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Chairman

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JUN 25 2014
OPINION COMMITTEE



FILE # MC-47600-14
I.D.# 47600

Public Utility Commission of Texas

June 20, 2014

RQ-1208-GA

The Honorable Greg Abbott
Attorney General of Texas
Attn: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

Re: Request for Opinion

Dear Attorney General Abbott:

This is a request for an opinion from your office regarding whether the Public Utility Commission of Texas (hereinafter, "PUC," or "the commission") may declassify the compliance reports filed in PUC Project Number 41505, when there is not a Public Information Act (PIA) request for the information and no protective order issued in a contested case where that protective order might be challenged in a declassification motion.¹

Background

The Public Utility Regulatory Act (PURA)² Chapter 56 establishes the Texas Universal Service Fund (TUSF) and charges the PUC with several duties and powers relating to administration of the fund.³ The underlying purpose of the TUSF is to implement a competitively neutral mechanism to enable all Texas residents to obtain, at reasonable rates, basic local telecommunications services needed to communicate with other residents, businesses, and governmental entities. The TUSF is funded through a statewide uniform assessment levied on each telecommunications provider that has access to the Texas customer base. In most cases, telecommunications providers choose to recover the assessment via a segregated surcharge that is flowed through to customers.

In 2011, the Texas Legislature enacted Senate Bill 980, which required the PUC to "adopt rules for the administration of the universal service fund...includ[ing] procedures to ensure

¹ The PUC's procedural rules allow for issuance of a protective order in a proceeding before the commission at the discretion of the presiding officer and provide a mechanism for challenging those protective orders. See P.U.C. PROC. R. 22.142 (a)(2) and (c), and Tex. Pub. Util. Comm'n., *Development of a Standard Protective Order for use in Senate Bill 7 Transition Cases*, Docket No. 21662, Memorandum Reflecting Final Approval of Standard Protective Order at 1 para. 1 and at 10 para. 26 (Jan. 6, 2000)

² PURA is codified in Title II of the Texas Utility Code.

³ See PURA § 56.001 et seq.



reasonable transparency and accountability in the administration of the universal service fund.”⁴

Pursuant to this statute, the PUC adopted P.U.C. SUBST. R. 26.402⁵, which required (among other things) certain telephone providers⁶ that receive funds through the Texas Universal Service Fund (TUSF) and also receive Federal Universal Service Fund (USF) High Cost Support funds to file a five-year plan that describes proposed improvements or upgrades to the provider’s network throughout its service area by July 1, 2013.⁷ Providers who are required to file these five-year plans are also required to file annual progress reports each year thereafter.⁸ These reports were intended to mirror reports required by the Federal Communications Commission (FCC) in order to minimize the burden of reporting on these providers.⁹

However, after the PUC adopted P.U.C. SUBST. R. 26.402, and before the initial reports were due on July 1, 2013, the FCC began the process of revising its reporting requirements. In response to requests by the providers required to file the Texas reports, and again in order to minimize the burden on reporting providers, the PUC granted a one-year extension of time for filing the five-year plans.¹⁰ But, as a condition of the one-year extension, the PUC required the providers to file the following information on a service area-wide basis by July 31, 2013:

- 1) TOTAL TUSF RECEIPTS broken out by the following categories¹¹:
 - a. Disbursements from the Texas High Cost Universal Service Plan (THCUSP),
 - b. Disbursements from the Small and Rural Incumbent Local Exchange Carrier Universal Service Plan (SRILEC USP),
 - c. Disbursements from the High Cost Universal Service Plan (USP) for Uncertificated Areas
 - d. Disbursements from the High Cost Assistance Fund
 - e. Disbursements from Additional Financial Assistance

⁴ Act of May 10, 2011, 82nd Leg., R.S., ch. 98 (SB980), § 10 (codified at TEX. UTIL. CODE § 56.023(d)).

⁵ The Public Utility Commission rules are compiled in the Texas Administrative Code under Title 16, Part II. They may also be found on the PUC website at:

<http://www.puc.texas.gov/agency/rulesnlaws/Default.aspx>.

⁶ In the pleadings related to the declassification question posed in this letter, the telephone providers are referred to as ETP/ETCs, which stands for Eligible Telecommunications Providers/Eligible Telecommunications Carriers.

⁷ P.U.C. SUBST. R. 26.402(d)(1).

⁸ P.U.C. SUBST. R. 26.402(d)(2).

⁹ Tex. Pub. Util. Comm’n., *Rulemaking Proceeding to Amend Chapter 26, Subchapter P-Relating to Administration of the Texas Universal Service Fund (TUSF)*, PUC Project No. 39939, Order Adopting New § 26.402 as Approved at the October 12, 2012 Open Meeting at 12 (Oct. 19, 2012).

¹⁰ Tex. Pub. Util. Comm’n., *Petition of the Texas Telephone Association Price Cap Carriers for a Good Cause Waiver from the Requirements of PUC SUBST. R. § 26.402*, PUC Docket No. 41570, Notice of Approval at 7 (July 11, 2013).

¹¹ Each of these categories is a specific program under the Texas Universal Service Fund that provides funding to qualifying telephone providers.

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- f. Disbursements from the Universal Service Fund Reimbursement for Certain Intra-Local Access and Transport Area (IntraLATA) Service,
 - g. Disbursements from Lifeline,
 - h. Disbursements from Tel-Assistance;
- 2) TOTAL OPERATING EXPENSE broken out by the following categories:
- a. Plant Specific Operations Expense,
 - b. Plant Non-Specific Operations Expense,
 - c. Customer Operations Expense,
 - d. Corporate Operations Expense,
 - e. Depreciation and Amortization,
 - f. Other Operating Expense; and
- 3) TOTAL PROPERTY broken out by the following categories:
- a. Telecom Plant in Service,
 - b. Property Held for Future Use, and
 - c. Telecom Plant Under Construction.¹²

The providers were required to report this information for the calendar year of January 1, 2012 through December 31, 2012.¹³

The providers filed this information with the PUC in Project Number 41505, and chose to file it confidentially.¹⁴ On August 5, 2013, PUC Staff filed a petition to open a contested case in order to declassify the reports,¹⁵ which the providers opposed.¹⁶ Ultimately, the Commission dismissed the petition without prejudice in order to seek an opinion from the Attorney General regarding whether the Commission has the authority to declassify these reports.¹⁷ Although the parties disagree regarding the PUC's authority to declassify the information in PUC Project Number 41505, all parties are in agreement that seeking an Attorney General Opinion regarding the Commission's authority to declassify this information is an appropriate course of action.¹⁸

¹² *Petition of the Texas Telephone Association Price Cap Carriers for a Good Cause Waiver from the Requirements of PUC SUBST. R. § 26.402*, PUC Docket No. 41570, Notice of Approval at 5-6.

¹³ *Id.*

¹⁴ See the compliance reports filed in Tex. Pub. Util. Comm'n., *Compliance Proceeding for Eligible Telecommunications Carriers to Submit Five-Year Plans Pursuant to P.U.C. Subst. R. 26.402*, Project No. 41505, e.g., Consolidated Communications of Fort Bend Company's Compliance Filing (July 25, 2013).

¹⁵ Tex. Pub. Util. Comm'n., *Commission Staff's Petition to Declassify TUSF Transparency Compliance Reports Filed in Project No. 41505 by Reporting ETC/ETPs*, PUC Docket No. 41735, Commission Staff's Original Petition to Declassify TUSF Transparency Compliance Reports (August 5, 2013).

¹⁶ See generally filings in *Commission Staff's Petition to Declassify TUSF Transparency Compliance Reports filed in Project No. 41505 by Reporting ETC/ETPs*, PUC Docket No. 41735.

¹⁷ *Commission Staff's Petition to Declassify TUSF Transparency Compliance Reports Filed in Project No. 41505 by Reporting ETC/ETPs*, PUC Docket No. 41735, Order of Dismissal without Prejudice (March 4, 2014).

¹⁸ See *Commission Staff's Petition to Declassify TUSF Transparency Compliance Reports Filed in Project No. 41505 by Reporting ETC/ETPs*, PUC Docket No. 41735, Commission Staff's Corrected Response to Responding Companies' Joint Motion to Dismiss at 3-4 (October 17, 2013), and Responding Companies' Joint Motion to Dismiss at 10 (September 27, 2013).

Summary of Arguments For and Against Declassification

The proponents of declassification of the reports (i.e., PUC Staff; Sprint Communications Company, L.P.; TW Telecom of Texas, LLC; and the Texas Cable Association) argue that the information should not have been filed confidentially because there is no legal basis for confidentiality and filing the information confidentially is counter to the legislative mandate for the PUC to increase the transparency and accountability in the administration of the TUSF.¹⁹

The opponents of declassification of the reports (i.e., the providers who filed the reports confidentially) present several arguments against declassification, which the proponents of declassification dispute.

Disputed Confidentiality of the Information

First, the opponents of declassification allege that the information is confidential under PIA §§ 552.110 and 552.101 in conjunction with PURA § 56.024.²⁰ However, proponents of declassification argue that the information filed in Project Number 41505 does not contain any trade secrets, and cannot be demonstrated to cause substantial competitive harm under PIA § 552.110 because the information is provided on a service area-wide level by each company, rather than breaking down this information by individual market area or “exchange,”²¹ and providers do not always maintain this type of information confidentially.²² Rather, they file it publically during rate cases²³ and have publically filed it in the past with the FCC.²⁴

Additionally, proponents of declassification argue that the information is not confidential under PIA § 552.101 in conjunction with PURA § 56.024. PURA § 56.024 includes two

¹⁹ See *Commission Staff's Petition to Declassify TUSF Transparency Compliance Reports Filed in Project No. 41505 by Reporting ETC/ETPs*, PUC Docket No. 41735, Staff's Original Petition to Declassify TUSF Transparency Compliance Reports at 16, citing PURA § 56.023(d); and *Motion to Intervene of Sprint Communications Company, L.P., TW Telecom of Texas, LLC, and The Texas Cable Association* at 2 (September 5, 2013).

²⁰ See, e.g., *Commission Staff's Petition to Declassify TUSF Transparency Compliance Reports Filed in Project No. 41505 by Reporting ETC/ETPs*, PUC Docket No. 41735, Responding Companies' Joint Motion to Dismiss at 1-2.

²¹ The reports filed by single exchange companies were excluded from Staff's petition to declassify.

²² See, e.g., *Commission Staff's Petition to Declassify TUSF Transparency Compliance Reports Filed in Project No. 41505 by Reporting ETC/ETPs*, PUC Docket No. 41735, Commission Staff's Original Petition to Declassify TUSF Transparency Compliance Reports at 11.

²³ See, e.g., *id.* at 12, fn 34 and 35, citing e.g. *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 (November 29, 1983); and *Application of Hooks Telephone Company for a Rate Increase within Bowie County*, Docket No. 2150; Examiner's Report publically disclosing the Hearing Examiner's recommendation for Hooks Telephone Company's total cost-of-service including particular amounts for operating expenses plant-in-service (Mar. 28, 1998).

²⁴ See, e.g., *Commission Staff's Petition to Declassify TUSF Transparency Compliance Reports Filed in Project No. 41505 by Reporting ETC/ETPs*, PUC Docket No. 41735, Commission Staff's Corrected Response to Responding Companies' Joint Motions to Dismiss at 5 and Attachment A (October 17, 2013).

provisions providing for confidentiality of certain information. PURA § 56.024(b) provides that “a report or information the commission requires a telecommunications provider to provide under [§ 56.024 (a)]” is confidential. (PURA § 56.024(a) gives the commission discretionary authority to require a provider to supply “a report or information necessary to assess contributions and disbursements to the universal service fund.”) PURA § 56.024(d) provides that telecommunications providers’ annual earnings reports filed under § 56.024(c) are confidential.²⁵

Proponents of declassification argue that the information filed in Project Number 41505 is not covered by either of these provisions because the information is not used to assess contributions or disbursements to the universal service fund,²⁶ and the filings are not earnings monitoring reports, although they contain some of the same information as the earnings monitoring reports.²⁷ Proponents of declassification argue that, although the reports themselves are confidential, that does not extend confidentiality to every kind of information included within the reports when they are included in a different record.²⁸ Additionally, proponents of declassification argue that the filings in Project Number 41505 were not made in accordance with PURA § 56.024, they were made pursuant to P.U.C. SUBST. R. 26.402 and PURA § 56.023(d).²⁹

PUC’s Confidential Filing Process

Second, the opponents of declassification argue that the information should be treated as confidential because PUC provides a process for filing confidentially in P.U.C. PROC. R. 22.71, which the providers followed.³⁰ Proponents of declassification argue that the providers did not appropriately follow the PUC’s process for filing the information in Project Number 41505 because P.U.C. PROC. R. 22.71(d) specifies that only confidential materials may be filed confidentially, and since they allege that the information is not confidential, the information could not have been properly filed confidentially.³¹

²⁵ The form and instructions for the annual earnings reports describe the information to be included in those reports. Links to the form and instructions for the annual earnings reports can be found at <http://www.puc.texas.gov/industry/communications/forms/Default.aspx>, under the heading “Earnings Monitoring Report” (approximately mid-way down the page).

²⁶ See *Commission Staff’s Petition to Declassify TUSF Transparency Compliance Reports Filed in Project No. 41505 by Reporting ETC/ETPs*, PUC Docket No. 41735, Commission Staff’s Original Petition to Declassify TUSF Transparency Compliance Reports at 15, citing PURA § 56.022(a) (“Contributions are achieved by assessing a ‘statewide uniform charge payable by each telecommunications provider that has access to the customer base.’”).

²⁷ See *id.* at 15.

²⁸ See *id.*

²⁹ See *id.*

³⁰ See, e.g., *Commission Staff’s Petition to Declassify TUSF Transparency Compliance Reports Filed in Project No. 41505 by Reporting ETC/ETPs*, PUC Docket No. 41735, Appearance and Response to Commission Staff’s Original Petition to Declassify TUSF Compliance Reports at 2 (August 26, 2013).

³¹ See *Commission Staff’s Petition to Declassify TUSF Transparency Compliance Reports Filed in Project No. 41505 by Reporting ETC/ETPs*, PUC Docket No. 41735, Commission Staff’s Original Petition to Declassify TUSF Transparency Compliance Reports at 9.

PUC's Disputed Authority to Declassify Information in These Circumstances

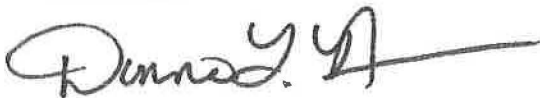
Third, the opponents of declassification argue that an Attorney General Decision is the only vehicle for determining that the information is public.³² They allege that neither P.U.C. SUBST. R. 26.402 nor P.U.C. PROC. R. 22.71 authorizes or establishes a process for reviewing and determining the validity of confidentiality claims and the PIA requires that disputes regarding the confidentiality of materials designated as confidential be addressed by the Attorney General.³³

Proponents of declassification argue that the commission has the authority to interpret and act upon its rule, P.U.C. PROC. R. 22.71(d), which states a party making a filing with the Commission may not designate as confidential any "non-confidential materials unless directly related to and essential for the clarity of the confidential material." Since proponents of declassification argue that none of the information filed in Project Number 41505 is confidential, the information cannot be "directly related to [or] essential for the clarity of" confidential material in those filings. The proponents also noted there has been no PIA request for this information, so the PIA provision allowing a governmental body to request an Attorney General Decision regarding confidentiality under the PIA does not apply.³⁴

Conclusion

I appreciate your attention to this request. Please let me know if you need additional information. If it is helpful to review any of the filings in the case underlying this request, they can be accessed at the following link on the Commission's website: <http://interchange.puc.texas.gov/WebApp/Interchange/application/dbapps/filings/pgSearch.asp> by entering the Docket Number, 41735, into the "Control Number" field and clicking "Search."

Sincerely,



Donna L. Nelson, Chairman
Public Utility Commission

³² See, e.g., *Commission Staff's Petition to Declassify TUSF Transparency Compliance Reports Filed in Project No. 41505 by Reporting ETC/ETPs*, PUC Docket No. 41735, Response of Verizon at 1 (August 26, 2013), citing PIA § 552.305.

³³ See, e.g., *id.* at 1 and 7 (August 26, 2013).

³⁴ See *Commission Staff's Petition to Declassify TUSF Transparency Compliance Reports Filed in Project No. 41505 by Reporting ETC/ETPs*, PUC Docket No. 41735, Commission Staff's Response to the Motions to Dismiss of the Alenco Group, The Brazos Companies, Centurylink, The Consolidated Group, Cumby, and Verizon at 6 (September 16, 2013).