

PROJECT NO. 31937

RULEMAKING TO ESTABLISH A	§	PUBLIC UTILITY COMMISSION
CLASSIFICATION SYSTEM	§	
FOR THE ASSESSMENT OF	§	OF TEXAS
ADMINISTRATIVE PENALTIES	§	

**ORDER ADOPTING NEW §26.9
AS APPROVED AT THE SEPTEMBER 21, 2006 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts new §26.9, relating to a Classification System for Violations of Statutes, Rules and Orders Applicable to Telecommunications Service Providers with changes to the proposed text as published in the April 28, 2006 issue of the *Texas Register* (31 TexReg 3464). The new section implements the Public Utility Regulatory Act (PURA) §15.023. The new section will establish a classification system for violations of certain provisions of the Business and Commerce Code, PURA and related commission rules and orders, and establish a range of penalties that may be assessed for each class of violations. This new section is adopted under Project Number 31937.

The commission received comments on the proposed new section from Verizon, AT&T Texas (AT&T), Texas Commission on State Emergency Communications (CSEC), Texas Telephone Association (TTA), and Texas Statewide Telephone Cooperative, Inc. (TSTCI).

Subsection (a) - Purpose

AT&T stated that the general nature of the classification scheme does not provide sufficient notice to telecommunications carriers as to what actions(s) would constitute an infraction subject to a penalty under each particular class of violations.

Commission response

Actions that constitute a violation are determined by reference to the particular statute, rule or commission order that sets up the regulatory requirement, and not this rule. This rule is intended to notify persons of the particular range of penalties that may be assessed for particular violations. Accordingly, the commission declines to change the rule.

AT&T stated that the new section doesn't address good faith efforts to correct an infraction or self-reporting.

Commission response

Along with the other five factors specified in PURA §15.023(c), efforts to correct a violation (and self-reporting) are more appropriately taken into account in deciding the amount of the administrative penalty to assess in a specific enforcement proceeding. The scope of this rulemaking is limited to establishing the classification system for all violations. Accordingly, the commenter's request is beyond the scope of this rulemaking and the commission declines to amend the rule.

Subsection (b)(1)(A)

In its reply comments AT&T stated that it supports the comments of others that there should be a minimum penalty amount of \$0.

Commission response

The commission agrees with commenters that there should be a minimum penalty of \$0 for all violations. However, allowance for \$0 penalties is already incorporated into the rule as proposed. For each class of violations, the rule establishes a maximum penalty amount for each class of violation. The phrase, “may not exceed,” allows for a \$0 penalty in the appropriate situation. The commission sees no benefit to expressly repeating what is already permitted under the rule. Therefore, the commission declines to make the requested change.

Subsection (b)(1)(B)(i)

TSTCI indicated that a small ILEC occasionally may not have the resources to meet all reporting deadlines and requested the commission to revise this provision to make the violation applicable to cases where a company fails to file a report after being warned by the Commission and given additional time to respond.

Commission response

All ILECs, regardless of size, are required to follow the provisions of PURA, and the commission rules and orders. In those instances where an ILEC fails to follow the law, the commission will refer to the classification scheme in this rule and the factors set forth in PURA §15.023(c) and P.U.C. PROC. R. §22.246 in establishing the appropriate administrative penalty. (As noted in the commission response under subsection (b)(1)(A), a penalty as low as \$0 could result depending on the extent of the violation involved.) Accordingly, the commission declines to revise the rule.

Subsection (b)(1)(B)(ii)

AT&T stated that in subsection (b)(1)(B)(ii), the word “certified” should be changed to “certificated.”

Commission response

The commission agrees that the appropriate word is “certificated,” and has changed subsection (b)(1)(B)(ii) accordingly.

Subsection (b)(3)(A)

Verizon and AT&T stated that the commission should distinguish between intentional and unintentional violations with the most severe penalty being reserved for intentional violations.

Commission response

The commission disagrees with the commenters. PURA §15.023 does not require that “intent” be a factor in designing a classification system of violations. Rather, the provision provides the commission with wide discretion to develop a classification system. The only limitation that the legislature placed on the design of the classification system was that only the highest class of violation could command a penalty in excess of \$5,000. The commission concludes that more objective factors should be used to determine the class of a violation, but that intent and other factors may be used to determine the severity of a penalty within each class, as discussed below. Accordingly, the commission declines to include intent as a factor in its classification of violations.

Intent can be a relevant factor in determining the appropriate size of a penalty on a case-specific basis. Indeed, PURA §15.023(c)(1)-(6) requires consideration of a number of factors in determining an appropriate penalty within a class for a particular violation, including such factors as the amount necessary to deter future violations, efforts to correct the violation, and any other matter that justice may require. Consideration of whether an action was intentionally or unintentionally committed may be an appropriate consideration in evaluating these factors and determining the proper penalty, depending on the nature and severity of a violation. To clarify that “intent” and “history of violations” are factors in assessing a penalty along with the other factors enumerated in PURA §15.023(c), rather than bases for a classification system, the commission has removed subsection (b)(3)(B)(x) and (xi) from the proposed language. The commission adds to Class A, violations not already listed that affect the reliability of the telecommunications network or a portion thereof. Making these changes will also ensure greater consistency between this rule and its electric service counterpart, §25.8 of this title.

For the purposes of establishing the classification system, the commission believes that §15.023 contemplates that only the most serious types of violations would be in Class A, irrespective of intent. However, the commission believes that the measurement of the seriousness of a violation is best measured by the harm that results or might result from a violation. The most serious violations are those that create significant economic harm to a person or persons, property, or the environment, or create a significant economic benefit to the violator; create a hazard or potential hazard to the health or safety of the public; or

cause a risk to the reliability of the telecommunications network or a portion thereof. The commission finds that it is appropriate to limit Class A violations to those violations that meet one or more of these criteria and the commission has modified subsection (b)(3)(B) accordingly.

Subsection (b)(3)(B)(i)

TSTCI stated that violations related to missed service objectives and improper disconnections should not be Class A violations. For small companies this would be extremely consequential. Missed service quality benchmarks, while serious are most likely the result of technical problems beyond the company's control.

Commission response

Service quality benchmarks have been established to assure a minimum level of service to customers. All companies subject to these benchmarks, regardless of size, are required to meet the benchmarks. In those instances where a company fails to meet the benchmarks, the commission will refer to the classification scheme in this rule and the factors set forth in PURA §15.023(c) and P.U.C. PROC. R. §22.246 in establishing the appropriate administrative penalty. Accordingly, the commission declines to revise the rule.

Subsection (b)(3)(B)(iv)

CSEC indicated that it fully supports and endorses the classification of "acts that adversely affect the integrity of the state's 9-1-1 system relating to network interoperability, service quality standards and database integrity standards," as Class A violations.

Commission response

The commission appreciates the support of CSEC in its decision to include this type of violation in the highest class of violations.

Subsection (b)(3)(B)(v)

TTA stated that unintentional disconnections should be in Class C.

Commission response

Please refer to the commission's response to commenters in reference to subsection (b)(3)(A).

In its reply comments AT&T stated that the commission should define "improper disconnection" as one committed willfully and knowingly.

Commission response

The commission finds that an "improper disconnection" is a disconnection not permitted by law. Whether a disconnection is improper does not depend on the state of mind of the person doing the disconnection. Accordingly, the commission declines to amend the rule.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission makes other minor modifications for the purpose of clarifying its intent.

This new section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2005) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction: and specifically, PURA §15.023, which requires that the commission to establish by rule a classification system for violations.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §15.023.

§26.9. Classification System for Violations of Statutes, Rules, and Orders Applicable to Telecommunications Service Providers.

- (a) **Purpose.** The purpose of this rule is to establish a classification system for violations of certain provisions of the Business and Commerce Code, the Public Utility Regulatory Act (PURA), and related commission rules and orders, and to establish a range of penalties that may be assessed for each class of violations.
- (b) **Classification system.**
- (1) **Class C violations.**
- (A) Penalties for Class C violations may not exceed \$1,000 per violation per day.
- (B) The following violations are Class C violations:
- (i) Failure to file a report or provide information required to be submitted to the commission under this chapter within the timeline required;
- (ii) Failure by a certificated telecommunications utility to investigate a complaint by a customer and appropriately report the results within the timeline required;
- (iii) Failure to update information relating to a registration or certificate by the commission within the timeline required;
- (iv) Failure to comply with the requirements for the use and permitting of an automatic dial announcing device (ADAD); and
- (v) A violation of the Texas no-call list.

(2) **Class B violations.**

- (A) Penalties for Class B violations may not exceed \$5,000 per violation per day.
- (B) All violations not specifically enumerated as a Class C or Class A violation shall be considered Class B violations.

(3) **Class A violations.**

- (A) Penalties for Class A violations may not exceed \$25,000 per violation per day.
- (B) The following types of violations are Class A violations if they (1) create economic harm in excess of \$5,000 to a person or persons, property, or the environment, or create an economic benefit to the violator in excess of \$5,000; (2) create a hazard or potential hazard to the health or safety of the public; or (3) cause a risk to the reliability of the telecommunications network or a portion thereof.
 - (i) A violation related to service quality, service objectives, or performance benchmarks;
 - (ii) A violation related to prohibited discrimination in the provision of telecommunications service;
 - (iii) A violation related to prohibited discrimination by a cable service provider or video service provider that has been granted a state-issued certificate of franchise authority;

- (iv) Engaging in acts that adversely affect the integrity of the state's 9-1-1 system relating to network interoperability, service quality standards and database integrity standards;
 - (v) A violation relating to improper suspension or disconnection of a customer;
 - (vi) A violation related to fraudulent, unfair, misleading, deceptive, or anticompetitive business practices;
 - (vii) Conducting business subject to the jurisdiction of the commission without proper commission authorization, registration, licensing, or certification;
 - (viii) A violation not otherwise enumerated in this paragraph (3)(B) of this subsection that creates a hazard or potential hazard to the health or safety of the public;
 - (ix) A violation not otherwise enumerated in this paragraph (3)(B) of this subsection that creates economic harm to a person or persons, property, or the environment in excess of \$5,000, or creates an economic benefit to the violator in excess of \$5,000; and
 - (x) A violation not otherwise enumerated in this paragraph (3)(B) of this subsection that causes a risk to the reliability of the telecommunications network or a portion thereof.
- (c) **Application of enforcement provisions of other rules.** To the extent that the Business and Commerce Code, PURA, or other rules in this chapter establish a range of administrative penalties that are inconsistent with the penalty ranges provided for in

subsection (b) of this section, the other provisions control with respect to violations of those rules.

- (d) **Assessment of administrative penalties.** In addition to the requirements of §22.246 of this title (relating to Administrative Penalties), a notice of violation recommending administrative penalties shall indicate the class of violation.

This agency hereby certifies that the adoption 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 §26.9 relating to Classification System for Violations of Statutes, Rules and Orders Applicable to Telecommunications Service Providers is hereby adopted with changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE _____ DAY OF SEPTEMBER 2006.

PUBLIC UTILITY COMMISSION OF TEXAS

PAUL HUDSON, CHAIRMAN

JULIE PARSLEY, COMMISSIONER

BARRY T. SMITHERMAN, COMMISSIONER