



Control Number: 50667



Item Number: 13


Addendum StartPage: 0

Public Utility Commission of Texas

Commissioner Memorandum

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PUBLIC UTILITY COMMISSION

TO: Commissioner Arthur C. D'Andrea
Commissioner Shelly Botkin

FROM: Chairman DeAnn T. Walker 

DATE: July 15, 2020

RE: July 16, 2020 Open Meeting
Item No. 1 - Docket No. 50667 – *Application of Texas Telephone Association for Administrative Approval of Access Service Tariff Under 16 § 26.207* and
Item No. 2 - Docket No. 50853 – *Application of Texas Statewide Telephone Cooperative, Inc. for its Administrative Revisions to its Intrastate Access Services Tariff*

Before the Commission is a complex issue related to applications by the Texas Telephone Association (TTA) and the Texas Statewide Telephone Cooperative, Inc. (TSTCI) for approval of extensive tariffs, including over 1,400 pages. I also believe that there is a need to better define the situation that is before the Commission related to these dockets. This is necessary because the information on the issues in the proceedings is extremely limited and consists of the following:

- (1) Application of Texas Telephone Association for Administrative Approval of Access Service Tariff under 16 Texas Administrative Code (TAC) § 26.207 in Docket No. 50667 filed on March 16, 2020 consisting of 1,461 pages;
- (2) Texas Telephone Association Revised Tariff Pages in Docket No. 50667 filed on March 24, 2020 consisting of 29 pages;
- (3) Joint Brief in Response to Order No. 1 in Docket No. 50667 filed on May 11, 2020 consisting of eight pages;
- (4) Application of Texas Statewide Telephone Cooperative, Inc. for Administrative Revisions to Its Intrastate Access Service Tariff in Docket No. 50853 filed on May 15, 2020 consisting of 231 pages;
- (5) Letter from the Texas Telephone Association in Docket No. 50667 filed on May 19, 2020 regarding “potential timing issue” consisting of three pages;
- (6) Request for Correction on Original Filing in Docket No. 50853 filed on May 22, 2020 consisting of 7 pages;

- (7) Letter from the Texas Telephone Association in Docket No. 50667 filed on June 2, 2020 responding to Order No. 2 consisting of four pages;
- (8) Letter from the Texas Statewide Telephone Cooperative, Inc. in Docket No. 50667 filed on June 2, 2020 responding to Order No. 2 consisting of one page;
- (9) Joint Brief of Texas Statewide Telephone Cooperative, Inc. and Staff of the Public Utility Commission of Texas to Certified Issues in Docket No. 50853 filed on June 3, 2020 consisting of five pages; and
- (10) Letter from the Texas Telephone Association in Docket No. 50853 filed on June 3, 2020 responding to the certified issue consisting of two pages.

Background

TTA and TSTCI are trade associations representing various companies in the telecommunications industry, including telecommunications providers and companies that provide products and services to those providers. TTA and TSTCI are not regulated entities and do not provide any type of telecommunications service. The members of each trade group include a number of small and rural incumbent local exchange companies (ILECs) that provide service in Texas.

The companies identified as an issuing carrier in TTA's and TSTCI's access tariffs possess certificates of convenience and necessity (CCN), provide local exchange telephone service and basic local telecommunications service, and own and operate for compensation in Texas equipment and facilities to convey, transmit, and receive communications over a telephone system. In addition, each of them provided local exchange telephone service in a certificated area on or before September 1, 1995. Accordingly, each is a dominant carrier,¹ a public utility,² a local exchange company,³ and an incumbent local exchange company.⁴ And each is a certificated telecommunications utility⁵ and a dominant certificated telecommunications utility,⁶ usually referenced as a DCTU in the Commission's rules.

Currently, TSTCI has an intrastate access tariff on file with the Commission that identifies 39 ILECs as issuing carriers to the tariff. TSTCI states that its tariff has served as the intrastate access tariff for not only its members, but also many other small and rural carriers in Texas as well.⁷ It appears that the Commission first approved such a tariff for TSTCI in 1992 in a proceeding addressing the revamping of access charges following the break-up of the AT&T

¹ PURA § 51.002(2).

² *Id.* § 51.002(8).

³ *Id.* § 51.002(4).

⁴ *Id.* § 51.002(3).

⁵ 16 Tex. Admin. Code § 26.5(38) (TAC).

⁶ *Id.* § 26.5(74).

⁷ Docket No. 50853, Joint Response of TSTCI and Commission Staff at 2 (Jun. 3, 2020).

system.⁸ TSTCI made filings on a regular basis to amend this access tariff over the following years.⁹

Recently, 17 ILECs that were members of TSTCI left that organization and joined TTA. This change precipitated, at least in part, the filing by TTA for its own access tariff that included these 17 ILECs as issuing carriers to this new tariff.¹⁰ Similarly, TSTCI filed an application to amend its existing access-service tariff to remove these 17 ILECs as subscribers to its tariff.¹¹ Thus, there will be 22 small and rural ILECs that are members of TSTCI and would be issuing carriers in its proposed tariff, if approved.¹² And there will be 17 small and rural ILECs that are members of TTA (and former members of TSTCI) and would be issuing carriers in its proposed tariff, if approved.¹³ Currently, however, these 17 ILECs and the other 22 ILECs are providing access services under TSTCI's access tariff, which was last approved in 2019.¹⁴

The removal of these 17 ILECs from TSTCI's tariff appears to be the only reason for TTA's tariff filing. It also appears that each trade group wants its own tariff for its members. TTA states that the "proposed tariff will not result in any changes to the issuing carrier's revenues or company-specific access-services rates and will not substantially affect the customers receiving the affected services from the issuing carriers. It is a consolidated tariff under which the issuing carrier companies who are currently providing the affected services under a separate tariff will transition to the new tariff without effect to current rates and services."¹⁵ Apparently, the two trade-group tariffs will be identical except for the company-specific areas of the tariffs. However, there is no

⁸ *Petition of AT&T Communications of the Southwest, Inc. for Emergency and Other Relief Concerning Access Charges and Petition of the General Counsel for an Inquiry into a Flat Rate Plan for Access Charges*, Consolidated Docket Nos. 6106 and 7205, Order (Aug. 27, 1992).

⁹ See Docket No. 50667, TTA's Brief at 2–3 n.3 (providing citations to access service tariff applications approved by the Commission before this proceeding).

¹⁰ *Application of Texas Telephone Association for Administrative Approval of Access Service Tariff Under 16 TAC § 26.207*, Docket No. 50667 (Mar. 16, 2020).

¹¹ *Application of Texas Statewide Telephone Cooperative, Inc. for Administrative Revisions to its Intrastate Access Services Tariff*, Docket No. 50853 (May 15, 2020).

¹² Alenco Communications, Inc.; Brazos Telephone Cooperative, Inc.; Cameron Telephone Company; Cap Rock Telephone Cooperative, Inc.; Coleman County Telephone Cooperative, Inc.; Colorado Valley Telephone Cooperative, Inc.; Cumby Telephone Cooperative, Inc.; Dell Telephone Cooperative, Inc.; ENMR Telephone Cooperative, Inc.; Electra Telephone Company; Five Area Telephone Cooperative, Inc.; Industry Telephone Company; La Ward Telephone Exchange, Inc.; Lake Livingstone Telephone Company; Lipan Telephone Company; Livingstone Telephone Company; Mid-Plains Rural Telephone Cooperative; Pola Lambro Telephone Cooperative, Inc.; South Plains Telephone Cooperative, Inc.; Southwest Arkansas Telephone Cooperative; Tatum Telephone Company; Taylor Telephone Cooperative, Inc.; Wes-Tex Telephone Cooperative, Inc.; XIT Rural Telephone Cooperative, Inc.; West Plains Telecommunications, Inc.; and Border to Border Communications, Inc.

¹³ Big Bend Telephone Company, Inc. d/b/a BBT; Blossom Telephone Company; Brazoria Telephone Company; Central Texas Telephone Cooperative, Inc. d/b/a Central Texas TeleCommunications; Community Telephone Company; Eastex Telephone Cooperative, Inc.; Etex Telephone Cooperative, Inc.; Ganado Telephone Company, Inc. d/b/a YK Communications; Guadalupe Valley Telephone Cooperative, Inc.; Hill Country Telephone Cooperative, Inc.; Muenster Telephone Corporation of Texas d/b/a Nortex Communications; North Texas Telephone Company; Peoples Telephone Cooperative, Inc., d/b/a Peoples; Riviera Telephone Company; Santa Rosa Telephone Cooperative, Inc.; Totelcom Communications, LLC; and West Texas Rural Telephone Cooperative, Inc.

¹⁴ *Application of Texas Statewide Telephone Cooperative, Inc. for Administrative Revisions to its Intrastate Access Services Tariff*, Tariff Control No. 49545, Notice of Approval (Jun. 21, 2019).

¹⁵ Docket No. 50667, Application at 1 and 2 (with corrections).

indication that there has been any review of the tariffs by the Commission Staff to determine if substantive changes have been made to the tariffs.

In addition to the removal of the 17 ILECs, TSTCI states that its filing is necessary to change the intrastate access rates to maintain parity with interstate access rates, which TSTCI stated would be reduced in a future filing by the National Exchange Carrier Association (NECA).¹⁶ Further, TSTCI states that additional changes are needed in its access tariff because two of the issuing ILECs in its tariffs to are changing their interstate access rate tariffs.¹⁷

Further, under the rules of the Federal Communications Commission (FCC), the ILECs are required to reduce their access rates related to the bill and keep pricing arrangement.¹⁸ Rate regulated carriers were given a nine-year transition period to file a tariff reflecting this change.¹⁹ TTA filed revised tariff pages on June 8, 2020 in Docket No. 50667 to comply with the FCC requirements.

Relevant Statutes and Rules

The resolution of the certified issues in these proceedings depends on the Commission's interpretation of the Public Utility Regulatory Act (PURA)²⁰ and the Commission's telecommunications rules. Specifically, whether the Commission has the authority to approve a tariff filed by and in the name of a representative of multiple CCN holders, under which the CCN holders will charge various rates for services, products, or commodities on an individual basis.

The term *tariff* has two distinct but related meanings: a tariff is a fee, charge, rate, duty, tax, etc. that is charged for a service, product, or activity;²¹ and a tariff is a schedule listing the fees, charges, rates, etc.²² Both meanings are used in the utility arena. The term *tariff* is not explicitly defined in PURA. It is part of the definition of rate and is used there in the sense of a charge for service.²³ However, the term is defined in 16 TAC 26.5 (241) as follows:

¹⁶ Docket No. 50853, Application at 1. TSTCI, in its filing made on May 15, states that NECA will make its filing on June 16, but the record does not include an explanation of how the proposed tariff in this docket is addressing the changes in a filing that has not yet been made.

¹⁷ *Id.* This proposed change to the TSTCI tariff also appears to be reflecting future changes that had not been made at the time of TSTCI's filing in this docket.

¹⁸ See *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support, Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, (2011) (USF/ICC Transformation Order), *aff'd sub nom In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

¹⁹ *Id.*, para. 801; see also 47 C.F.R. § 51.909(j).

²⁰ Public Utility Regulatory Act, Tex. Util. Code §§ 11.001-66.016.

²¹ *Tariff*, Black's Law Dictionary (7th ed. 1999).

²² *Id.*

²³ PURA § 11.003(16)(A).

The schedule of a utility containing all rates, tolls, and charges stated separately by type or kind of service and the customer class, and the rules and regulations of the utility stated separately by type or kind of service and the customer class.

However, the term is used in PURA with the sense defined by this rule: a schedule of all the charges for the utility's services.²⁴ Although several provisions in PURA discuss the requirements of tariff filings for telecommunications services, PURA § 52.251 is perhaps the most relevant. In its entirety, PURA § 52.251 states that:

- (a) A *public utility* shall file with the commission a tariff showing each rate that is:
 - (1) subject to the commission's jurisdiction;
 - (2) in effect for a utility service, product, or commodity offered by the utility.
- (b) The *public utility* shall file as a part of the tariff required under Subsection (a) each rule that relates to or affects:
 - (1) a rate of the utility; or
 - (2) a utility service, product, or commodity furnished by the utility.

(Emphasis added)

In comparison with PURA § 52.251, the Commission's rules provide more granular information such as when utilities must file tariffs with the Commission, what information a utility must include in a tariff filing, the effectiveness of a tariff filing, and procedures for processing tariff filings.²⁵ Under the Commission's rules, an application for approval of a proposed tariff is to be approved by the Commission if the application passes an administrative review and meets the requirements of 16 TAC §§ 26.207 and 26.208(c).²⁶

To obtain Commission approval of a proposed tariff or proposed tariff revision, a *public utility* must file with the Commission an application for approval of a proposed tariff revision and five copies of *its* proposed tariff revision.²⁷ The application must include public notice plans that accord with the requirements of 16 TAC § 26.208(c). The proposed tariff revision must contain all of the utility's rates, tolls, charges, rules, and regulations pertaining to all of its utility service,

²⁴ See *id.* § 52.251(a) ("A public utility shall file with the commission a tariff showing each rate subject to the commission's jurisdiction that . . . is in effect for a utility service, product, or commodity offered by the utility"); see also *id.* § 32.101(a) (discussing electric utilities); Tex. Water Code § 13.136(a) (discussing water and sewer utilities).

²⁵ 16 TAC §§ 26.207 and 26.208.

²⁶ See *id.* § 26.208.

²⁷ See *id.* § 26.207(d)(1) ("Every public utility shall file with the commission filing clerk five copies of *its* tariff containing schedules of all *its* rates, tolls, charges, rules, and regulations pertaining to all of *its* utility service when *it* applies for a [CCN] to operate as a public utility. *It* shall also file five copies of each subsequent revision."); *id.* § 26.208(c), (f).

meet the formatting requirements of 16 TAC § 26.207(d)(1), and contain the sections listed under 16 TAC § 26.207(e).

Additionally, the Commission's rule that applies to intrastate access service, while focused on the rates for this service, does contain relevant language. The rule states that "*each DCTU's tariff must include*" rates for certain specified services.²⁸ And a "DCTU is not required to include in *its* access tariff any access service that its network is technologically incapable of providing."²⁹ And, "a DCTU must include in *its* access tariff" certain specified services.³⁰ Finally, "[t]he intrastate access service tariff of all DCTUs must contain" certain minimum requirements.³¹

Discussion on Certified Issues

I believe that the four issues certified to the Commission can be condensed into two issues:

- May a tariff be issued in the name of a non-utility trade group?
- Must each utility file its own tariff?

May a tariff be issued in the name of a non-utility trade group?

I believe the answer is no. As set forth above, PURA and the Commission's rules state the following: a utility is required to have a tariff; a utility applies for a tariff; and a tariff is approved for the rates and rules of a utility. While the Commission's rules do not explicitly state that a tariff must be in the name of the utility and cannot be in the name of a trade group, I believe that is a proper inference from PURA and the Commission's rules and is the proper policy decision. Thus, I do not believe that the Commission should approve the application of TTA for a new intrastate access tariff. In addition, I do not believe that the Commission should approved the amendments proposed by TSTCI for its tariff or that this tariff should remain in TSTCI's name.

In their arguments, the trade groups focus on the fact that a consolidated tariff was approved by the Commission in 1992 and amendments have been approved over the succeeding time period. This is the extent of the legal analysis presented by the parties in the proceedings. There is no analysis of the current statute or Commission rules or the changes in either that have been made over the last 18 years that might have a bearing on this issue. And while TSTCI cited to certain findings in Consolidated Docket Nos. 6106 and 7205 recognizing the filing and approval of the consolidated tariff, it failed to note the Commission's finding in that same order that short time limits prevented a thorough review of the access tariffs to ensure that they are in complete compliance with the Commission's rules.³² This finding undercuts the assertion that the approval of the consolidated tariff demonstrates compliance with Commission rules.

²⁸ *Id.* § 26.205(b) (emphasis added).

²⁹ *Id.* (emphasis added).

³⁰ *Id.* (emphasis added).

³¹ *Id.* (emphasis added).

³² *Petition of AT&T Communications of the Southwest, Inc. for Emergency and Other Relief Concerning Access Charges* and *Petition of the General Counsel for an Inquiry into a Flat Rate Plan for Access Charges*, Consolidated Docket Nos. 6106 and 7205, Finding of Fact No. 33 (Aug. 27, 1992).

Notwithstanding the previous approval of the consolidated tariff in a settled docket and subsequent administrative approvals of revisions to the tariff that were not addressed by the Commission itself, the question to be answered in these cases is whether the provisions of PURA and the Commission's rules as they exist today allow tariffs to be issued in the name of trade group. I do not believe that either PURA or the Commission's rules allow such tariffs.

However, I want to make clear that this decision would not preclude TTA or TSTCI from providing assistance to its members regarding their tariffs. They can each track for their members changes in law that require tariff changes, advise their members on the language of the tariff, and prepare the tariff filing. In summary, those associations can perform the same functions of assisting their members except they cannot have a tariff issued in their names.

Must each utility file its own tariff?

I believe the answer under the Commission's existing rules is yes. The concept in PURA and the Commission's rules is that a utility will have a tariff "containing all rates" for each service it provides, broken down by the type of service and customer class.³³ It is inconsistent with PURA and the Commission's rules for the rates and rules of a utility to be found in separate tariffs issued to different entities.

Thus, I believe that there are two possible approaches to this issue. First, the Commission could require each ILEC to file an amendment to its tariff to include the rates and rules regarding intrastate access service. If the Commission decides to take this approach, the Commission should establish a schedule for these filings so that they are not all filed at the Commission at one time. Otherwise, the workload would be too large of a strain on both the Commission's resources and the resources of TTA and TSTCI.

A second approach would be the adoption by rule of a pro forma tariff for intrastate access service and an amendment of the current access rate rule to allow incorporation of that pro forma tariff by reference. This rule currently allows an ILEC's access tariff to cross-reference its federal tariff if the access rates for both are the same.³⁴ This approach would provide better oversight than a single tariff of provisions that apply to over 40 companies.

However, there is a need to update the access rates for these utilities now. Transitioning to utility-specific tariffs, whether a pro forma tariff is used or not, will require some amount of time and cannot stand in the way of getting updated access rates in a tariff. Thus, I propose that the Commission use a two-step approach.

The first step would be to convert TSTCI's existing consolidated tariff into a generic Texas Intrastate Access Tariff that can be revised to reflect the new access rates required by the FCC rules. TTA and TSTCI can work jointly to revise this new generic tariff, based on TSTCI's current tariff, to reflect the new access rates as of July 1 for their member ILECs. Because TTA's filing was to reflect the change in trade-group membership with no changes to revenues or rates and no customer impacts, it appears that only changes to the rates as reflected in TTA's June 8, 2020 filing need to be made. TSTCI will also need to update the rates for its member ILECs. In addition,

³³ 16 Tex. Admin. Code § 25.5(131)

³⁴ 16 Tex. Admin. Code § 256.205(b).

TSTCI will need to make changes to the existing tariff to address its two members exiting the NECA interstate access tariff, but those changes have already been identified.

Preparing this generic Texas tariff should be relatively easy and take a short time to complete. Upon filing, Commission Staff will need to focus primarily on the rates, but also on those portions of the tariff needing revision. Once the new access tariffs are approved in the new generic Texas tariff, the Commission can decide how to approach the second step, primarily whether to adopt a pro forma tariff or a schedule for individual companies.

I look forward to discussing this matter with you at the open meeting.