



Control Number: 38872



Item Number: 26

Addendum StartPage: 0

<p><b>PETITION FOR DETERMINATION OF NON-ELIGIBILITY FOR TEXAS UNIVERSAL FUND DISPURSEMENTS TO CONSOLIDATED COMMUNICATIONS OF TEXAS COMPANY PURSUANT TO PURA §56.025 AND P.U.C. SUBST. R. 26.406 AND REFUND OF DISBURSEMENTS</b></p>	<p>§ § § § § § § § § §</p>	<p><b>PUBLIC UTILITY COMMISSION  OF TEXAS</b></p>
---	--	---

11/11/28 11:2:32  
 FILING CLERK

**RESPONSE OF CONSOLIDATED COMMUNICATIONS OF TEXAS COMPANY  
TO THE STAFF’S AMENDED PETITION**

TO THE HONORABLE COMMISSION AND ADMINISTRATIVE LAW JUDGE:

COMES NOW, Consolidated Communications of Texas Company (“CCTX”), who files this Response to the amended petition of the Staff of the Public Utility Commission of Texas (“PUC” or “Commission”). Staff’s petition was filed pursuant to Sections 56.025 and 14.001 of PURA and P.U.C. SUBST. R. 26.406 seeking a discontinuation of high cost funding and refunds of past high cost disbursements.<sup>1</sup> CCTX respectfully urges the Commission to deny the Staff’s petition as being wholly without merit and in support thereof hereby states as follows:

**I. Jurisdiction**

Chapter 56 of PURA governs the creation and operation of the Texas Universal Service Fund (“TUSF”). The Staff relies primarily on Section 56.025 of PURA and P.U.C. SUBST. R. 26.406 (the rule implementing Section 56.025) as its basis for filing this petition. As will be addressed below, CCTX’s right to receive funding does not arise from, and predates the

<sup>1</sup> CCTX notes one minor correction to the style of this case. The style references Section 54.025 of PURA. We believe the Commission Staff intended to reference Section 56.025 of PURA, which is the section CCTX references in the style of this response.

enactment of, Section 56.025. The Staff also claims to rely on Section 14.001 of PURA. This section, however, does not grant the Commission any specific, substantive rights.

While the Commission Staff cites to Section 14.001 of PURA as statutory support for its amended petition, their petition is silent as to how or in what manner they are invoking this section. Section 14.001, which reads as follows, does not provide any specific substantive grant of authority to the Commission:

The Commission has the general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything **specifically designated or implied by this title** that is necessary and convenient to the exercise of that power and jurisdiction. (emphasis added)

A plain reading of Section 14.001 indicates that it merely grants the Commission the power to do anything *specifically designated* or implied in PURA. It does not serve as a “catch all,” empowering the Commission to exercise its authority beyond that which is otherwise specifically set forth in PURA.

In addition to seeking to eliminate CCTX’s continued receipt of its lawfully received HCAF disbursements, the Staff petition also seeks refunds of TUSF disbursements retroactive to September 1, 2007, apparently relying on Section 56.026 of PURA. That section, however, does not grant the Commission authority to seek retroactive refunds from recipients who lawfully received TUSF disbursements. It simply states that the Commission may not reduce disbursements of an electing company prior to September 1, 2007. The Staff does not cite to any authority in its petition allowing for retroactive refunds. In fact, the Commission Staff’s unsupported claim for retroactive refunds exceeds the Commission’s authority under PURA, is inconsistent with Commission precedent and treatment afforded similarly situated companies, is

contrary to the constitutional prohibition against ex post facto laws, and the presumption against retroactive application of state law as prescribed in the Code Construction Act.

## **II. Other Affected Entities and Territories**

CCTX will be adversely affected if the relief sought by the PUC Staff is granted. CCTX disagrees with Staff's assertion that "[n]o territories, customers, or other parties are affected by this petition." The relief requested will adversely affect CCTX's ability to provide telephone service in its high cost areas. Staff has not petitioned to relieve CCTX of its provider of last resort obligations, despite petitioning to remove the universal service support needed in order for CCTX to carry out such obligations.

## **III. Parties**

The Commission Staff is the Petitioner and is represented by:

Susan E. Goodson  
State Bar No. 24045960  
Attorney – Legal Division  
Public Utility Commission of Texas  
1701 N. Congress Avenue  
P. O. Box 13325  
Austin, Texas 78711-3326  
Tel: (512) 936-7292  
Fax: (512) 936-7268  
[susan.goodson@puc.state.tx.us](mailto:susan.goodson@puc.state.tx.us)

CCTX is the Respondent and is represented by:

Keith E. Gamel  
State Bar No. 07606550  
Stephen F. Morris  
State Bar No. 14501600  
Marcus J. Brooks  
State Bar No. 24040579  
Naman, Howell, Smith & Lee, PLLC  
8310 N. Capital of Texas Highway, Suite 490  
Austin, Texas 78731  
Tel: (512) 479-0300  
Fax: (512) 474-1901

CCTX is an incumbent local exchange company duly certificated by the Commission to provide local exchange service in its certificated territory. CCTX is also an Eligible Telecommunications Provider (“ETP”) that receives universal service support – support that is at issue in this docket – so that it can offer telephone service in its high cost areas at affordable rates. CCTX also has provider of last resort obligations to offer service to all customers within its service area.

#### **IV. Facts**

CCTX expects to file a brief that will more fully detail the factual, legal, and procedural history of the creation of the High Cost Assistance Fund (“HCAF”) and the Texas Universal Service Fund (“TUSF”) as well as address the legal infirmities of Staff’s request for retroactive refunds. However, a brief overview of the origin and development of the HCAF and the TUSF are as follows:

The HCAF was created as a result of a series of earnings investigations of small ILECs, including, CCTX, in the early 1990s. Concurrent with these earnings investigations, the Commission was also addressing the issue of access charges in two industry-wide proceedings, Docket Nos. 6106 and 7205, which were ultimately consolidated given the similar scope of those dockets.<sup>2</sup>

As a result of the earnings investigation, the HCAF funding level for CCTX of \$787,248 per year was set in Docket No. 8773, *Petition of the General Counsel to Inquire into the Reasonableness of the Rates and Services of Lufkin-Conroe Telephone Exchange, Inc.* Coincident with Docket No. 8773, the HCAF was created by the final order in Docket Nos. 6106

---

<sup>2</sup> *Petition of AT&T Communications of the Southwest, Inc., for Emergency and Other Relief Concerning Access Charges*, Docket No. 6106; *Petition of General Counsel for an Inquiry into a Flat Rate Plan for Access Charges*, Docket No. 7205.

and 7205. On August 27, 1992, the final order in Docket Nos. 6106 and 7205 established the HCAF and set or restated the funding levels of HCAF support for various local exchange carriers, including CCTX.<sup>3</sup> The net effect of these orders is that CCTX reduced its access charge rates by \$787,248 in exchange for HCAF funding, pursuant to (then) P.U.C. SUBST. RULES 23.23 and 23.53. These contested case dockets and attendant rules predate the enactment of Section 56.025 in 1995, the 2005 amendment of which is the sole substantive basis of Staff's complaint against CCTX.

The statutory basis for the HCAF, as cited in the preamble to Subst. R. 23.53, is the Commission's general authority over all public utilities (then Art. 1446c, sec. 16, and now PURA § 14.001), the Commission's general authority over all telecommunications utilities (then Art. 1446c, Sec. 18, and now PURA § 52.001), and the Commission's specific authority to enact a universal service fund to assist local exchange companies in providing basic local exchange service at reasonable rates in high cost rural areas (then Art. 1446c, sec. 98, and now PURA Section 56.021). (17 Tex. Reg. 2990, Apr. 24, 1992) As stated in the preamble to Subst. R. 23.53, "The amendment is adopted under Texas Civil Statutes, Article 1446c...sec. 98 which authorized the commission to adopt and enforce rules requiring local exchange companies to establish a universal service fund to assist local exchange companies in providing basic local exchange service at reasonable rates in high cost rural areas."

The Legislature expanded the scope of the TUSF in 1995 by including the HCAF as part of the TUSF, although it is accounted for separately and it treated as a separate fund.

In 1997, the Legislature modified the TUSF by making it consistent with the recent changes to the federal USF. The HCAF remained as part of the TUSF. Furthermore, the

---

<sup>3</sup> During that time, CCTX was doing business as the Lufkin-Conroe Telephone Exchange.

Commission reaffirmed CCTX's continued receipt of HCAF funding in the previously-determined amount of \$787,248 in its order dated December 21, 1998 in Docket No. 19187.

We note that the Commission Staff is incorrect in stating that "[t]he HCAF ceased to exist upon repeal of P.U.C. SUBST. R. 23.53 by order dated January 19, 1999."<sup>4</sup> While it is true that the Commission repealed P.U.C. SUBST. R. 23.53, it did so because it had adopted P.U.C. SUBST. R. 23.136, which continued the HCAF provisions previously found in P.U.C. SUBST. R. 23.53. Obviously it made no sense for the Commission to have two rules covering the HCAF. The Commission confirmed the continuance of the HCAF in its order adopting P.U.C. SUBST. R. 23.136, where the Commission stated: "The Commission clarifies that §23.136(b)(1) provides continued TUSF support for the existing HCAF." 23 Tex. Reg. at 976 (Feb. 6, 1998), Order Adopting P.U.C. SUBST. R. 23.136.

In 2005, Section 56.025 of PURA was modified to limit *expansion* of high cost support to companies having fewer than 31,000 access lines. More importantly, this legislative change did not terminate existing HCAF support for CCTX (or any other company then receiving such support). Section 56.025 is entitled "Maintenance of Rates and *Expansion* of Fund for Certain Companies;" section 56.025 did not establish HCAF, but limits the PUC's discretion in expanding the existing HCAF. Consequently, the 2005 amendment to PURA Section 56.025(a) does not withdraw the PUC's authority for maintaining the existing HCAF for companies over 31,000 access lines. Rather, by raising the access line threshold, it limits the PUC's authority to replace HCAF with TUSF support and eliminates the mandate that the PUC in certain circumstances adopt rules to expand the universal service fund for companies over 31,000 access lines.

---

<sup>4</sup> Amended Petition for Determination of Non-Eligibility and Refund of Disbursements, pg. 3 and fn 6.

The legislative history clearly shows that the intent of this change was to limit the expansion of the HCAF. The House Committee Report plainly explains the rationale for the changes to Section 56.025. That report states:

The bill limits the PUC's authority to *expand* TUSF support for certain telecommunications providers in certain circumstances, as provided by Sections 56.025 and 56.026, Utilities Code. The PUC retains the authority to adopt mechanisms necessary to maintain reasonable rates for local exchange service and to *expand* TUSF disbursements for each local exchange company that serves fewer than 31,000 access lines and each telephone cooperative. (emphasis supplied)

The House Committee Report is significant because it underscores that the legislature intended to limit the *expansion* of TUSF (specifically, HCAF) support, not eliminate it for current recipients. This conclusion makes sense, given the requirement, discussed more fully below, imposed on the Commission by SB 5 to examine the nature, operations, and structure of the TUSF during the period preceding the 2007 legislative session.

In 2005, the Legislature also directed the Commission to conduct a study on the nature, scope, and operation of the TUSF (including the HCAF) and prepare a report with any recommended changes for the Legislature to consider in its 2007 session.

In 2006, the Commission Staff initiated an informal inquiry regarding CCTX's receipt of high cost assistance under Section 56.025 of PURA, citing to the 2005 legislative changes which limited the expansion of the HCAF to ILECs with less than 31,000 lines. CCTX thoroughly briefed this issue and had discussions with the Commission Staff regarding its inquiry. The Commission Staff took no action regarding CCTX's continued receipt of such funding. The issues raised in the Staff's petition and amended petition in this docket were addressed in 2006 during the Staff's informal inquiry.



The next time the Commission addressed this issue was about a year later. In 2007, the Commission submitted its report to the Legislature regarding the structure and operation of the Texas universal service fund, as required by Section 56.029 of PURA. The Commission addressed the HCAF fund (which included the high cost assistance paid to CCTX) in its report to the Legislature. *With respect to the HCAF, the Commission told the legislature in its report that the “program is functioning properly and achieving its intended purpose” and recommended no change to the existing HCAF.* The Commission’s 2007 report, obviously subsequent to the 2005 amendment which the Commission now claims form the basis for its retroactive termination of HCAF funding, was made with full knowledge of CCTX’s continued receipt of HCAF funding, which was addressed and discussed by CCTX the previous year when the Commission Staff conducted its informal inquiry.

Even if CCTX were no longer entitled to continued HCAF funding, which CCTX denies, Staff’s petition for retroactive refunds of authorized support is improper as being contrary to the 2005 amendments to Section 56.025 of PURA and contrary to the prohibition against retroactive application of statutes in the Code Construction Act. Both as a product of the constitution and of the Code Construction Act, statutes are presumed to apply only prospectively. *See* TEX. GOV’T CODE § 311.022; *Subaru of Am. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 219 (Tex. 2002). Unless the legislature expressly provides for retroactive application, a statute applies only prospectively. TEX. GOV’T CODE § 311.022.

Nor is Staff’s petition for retroactive refunds proper and consistent with Commission rules and practices. In situations where there have been changes to support authorized or afforded companies, those changes have been made – and in current situations are being made – in proceedings allowing the affected companies to effect rate changes or rate rebalancing so that

the reductions in support payments from the TUSF would be revenue neutral (or close to revenue neutral) and, in some cases, allow the companies to phase in such rebalancing over a period of years. In the case of CCTX, however, the Commission Staff is taking the unprecedented and unfounded stance of employing a clawback of HCAF funding lawfully received with no opportunity for any rate adjustments on a revenue neutral basis. Allowing the Commission to retroactively claw back years of HCAF funding would violate (i) the prohibition on retroactive laws contained in Article I, §16 of the Texas Constitution; and (ii) violate CCTX's rights to equal protection and due process.

After CCTX re-oriented its pricing for its customers based on the Commission's allocation of HCAF funding, the Commission now seeks to retroactively claw back such funding and leave CCTX in a position that is no longer revenue neutral but that is instead significantly revenue negative. CCTX has relied on the PUC Staff's actions in continuing to collect TUSF, and the PUC Staff should be stopped from reversing field at this late date. *Cf. Hudspeth v. Chapel Hill I.S.D.*, No. 03-06-00243-CV, 2007 Tex. App. LEXIS 4506, at \*10-\*11 (Tex. App.—Austin 2007, no pet.) (mem. op.) (estoppel may apply to a unit of government's governing body or commission).

#### **V. Prayer**

WHEREFORE, PREMISES CONSIDERED, CCTX prays that the Commission set this matter for hearing and, after hearing, deny the Staff's petition in its entirety, and for all other relief to which CCTX is justly entitled.

Respectfully submitted

Naman, Howell, Smith & Lee, PLLC  
8310 N. Capital of Texas Highway, Suite 490  
Austin, Texas 78731  
(512) 479-0300

(512) 474-1901 (Facsimile)

By: 

Stephen F. Morris

State Bar No. 14501600

Keith E. Gamel

State Bar No. 07606550

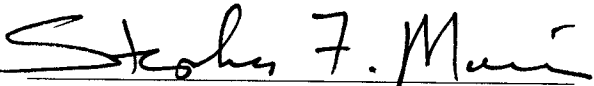
Marcus J. Brooks

State Bar No. 24040579

ATTORNEYS FOR CONSOLIDATED  
COMMUNICATIONS OF TEXAS COMPANY

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this document will be served on all parties of record on this  
the 28<sup>th</sup> day of June, 2011.



Stephen F. Morris