PROJECT NO. 24376

IMPLEMENTATION OF HB 472, RELATING TO THE REGULATION OF TELEMARKETING SOLICITATION AND PROVIDING PENALTIES	**§**	**PUBLIC UTILITY COMMISSION**
	§	**OF TEXAS**

ORDER ADOPTING §26.37, RELATING TO THE TEXAS NO-CALL LIST, AS APPROVED AT THE MAY 23, 2002 OPEN MEETING

The Public Utility Commission of Texas (commission) adopts new §26.37, relating to the Texas No-Call List with changes to the proposed text as published in the April 5, 2002 *Texas Register* (27 TexReg 2674). The rule implements House Bill 472 (HB 472), 77th Legislature, later codified as the Texas Business and Commerce Code Annotated §43.103 (Bus. & Com. Code) (Vernon 1998 & Supplement 2002) relating to Rules, Customer Information, Isolated Violation. The rule sets forth procedures whereby certificated telecommunications utilities (CTUs) must notify customers of the availability of the Texas no-call list. The rule also provides for quarterly publication and dissemination of the no-call list in formats commonly used by persons making telemarketing calls, and addresses violations of the no-call list. This new section is adopted under Project Number 24376.

The creation of the Texas no-call list assists residential telephone customers in limiting the number of telemarketing calls received. As provided in the Bus. & Com. Code §43.101 relating to Commission to Establish Texas No-Call Lists, the state has contracted with a private vendor to maintain and administer the Texas no-call database. The no-call program is self-funding in that costs of the vendor contract will be offset by the fees paid by customers to register for the list and telemarketers to subscribe to the list.

After the proposed rule was published in the Texas Register, the commission received written comments from the following: AT&T Communications of Texas, L.P. (AT&T); Entergy Solutions Select Ltd., Entergy Solutions Essentials Ltd, and Entergy Solutions Ltd. (Entergy REPs); MCI Worldcom, Inc. (MCI); the Office of Public Utility Counsel (OPC); Reliant Resources, Incorporated (RRI); the State of Texas - Office of the Attorney General (OAG); Southwestern Bell Telephone Company (SWBT); Sprint Communications Company LLP, United Telephone Company of Texas, Inc. doing business as Sprint, Central Telephone Company of Texas doing business as Sprint (Sprint); Texas Statewide Telephone Cooperative, Inc. (TSTCI); TXU Energy Retail Company LP (TXU Energy); and Verizon Southwest (Verizon).

A public hearing on the proposed section was held at commission offices on May 6, 2002 at 1:30 p.m. Representatives from AT&T, MCI, OAG, OPC, SWBT, and TXU Energy attended the hearing and provided comments at the hearing. To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

General comments

Prior to publication of the proposed rule, State Representative David Farabee filed a letter on behalf of a blind constituent who works as a telemarketer and asked that the commission consider reducing the quarterly fee charged to telemarketers who are disabled, self-employed or a small business.

Representative Farabee also asked that the commission ensure that the format of the no-call list software is compatible with the blind voice system.

The commission notes that the fee charged by the administrator of the no-call database is presently $45 per quarter, which is less than the amount authorized by statute. The database administrator has agreed to provide the no-call list to subscribing telemarketers in a variety of formats, including a format compatible with the blind voice system. The commission believes that in setting a lower quarterly rate for all subscribing telemarketers and allowing for a number of formats, including any format agreed to by the administrator and the subscribing telemarketer, Representative Farabee's concerns have been addressed.

Customer, Nancy Basham, wrote a letter expressing her concern that the law contained too many loopholes. Consumer's Union also filed a similar letter.

The commission acknowledges these concerns; however, the purpose of this rulemaking is to implement the law as written and as a result, the commission must work within the confines of the applicable law.

In response to the proposed rule, AT&T commended the commission for drafting a proposed rule that was generally consistent with HB 472. OPC also noted its general support for the rule. RRI suggested some minor changes throughout the rule in order to harmonize the provisions in this section with the provisions in §25.484, Texas Electric No-Call List. RRI also made changes to clarify that the Texas

no-call list and the Texas electric no-call list are two different lists and are based on two different databases. RRI, in general, suggested such changes as adding the word "Texas" before the terms no-call registrant (formerly no-call subscriber) and no-call database.

The commission disagrees that adding the word "Texas" before the terms no-call database and no-call registrant serves to enhance the distinction between the two rules and declines to make that particular change. The rules relating to the Texas No-Call List and the Texas Electric No-Call List are in separate chapters of the commission's substantive rules, and are therefore clearly distinguishable. Furthermore, the definitions contained in subsection (c) of each section clearly distinguish the lists and databases from one another. Accordingly, the commission declines to make the clarifying changes suggested by RRI.

Specific comments to the rule language

Subsection (c) contains definitions of terms used in this rule. MCI suggested changing the definition of established business relationship to mirror the definition in the law. TXU Energy asserted that the definition of established business relationship, as proposed, implies that customer business relationships are developed only through personal contacts or face-to-face meetings, and fails to recognize relationships developed by mail, facsimile or over the Internet. TXU Energy suggested that in order to resolve the issue, the phrase "between a person and a consumer" should be deleted from the definition. In its reply comments, OPC indicated that it did not find the phrase confusing and noted that the definitions of "person" in the commission's substantive rules, §25.5(42) and §26.5(153) relating to

Definitions, are not limited to a natural person. AT&T indicated that TXU Energy's suggested revision could possibly create more ambiguity rather than provide clarification. AT&T recommended that the definition be altered by adding the words "or entity" after the phrase "between a person." MCI indicated that the definitions of "person" in the substantive rules appear to resolve TXU Energy's concern.

The commission declines to modify the definition of an established business relationship in subsection (c)(2). As published, the commission slightly altered the definition from the definition in the statute for clarification purposes only; however, the change was not intended to alter the meaning. The commission finds the definition as proposed, neither confusing nor restrictive in the manner purported by TXU Energy.

OPC proposed modifying the definition of telephone call by adding the phrase "but not limited to" after the word "including." OPC contended that by doing so, the rule would clearly pertain to any other types of telephone contact made with future technological advances.

The commission agrees that the clarification proposed by OPC will better reflect the commission's intent with respect to potential technological advances not specifically contemplated in the rule. The commission makes the change to the definition of telephone call in subsection (c)(8).

OPC recommended deleting the phrase "including a telemarketing call made by an ADAD" in the definition of telemarketer in subsection (c)(9). OPC explained that the phrase does not enhance the rule in any way and is already addressed within the definition of a telemarketing call.

The commission adopts the change recommended by OPC for the reasons stated.

Subsection (d) relating to the requirement of telemarketers establishes the required time frame within which telemarketers must remove newly-registered telephone numbers on the no-call list from their internal telemarketing call lists. RRI and Entergy REPs contended that as proposed, subsection (d) is unclear as to whether the 60-day compliance period starts when a customer registers a telephone number on the no-call list or when the telephone number is published on the list. Commenters recommended that the commission clarify the precise date triggering the 60-day compliance period. In its reply comments MCI supported RRI's and Entergy REPs' proposed change of adding the word "published" to help clarify this provision.

The commission agrees with the suggested change clarifying the deadline set in this subsection and modifies the rule accordingly.

MCI also indicated in its initial comments to the commission that the definition of "established business relationship", discussed in subsection (c)(2), does not permit calls to numbers on the Texas no-call list unless the communication is voluntary. Therefore, MCI contended that in a monopoly setting, calls

made to customers by the monopoly provider of a service or good are not voluntary. MCI suggested that the definition of "established business relationship" in the statute already reflects the restriction and that the commission should also reflect the restriction in subsection (d). Specifically, MCI suggested that a CTU shall not make telemarketing calls in an area where it has a market share of 90% or greater and in which if offers telecommunications services under a specific schedule of exchange rates. In reply comments, SWBT and Verizon objected to MCI's proposed restriction on CTU telemarketing. SWBT and Verizon stated that neither HB 472 nor the Federal Communications Commission's (FCC's) telemarketing rule (47 C.F.R. §64.1200, U.S.C. §227) prohibits an incumbent local exchange company (ILEC) from contacting customers with whom it has an "established business relationship."

The commission disagrees with MCI's interpretation of the "established business relationship" definition and the proposed restriction on ILEC telemarketing. The commission agrees with SWBT's and Verizon's contention that such a limitation is not included in the Bus. & Com. Code, Chapter 43 relating to Telemarketing, nor in the FCC's telemarketing rule. Both sections contain definitions of an "established business relationship" and neither definition suggests that ILECs are not part of the established business relationship exemption. Accordingly, the commission declines to make the change to subsection (d) suggested by MCI.

Subsection (e) relating to exemptions excludes certain types of telephone calls from the requirements of this section. In its written comments, TXU Energy suggested that the introductory phrase "In response to a call" be added to subsection (e)(1). TXU Energy contended that the added language is necessary

to clarify that telemarketing calls made by a telemarketer at the request of an individual is not a violation of this section even if that individual's telephone number appears on the Texas no-call list.

The commission disagrees with TXU Energy's characterization that its suggested language does not alter the meaning of the rule. The rule, as published, and in full accord with the enabling statute, specifically refers to a call made by a customer. Furthermore, the definition of telemarketing call specifically references an unsolicited telephone call. The commission is not persuaded that the additional exemption is necessary or serves any clarifying purpose.

Subsection (f)(2)(A) outlines when the no-call list will be updated and published by the administrator. MCI challenged the basic authority of the commission to implement this subsection until an issue regarding the national no-call list has been resolved. MCI referenced Bus. & Com. Code §43.101 which provides the commission with the authority to contract with a private vendor to maintain the Texas no-call database. MCI contended that the "provision clearly permits persons making telemarketing calls to update the national no-call list by adding to the national list those names on the Texas no-call list." MCI asserted that according to this provision, the vendor must publish the Texas portion of the national no-call list in an electronic format for subscribing telemarketers. Therefore, MCI asserted that the commission is not authorized to provide for the operation of the Texas no-call database until the pending national no-call list issue has been resolved.

OAG indicated that MCI's argument that the Texas vendor must provide the Texas no-call list to the Direct Marketing Association (DMA) for inclusion in DMA's national no-call list was in error. OAG indicated that such a requirement would allow telemarketers to comply with the Texas no-call statute by acquiring the DMA's national no-call list. OAG asserted that Bus. & Com. Code §43.101(b) addresses the requirements the contracted vendor must meet; the first being that the vendor must have previously maintained a national no-call list for more than two years. Therefore, OAG contended that rather than requiring the vendor to provide the Texas no-call list to the DMA as suggested by MCI, the statute requires the vendor to provide the Texas portion of its national no-call list to telemarketers so that telemarketers may include those Texas residents on their list of persons not to call.

The commission rejects the claim that the commission does not have the authority to provide for the operation of the Texas no-call database. Furthermore, the commission agrees with OAG's interpretation of the statute. Texas Bus. & Com. Code §43.101 specifically grants the commission authority to establish and provide for the operation of the database. In addition, Bus. & Com. Code §43.103(a) grants the commission the authority to adopt rules to administer Bus. & Com. Code Subchapter C, relating to the Texas No-Call List. The commission finds that in adopting this rule, it is acting within its statutory authority.

TXU Energy suggested that the commission clarify that the administrator of the database must update and publish the "entire" Texas no-call list, not merely the most recent additions. TXU Energy asserted that publication of the entire list would lessen the possibility of error when a subscribing telemarketer is

updating its own list. In addition, TXU Energy suggested that the administrator of the no-call database should be required to alert subscribing telemarketers who have previously received a copy of the no-call list of the availability of the updated list in order to expedite telemarketer access to the list.

The commission accepts TXU Energy's suggestion of adding the word "entire" to subsection (f)(2)(A). Publication and distribution of the entire no-call list rather than just the updated portions of the list will assist in avoiding any variation in the number of names contained on each list received by a subscribing telemarketer. This precautionary measure will assist in preventing any unintended omission at the distribution phase.

The commission declines to accept TXU Energy's suggested modification requiring the database administrator to alert telemarketers, via electronic mail, of the availability of an updated list. The legislature has already prescribed very specific time frames for publication and distribution of the no-call list. The commission finds that placing an added requirement upon the administrator when the time frame has already been clearly set serves no beneficial purpose.

TXU Energy also recommended new language to subsection (f)(2)(C), which specifies that a telemarketer has 60 days from the quarterly database publication date to acquire the updated list and incorporate the information into its own telemarketing database.

The commission finds that the 60-day compliance period is adequately explained in §26.37(d) and declines to reiterate the requirement elsewhere in the rule.

Subsection (f)(3)(A) specifies the intended use of and prohibited uses of the no-call database. The OAG, in its written comments, specifically cited its support of this portion of the rule. AT&T suggested that the commission make a clarifying change that specifies that the database cannot be resold or transferred to any other "non-affiliated" person or entity. By adding the term "non-affiliated," AT&T indicated the change will clarify that the purchased list can be shared amongst company affiliates. AT&T asserted that allowing the internal distribution of the no-call list amongst all affiliates of a company will promote timely compliance with this section. Both MCI and Verizon supported AT&T's position on this issue.

The commission declines to insert the suggested language into subsection (f)(3). It was not the commission's intention to allow sharing amongst a parent company and its affiliates. Each affiliate that chooses to make telemarketing calls to Texas residential customers must purchase the list; just as each customer that wishes to register more than one telephone number must pay a registration fee for each number. In order to clarify this requirement, the commission adds language to subsection (f)(3)(A) to specify that a subscribing telemarketer cannot share a purchased no-call list with its affiliates. Instead, affiliates must pay a separate fee for each individual list. However, the commission notes that this does not preclude a parent company from purchasing numerous copies of the no-call list and then disbursing the lists to its affiliates, as long as each affiliate has separately subscribed to, and paid the appropriate

fee for, the Texas no-call list and agrees to comply with the requirements of this section. This should resolve AT&T's concern regarding timely compliance with this section. The commission also makes other minor clarifying changes to this subsection.

Subsection (g) relating to notice outlines the requirements for the customer notice provided by CTUs. OPC recommended that the commission spell out the acronym CTU in recognition of the fact that persons who are unfamiliar with the acronym will be referring to the rule.

The commission notes that the acronym is defined at its first occurrence, in subsection (b).

Subsection (g)(1) details the contents of the CTU-provisioned customer notice. AT&T indicated that the level of information required in the customer notice is excessive and recommended deletion of subparagraphs (B), (F) and (H). AT&T asserted that the information can be obtained by the customer when registering for the no-call list. In its reply comments, OPC and OAG disagreed with the deletion of any of the notice content requirements. OPC contended that each method of notice provided by CTUs should contain all of the required information. OAG indicated the commission has achieved a good balance between essential information to make a purchasing decision and supplying too much non-material information. OAG stated the disclosures proposed are necessary to prepare a customer for initial contact with the Texas no-call list. At the public hearing, AT&T supported its written comments indicating that the notice should be short in length and general in nature. In response, OPC stated it

would be more convenient for customers if the information was readily available in the notice produced by CTUs.

The commission agrees with OPC and OAG and declines to make any substantive changes to the notice content requirements. The commission finds that the level of information required in the notice is not excessive as asserted by AT&T. The content requirements offer the customer basic information in order to make a determination about whether or not to pursue registration.

In its reply comments, AT&T also requested clarification regarding the first sentence in subsection (g)(1), relating to content of notice. AT&T asserted that as currently proposed, subsection (g)(1) would require a CTU's notice to be printed in both English and Spanish on the same notice.

The commission deletes the proposed language and adds clarifying language to subsection (g)(1) in response to AT&T's observation that the notice publication requirement in both English and Spanish is confusing. The commission does not require a CTU to provide notice of the no-call list to customers in both English and Spanish on the same form. Instead, through the reference to §26.26 of this title (relating to Foreign Language Requirements), the commission requires a CTU to inform Spanish-speaking customers how to obtain notice of the no-call list in Spanish. As suggested by §26.26(a), this may be accomplished by an informational sentence in English and Spanish indicating that the information is available in Spanish upon request. Furthermore, consistent with §26.26(c), the commission requires a

CTU that advertises, promotes, or markets a service or product in any language other than English and Spanish, to provide the no-call list notice in that language upon customer request.

OPC recommended additional language to inform customers that they may only register residential phone numbers (one per fee) on the Texas no-call list. RRI suggested an additional requirement informing a customer how to remove a telephone number from the Texas no-call list and that a telephone number may be automatically removed if that number changes. OPC and MCI supported RRI's addition.

The commission finds the additions proposed by OPC and RRI are not necessary to a customer's initial decision to register for the no-call list and therefore, declines to implement the changes.

Subsection (g)(2) relates to publication of the no-call list notice and outlines the allowable methods through which CTUs may accomplish customer notification. AT&T contended that requiring CTUs to provide both directory notice and bill inserts or bill messages is an onerous requirement that far exceeds what is required by statute. Furthermore, it fails to recognize any other appropriate means of notice. AT&T requested that the commission require only one type of CTU-provisioned customer notice and add language allowing the option of "other direct notification in writing." AT&T asserted that other means of appropriate notice include other direct notice in writing, such as a postcard, and notice in the Customer Rights disclosure that a CTU must provide at the initiation of service and at least annually thereafter.

MCI, SWBT, Sprint, TSTCI, and Verizon also maintained that requiring CTUs to provide customer notice in more than one manner is contrary to the law. SWBT suggested that the publication of the notice in the telephone directory should be an option in lieu of the other types of required notice. AT&T supported these commenters' position, but referred the commission to AT&T's recommended revisions in order to amend the provisions in subsection (g)(2).

OPC opposed the parties' challenge to the publication requirements and commented that publication of the notice in the directory and in a bill message or insert should not be an either/or proposition. OPC noted that the statute is the minimum standard for notice, but in no way restricts the commission from requiring additional forms of notice. OPC supported the requirement as proposed because it helps ensure that the notice reaches customers. OPC argued that requiring notice by more than one method increases the chances that a person will see it. AT&T opposed OPC's suggestions regarding CTU-provisioned customer notice.

TSTCI contended that the law intended to afford CTUs some latitude as to the type of notice they provide to customers and that other means, such as company newsletters, should be an option. OPC did not oppose TSTCI's suggestion allowing notice to be accomplished through a separate direct mailing or within a regularly published newsletter.

In response to the commenters' suggestion requesting that the commission allow more flexibility in the options available for CTU-provisioned customer notice, the commission agrees and modifies the rule accordingly. In removing the telephone directory requirement, the commission encourages, but does not require, CTUs to provide basic information regarding the Texas no-call list in the consumer information pages of the telephone directory. Although the commission, in subsection (g)(2)(B), does not allow a CTU to satisfy the notice publication requirement by publishing the notice in the telephone directory only, the commission has expanded the number of notification methods available to CTUs in order to allow the flexibility that the commenters requested. The commission finds that its objective regarding customer notification will best be met by requiring CTU-provisioned notice to each individual residential customer.

In response to other suggested methods of notice, the commission has incorporated TSTCI's suggestion regarding notification via newsletter, given that the newsletter is provided to each residential customer. The commission has also accepted AT&T's recommendations regarding the Customer Rights disclosure and other direct notification. However, regardless of the method of notification selected by a CTU, the first notification to residential customers must be completed before the end of 2002.

Subsection (g)(3) relates to the timing of notice. AT&T disagreed with the commission's requirements in this subsection as to the timing of the notice. Both AT&T and TSTCI indicated that the proposed 60-day timeframe for initial notice narrows the options available to CTUs to provide notice. AT&T elaborated that due to the short timeframe allowed for the initial notice and the narrow timeframe of

subsequent annual notices, a CTU would not be able to provide notice of the no-call list in the telephone directory or Customer Rights disclosure. AT&T and TSTCI suggested increasing the initial notice requirement timeframe to 90 days. AT&T further requested that the commission only require notice in telephone directories produced after an appropriate period of time. AT&T maintained that as evidenced by the current number of registrants on the no-call list to date, lack of CTU-provisioned notice has not created a lack of program awareness. Therefore, the commission should avoid the imposition of unreasonable expenses upon CTUs.

The commission notes that as a result of the changes made to subsection (g)(2), AT&T's request regarding the allowable timeframe for customer notice in the telephone directory is no longer applicable. The commission agrees that as evidenced by the number of registrants that have requested to be included on the no-call database to date, lack of CTU-provisioned notice has not created any obstacles to enrollment. Accordingly, the commission relaxed the 60-day initial notice requirement and instead allows notification to occur anytime before the end of the year 2002. The commission also removes the specific time period requirement during which subsequent notification must occur. A CTU must still provide annual notice of the no-call list to customers, but may do so anytime during the year. These changes should allow CTUs full flexibility in their chosen method of customer notice and avoid the imposition of unreasonable costs.

AT&T incorrectly stated that §26.31(a)(4) of this title (relating to Disclosures to Applicants and Customers) requires a CTU to provide the Customer Rights disclosure at the initiation of service and at

least annually thereafter. Instead, it requires a CTU to provide the Customer Rights disclosure at the initiation of service, and at least every other year thereafter OR a printed statement on the bill or a billing insert referencing the location of the Customer Rights information. The printed statement must be sent to customers every six months. Because the commission included the Customer Rights disclosure as a viable option through which a CTU may provide notice of the no-call list, the commission sees no benefit in straying from the timing requirements already outlined in §26.31(a)(4). Doing so would be counterproductive to allowing the Customer Rights disclosure as an option. However, the commission notes that the no-call list notice provided in the Customer Rights disclosure must be in compliance with §26.37(g)(1), relating to the content of the notice. Should a CTU provide subsequent notice through a printed statement on a customer bill or a bill insert distributed to customers every six months as outlined in §26.31(a)(4)(B)(ii), then the CTU must identify on the bill or bill insert, the location of the no-call list notice; a specific reference to the no-call list notice is required. A CTU that chooses an allowable notification method other than the Customer Rights disclosure must provide such notice on an annual basis and the notice must comply with the content requirements listed in subsection (g)(1).

Regarding subsection (g)(4), relating to commission review of notice, AT&T asserted that rather than the commission micromanaging the notice development process, the appropriate approach would be to require CTUs to provide a copy of the notice text to the commission upon request. SWBT echoed the concerns stating that a commission review requirement will only serve to delay the notification process. However, in the event a CTU chooses to obtain notice approval from the commission, SWBT believes

that prior approval should create a "safe harbor," barring future disputes regarding the notice. MCI and Verizon supported SWBT's position on this issue.

OPC opposed the comments made by AT&T and SWBT. OPC asserted that the approval process acts as an important customer protection tool. Additionally, with commission review, a company can avoid the expense of having to re-run the notice due to defects in the publication.

The commission deletes what was formerly subsection (g)(4)(A), commission review of the notice. The commission has explicitly detailed the notice requirements in subsection (g)(1) and relies upon CTU compliance with this section. Should the commission have any concerns regarding the content, method or timing of CTU-provisioned notice, the commission has reserved the right to request the records.

TSTCI urged the deletion of subsection (g)(4)(B) indicating that the Public Utility Regulatory Act (PURA) already grants the commission the authority to review and inspect the records of public utilities, thus this provision is not necessary. OPC strongly opposed TSTCI's suggestion to delete this provision because the requirement to provide records is not unique to this rule and should not be eliminated merely because it is an inconvenience.

OPC requested that the commission require CTUs to provide copies of customer notification records to OPC, in addition to the commission. OPC contended that such a requirement would serve to inform OPC of the status of CTU compliance and highlight the level of priority afforded this issue. At the

public hearing, OPC clarified its written comments and stated that OPC did not intend to suggest that it is a regulatory body, but that it is charged by the Legislature with representing the public interest of small commercial and residential customers. OPC stated that this gives it the jurisdiction to look at the notices supplied by companies to their customers. OPC further stated that allowing it to look at the notices would not place a burden on companies and that no companies have asserted that the notice information is confidential. OPC also stated that the agency would pay any copying costs associated with supporting its request. OPC stated that, if it is not allowed to view all notices, the agency will have to file open records requests for the materials and this would be administratively burdensome. AT&T, MCI, SWBT, RRI, and Verizon opposed this requirement citing that there is no statutory basis for granting OPC regulatory review authority. AT&T suggested that if OPC has concerns regarding CTU compliance with notice requirements, OPC should raise the concerns with the commission.

Given that the commission removed the commission review of the notice requirement in former subsection (g)(4)(A), the commission declines to delete the record retention requirement as suggested by TSTCI. However, the commission notes that a CTU must provide a copy of records to the commission only upon request.

Regarding OPC receipt of customer notification records, the commission agrees with the majority of the commenters and declines to require CTUs to provide copies of such records to OPC. There is no statutory authority for requiring OPC receipt of CTU-provisioned customer notification records.

MCI recommended that the commission set a 24-month time limit on the retention of records. OPC does not oppose such a time limitation, but asserted it would not support any period less than 24 months. SWBT recommended a retention period of one year since notification must occur on an annual basis.

In response to MCI's recommendation, the commission finds a record retention requirement of 24 months sufficient, and therefore adds language to that effect to subsection (g)(4).

Subsection (h) relates to violations and explains that it is an affirmative defense to this section that a telemarketing call made to a telephone number on the Texas no-call list is not a violation if the telemarketing call was an isolated occurrence made by a telemarketer who has implemented adequate procedures to comply with this section. MCI, OAG and OPC generally supported §26.37(h)(2). OAG suggested adding the phrase "or by a court of competent jurisdiction" to the initial sentence in subsection (h)(2). Verizon disagreed, explaining that the inclusion of the OAG's suggested phrase does not have any bearing on a court's jurisdiction.

OPC commented that §26.37(h), as published, does not seem to address businesses that do not engage in telemarketing full-time, and suggested adding a different set of requirements for such businesses.

In lieu of the OAG's suggested language regarding a determination by a court of competent jurisdiction, the commission simply deletes the phrase "by the commission" from subsection (h)(2). The commission

also rejects OPC's suggestion that the commission create a different type of affirmative defense claim for telemarketers who do not make telemarketing calls on a full-time basis or employ a "low-tech" approach to telemarketing. The main intent of this section is to protect customers from unwanted telemarketing calls. It makes no difference to the recipient of the unwanted telemarketing call what category of telemarketer initiated the call. Accordingly, the commission refuses to incorporate any further exemptions other than what is explicitly provided for by statute.

Subsection (h)(2)(A) defines an isolated occurrence. SWBT recommended deleting the term "or follow," and replacing the word "incident" with "separate occurrence." AT&T supported the wording changes.

The commission agrees to replace the word "incident" with "separate occurrence" for clarification purposes, but declines to delete the term "or follow." Deleting the term "or follow" is not a clarifying change but a substantive one that would significantly change the meaning of the provision.

Subsection (h)(2)(B) addresses violations of the no-call list and specifically places the burden to prove that a telemarketing call was an isolated occurrence made in error upon the telemarketer that made the call. SWBT stated that this subsection, as published, requires an alleged violator to prove a negative, in that, the violator must prove that the violation had rarely occurred. SWBT suggested deleting the first sentence relating to burden of proof. At the public hearing, SWBT reiterated its position on this issue and stated that forcing a telemarketer to prove something that is impossible to prove would raise due

process concerns. In its reply comments, AT&T concurred with SWBT's recommended changes but provided additional clarifying language to that offered by SWBT. AT&T suggested replacing the word "claim" with the phrase "assert as an affirmative defense" and also deleting the word "first" in subsection (h)(2)(B). OAG and OPC opposed SWBT's recommendation, with OPC adding that the subsection as published has a deterrent value. OAG pointed out that the statute specifically contemplates a telemarketer proving both that an alleged violation is an isolated occurrence and that the telemarketer has adequate procedures in place. OAG asserted that the defense has two prongs and the burden of proof for both prongs should rest with the telemarketer.

The commission rejects SWBT's and AT&T's recommended changes regarding burden of proof. Bus. & Com. Code §43.103(a)(2) provides that a telemarketing call made to a number on the Texas no-call list is not a violation of Bus. & Com. Code §43.102 if the telemarketing call was an isolated occurrence made by a person who has adequate procedures in place. As stated by OAG, the statute expressly requires that both criteria are met. The commission does, however, make the clarifying changes to subsection (h)(2)(B) suggested by AT&T. The commission deletes the words "claim" and "first" and inserts the phrase "assert as an affirmative defense."

Subsection (i), relating to enforcement and penalties, delineates the commission's authority for investigating violations of this section. The OAG proposed that subsection (i)(3) be modified to reflect that the commission does not have exclusive jurisdiction to investigate violations of the no-call list made by retail electric providers (REPs).

The commission agrees and modifies the rule accordingly. The commission also removes the word "exclusive" from subsection (i)(2) which relates to the commission's jurisdiction to investigate violations made by telecommunications providers. The commission finds that the word is not necessary, as the commission simply wanted to affirm that it has jurisdiction to investigate violations of this section.

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 purposes of clarifying its intent and consistency with §25.484. For example, the commission changes the term no-call "subscriber" to no-call "registrant" to distinguish a no-call "registrant" as a telephone customer that has registered to be on the Texas no-call list, from a "subscribing" telemarketer which denotes a telemarketer that has "subscribed," through application and payment of fees, to receive the quarterly published no-call list.

This section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2002) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. In addition, this section is adopted under the Texas Business and Commerce Code Annotated §43.103 which grants the commission the authority to adopt rules to administer the no-call list.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002; Texas Business & Commerce Code Annotated §§43.002, 43.003, and 43.101 — 43.103.

§26.37. Texas No-Call List.

(a) **Purpose.** This section implements the Texas Business & Commerce Code Annotated §43.103 (Bus. & Com. Code) relating to rules, customer information, and isolated violations of the Texas no-call list.

(b) **Application**. This section is applicable to:

(1) Certificated telecommunications utilities (CTUs), as defined by §26.5 of this title (relating to Definitions), that provide local exchange telephone service to residential customers in Texas; and,

(2) Telemarketers, as defined in subsection (c)(9) of this section including, but not limited to, retail electric providers as defined in §25.5 of this title (relating to Definitions).

(c) **Definitions.** The following words and terms, when used in this section shall have the following meanings, unless the context clearly indicates otherwise.

(1) **Consumer good or service** — For purposes of this section, consumer good or service has the same meaning as Bus. & Com. Code §43.002(3) relating to Definitions.

(2) **Established business relationship** — A prior or existing relationship that has not been terminated by either party, and that was formed by voluntary two-way communication between a person and a consumer regardless of whether consideration was exchanged, regarding consumer goods or services offered by the person.

(3) **No-call database** — Database administered by the commission or its designee that contains the names, addresses, non-business telephone numbers and dates of registration for all Texas no-call registrants. Lists or other information generated from the no-call database shall be deemed to be a part of the database for purposes of enforcing this section.

(4) **No-call list** — List that is published and distributed as required by subsection (f)(2) of this section.

(5) **No-call registrant** — A telephone customer who has registered, by application and payment of accompanying fee, for the Texas no-call list.

(6) **State licensee** — A person licensed by a state agency under a law of this state that requires the person to obtain a license as a condition of engaging in a profession or business.

(7) **Telemarketing call** — An unsolicited telephone call made to:

(A) solicit a sale of a consumer good or service;

(B) solicit an extension of credit for a consumer good or service; or,

(C) obtain information that may be used to solicit a sale of a consumer good or service or to extend credit for sale.

(8) **Telephone call** — A call or other transmission that is made to or received at a telephone number, including but not limited to:

(A) a call made by an automatic dial announcing device (ADAD); or,

(B) a transmission to a facsimile recording device.

(9) **Telemarketer** — A person who makes or causes to be made a telemarketing call.

(d) **Requirement of telemarketers.** A telemarketer shall not make or cause to be made a telemarketing call to a telephone number that has been published for more than 60 calendar days on the Texas no-call list.

(e) **Exemptions.** This section shall not apply to a telephone call made:

(1) By a no-call registrant that is the result of a solicitation by a seller or telemarketer or in response to general media advertising by direct mail solicitations that clearly, conspicuously, and truthfully make all disclosures required by federal or state law;

(2) In connection with:

(A) An established business relationship; or,

(B) A business relationship that has been terminated, if the call is made before the later of

(i) the date of publication of the first Texas no-call list on which the no-call registrant's telephone number appears; or,

(ii) one year after the date of termination;

(3) Between a telemarketer and a business, other than by a facsimile solicitation, unless the business informed the telemarketer that the business does not wish to receive telemarketing calls from the telemarketer;

(4) To collect a debt;

(5) By a state licensee if:

(A) The call is not made by an ADAD;

(B) The solicited transaction is not completed until a face-to-face sales presentation by the seller, and the consumer is not required to pay or authorize payment until after the presentation; and,

(C) The consumer has not informed the telemarketer that the consumer does not wish to receive telemarketing calls from the telemarketer; or,

(6) By a person who is not a telemarketer, as defined in subsection (c)(9) of this section.

(f) **No-call database.**

(1) **Administrator.** The commission or its designee shall establish and provide for the operation of the no-call database.

(2) **Distribution of database.**

(A) Timing. Beginning on April 1, 2002, the administrator of the no-call database will update and publish the entire Texas no-call list on January 1, April 1, July 1, and October 1 of each year;

(B) Fees. The no-call list shall be made available to subscribing telemarketers for a set fee not to exceed $75 per list per quarter;

(C) Format. The commission or its designee will make the no-call list available to subscribing telemarketers by:

(i) electronic internet access in a downloadable format;

(ii) Compact Disk Read Only Memory (CD-ROM) format;

(iii) paper copy, if requested by the telemarketer; and,

(iv) any other format agreed upon by the current administrator of the no-call database and the subscribing telemarketer.

(3) **Intended use of the no-call database and no-call list.**

(A) The no-call database shall be used only for the intended purposes of creating a no-call list and promoting and furthering statutory mandates in accordance with the Bus. & Com. Code, Chapter 43 relating to Telemarketing. Neither the no-call database nor a published no-call list shall be transferred, exchanged or resold to a non-subscribing entity, group, or individual regardless of whether compensation is exchanged.

(B) The no-call database is not open to public inspection or disclosure.

(C) The administrator shall take all necessary steps to protect the confidentiality of the no-call database and prevent access to the no-call database by unauthorized parties.

(4) **Penalties for misuse of information.** Improper use of the no-call database or a published no-call list by the administrator, telemarketers, or any other person regardless of the method of attainment, shall be subject to administrative penalties and enforcement provisions contained in §22.246 of this title (relating to Administrative Penalties).

(g) **Notice.** A CTU shall provide notice of the no-call list to each of its residential customers as specified by this subsection. In addition to the required notice, the CTU may engage in other forms of customer notification.

(1) **Content of notice.** A CTU shall provide notice in compliance with §26.26 of this title (relating to Foreign Language Requirements) that, at a minimum, clearly explains the following:

(A) Beginning January 1, 2002, residential customers may add their name, address and non-business telephone number to a state-sponsored no-call list that is intended to limit the number of telemarketing calls received;

(B) When a customer who registers for inclusion on the no-call list can expect to stop receiving telemarketing calls;

(C) A customer must pay a fee to register for the no-call list;

(D) Registration of a non-business telephone number on the no-call list expires on the third anniversary of the date the number is first published on the list;

(E) Registration of a telephone number on the no-call list can be accomplished via the United States Postal Service, Internet, or telephonically;

(F) The customer registration fee, which cannot exceed three dollars per term, must be paid by credit card when registering online or by telephone. When registering by mail, the fee must be paid by credit card, check or money order;

(G) The toll-free telephone number, website address, and mailing address for registration; and,

(H) A customer that registers for inclusion on the no-call list may continue to receive calls from groups, organizations, and persons who are exempt from compliance with this section, including a listing of the entities exempted as specified in subsection (e) of this section.

(2) **Publication of notice.**

(A) Telephone directory. A CTU that publishes, or has an affiliate that publishes, a residential telephone directory may include in the directory a prominently displayed toll-free number and Internet mail address, established by the commission, through which a person may request a form for, or request to be placed on, the Texas no-call list in order to avoid unwanted telemarketing calls.

(B) Notice to individual customers. A CTU shall provide notice of the Texas no-call list to each of its residential customers in Texas by one or more of the methods listed in clauses (i)–(v) of this subparagraph.

(i) an insert in the customer's billing statement. Electronic notification is permissible for a customer who, during the notification period, is receiving billing statements from the CTU in an electronic format;

(ii) a bill message;

(iii) separate direct mailing;

(iv) customer newsletter; or

(v) Customer Rights disclosure as provided in §26.31(a)(4) of this title (relating to Disclosures to Applicants and Customers).

(3) **Timing of notice.** Beginning in 2002, a CTU shall provide notice of the Texas no-call list to its residential customers using one of the methods listed in paragraph (2)(B)(i)-(v) of this subsection.

(A) A CTU that uses a notification method listed in paragraph (2)(B)(i)-(iv) of this subsection, shall provide the notice annually beginning in 2002. The annual notice shall be easily legible, prominently displayed, and comply with the requirements listed in paragraph (1) of this subsection.

(B) A CTU that elects the Customer Rights disclosure as its notification method as allowed in paragraph (2)(B)(v) of this subsection shall comply with the timing of distribution requirement in §26.31(a)(4) of this title. The no-call list information provided in the Customer Rights disclosure shall comply with paragraph (1) of this subsection.

(4) **Records of customer notification.** Upon commission request, a CTU shall provide a copy of records maintained under the requirements of this subsection to the commission. A CTU shall retain records maintained under the requirements of this subsection for a period of two years.

(h) **Violations.**

(1) **Separate occurrence.** Each telemarketing call to a telephone number on the no-call list shall be deemed a separate occurrence.

(2) **Isolated occurrence.** A telemarketing call made to a number on the no-call list is not a violation of this section if the telemarketing call is determined to be an isolated occurrence.

(A) An isolated occurrence is an event, action, or occurrence that arises unexpectedly and unintentionally, and is caused by something other than a failure to implement or follow reasonable procedures. An isolated occurrence may involve more than one separate occurrence, but it does not involve a pattern or practice.

(B) The burden to prove that the telemarketing call was made in error and was an isolated occurrence rests upon the telemarketer who made the call. In order for a telemarketer to assert as an affirmative defense that a potential violation of this section was an isolated occurrence, the telemarketer must provide evidence of the following:

(i) The telemarketer has adopted and implemented written procedures to ensure compliance with this section and effectively prevent telemarketing calls that are in violation of this section, including taking corrective actions when appropriate;

(ii) The telemarketer has trained its personnel in the established procedures; and,

(iii) The telemarketing call that violated this section was made contrary to the policies and procedures established by the telemarketer.

(i) **Enforcement and penalties.**

(1) **State licensees.** A state agency that issues a license to a state licensee may receive and investigate complaints concerning violations of this section by the state licensee.

(2) **Telecommunications providers.** The commission has jurisdiction to investigate violations of this section made by telecommunications providers, as defined in the Public Utility Regulatory Act (PURA) §51.002.

(3) **Retail electric providers.** The commission has jurisdiction to investigate violations of this section made by retail electric providers (REPs) as specified in §25.492 of this title (relating to Non-Compliance with Rules or Orders; Enforcement by the Commission).

(4) **Other Telemarketers**. A telemarketer, other than a state licensee or telecommunications provider, that violates this section shall be subject to administrative penalties pursuant to §22.246 of this title.

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 §26.37 relating to Texas No-Call List is hereby adopted with changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE 23rd DAY OF MAY 2002.

PUBLIC UTILITY COMMISSION OF TEXAS

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Rebecca Klein, Chairman

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Brett A. Perlman, Commissioner