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PUBLIC UTILITY COMMISSION
FILING CLERK
OF TEXAS

**COMMISSION STAFF'S PETITION TO
DECLASSIFY TUSF TRANSPARENCY
COMPLIANCE REPORTS FILED IN
PROJECT NO. 41505 BY REPORTING
ETC/ETPs** §
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**COMMISSION STAFF'S RESPONSE TO THE MOTIONS TO DISMISS
OF THE ALENCO GROUP, THE BRAZOS COMPANIES,
CENTURYLINK, THE CONSOLIDATED GROUP, CUMBY, AND
VERIZON**

COMES NOW the Staff ("Staff") of the Public Utility Commission of Texas ("Commission"), representing the public interest and files this Response and would show the following:

I. BACKGROUND

On August 5, 2013, Staff filed a petition seeking to declassify certain TUSF transparency compliance reports filed on or about July 31, 2013 in Project No. 41505 ("Compliance Reports"), so that the information in these reports can be made available to the public.¹ These Compliance Reports were ordered in furtherance of the statutory mandate for ensuring reasonable transparency and accountability in the administration of the Texas Universal Service Fund ("TUSF").² The Compliance Reports were required to be filed by certain rate-of-return or price-cap telecommunications providers that have been designated as both an Eligible Telecommunications Provider ("ETP") and an Eligible Telecommunications Carrier ("ETC"), that receive support from the federal Universal Service Fund, and that receive disbursements from the TUSF (collectively, "the Reporting ETP/ETCs").³

¹ Commission Staff's Original Petition to Declassify TUSF Transparency Compliance Reports at 1 (Aug. 5, 2013) ("Staff's Petition" or "Petition").

² PURA § 56.023(d).

³ Consolidated Communications of Fort Bend Company; Consolidated Communications of Texas Company; Santa Rosa Telephone Cooperative, Inc.; Hill Country Telephone Cooperative, Inc.; Guadalupe Valley Telephone

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On August 26, 2013, responses to Staff's Petition were filed by the following parties: GTE Southwest Incorporated d/b/a Verizon Southwest ("Verizon");⁴ Consolidated Communications of Texas Company, Consolidated Communications of Fort Bend Company, Valley Telephone Cooperative, Inc., Big Bend Telephone Company, and Eastex Telephone Cooperative, Inc. (collectively, "the Consolidated Group");⁵ Cumby Telephone Cooperative, Inc. ("Cumby");⁶ Brazos Telephone Cooperative, Inc., Brazos Telecommunications, Inc., Cameron Telephone Company, Cap Rock Telephone Cooperative, Inc., Central Texas Telephone Cooperative, Inc., Coleman County Telephone Cooperative, Inc., Colorado Valley Telephone Cooperative, Inc., Community Telephone Co., Inc., ENMR Telephone Cooperative, Inc., ETEX Telephone Cooperative, Inc., Five Area Telephone Cooperative, Inc., Guadalupe Valley Telephone Cooperative, Inc., Hill Country Telephone Cooperative, Inc., Industry Telephone Company, Lipan Telephone Co., Inc., Mid-Plains Rural Telephone Cooperative, Inc., Poka Lambro Telephone Cooperative, Inc., South Plains Telephone Cooperative, Inc., Taylor Telephone Cooperative, Inc., Wes-Tex Telephone Cooperative, Inc., West Plains Telecommunications, Inc. and XIT Telephone Cooperative, Inc. (collectively, "the Brazos

Cooperative; ETEX Telephone Cooperative, Inc.; Eastex Telephone Cooperative, Inc.; Community Telephone Company; Colorado Valley Telephone Cooperative, Inc.; Coleman County Telephone Cooperative, Inc.; Cameron Telephone Company (TX); Brazoria Telephone Company; Big Bend Telephone Company; Industry Telephone Company; Mid-Plains Rural Telephone Cooperative, Inc.; North Texas Telephone Company; Poka Lambro Telephone Cooperative, Inc.; Riviera Telephone Company, Inc.; Taylor Telephone Cooperative, Inc.; Totelcom Communications, LLC; Valley Telephone Cooperative, Inc.; Wes-Tex Telephone Cooperative, Inc.; Ganado Telephone Company, Inc.; Dell Telephone Cooperative, Inc.; Southwest Texas Telephone Company; La Ward Telephone Exchange, Inc.; Verizon Southwest; Cumby Telephone Cooperative, Inc.; Central Texas Telephone Cooperative, Inc.; Five Area Telephone Cooperative, Inc.; ENMR Telephone Cooperative, Inc.; Alenco Communications, Inc.; Brazos Telecommunications, Inc.; Brazos Telephone Cooperative, Inc.; Cap Rock Telephone Cooperative, Inc.; Lipan Telephone Company; Nortex Communications; Peoples Telephone Cooperative, Inc.; South Plains Telephone Cooperative, Inc.; West Plains Telecommunications, Inc.; West Texas Rural Telephone Cooperative, Inc.; XIT Rural Telephone Cooperative, Inc.; Central Telephone Company of Texas d/b/a Centurylink; and United Telephone Company of Texas, Inc. d/b/a CenturyLink (collectively, "the Reporting ETP/ETCs").

⁴ Docket No. 41735, Response of Verizon at 8 (Aug. 26, 2013) (requesting that Staff's Petition be denied as to Verizon) ("Verizon Motion").

⁵ Docket No. 41735, Notice of Appearance and Answer of Consolidated Communications of Texas Company, Consolidated Communications of Fort Bend Company, Valley Telephone Cooperative, Inc., Big Bend Telephone Company, and Eastex Telephone Cooperative, Inc. to Staff's Original Petition to Declassify TUSF Compliance Reports at 12 (Aug. 26, 2013) (claiming that Staff's Petition should be denied as being contrary to statute and the Commission's substantive rules) ("Consolidated Group Motion").

⁶ Docket No. 41735, Motion of Cumby Telephone Cooperative, Inc. for Dismissal at 3 (Aug. 26, 2013) (moving that Staff's Petition be dismissed as to Cumby without prejudice) ("Cumby Motion").

Companies”);⁷ Alenco Communications, Inc., Brazoria Telephone Company, Cumby Telephone Cooperative, Inc., Dell Telephone Cooperative, Inc., Ganado Telephone Company, Inc., La Ward Telephone Exchange, Inc., Nortex Communications, North Texas Telephone Company, Peoples Telephone Cooperative, Inc., Riviera Telephone Company, Inc., Santa Rosa Telephone Cooperative, Inc., Southwest Texas Telephone Company, Totelcom Communications, LLC, and West Texas Rural Telephone Cooperative, Inc. (collectively, “the Alenco Group”);⁸ and United Telephone Company of Texas, Inc. d/b/a CenturyLink and Central Telephone Company of Texas, Inc. d/b/a CenturyLink (collectively “CenturyLink”).⁹

Although only Verizon and Cumby filed explicit motions to dismiss, Staff responds, out of an abundance of caution, to all of the above-listed responses and/or motions as though they all asserted grounds for dismissal. Pursuant to P.U.C. PROC. R. 22.181(a)(2), the party that initiated a proceeding shall have 20 days to respond to a motion to dismiss.¹⁰ Therefore, this pleading is timely filed.

II. THE MOTIONS TO DISMISS

The Alenco Group, the Brazos Companies, Centurylink, the Consolidated Group, Cumby, and Verizon, (collectively, “Movants”) raise similar issues in response to Staff’s Petition.

Several Movants claim that Staff’s Petition is procedurally improper.¹¹ Movants rely on the fact that the Texas Public Information Act (“PIA”)¹² states that requests for information

⁷ Docket No. 41735, Brazos Companies’ Notice of Appearance and Answer to Commission Staff’s Original Petition to Declassify TUSF Compliance Reports at 6 (Aug. 26, 2013) (requesting that the Petition be denied) (“Brazos Companies Motion”).

⁸ Docket No. 41735, Alenco Group’s Notice of Appearance and Answer to Commission Staff’s Original Petition to Declassify TUSF Compliance Reports at 4 (Aug. 26, 2013) (“Alenco Group Motion”).

⁹ Docket No. 41735, CenturyLink’s Notice of Appearance and Conditional Response to Commission Staff’s Original Petition to Declassify TUSF Compliance Reports at 8 (Aug. 26, 2013) (requesting that Staff’s Petition be denied) (“CenturyLink Motion”).

¹⁰ The 20th day following August 26, 2013 is Sunday September 15, 2013. Pursuant to P.U.C. PROC. R. 22.4, this pleading is filed on or before the first working day following September 15, 2013.

¹¹ Alenco Group Motion at 4; Brazos Companies Motion at 5; CenturyLink Motion at 6; Consolidated Group Motion at 9.

¹² TEX. GOV’T CODE ANN. § 552.001, et seq. (“PIA”).

subject to a claim of confidentiality are referred to the Attorney General for the preparation of a written opinion.¹³ Alternatively, multiple Movants claim that declassification is not necessary for Staff to perform its statutory function, which can constructively be read as an argument that Staff's Petition is moot.¹⁴ Several Movants further assert the information is statutorily excepted from public disclosure by PIA § 552.110 and/or PURA¹⁵ § 56.024(d).¹⁶ Finally, multiple Movants claim that P.U.C. SUBST. R. 26.402(e)¹⁷ sets forth the only information that must be publicly filed in order to further transparency and accountability in the administration of the TUSF.¹⁸

Cumby, in addition to joining the Alenco Group's motion, separately pleads that it is entitled to dismissal because, uniquely among the Movants, Cumby has a service area consisting of a single exchange.¹⁹

III. ADVISORY OPINION FROM THE ATTORNEY GENERAL

At the outset, Staff notes, that there is a process available by which the Commission Chairman may seek external guidance from the Office of the Texas Attorney General (Attorney General) regarding whether or not the Movants' Compliance Reports contain information that is confidential. The Texas Constitution and Texas Government Code § 402.042 grant the Attorney General authority to issue written opinions upon request from particular individuals, including "the head of a department of state government."²⁰ The Chairman holds the discretion to

¹³ E.g. Brazos Companies Motion at 5, *discussing* PIA § 552.305.

¹⁴ Brazos Companies Motion at 4–5; Consolidated Group Motion at 11; Verizon Motion at 5.

¹⁵ Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 11.001–66.016 (Vernon 2007 & Supp. 2012) ("PURA").

¹⁶ Alenco Group Motion at 3; Brazos Companies Motion at 3; CenturyLink Motion at 3; Consolidated Group Motion at 9; Verizon Motion at 2.

¹⁷ P.U.C. SUBST. R. 26.402(e) addresses TUSF cashflow and disbursements information that the *Commission* shall make publicly available on the Commission's website.

¹⁸ CenturyLink Motion at 3; Consolidated Motion at 6.

¹⁹ Cumby Motion at 1.

²⁰ TEX. GOVERNMENT CODE § 402.042(b)(2).

determine whether or not to ask for an Attorney General opinion.²¹ Previously, the Chairman has exercised this discretion to solicit opinions from the Attorney General on a number of occasions.²² Although Staff contends the information that is the subject of the Petition to Declassify is not confidential, one reason the Chairman may choose to seek an Attorney General opinion is that the PIA provides criminal penalties if an officer or employee of a governmental body knowingly discloses confidential information to a person who is not authorized to receive the information.²³

Staff defers to the discretion of the Chairman whether to seek an Attorney General opinion but recommends that *if* the Chairman desires to seek an opinion, this proceeding should be dismissed without prejudice to refileing.²⁴

IV. RESPONSE TO THE MOTIONS TO DISMISS

Although a process is available by which the Chairman may seek an opinion from the Attorney General, the Commission nevertheless possesses the authority to grant the relief Staff seeks in this proceeding. As such, if the Commission does wish to exercise its authority in this proceeding, the motions to dismiss Staff's Petition should be denied. The Movants' have failed to demonstrate grounds for dismissal pursuant to P.U.C. PROC. R. 22.181. In fact, Movants continue to fail to provide support for their assertions of confidentiality.

²¹ Office of the Texas Attorney General website, *About Attorney General Opinions*, <https://www.oag.state.tx.us/opin/> (revised Sep. 3, 2013) (AG website).

²² See e.g. Tex. Atty. Gen. Op. DM-288 (1994); Tex. Atty. Gen. Op. JM-645 (1987); and Tex. Atty. Gen. Op. JM-353 (1985).

²³ PIA §§ 552.352(a-1)(3) and 552.352(b).

²⁴ A request for an opinion from the Attorney General pursuant to Texas Government Code § 402.02 must be in writing and sent by certified or registered mail, with return receipt requested. A request should include a supporting brief that identifies any legal authorities or analysis applicable to the question being posed. The supporting brief should also convey any relevant background regarding what led to the submission of the request. Staff notes that the Attorney General has the ability to notify a requestor in writing that the Attorney General is refusing to render an opinion. Grounds for such refusal include that the requested opinion would address issues that are involved in pending litigation. If an opinion is rendered, it is usually issued within 180 days after receipt of the request for opinion. TX. GOVERNMENT CODE § 402.042 and AG website at <https://www.oag.state.tx.us/opin/#aboutthe>.

1. Staff's Petition is procedurally proper.

Movants assert a flawed claim that it would be procedurally improper for the Commission to rule on Staff's request because an agency should refer requests for information under the PIA to the Attorney General's office if a question of confidentiality exists.²⁵ However, Movants' argument ignores that Staff's Petition *is not* "a case in which information is requested under [the PIA]."²⁶ Rather, this is a proceeding in which Staff requests that the Commission interpret and act upon its own rule, P.U.C. PROC. R. 22.71(d), which states that a party may not designate as confidential "non-confidential materials unless directly related to and essential for clarity of the confidential material."²⁷

Furthermore, the fact that Staff can access the Compliance Reports while they are under seal does not moot Staff's request. Although Staff may perform its oversight functions even while the Compliance Reports are classified, Staff must seek to declassify the Compliance Reports in order to perform its duty to implement the statutory directive and the Commission's rule "ensur[ing] reasonable transparency and accountability in the administration of the Texas Universal Service Fund."²⁸

Finally, Movants' argument that P.U.C. SUBST. R. 26.402(e) provides an exhaustive list of the information that must be publicly filed relies on a fundamental misreading of the rule. P.U.C. SUBST. R. 26.402(e) merely states what information must be made publicly available by the *Commission*. When adopting P.U.C. SUBST. R. 26.402, the Commission expected that the Compliance Reports filed by the Reporting ETP/ETCs would be publicly filed unless subject to a claim of confidentiality.²⁹ Movants' argument that the Commission must explicitly identify what is to be publicly filed is contrary to the Commission's procedural rule regarding filings and is

²⁵ PIA § 552.035.

²⁶ *Id.*

²⁷ Staff's Petition at 9.

²⁸ P.U.C. SUBST. R. 26.402(a); *see also* PURA § 56.023(d).

²⁹ *Rulemaking Proceeding to Amend Chapter 26, Subchapter P-Relating to Administration of the Texas Universal Service Fund (TUSF)*, Project No. 39939, Order Adopting New § 26.402 as Approved at the October 12, 2012 Open Meeting at 4 (Oct. 19, 2012) (stating that "all filings made with the commission pursuant to this section, including a filing subject to a claim of confidentiality, shall be filed pursuant to the commission's procedural rules relating to pleadings and other documents").

patently contrary to the goal of open governance.

2. The information at issue is not deemed confidential merely because it is also found in Annual Earnings Report.

Multiple Movants assert that the information found in their Compliance Reports is exempt from disclosure. This argument mainly relies on the fact that the same information has been treated as confidential when filed as part of an ETP's Annual Earnings Report, which is filed annually pursuant to P.U.C. SUBST. R. 26.73.³⁰ However, this argument was anticipated in Staff's Petition,³¹ and Movants have failed to address the specific points raised by Staff.

In short, filings "necessary to assess contributions and disbursements to the universal service fund"³² as well as an ETP's Annual Earnings Report may be filed confidentially pursuant to PURA § 56.024. Annual Earnings Reports contain both competitively sensitive information and information that is obviously not competitively sensitive. The Legislature, in adopting PURA § 56.024, could not have intended to extend a permanent blanket of confidentiality over all information an ETP may include in its Annual Earnings Report. For example, it would be absurd for an ETP to assert that an ETP's principle business address is PIA-exempt information by virtue of that information being included in its Annual Earnings Report.

Multiple Movants also claim that two Attorney General's Office's Open Records Division decisions³³ have exempted similar information from disclosure when it was provided by ETPs in their Annual Earnings Reports.³⁴ As stated in Staff's Petition, Open Records Division

³⁰ Alenco Group Motion at 3; Brazos Companies Motion at 4; Consolidated Group Motion at 3–5; Verizon Motion at 2.

³¹ Staff's Petition at 11–12 and 15.

³² Staff's Petition clearly establishes that the Compliance Reports are not "a report or information necessary to assess contributions and disbursements to the universal service fund" that would be deemed confidential pursuant to PURA § 56.024(b). *See* Staff's Petition at 15. In short, the information found in the Compliance Reports is not currently necessary in order to calculate disbursements that will be provided from the TUSF to ETPs or to calculate an ETP's yearly contribution to the TUSF. Therefore, a Compliance Report could not be a report contemplated by PURA § 56.024(a)–(b).

³³ Tex. Attorney Gen. OR2001-5309 and Tex. Attorney Gen. OR2004-9937.

³⁴ Alenco Group Motion at 3; Brazos Companies Motion at 4; CenturyLink Motion at 3–4; Consolidated Motion at 10; Verizon Motion at 2.

decisions have extremely limited, if any, precedential value.³⁵ Both decisions state plainly: “This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.”³⁶ Additionally, the Legislature has since demanded enhanced transparency and accountability in the administration of the TUSF.³⁷ Therefore, Movants wrongly rely on these Open Records Division decisions in their motions.

3. The Movants have not satisfied their burden to show that the information is competitively sensitive or protected trade secret.

As stated in Staff’s Petition, the Reporting ETP/ETCs have provided little more than conclusory allegations that the information in their Compliance Reports is competitively sensitive or protected trade secret.³⁸ Movants have not expounded on their positions in their latest filings and have failed to address previous cases cited by Staff’s Petition in which the information at issue has been filed publicly during past rate cases.³⁹ Movants have not shown why this information should now be considered to be confidential in all contexts when it has not been so treated in the past. Movants could not credibly claim that essential components of their cost of service could be filed confidentially in the context of a future rate case.⁴⁰ Despite the fact that the designating party bears the burden of proof,⁴¹ Movants have not met their burden to demonstrate that the information at issue is competitively sensitive or protected trade secret.

³⁵ Staff’s Petition at 14.

³⁶ Tex. Attorney Gen. OR2001-5309 at 3; Tex. Attorney Gen. OR2004-9937 at 2.

³⁷ PURA § 56.023(d) was amended by Senate Bill 980, adopted by the 82nd Legislature in 2011, seven years following the latter of the two Open Records Division decisions relied on by Movants.

³⁸ Staff’s Petition at 10-11.

³⁹ *Id.* at 12 (citing *Application of Sharyland Utilities, L.P. to Establish Retail Delivery Rates, Approve Tariff for Retail Delivery Service, and Adjust Wholesale Transmission Rate*, Docket No. 41474, Application (May 31, 2013); *Application of Lufkin Telephone Exchange, Inc. for a Rate Increase*, Docket No. 5228, Examiner’s Report at 4 (Nov. 29, 1983); and *Application of Hooks Telephone Company for a Rate Increase within Bowie County*, Docket No. 2150, Examiner’s Report (Mar. 28, 1998)).

⁴⁰ The data in the Compliance Reports are all components of a public utility’s cost of service pursuant to P.U.C. SUBST. R. 25.231 and P.U.C. SUBST. R. 26.201.

⁴¹ See PIA § 552.110 (exempting from disclosure “information for which it is demonstrated *based on specific factual evidence* that disclosure would cause substantial competitive harm” (emphasis added)); see also Public Information: 2012 Handbook, The Attorney General of Texas at 84-85. (Nov. 2011).

V. RESPONSE TO CUMBY'S MOTION TO DISMISS

Cumby's separate motion relies on the fact that it uniquely among the Movants, Cumby has a service area consisting of a single exchange.⁴² Staff's Petition stated that the data filed by a single-exchange ETP "*might* be confidential if provided at the exchange level."⁴³ Out of an abundance of caution, therefore, Staff elected not to include any single-exchange ETPs in its petition. Subsequent to the filing of Staff's Petition, Cumby represented to Staff that it possesses a service area that is limited to a single exchange. Based on this representation and without stating a position on Staff's claims as to Cumby's Compliance Report, Staff believes that a dismissal without prejudice of its claims against Cumby is appropriate for the purpose of furthering administrative efficiency.

VI. CONCLUSION

For the reasons stated above, the pending motions to dismiss, with the exception of Cumby's, should be denied. However, *if* the Chairman desires to seek an opinion from the Attorney General regarding whether or not the Compliance Reports contain confidential information, this proceeding should be dismissed without prejudice to refiling.

⁴² Cumby Motion at 1.

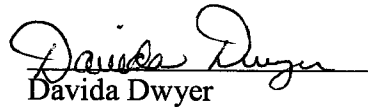
⁴³ Staff's Petition at 11 (emphasis in original).

Date: September 16, 2013

Respectfully Submitted,

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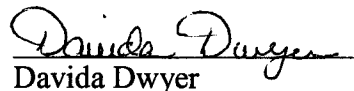


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CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on September 16, 2013, in accordance with P.U.C. Procedural Rule 22.74.



Davida Dwyer