PROJECT NO. 26955

RULEMAKING TO ESTABLISH BUSINESS/MARKETING CODE OF CONDUCT FOR CERTIFICATED TELECOMMUNICATIONS UTILITIES	**§**	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER ADOPTING NEW §26.133
AS APPROVED AT THE SEPTEMBER 18, 2003 OPEN MEETING

The Public Utility Commission of Texas (commission) adopts new §26.133, relating to Business and Marketing Code of Conduct for Certificated Telecommunications Utilities (CTUs), with changes to the proposed text as published in the April 18, 2003 issue of the *Texas Register* (28 TexReg 3189). The rule implements Public Utility Regulatory Act (PURA) §51.001 and §64.001 relating to fair business practices and safeguards against fraudulent, unfair, misleading, deceptive, or anticompetitive practices in order to ensure quality service and a competitive market. The rule establishes standards relating to communications by CTU employees or authorized agents with competitors and competitors' end-user customers, corporate advertising and marketing, information sharing and disclosure, and requires the adoption of such standards as company policy. The rule also requires CTUs to disseminate and train all existing and new employees and agents on the specific requirements set forth in the rule. This new section is adopted under Project Number 26955.

A public hearing on the proposed section was held at commission offices on May 29, 2003. Representatives from AT&T Communications of Texas, L.P. (AT&T), MCI WorldCom Communications, Inc. (MCIW), Office of Public Utility Counsel (OPUC), Sage Telecom of Texas, L.P. (Sage), Southwestern Bell Telephone, L.P., (SBC), Southwest Competitive

Telecommunications Association and Logix Communications (collectively referred to as Joint Commenters), Sprint Corporation (Sprint), Office of the Attorney General of the State of Texas (OAG), Texas Telephone Association (TTA) and Verizon Southwest (Verizon) attended the hearing and provided comments. To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

The commission received written comments on the proposed new section from AT&T, MCIW, OPUC, Sage, SBC, Joint Commenters, Sprint, TSTCI, OAG, TTA and Verizon.

General comments

Joint Commenters supported the implementation of a Code of Conduct but stressed that such a code cannot be deemed as a replacement for substantive regulation. Joint Commenters pointed out that since competitors must often rely on the wholesale actions of its incumbent wholesale supplier who is also the primary competitor in the retail market, PURA envisioned more proactive enforcement to address observable manifestations of potential improper conduct rather than assuming compliance where industry observation is not possible or feasible.

AT&T also pointed out that the focus of this rule is to address the concerns and complaints related to incumbent local exchange company (ILEC) mistreatment of their wholesale customers and retail competitors. AT&T averred that although this rule is a positive step in developing a competitive local exchange market, it is nonetheless a half-measure compared to structural

separation of the wholesale and retail operations of ILECs, which eliminate incentives for anti-competitive behavior by the ILECs in the wholesale environment.

Sage supported the publication of explicit rules to set standards for proper conduct for telecommunications carriers, their employees and agents.

OAG supported this rule and commented that it provides additional protections against anti-competitive practices needed in the still developing competitive telecommunications marketplace. OAG further commented that the rule is narrowly focused on specific anti-competitive activities, yet encompasses all employees and agents that are potentially able to engage in such activities. OAG supported the commission's effort in creating broad standards for conduct which are tailored to specific needs in regulating the telecommunications industry.

OPUC supported the establishment of a code of conduct for CTUs. TSTCI supported the rule and commented that it is balanced and not unduly burdensome for the small ILECs.

MCIW supported the rule stating that it will benefit the public by deterring anti-competitive activities, and help create a marketplace that is more conducive to fair competition.

Sprint commented that since ethical and fair business practices are critically important to the conduct and success of any business, every CTU should, as Sprint has done, adopt comprehensive policies regarding business and sales ethics. Sprint stated that it is in the best

interest of every CTU to reaffirm this ongoing commitment to integrity. Furthermore, Sprint stated that the overarching principles of business conduct should include guidelines to ensure fair competition among businesses and guidelines to protect customers against anti-competitive acts, as well as guidelines to protect the property rights of others such as competitive information. Every employee must be instructed to conduct business in a legal and ethical manner when conducting sales or marketing activities, and must represent products, services, benefits and pricing accurately. Sprint suggested that specialized training incorporating specific sales ethics, policy training, and certification should be added in each CTU's rigorous new hire training for every customer representative.

In addition, Sprint commented that every CTU should have clearly articulated policies identifying what constitutes violations to these policies and the consequences of such acts. All Sprint employees are required to review and comply with its internal policies and verification of employees' agreement to comply is accomplished through on-line intranet certification.

Commission response

Most of the commenters are generally supportive of the commission's efforts to establish an industry-wide rule regarding business and marketing activities. The non-ILEC CTUs are concerned about the opportunities for ILECs to engage in improper conduct and anticompetitive activities since they are both a wholesale supplier of essential facilities, as well as a direct competitor in their respective retail telecommunications markets. The commission understands

the market dynamics and shares these concerns. While some of the commenters believe that PURA envisioned a more proactive approach such as structural separation of the ILEC's wholesale and retail operations, the commission believes that the measures taken in this rulemaking, which include provisions for both the assessment of administrative penalties, as well as suspension, restriction, and revocation of a CTU's certificate of operating authority, will address concerns relating to fair business practices and safeguards against fraudulent, unfair, misleading, deceptive, or anticompetitive practices.

Specific comments

Subsection (c)(2) relating to communications

To ensure that technicians act in a manner that is not discriminatory, Joint Commenters proposed adding the words "directly or indirectly" after the word "promote" in subsection (c)(2), while deleting the words "false or misleading" in that same paragraph. MCIW supported Joint Commenters' proposed revision to this subsection. Joint Commenters opined that, consistent with the Pennsylvania Code of Conduct, nondiscrimination requires that ILEC technicians act in the same manner whether they are providing installation and repair service on behalf of the ILEC or competitive local exchange companies (CLECs). If the technician is engaging in their wholesale role of providing installation and maintenance services on behalf of a CLEC, the technicians must not act in a manner detrimental to the CLEC. Joint Commenters and MCIW stated that the inclusion of the indirect/direct language is to clarify that action taken to lead a

customer to change providers would be in violation of this rule even if those actions are not overt or are indirect. MCIW noted that the sole duty of an installer of service for a competitor at a customer's site is to install service for the competitor. Therefore there is no need for an installer to make statements about a competitor or the competitor's service, nor should the installer leave behind a brochure or flyer touting the service of the installer's company.

Joint Commenters proposed deleting the words "false or misleading," in the situations addressed by subsection (c)(2), stating that it is inappropriate for the ILEC technician to make any statement regarding a CLEC's service. Joint Commenters reminded the commission that in the context of subsection (c)(2), the ILEC technician's only reason for being at the customer location is to fulfill the ILEC's wholesale obligation to the CLEC. Whether deemed as an agent of the CLEC or not, Joint Commenters opined that this technician's role is to support the CLEC service in place rather than use the install or repair activity as an opportunity to undermine the customer's continued patronage of its CLEC provider. Joint Commenters argued that any other result would allow the ILEC to abuse the wholesale arrangement.

SBC opposed the revision proposed by Joint Commenters. First, SBC noted that the Pennsylvania Code of Conduct language quoted by Joint Commenters does not include the words "directly or indirectly" after "promote." Secondly, SBC claimed that deleting the word "false or misleading" from this subsection would prohibit a CTU from making any statements whatsoever about a competitor's service, rendering the restriction overly broad and would not be sufficiently narrowly tailored to withstand a constitutional challenge under the "Central Hudson

analysis" set forth in *U.S. West, Inc. v. Federal Communications Commission et al*, 182 F.3d 1224 (10th Cir. 1999).

SBC requested clarification on the scope of prohibition in the phrase "or promote any of its services to end-user customers." Specifically, SBC commented that the rule should clarify whether this prohibition applies only to employee-initiated communications, or whether it also included customer-initiated communications.

AT&T opined that no further modification of the rule language should be required, but suggested that the preamble should clarify that the rule does not permit any interaction by the wholesale CTU's employee on behalf of the wholesale CTU's retail or affiliate operations. Alternatively, AT&T would support the Pennsylvania Code of Conduct language. Both AT&T and Joint Commenters recommend the commission state within the rule preamble that the prohibition on promotions by a wholesale CTU's employee to a competitor CTU's end-user customer applies to all communications, including customer initiated communications, since the wholesale CTU's employee is performing work on behalf of the competitor CTU. OPUC also believed that the prohibition should apply to customer-initiated communications.

Joint Commenters emphasized that SBC's attempt to permit a sales role for its employees performing wholesale functions on behalf of CLECs demonstrated the urgent need for structural separation.

TTA asserted that if the intent of the rule is to prevent any wholesale CTU employee acting on behalf of its competitor from initiating or answering any questions from the customer regarding competitive service, customers will have to contact the business office instead and that is an onerous requirement. TTA stated that the end-user customers should come first and any person capable of answering questions for a customer should be allowed to do so. TTA does agree that it would not be appropriate for a wholesale CTU's employee acting on behalf of its competitor to initiate any marketing oriented conversations with a customer.

Commission response

The commission is not persuaded by the comments to insert the words "directly or indirectly" after the word "promote" in this subsection. The commission does not believe that the insertion of such words is necessary since the rule expressly prohibits promotional activities by a CTU employee or authorized agent while performing services on behalf of a competitor. The commission believes that the express, unqualified prohibition against promotions applies to both direct and indirect promotions. For example, the rule would prohibit a CTU employee or authorized agent from leaving a flyer or brochure behind which touted the services of its company. Furthermore, the commission would note that the Pennsylvania Code of Conduct does not include the words "directly or indirectly" after the term "promote."

The commission also does not believe that a customer-initiated communication exception for promotional activities during that period of time where a CTU or authorized agent is performing

a service on behalf of a competitor is appropriate. If an end-user customer initiates any communication regarding a CTU's services, or that of a competitor, when a CTU employee or authorized agent is performing a service on behalf of a competitor, the CTU employee or authorized agent should advise the end-user that he or she is not in a position to discuss such matters, and perhaps suggest that the end–user customer direct their inquiries to the appropriate company's business office.

The commission is, however, persuaded that the deletion of the words "false or misleading" in this subsection is appropriate. The deletion of these words would prohibit the CTU employee or agent from making any statement about competitors' services while performing services on behalf of a competitor. The commission believes this would be appropriate since the CTU employee or agent is appearing before the end-user customer solely for the purpose of performing a service on behalf of a competitor. Under this very limited circumstance, the commission does not believe it is appropriate for a CTU or authorized agent to use this carrier-to-carrier engagement to comment on competitor's services. The commission believes that this very limited restriction is sufficiently tailored to withstand a constitutional challenge under *U.S. West, Inc. v. Federal Communications Commission et al*, 182 F. 3d 1224 (10th Cir. 1999).

Subsection (d)(1) relating to corporate advertising and marketing

Joint Commenters suggested adding the word "unfair" after the word "false" in subsection (d)(1) to match the purpose of the rule. Joint Commenters opined that the rule could not achieve its

stated purpose if "unfair" advertising and marketing is permitted, citing the recent advertisements by ILECs that focus on the ownership of wires to create an implication that the ILEC service is superior. Joint Commenters further argued that such an advertisement creates a false impression to the viewing public since ILECs are required to provide services and elements to CLECs in a manner that allows a reasonable opportunity to compete and is non-discriminatory, as required by federal Communications Act of 1996 §251 and §271. Joint Commenters further opined that SBC and its agents were attempting to create the false impression that a customer's particular carrier may be in or near financial insolvency. Joint Commenters stated that Pennsylvania has addressed the issue of unfair advertising in its Code of Conduct.

SBC argued against Joint Commenters' suggestion to include "unfair" in this subsection, stating that a rule that prohibits "unfair advertising" or "unfair marketing" would be vague, unenforceable, and would violate parties' First Amendment commercial free speech rights. SBC further opined that since the word is not defined in the rule, a CTU would never know whether their marketing or advertising complies with the rule. Finally, SBC pointed out that Joint Commenters claim that this same issue is covered by the Pennsylvania Code of Conduct is not correct; rather, the Pennsylvania Code of Conduct only prohibits advertising that is "false or deceptive."

TTA noted that the Deceptive Trade Practices Act addresses issues such as slander, and as such, procedures already exist to address any misconduct or concern raised by Joint Commenters.

OPUC supported Joint Commenters argument that "unfair" be added in subsection (d)(1). OPUC cited language from PURA §64.001(b) and stated that the word "practice" is a broad term that could reasonably be interpreted to include advertising. OPUC further opined that the burden of proving that a CTU has engaged in an unfair practice would be on the complainant.

MCIW agreed with Joint Commenters' proposal to add "unfair," stating that such an addition is consistent with the statutory authority on which the commission relies to promulgate this rule. MCIW disagreed with the comments made by SBC at the public hearing that this was protected speech, arguing that the complainant should be allowed to make the complaint based on its allegation that the practice is "unfair." Furthermore, MCIW opined that the respondent CTU would have the burden of persuasion that the speech, in fact, was protected, and then the decision maker would make a determination based on the facts and case law provided by the parties.

OAG agreed in part to Joint Commenters' rationale that language in subsection (d)(1) should reflect the language in the purpose clause of the rule. As an alternative, the OAG suggested that the commission reference the statutory provision within the rule, so that the sentence would read, "a CTU, CTU employee or authorized agent shall not engage in advertising or marketing practices as enumerated in §64.001(a) with respect to the offering of any telecommunications service."

Joint Commenters also suggested including the word "disparaging" in subsection (d)(1). Joint Commenters argued that disparaging advertising, particularly in the early stages of a market transition and made by the former monopolist, works as a barrier to entry by increasing the costs of market entry since the competitor would have to consider a countering advertisement to negate the ILEC's advertising. Joint Commenters argued that including the word "disparaging" is consistent with the Pennsylvania Code of Conduct.

SBC opposed inclusion of the word "disparaging" in this subsection. SBC cited Staff's earlier decision not to include the word "disparaging" in the Proposal for Publication, which was a recommendation by Joint Commenters to the "strawman" code of conduct. SBC further argued that inclusion of the word "disparaging" would violate a CTU's constitutional right to engage in commercial free speech, and that even if such a rule were constitutional, there would be disputes over the meaning of "disparaging." Additionally, SBC noted that MCIW's counsel at the January 8, 2003 workshop in this project acknowledged that adequate legal remedies already exist to address any perceived problems in a CTU's advertising or marketing campaign.

Commission response

The commission does not agree with the comments to include words "unfair" or "disparaging" in this subsection. The purpose of this rule, as articulated in subsection (a), is to implement the policy guidelines under PURA Chapter 51 and the customer protection policy under PURA Chapter 64 relating to fair business practices and safeguards against fraudulent, unfair,

misleading, deceptive, or anticompetitive practices in order to ensure quality service and a competitive market. Based on the legal and policy requirements of PURA, nothing prevents a complainant from making a complaint based on its allegation that the practice is "unfair" under the rule. The commission believes that inclusion of the aforementioned terms is inappropriate and unnecessary, and that the prohibition against false, misleading, or deceptive practices, including advertising, adequately addresses the type of behavior the commission is compelled to constrain. The commission also considers the terms "unfair" and "disparaging" to be too vague to be enforceable. To the extent that a complainant believes they have grounds for a cause of action regarding a CTU's advertising campaign, the commission believes that there are other adequate legal remedies available through the Deceptive Trade Practices Act. The commission also notes that the Pennsylvania Code of Conduct does not prohibit "unfair" or "disparaging" advertising; but only prohibits "false or deceptive" advertising.

Subsection (d)(4) relating to corporate advertising and marketing

SBC suggested modifying the first sentence in subsection (d)(4) to read, "shall not falsely state or *falsely* imply..."(emphasis added) to be consistent with subsections (d)(2) and (d)(3). Further, SBC opined that it is not clear what types of statements this subsection attempts to prevent, and requested that the commission provide specific examples of the kinds of statements this subsection prohibits in order to minimize or eliminate confusion or misunderstanding.

MCIW stated its opposition to SBC's request that subsection (d)(4) should include examples of types of prohibited statements, arguing that any examples would not limit a complaint that fit the subsection's requirements.

Commission response

The commission agrees with SBC's recommendation to insert the word "falsely" before the word "imply" in this subsection of the rule. The commission finds that SBC's consistency argument has merit, and that the term "falsely" was intended to modify the term "imply." If the continuation of any telecommunications service is, in fact, contingent upon ordering any other telecommunications service, the CTU may so state or imply.

The commission also believes that while examples of prohibited statements might be somewhat illustrative, it would be impossible to develop an exhaustive list of potential statements to which a competitor could take exception. Alleged violations of this section of the rule will have to be addressed on a case-by-case basis. Accordingly, the commission agrees with MCIW comments that including examples of types of prohibited statements, as requested by SBC, would not limit a complaint under this subsection of the rule.

Subsection (f) relating to references to other Chapter 26 substantive rules

Joint Commenters urged the commission to change the first sentence in subsection (f) to the following: "Commission rules regulating CTU conduct applies to both employees and authorized agents acting on behalf of the CTU. The following is a representative list of such rules." Joint Commenters opined that such a clarification to the language would avoid any negative presumptions that a rule inadvertently left off the list would not apply to the conduct of a CTU employee and authorized agent. Further, Joint Commenters opined that the proposed language avoids the need to regularly amend this rule when new substantive rules are added.

Verizon opposed the inclusion of subsection (f) in the rule. Verizon asserted that including this subsection in the rule in order to make CTU employees aware of certain rules would require all rules to have references to all other commission rules. Verizon argued that companies are already required to comply with new and existing rules, and have processes for distributing rules and training the appropriate company personnel, and as such, this subsection is not necessary.

SBC argued that the commission should clarify that the references to the seven rules in this subsection do not mean those rules should become an official part of the "Business and Marketing Code of Conduct" established in this rulemaking. SBC opined that it would be very unwieldy and unworkable to incorporate the seven rules into a company's existing code of conduct because many of the rules are extremely long, and most of these rules do not apply to many CTU employees. SBC provided an example where the commission's cramming and slamming rules do not apply to workers such as accounting and information technology employees who have no billing responsibilities or who have little or no customer contact.

AT&T supported SBC's initial comments and those raised by SBC and Verizon during the public hearing about incorporating actual commission rules into a carrier's official Code of Conduct, and, at the same time, needing to comply with the intent of this subsection, which is to disseminate the requirements of specific commission rules to those employees who need to know. AT&T further supported their objection to the requirement that all of the referenced rules within the Code of Conduct need to be disseminated. AT&T argued that it has systems and processes in place to disseminate regulatory requirements and provide adequate training to the applicable personnel. AT&T opined that compliance with regulatory requirements should be the commission's primary concern and test, and peremptorily imposing requirements for internal dissemination of "regulatory requirements" unnecessarily involves the commission in the CTU's management practices (particularly in the case of non-dominant CTUs). Further, AT&T reiterated its earlier comments on the straw man that oppose unnecessary duplication of regulatory requirements in different rules. AT&T agreed with SBC's public hearing comments that a carrier should not face multiple penalties for violating the same requirement simply because that requirement is found in multiple rules. AT&T recommended reordering subsection (f) as subsection (g), and subsection (g) as subsection (f). AT&T further recommended modifying the first sentence of the current subsection (g)(1) and (g)(2) to "applicable provisions of this section, except subsections (g) and (h)...." AT&T opined that such changes would clarify that the referenced rules as well as the rules' penalty provisions need not be specifically incorporated into the Code of Conduct nor disseminated as part of the Code.

OPUC argued that including references to the seven substantive rules with a brief description of the rule, either in the code of conduct or as an addendum to the code of conduct, is appropriate, and serves to alert CTU employees to the rule requirements. Instead of distributing copies of the seven rules to each employee and agent, OPUC suggested that the rule could be made readily available to all employees by posting on a department bulletin board, in an employee break room, or available electronically.

MCIW opposed the suggestion by OPUC at the hearing that all CTUs incorporate as part of the codes of conduct or as addenda to their codes the substantive rules enumerated in subsection (f). MCIW opined that those rules are more properly incorporated at the employee level, rather than company-wide, into the policies, practices, and training of the appropriate employees, who carry out the functions as their job descriptions.

In response to the concerns raised by the parties at the public hearing regarding the appropriateness and intent of this provision, the OAG offered the following substitute language for the initial paragraph: "References to other Chapter 26 substantive rules. The following commission rules also affect the conduct of CTU employees and authorized agents. All CTU employees and agents must be trained to comply with the specific substance of these rules which affect their employment responsibilities. Copies of specific commission rules shall be made available by the CTU to any employee or agent upon their request."

OPUC stated its opposition to Sprint's proposal that the commission certify that the CTU's standard policy and training package meets or exceeds Texas requirements because it is ineffective and costly for multi-state CTU's to have a state-specific code of conduct. OPUC argued that each CTU should be required to implement and disseminate a Texas-specific code of conduct, or in the alternative, have a Texas specific addendum to the CTU's national code of conduct. OPUC stated that such an addendum could be minimal; a stapled photocopy with all the required information would suffice.

AT&T also opposed any additional requirement to provide affidavits or "certification" of compliance.

Commission response

The commission disagrees with Joint Commenters suggestion to change the first sentence. The commission believes that the language, as articulated in the proposal for publication, clearly states that a CTU is not relieved of its responsibility to abide by other commission rules. Further, the commission believes that the language makes clear the fact that references to other rules does not exclude CTU's from complying with additional substantive rules the commission may adopt in the future.

The commission finds Verizon's arguments to be without merit, and therefore, declines to delete subsection (f). The commission believes subsection (f) serves as a guide for CTU's by including

references to other subsections that affect the conduct of CTU employees and authorized agents. As mentioned above, the commission recognizes that this list may change as new substantive rules are adopted or existing rules are repealed, and makes clear that applicability of each section is unaffected by the reference in this section and does not relieve any CTU of its responsibility to abide by other applicable commission rules.

While the commission agrees with the comments made by SBC Texas, AT&T, Verizon, and Sprint that it would be difficult to incorporate the seven rules into a company's existing code of conduct, the commission does believe that copies of the specific commission rules should be made readily available by the CTU to any employee or agent. The commission believes the language provided in subsection (g) clearly require a CTU to adopt and disseminate applicable provisions of the rule while allowing a CTU to disseminate such information in a manner that best meets each company's internal processes. The commission agrees with MCIW's reply comments that rules are more properly incorporated at the employee level, rather than company-wide, into the policies, practices, and training that are tailored to the employees' specific job functions. In order to accommodate these matters, the commission adopts the modifications suggested by the OAG regarding the training of employees on specific rules based upon their job function, as well as making the rules available to employees upon request.

Subsection (g) relating to adoption and dissemination

OPUC proposed that the rule should specify that the commission and OPUC both be provided the codes of conduct when requested by either agency.

Verizon opposed OPUC's proposal, stating it would be unduly burdensome, and unnecessary. Verizon opined that companies should not be required to provide copies of their code of conduct without just cause — for example, after the commission has deemed it necessary to establish a formal proceeding to investigate a potential violation — and then it should be provided only to the commission.

SBC requested that "and acknowledgement" either be clarified or deleted from subsection (g)(2). SBC stated that "acknowledgement" typically is indicated by an employee signing a form or checking off a box, and that SBC cannot force such a requirement on non-management employees of SBC due to union restrictions. SBC stated that such action is not permitted under the collective bargaining agreement entered into between the Communications Workers of America (CWA) and SBC. However, SBC noted that a non-management employee's refusal to sign does not relieve these employees of their need and obligation to follow and comply with the SBC Code of Business Conduct, and that non-signing employees who subsequently violate SBC's code of conduct are treated and disciplined just like employees who sign the code of conduct. Consequently, SBC stated that while it can provide documentation that every non-management employee receives the code of conduct and is expected to comply with it, SBC would not be able to provide documentation showing that every non-management employee *acknowledges* the code of conduct. Therefore, SBC requested clarification that documentation

showing that a particular non-management employee (a) was provided a copy of the code of conduct, (b) refused to sign it, and (c) nevertheless is bound by it, would adequately demonstrate "receipt and acknowledgement" of the code of conduct by that employee. AT&T supported SBC's recommendation to delete the word "acknowledgement," arguing that "compliance" should be the general touchstone of regulation, not the CTU's processes for ensuring compliance.

OPUC recommended that when an employee is provided the code of conduct, "acknowledgement" could consist of a note signed by the employee's supervisor that the unionized employee read the code of conduct, was given the acknowledgement form, and did not sign it. OPUC further suggested that the acknowledgement form should also acknowledge that the employee was made aware of the availability of the seven rules listed in subsection (f) of this rule.

TTA argued that CTU's already have standing company policies, based on the business practices of their individual company, that address how their employees will conduct business. TTA further stated that most companies at the workshop agreed that the requirement of the rule to adopt the commission rules as part of each company's code of conduct is very burdensome. TTA argued that if the intent of the rulemaking is to ensure that CTU employees are aware of the standards and requirements of the commission, then each company (especially national companies) should have the flexibility to train and inform their employees by means of their own internal policies.

Regarding the costs and benefits of rule implementation, Sprint stated that the cost of implementation should be borne by CTUs that have not yet implemented such procedures as a necessary cost of doing business. For CTUs such as Sprint that have extensive, existing procedures in place, Sprint suggested that the commission consider a one-time certification of the CTU's existing policy and training package to indicate that it is fully compliant with the proposed rule.

Sprint questioned the economic feasibility of mandating specific language for internal procedures that apply to a broader market than the state of Texas. Sprint averred that for multi-state CTUs such as Sprint, it is both ineffective and costly to have unique business and marketing conduct policies for each operating state. Sprint recommended that the commission should certify that the CTU's standard policy and training package meets or exceeds the Texas requirements, and the CTU should make that certified standard package available to the commission upon its request. Joint Commenters agreed with Sprint that the commission should not mandate specific wording of a company's code of conduct as long as the flexibility in wording does not compromise substantive compliance of the rule.

Commission response

The commission does not agree with Sprint's proposal that the commission render a one-time certification attesting to each and every CTU's compliance with the instant rule. Such an undertaking would be undoubtedly time consuming and of limited value. The rule is clear on

what is expected and what is required of all CTUs. If a CTU has any doubts regarding its compliance with this rule, it is free to seek guidance from the commission any time. While the commission has the right to request information relative to CTUs' compliance with these rules at any time, the commission believes that a more efficient use of its resources is to address such matters on a more streamlined basis, or perhaps on a case-by-case basis as facts and circumstances warrant monitoring or investigation in the case of a complaint from an industry participant or affected party.

The commission agrees with comments that the CTUs should have flexibility to train and inform their employees of the requirements of commission rules. The commission refrains from dictating the precise form and means associated with the adoption and dissemination of the requirements of this rule. The burden of compliance is on the CTU. The CTU must, upon request, show that they have adopted the provisions of this rule as company policy, disseminated such policies to employees, at least on a need-to-know basis, and implemented adequate training and enforcement procedures.

The commission believes that the word "acknowledgement" should be clarified, as suggested by SBC, but not deleted since not all CTU's contract with union employees. The commission believes that in instances where a CTU has entered into a collective bargaining agreement with union employees that have limitations as SBC has described, then "acknowledgement" can mean that a particular non-management employee (a) was provided a copy of the code of conduct, (b) refused to sign it, and (c) nevertheless is bound by it.

The commission agrees in part with Verizon's comments that it would be unduly burdensome and unnecessary to provide the code of conduct to both the commission and to OPUC. However, the commission does not agree with Verizon that a formal proceeding is required prior to a CTU providing the commission with a copy of the CTU's internal policies, including its code of conduct. At any time, the commission can request that a CTU provide the commission with a copy of such documents.

Subsection (h) relating to investigation and enforcement

OPUC argued that within subsection (h)(2) the "repeatedly and recklessly" language sets the standard for certificate revocation at too high a level. OPUC suggested that the language be changed to "repeatedly *or* recklessly."

OAG agreed with OPUC's suggestion that the standard be changed to repeatedly or recklessly in violation. OAG argued that it is easy to imagine instances of repetitive violations alone or extreme recklessness of conduct, which would warrant the revocation of a certificate.

SBC Texas had no objections to this subsection but notes that if the commission is contemplating imposing these kinds of serious penalties on CTUs who violate any portion of this rule, the commission needs to ensure that the rule's requirements are clear and unambiguous to all CTUs who are expected to comply with it.

MCIW commented that PURA §64.052 permits the commission to act only in the case of repeated violations. MCIW argued that incorporation of the language as proposed by OPUC would exceed the commission's statutory authority and suggested the more appropriate language for the subsection (h)(2) standard to simply be "repeated."

Commission response

The commission agrees that MCIW is correct in stating that PURA §64.052 limits the commission in suspending or revoking certificates or registrations to just repeated violations. The language in subsection (h)(2) shall be changed from "repeatedly and recklessly" to just "repeatedly."

Question 1: What should be the proper and permissible standard of proof for a violation of any provision of this rule?

Sprint commented that the appropriate standard of proof should be no less than the permissible standards under the existing complaint process for other alleged violations of the commission rules.

OAG commented that the appropriate standard of proof is the standard for non-jury civil cases in the State of Texas as prescribed by the Texas Government Code §2001.081 and the commission's

procedural rule §22.221, as well as the State Office of Administrative Hearings' (SOAH) procedural rule §155.51. OAG also commented that it would be problematic to effectively coordinate enforcement efforts, as required under proposed §26.133(h)(3), if a different standard of proof is used by the commission, as this is also the effective standard for enforcement actions taken by OAG.

OPUC, MCIW, and Joint Commenters all commented that the proper standard of proof should be a preponderance of evidence. In particular MCIW commented that Texas Government Code §2003.049 mandates a preponderance of the evidence as the standard of proof. MCIW stated that this provision permits the commission to alter a finding of fact (FOF) or a conclusion of law (COL) by an administrative law judge (ALJ) only if the commission determines the ALJ issued FOF and COL is not supported by a preponderance of the evidence. MCIW determined that any decision made by a person other than the Commissioners or an ALJ, thus, also would appear subject to the preponderance of the evidence as the standard of proof.

SBC commented that the commission should employ the same standard of proof that is used in contested case proceedings before the SOAH.

TSTCI proposed in its comments that the standard of proof should be unquestionable and based on clear and sufficient grounds. TSTCI expressed concern that adoption of the business/marketing code of conduct rule without clear standards for enforcement may increase occurrences where inadvertent failure to comply with commission rules may cause an

enforcement proceeding to be initiated although no other party was harmed by the non-compliance.

Verizon commented that the appropriate standard of proof is clear and convincing evidence of the violation.

AT&T commented that the usual evidentiary standard applied in commission contested case proceedings should apply in this instance, *i.e.,* sufficient and competent evidence to satisfy a "substantial evidence" standard of judicial review.

Commission response

The commission declines to take a position or any action concerning the above question for purposes of this rulemaking.

Question 2: What proof is sufficient and allowable pursuant to PURA to meet such standards (i.e., affidavit only, valid customer complaint, live testimony, letter, etc.)?

Sprint commented that any complaint of an alleged violation should certainly meet a sufficient minimum level of documentation to warrant further action on the part of the commission. The commission should take care to weed out "frivolous" complaints that do not establish a "prima facie" case, intended to hamper or hamstring a healthy and robust competitive environment.

OAG asserted that any of the examples given (affidavits, complaints, etc.,) could constitute sufficient proof in appropriate circumstances. The sufficiency of proof will, of necessity, need to be addressed on a case by case basis, and may vary depending upon the particular subsections of the rule which are the subject of the alleged violations and all of the surrounding facts and circumstances. OAG gave an example of a situation in which numerous consumers have complained of a particular utility's conduct. OAG opined that it should not be necessary to prove that each and every consumer's complaint is valid in order to prove a pattern of conduct which the commission would find objectionable and worthy of penalty or sanction. OAG stated that this being the case, a universally applicable standard for sufficiency of proof under this rule may not be achievable or desirable.

SBC Texas commented that the same evidentiary standards used in contested case proceedings before SOAH should apply to alleged violations of any portions of the proposed rule.

OPUC commented that the commission should allow the admission of affidavits, customer letters and other forms of evidence when determining whether a violation has occurred.

MCIW commented that the commission by rule, and SOAH by statute, apply the rules of evidence used in nonjury civil trials to contested cases. MCIW stated a paper or recorded telephonic complaint, an affidavit, a complainant letter or a "sworn statement" does not pass muster under the applicable rules of evidence as sufficient to establish a violation. MCIW

proclaimed the consumer complaints are hearsay and as such deny respondents the due process mandated by PURA §14.052(d). MCIW argued that live witnesses or depositions of the complainants provide a respondent the due process PURA mandates. MCIW cited the commission's procedural rules and the Administrative Procedure Act (APA) as requiring the right of cross-examination in administrative hearings. However, MCIW proposed that the parties to the complaint could negotiate and reach agreement regarding whether each consumer complaint required the complainant to be at the hearing and/or the complainant's deposition to establish the violation. MCIW argued that affidavits and complaints are not sufficient to establish the validity of the alleged violation. As such, MCIW contended that the commission must prove each consumer complaint consistent with the rules of civil evidence applicable to nonjury trials, before the commission can impose a penalty or sanction.

TSTCI expressed concern about enforcement proceedings being initiated with insufficient grounds. TSTCI stated there should be written documentation or live testimony concerning the rule violation from a party that is alleged to have been harmed in the first place. TSTCI argued that if the proof consists of a customer complaint or live testimony, TSTCI believed the commission should have corroborating evidence supporting the grounds for the complaint in the form of a letter, live testimony or affidavit from another customer before an enforcement proceeding is initiated. TSTCI stated that an affidavit is not sufficient enough to prove a violation.

Joint Commenters stated that regarding the specific type of proof required, it is not clear that a streamlined letter or affidavit process would be practical. Joint Commenters cited various court decisions recognizing that it is well established in law that the hearsay rule is not applicable to administrative proceedings so long as evidence upon which a decision is ultimately based is both substantial and probative value.

Verizon commented that neither an affidavit, customer complaint, letter, nor "live testimony" is sufficient "proof" of a violation. Verizon argued that if a complaint, letter, etc. raised a contested issue of fact, then the commission must allow the parties to fully investigate all allegations. In its reply comments, Verizon agreed with OAG that proof of a violation should be addressed on a case-by-case basis. Verizon disagreed with OAG's assessment that it is not necessary to prove that each and every consumer's complaint is valid. Verizon stated that a thorough investigation of each and every allegation brought against a CTU for a violation is required before a CTU's certification may be revoked, suspended, or fines levied.

AT&T argued that, when an administrative penalty is involved, due process requires live witnesses and the opportunity for cross examination. AT&T cited the APA, Texas Government Code §2001.087, as also contemplating cross-examination, which is a fundamental aspect of due process and full and fair adjudication of disputed facts.

Commission response

The commission declines to take a position or any action concerning the above question for purposes of this rulemaking.

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 section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2003) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and PURA §51.001 and §64.001, which grant the commission authority to make and enforce rules necessary to protect customers of telecommunications services consistent with the public interest and to encourage a fully competitive telecommunications marketplace.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 51.001, and 64.001.

§26.133. Business and Marketing Code of Conduct for Certificated Telecommunications Utilities (CTUs).

(a) **Purpose**. The purpose of this section is to establish a code of conduct in order to implement Public Utility Regulatory Act (PURA) §51.001 and §64.001 relating to fair business practices and safeguards against fraudulent, unfair, misleading, deceptive, or anticompetitive practices in order to ensure quality service and a competitive market.

(b) **Application**. This section applies to all certificated telecommunications utilities (CTUs), as defined in §26.5 of this title (relating to Definitions), and CTU employees. This section also applies to all authorized agents of the CTU.

(c) **Communications**.

(1) A CTU employee or authorized agent shall conduct communications with competitors and competitors' end-user customers with the same degree of professionalism, courtesy, and efficiency as that performed on behalf of their employer and end-user customers.

(2) A CTU employee or authorized agent, while engaged in the installation of equipment or the rendering of services (including the processing of an order for the installation, repair or restoration of service, or engaged in the actual repair or restoration of service) on behalf of a competitor shall not make statements

regarding the service of any competitor and shall not promote any of the CTU's services to the competitor's end-user customers.

(d) **Corporate advertising and marketing**.

(1) A CTU, CTU employee or authorized agent shall not engage in false, misleading or deceptive practices, advertising or marketing with respect to the offering of any telecommunications service.

(2) A CTU, CTU employee or authorized agent shall not falsely state or falsely imply that the services provided by the CTU on behalf of a competitor are superior when purchased directly from the CTU.

(3) A CTU, CTU employee or authorized agent shall not falsely state or falsely imply that the services offered by a competitor cannot be reliably rendered, or that the quality of service provided by a competitor is of a substandard nature.

(4) A CTU, CTU employee or authorized agent shall not falsely state nor falsely imply to any end-user customer that the continuation of any telecommunications service provided by the CTU is contingent upon ordering any other telecommunications service offered by the CTU. This section is not intended to prohibit a CTU from offering, or enforcing the terms of, any bundled or packaged service or any other form of pricing flexibility permitted by PURA and commission rules.

(e) **Information sharing and disclosure.**

(1) Pursuant to the federal Telecommunications Act §222(a), each CTU has a duty to protect the confidentiality of proprietary information of, and relating to, other CTUs.

(2) Pursuant to the federal Telecommunications Act §222(b), each CTU that receives or obtains proprietary information from another CTU for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts or any other unauthorized purpose.

(f) **References to other Chapter 26 substantive rules**. The following commission rules also affect the conduct of CTU employees and authorized agents. All CTU employees and agents must be trained to comply with the specific substance of these rules which affect their employment responsibilities. Copies of specific commission rules shall be made available by the CTU to any employee or agent upon their request. The applicability of each of the following sections is unaffected by the reference in this section and does not relieve any CTU of its responsibility to abide by other applicable commission rules.

(1) Section 26.21 of this title (relating to General Provisions of Customer Service and Protection Rules);

(2) Section 26.31 of this title (relating to Disclosures to Applicants and Customers);

(3) Section 26.32 of this title (relating to Protection Against Unauthorized Billing Charges ("Cramming"));

(4) Section 26.37 of this title (relating to Texas No-Call List);

(5) Section 26.122 of this title (relating to Customer Proprietary Network Information (CPNI));

(6) Section 26.126 of this title (relating to Telephone Solicitation); and

(7) Section 26.130 of this title (relating to Selection of Telecommunications Utilities).

(g) **Adoption and dissemination**.

(1) Every CTU or authorized agent shall formally adopt and implement all applicable provisions of this section as company policy, or modify existing company policy as needed to incorporate all applicable provisions, within 90 days of the effective date of this section. A CTU shall provide a copy of its internal code of conduct required by this section to the commission upon request.

(2) Every CTU or authorized agent shall disseminate the applicable provisions of this section to all existing and new employees and agents, and take appropriate actions to both train employees and enforce compliance with this section on an ongoing basis. Every CTU shall document every employee's and agent's receipt and acknowledgement of its internal policies required by this section, and every CTU shall make such documentation available to the commission upon request.

(h) **Investigation and enforcement.**

(1) **Administrative penalties**. If the commission finds that a CTU has violated any provision of this section, the commission shall order the utility to take corrective action, as necessary, and the utility may be subject to administrative penalties and other enforcement actions pursuant to PURA, Chapter 15.

(2) **Certificate revocation**. If the commission finds that a CTU is repeatedly in violation of this section, and if consistent with the public interest, the commission may suspend, restrict, or revoke the registration or certificate of the CTU.

(3) **Coordination with the Office of the Attorney General**. The commission shall coordinate its enforcement efforts regarding the prosecution of fraudulent, misleading, deceptive, and anticompetitive business practices with the Office of the Attorney General in order to ensure consistent treatment of specific alleged violations.

This agency hereby certifies that the rule, as adopted, 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 §26.133 relating to Business and Marketing Code of Conduct for Certificated Telecommunications Utilities (CTUs) is hereby adopted with changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE 22nd DAY OF SEPTEMBER 2003.

PUBLIC UTILITY COMMISSION OF TEXAS

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Rebecca Klein, Chairman

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Julie Parsley, Commissioner

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Paul Hudson, Commissioner