

PROJECT NO. 24376

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

**PROPOSAL FOR PUBLICATION
AS APPROVED AT THE MARCH 21, 2002 OPEN MEETING**

The Public Utility Commission of Texas (commission) proposes new §26.37, relating to the Texas No-Call List. The proposed new rule implements provisions of House Bill 472 (HB 472) §43.103, 77th Legislature, pertaining to rules, customer information and isolated violations of the Texas no-call list. HB 472 was later codified in the Texas Business & Commerce Code Annotated (Vernon 1998 & Supplement 2002) (Bus. & Com. Code), Chapter 43 relating to Telemarketing. Project Number 24376 is assigned to this proceeding.

The proposed new section sets forth procedures whereby customers will be notified of the availability of the Texas no-call list, providing for the dissemination of the no-call list in formats commonly used by persons making telemarketing calls, and addressing violations of the no-call list.

Lori Hartman, Policy Analyst, Policy Development Division has determined that for the first five-year period the new section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering this section. 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 the no-call database. The no-call program is self-funding in that any costs resulting from the contract with the vendor will be offset by the fees paid by customers and telemarketers.

Ms. Hartman has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing this section will be that customers will be informed of the opportunity to sign-up for the no-call list; thereby reducing the number of unwanted or uninvited telemarketing calls made to their homes. Ms. Hartman has also determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section. There will be some economic cost to persons who are required to comply with the proposed section since telemarketers who make telemarketing calls to telephone numbers in Texas will be required to purchase the quarterly publication of the no-call list in order to update their own call lists. However, the amount is a set fee and subscribing to the list will assist telemarketers in identifying customers who do not wish to receive calls. In addition, companies that participate in telemarketing activities typically already have procedures established for removing names from their call lists, or for entry into their automatic dial announcing devices in order to prevent calling the telephone numbers of persons who have requested not to be called. Thus, the burden upon such persons is expected to be minimal and is outweighed by the customer benefit that will be derived.

Ms. Hartman has also determined that for each year of the first five years the proposed section is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under the Administrative Procedure Act §2001.022.

The commission staff will conduct a public hearing on this rulemaking pursuant to Government Code §2001.029 at the commission's offices, located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701, in the Commissioners' Hearing Room, on Monday, May 6, 2002, at 1:30 p.m.

Comments on the proposed new section (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 21 days after publication. Reply comments may be submitted within 28 days after publication. Comments should be organized in a manner consistent with the organization of the proposed rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 24376, Texas No-Call List.

This new section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated (PURA) §14.002 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 proposed under Bus. & Com. Code §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 §43.103.

§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.
- (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, telephone numbers and dates of registration for all Texas no-call subscribers. 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 subscriber** — 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:

- (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, including a telemarketing call made by an ADAD.
- (d) **Requirement of telemarketers.** A telemarketer shall not make or cause to be made a telemarketing call to a telephone number that has been on the Texas no-call list more than 60 days.
- (e) **Exemptions.** This section shall not apply to a telephone call made:
- (1) By a no-call subscriber 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 subscriber'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 Texas no-call database on January 1, April 1, July 1, and October 1 of each year;

- (B) Fees. The no-call database shall be made available to 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 database 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 telemarketer.
- (3) **Intended use of the no-call database.**
- (A) The no-call database shall be used only for the intended purpose of promoting and furthering statutory mandates in accordance with the Bus. & Com. Code, chapter 43 relating to Telemarketing. The no-call database shall not be transferred or resold to any other entity, group, or individual.
 - (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 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 to 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 both English and Spanish that, at a minimum, clearly explains the following:
- (A) Beginning January 1, 2002, residential customers may add their name, address and 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 subscribes to 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 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 subscribes to 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 shall include notice in the consumer information section of each local telephone directory. The notice in the directory shall be easily legible, prominently displayed and comply with the requirements listed in paragraph (1) of this subsection.
 - (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 following methods:
 - (i) an insert in the customer's billing statement. Electronic notification is permissible for any customer who, during the

notification period, is receiving billing statements from the CTU in an electronic format; or,

- (ii) a bill message if the CTU is also in compliance with subparagraph (A) of this paragraph.

(3) **Timing of notice.** A CTU shall provide initial notice to its residential customers within 60 days of the effective date of this rule, and beginning in 2003, shall provide annual notice to its residential customers between June 1 and August 31 of each year.

(4) **Compliance and enforcement.**

(A) Commission review of the notice. The CTU shall file a copy of the notice with the commission at least 45 days prior to the intended date of distribution. The CTU shall also inform the commission of its intended method and timing of customer notification. The notice will be reviewed by commission staff before distribution to customers. Commission staff will notify the CTU within ten days of submission if the proposed notice must be modified, and the specific modifications required.

(B) Records of customer notification. A CTU shall provide a copy of records maintained under the requirements of this subsection to the commission upon request.

(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 by the commission 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 incident, 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 claim that a potential violation of this section was an isolated occurrence, the telemarketer must first 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 exclusive 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 exclusive 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 proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

**ISSUED IN AUSTIN, TEXAS ON THE 22nd DAY OF MARCH 2002 BY THE
PUBLIC UTILITY COMMISSION OF TEXAS
RHONDA G. DEMPSEY**