pursuant to commission order. The commission may also impose an administrative penalty on a person for violations of law within its jurisdiction. The commission staff or any affected person may bring a complaint seeking to amend, suspend, or revoke a COA

or SPCOA's certificate. Grounds for initiating an investigation that may result in the suspension or revocation include the following:

(1) Non-use of approved certificate for a period of 24 months, without re-qualification prior to the expiration of the 24-month period;

(2) Providing false or misleading information to the commission;

(3) Bankruptcy, insolvency, failure to meet financial obligations on a timely basis, or the inability to obtain or maintain the financial resources needed to provide adequate service;

(4) Violation of any state law applicable to the certificate holder that affects the certificate holders' ability to provide telecommunications services;

(5) Failure to meet commission reporting requirements;

(6) Engaging in fraudulent, unfair, misleading, deceptive, or anti-competitive practices or unlawful discrimination in providing telecommunications service;

(7) Switching, or causing a customer's telecommunications service to be switched, without first obtaining the customer's permission;

(8) Billing an unauthorized charge, or causing an unauthorized charge to be billed, to a customer's telecommunications service bill;

(9) Failure to maintain financial resources in accordance with subsection (f)(1) of this section;

(10) A pattern of not responding to commission inquiries or customer complaints in a timely fashion;

(11) Suspension or revocation of a registration, certification, or license by any state or federal authority;

(12) Conviction of a felony by the certificate holder, a person controlling the certificate holder, or principal employed by the certificate holder, or any crime involving theft, fraud, or deceit related to the certificate holder's service;

(13) Failure to serve as a provider of last resort if required to do so by the commission;

(14) Failure to provide required services to customers under the federal or Texas Universal Service Fund;

(15) Failure to comply with the rules of the federal or Texas Universal Service Fund; and

(16) Violations of PURA or any commission rule or order applicable to the certificate holder.

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 §26.111 relating to Certificate of Operating Authority (COA) and Service Provider Certificate of Operating Authority (SPCOA) Criteria is hereby adopted with changes to the text as proposed.

SIGNED AT AUSTIN, TEXAS the 18th day of MARCH 2014.

PUBLIC UTILITY COMMISSION OF TEXAS

DONNA L. NELSON, CHAIRMAN

KENNETH W. ANDERSON, JR., COMMISSIONER

BRANDY D. MARTY, COMMISSIONER