

The Public Utility Commission of Texas (commission) adopts an amendment to §26.4 relating to Statement of Nondiscrimination, with changes to the proposed text as published in the August 25, 2000 *Texas Register* (25 TexReg 8120). The amendment implements the provisions of the Public Utility Regulatory Act (PURA) §17.004(a)(4) and §64.004(a)(4), both of which add "income level" and "source of income" as protected categories, and adds a prohibition on "unreasonable discrimination on the basis of geographic location." The amendment is adopted under Project Number 22706.

The commission received comments on the proposed amendment from the Office of the Attorney General (OAG); AT&T Communications of Texas, L.P. and AT&T Wireless Services (collectively AT&T); and Texas Legal Services Center, Texas Ratepayers' Organization to Save Energy, AARP Capital City Task Force for Deregulation of Electricity, and Consumers Union Southwest Regional Office (collectively Texas Consumer Organizations). The commission received reply comments from AT&T.

A public hearing on the proposed amendment was held at the commission offices on October 24, 2000 at 9:30 a.m. Representatives from the OAG, AT&T, Southwestern Bell Telephone Company (SWBT), Texas State Telephone Cooperative, Inc. (TSTCI), The Office of Public Utility Counsel (OPC), Sprint Communications Company, L.P. (Sprint), and Smith, Majcher, and Mudge, L.L.P. participated in the public hearing.

After the public hearing, the commission received comments from OPC.

The OAG suggested adding to proposed subsection (b) that a telecommunications provider shall offer services equitably to all customers within its service area. The OAG indicated that this addition would help clarify the meaning of the first clause of the proposed subsection, prohibition on unreasonable discrimination on the basis of geographic location.

AT&T commented that the proposed amendment ignores two specific limitations on the commission's authority. First, the proposed amendment seeks to apply the provisions of PURA §17.004 and §64.004 to all telecommunications providers. The term "telecommunications provider" is defined in PURA §51.002(10) as including wireless telephone service providers. However, the definition in PURA also includes a limitation stating that the term does not include these entities for the purposes of Chapters 17, 55, or 64. AT&T stated that by using the term "telecommunications provider" without qualification, the proposed amendment fails to reflect this limitation on the commission's authority under PURA Chapters 17 and 64. AT&T recommended revising the proposed amendment to indicate it is not applicable to wireless service providers. Second, AT&T stated that the proposed amendment also applies the prohibition on discrimination on the basis of income level and source of income, without appropriate limitation. AT&T stated that both Lifeline and Tel-Assistance services discriminate among customers on the basis of income level or source of income and would be prohibited by a strict enforcement of the proposed rule. AT&T pointed out that PURA §17.004(e) states that nothing in this

section shall be construed to abridge the rights of low-income customers to receive benefits through pending or operating programs in effect at the time of the enactment of this chapter. AT&T suggested including similar language in the proposed rule to clarify the scope of the prohibition on discrimination on the basis of income or source of income.

AT&T also sought the commission's clarification that the proposed changes to §26.4 were not intended to implicitly impact other commission rules, such as §26.23 relating to Refusal of Service and §26.24 relating to Credit Requirements and Deposits. AT&T expressed concern that a person could argue that the proposed amendment in this rulemaking also was intended to limit or eliminate a telecommunications utility's ability to utilize lawful and legitimate business procedures used to ensure creditworthiness of applicants and ensure payments may be required for services ordered and used.

Texas Consumer Organizations commented that an effective anti-discrimination rule would do the following: require written policies of the commission's anti-discrimination requirements and internal company procedures to assure compliance, require posting notices of anti-discriminatory requirements, require informing the public of prohibitions against discriminatory conduct, require offering service to all customers in the service territory at the same price, prohibit charging higher deposits based on income source, and collect sufficient data from providers and marketers for the commission to determine if marketing practices are discriminatory or have discriminatory effects. Texas Consumer Organizations stated that the proposed rule fails to meet the task of the Legislature to adopt and enforce rules that would effectively prohibit discrimination. Texas Consumer

Organizations indicated that to effectively implement anti-discrimination standards, the commission must do two things. First, the commission must require providers to adopt anti-discrimination policies and train their employees in those policies. Second, the commission must develop objective standards to measure compliance.

In its reply comments, AT&T urged the commission to reject the proposed changes by the OAG and Texas Consumer Organizations. With regard to the OAG recommendation, AT&T stated that the duty created by the statute is plainly stated in the proposed rule and that the recommended language by the OAG is so broad it appears to create an additional duty as well as uncertainty as to what conduct is being proscribed.

AT&T opposed Texas Consumer Organizations' recommendations for the following reasons: they would impose additional regulatory burdens and unnecessary costs on providers, there is no indication that the Legislature intended the detailed and prescriptive rules envisioned by Texas Consumer Organizations, they would have the commission micromanaging the operations of providers, they would not encourage competition, there is no evidence that discrimination is occurring, and there is no indication that the commission's current authority is insufficient to address any discrimination claims.

At the public hearing, SWBT expressed agreement with AT&T's comments and reply comments, with one exception. SWBT indicated that it was not necessary to revise proposed §26.4 to state that the requirements of this section do not apply to wireless

providers since the definition of "telecommunications provider" in PURA §51.002(10)(A)(iv) already exempts wireless providers from these provisions.

OPC stated that there may be some ambiguity as to the commission's intent due to the differences between the language in the proposed rule and that used in the relevant statute. OPC indicated that its reading of the proposed rule is that the prohibition on discrimination is not limited to actual buyers of telecommunications services. OPC further stated that a specific change to the proposed rule is not necessary because this issue involves a question of interpretation that may be addressed in the preamble.

The commission adopts proposed §26.4 with one revision. The commission adds subsection (c) to indicate that nothing in this section shall be construed to abridge the rights of low-income customers to receive benefits through pending or operating programs in effect as of May 25, 1999.

The commission does not agree with the AT&T proposal to revise proposed §26.4 to add an exclusion for commercial mobile radio service providers since this exclusion is already contained in the definition of "telecommunications provider" in PURA §51.002(10)(A)(iv). Thus, in the future, any change to the current definition of "telecommunications provider" will not require an amendment to §26.4.

The commission does not agree with the revisions to proposed §26.4 recommended by Texas Consumer Organizations. The purpose of §26.4 is to provide a clear statement of

nondiscrimination. Specific requirements related to nondiscrimination in telecommunications are addressed in Project Number 21423, *Rulemaking for Substantive Rules in Subchapter B, Regarding Telephone Customer Service and Protection*.

The commission does not agree with the OAG suggestion, which could be interpreted to create an obligation to serve all customers within a telecommunications provider's service area. A non-dominant certificated telecommunications utility (NCTU) is not required to serve all customers and may develop a niche market as long as it does not violate regulatory requirements.

With regard to AT&T's request for clarification, there is no intent to prevent legitimate nondiscriminatory business procedures for establishing credit and requiring payment for services rendered.

With regard to OPC's comments, the commission believes the intent of §26.4 is clearly stated and that the rule prohibits all illegal discrimination against actual buyers as well as potential buyers of telecommunications services.

In closing, the commission emphasizes that it does not tolerate any unlawful discrimination and will take swift enforcement action against any violator.

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2000) (PURA), which provides the Public

Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, PURA §17.004(b), which grants the commission authority to adopt and enforce rules as necessary or appropriate to implement customer protection standards, and specifically, PURA §17.004(a)(4) and §64.004(a)(4), that require protection from discrimination on the basis of race, color, sex, nationality, religion, marital status, income level, or source of income and from unreasonable discrimination on the basis of geographic location.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 17.004(a)(4), 17.004(b), and 64.004(a)(4).

§26.4. Statement of Nondiscrimination.

- (a) No telecommunications provider shall discriminate on the basis of race, nationality, color, religion, sex, marital status, income level, or source of income.
- (b) No telecommunications provider shall unreasonably discriminate on the basis of geographic location.
- (c) Nothing in this section shall be construed to abridge the rights of low-income customers to receive benefits through pending or operating programs in effect as of May 25, 1999.

This agency hereby certifies that the amendment, 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 §26.4, relating to Statement of Nondiscrimination, is hereby adopted with changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE 21st DAY OF NOVEMBER 2000.

PUBLIC UTILITY COMMISSION OF TEXAS

Chairman Pat Wood, III

Commissioner Judy Walsh

Commissioner Brett A. Perlman