

CHAPTER 414

S.B. No. 229

AN ACT

relating to the regulation of certain telecommunications carriers.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Subsection (c), Section 3, Public Utility Regulatory Act (Article 1446c, Vernon's Texas Civil Statutes), as amended by Chapters 99, 263, and 274, Acts of the 68th Legislature, Regular Session, 1983, is amended to read as follows:

(c) The term "public utility" or "utility," when used in this Act, includes any person, corporation, river authority, cooperative corporation, or any combination thereof, other than a municipal corporation or a water supply or sewer service corporation, or their lessees, trustees, and receivers, now or hereafter owning or operating for compensation in this state equipment or facilities for:

(1) producing, generating, transmitting, distributing, selling, or furnishing electricity ("electric utilities" hereinafter) provided, however, that this definition shall not be construed to apply to or include a qualifying small power producer or qualifying cogenerator, as defined in Sections 3(17)(D) and 3(18)(C) of the Federal Power Act, as amended (16 U.S.C. Sections 796(17)(D) and 796(18)(C));

(2)(A) the conveyance, transmission, or reception of communications over a telephone system as a dominant carrier as hereinafter defined ("telecommunications utilities" hereinafter); provided that no person or corporation not otherwise a public utility within the meaning of this Act shall be deemed such solely because of the furnishing or furnishing and maintenance of a private system or the manufacture, distribution, installation, or maintenance of customer premise communications equipment and accessories; and provided further that nothing in this Act shall be construed to apply to telegraph services, television stations, radio stations, community antenna television services, or radio-telephone services that may be authorized under the Public Mobile Radio Services rules of the Federal Communications Commission, other than such radio-telephone services provided by wire-line telephone companies under the Domestic Public Land Mobile Radio Service and Rural Radio Service rules of the Federal Communications Commission; and provided further that *interexchange telecommunications carriers (including resellers of interexchange telecommunications services)*, specialized communications common carriers, *other* resellers of communications, and other communications carriers who convey, transmit, or receive communications in whole or in part over a telephone system who are not dominant carriers are also telecommunications utilities, but the commission's regulatory authority as to them is only as hereinafter defined;

(B) "dominant carrier" when used in this Act means (i) a provider of any particular communication service which is provided in whole or in part over a telephone system who as to such service has sufficient market power in a telecommunications market as determined by the commission to enable such provider to control prices in a manner adverse to the public interest for such service in such market; and (ii) any provider of local exchange telephone service within a certificated exchange area as to such service. A telecommunications market shall be statewide until January 1, 1985. After this date the commission may, if it determines that the public interest will be served, establish separate markets within the state. Prior to January 1, 1985, the commission shall hold such hearings and require such evidence as is necessary to carry out the public purpose of this

Act and to determine the need and effect of establishing separate markets. Any such provider determined to be a dominant carrier as to a particular telecommunications service in a market shall not be presumed to be a dominant carrier of a different telecommunications service in that market.

(3) ~~[the transmitting, storing, distributing, selling, or furnishing of potable water to the public or for resale to the public for any use, or the collection, transportation, treatment, or disposal of sewage, or other operation of a sewage disposal service for the public, other than equipment or facilities owned and operated for either purpose by a city, town or other political subdivision of this state or a water supply or sewer service corporation.]~~ The term "public utility" or "utility" shall not include any person or corporation not otherwise a public utility that furnishes the services or commodity described in any paragraph of this subsection only to itself, its employees, or tenants as an incident of such employee service or tenancy, when such service or commodity is not resold to or used by others. The term "electric utility" shall not include any person or corporation not otherwise a public utility that owns or operates in this state equipment or facilities for producing, generating, transmitting, distributing, selling, or furnishing electric energy to an electric utility, if the equipment or facilities are used primarily for the production and generation of electric energy for consumption by the person or corporation.

SECTION 2. Section 18, Public Utility Regulatory Act (Article 1446c, Vernon's Texas Civil Statutes), is amended by amending Subsections (c) and (d) and by adding Subsections (l), (m), (n), (o), (p), (q), and (r) to read as follows:

(c) The commission shall only have the following jurisdiction over all *interexchange telecommunications carriers (including resellers of interexchange telecommunications services)*, specialized communications common carriers, *other* resellers of communications, and other communications carriers who convey, transmit, or receive communications in whole or in part over a telephone system who are not dominant carriers:

- (1) to require registration as provided in Subsection (d) of this section;
- (2) to conduct such investigations as are necessary to determine the existence, impact, and scope of competition in the telecommunications industry, including identifying dominant carriers and defining the telecommunications market or markets, and in connection therewith may call and hold hearings, issue subpoenas to compel the attendance of witnesses and the production of papers and documents, and make findings of fact and decisions with respect to administering the provisions of this Act or the rules, orders, and other actions of the commission; ~~and~~
- (3) to require the filing of such reports as the commission may direct from time to time;
- (4) *to require the maintenance of statewide average rates or prices of telecommunications service;*
- (5) *to require that every local exchange area have access to interexchange telecommunications service, except that an interexchange telecommunications carrier must be allowed to discontinue service to a local exchange area if comparable service is available in the area and the discontinuance is not contrary to the public interest. This section does not authorize the commission to require an interexchange telecommunications carrier that has not provided services to a local exchange area during the previous 12 months and that has never provided services to that same local exchange area for a cumulative period of one year at any time in the past to initiate services to that local exchange area; and*
- (6) *to require the quality of interexchange telecommunications service provided in each exchange to be adequate to protect the public interest and the interests of customers of that exchange if the commission determines that service to a local exchange has deteriorated to the point that long distance service is not reliable.*

(d) All providers of communications service described in Subsection (c) of this section who are providing such service to the public on the effective date of this Act shall register with the commission within 90 days of the effective date of this Act. All providers of communications service described in Subsection (c) of this section who commence such

service to the public thereafter shall register with the commission within 30 days of commencing service. Such registration shall be accomplished by filing with the commission a description of the location and type of service provided, the cost to the public of such service, and such other registration information as the commission may direct. *Notwithstanding any other provision of this Act, an interexchange telecommunications carrier doing business in this state shall continue to maintain on file with the commission tariffs or lists governing the terms of providing its services.*

(l) Notwithstanding any other provision of this Act, the commission may enter such orders as may be necessary to protect the public interest, including the imposition on any specific service or services of its full regulatory authority under Articles III through XI of this Act, if the commission finds upon notice and hearing that an interexchange telecommunications carrier has engaged in conduct that demonstrates the ability to control prices in a manner adverse to the public interest.

(m) Notwithstanding any other provision of this Act, the commission may enter such orders as may be necessary to protect the public interest if the commission finds upon notice and hearing that an interexchange telecommunications carrier has:

(1) failed to maintain statewide average rates;

(2) abandoned interexchange message telecommunications service to a local exchange area in a manner contrary to the public interest; or

(3) engaged in a pattern of preferential or discriminatory activities prohibited by Sections 45 and 47 of this Act, except that nothing in this Act shall prohibit volume discounts or other discounts based on reasonable business purposes.

(n) In any proceeding before the commission alleging conduct or activities by an interexchange telecommunications carrier against another interexchange carrier in contravention of Subsections (l), (m), and (o) of this section, the burden of proof shall be upon the complaining interexchange telecommunications carrier; however, in such proceedings brought by customers or their representatives who are not themselves interexchange telecommunications carriers or in such proceedings initiated by the commission's general counsel, the burden of proof shall be upon the respondent interexchange telecommunications carrier. However, if the commission finds it to be in the public interest, the commission may impose the burden of proof in such proceedings on the complaining party.

(o) The commission shall have the authority to require that a service provided by an interexchange telecommunications carrier described in Subsection (c) of this section be made available in an exchange served by the carrier within a reasonable time after receipt of a bona fide request for such service in that exchange, subject to the ability of the local exchange carrier to provide the required access or other service. No carrier shall be required to extend a service to an area if provision of that service would impose, after consideration of the public interest to be served, unreasonable costs upon or require unreasonable investments by the interexchange telecommunications carrier. The commission may require such information from interexchange carriers and local exchange carriers as may be necessary to enforce this provision.

(p) Before January 15 of each odd-numbered year, the commission shall report to the legislature on the scope of competition in regulated telecommunications markets and the impact of competition on customers in both competitive and noncompetitive markets, with a specific focus on rural markets. The report shall include an assessment of the impact of competition on the rates and availability of telecommunications services for residential and business customers and shall specifically address any effects on universal service. The report shall provide a summary of commission actions over the preceding two years that reflect changes in the scope of competition in regulated telecommunications markets. The report shall also include recommendations to the legislature for further legislation that the commission finds appropriate to promote the public interest in the context of a partially competitive telecommunications market.

(q) The commission may exempt from any requirement of this section an interexchange telecommunications carrier that the commission determines does not have a

significant effect on the public interest, and it may exempt any interexchange carrier which solely relies on the facilities of others to complete long distance calls if the commission deems this action to be in the public interest.

(r) Requirements imposed by Subsections (c), (d), (l), (m), (n), (o), (p), and (q) of this section on an interexchange telecommunications carrier shall apply to nondominant carriers and shall constitute the minimum requirements to be imposed by the commission for any dominant carrier.

SECTION 3. Section 78, Public Utility Regulatory Act (Article 1446c, Vernon's Texas Civil Statutes), is amended to read as follows:

Sec. 78. An assessment is hereby imposed upon each public utility within the commission's jurisdiction, *including interexchange telecommunications carriers*, serving the ultimate consumer equal to one-sixth of one percent of its gross receipts from rates charged the ultimate consumers in Texas for the purpose of defraying the costs and expenses incurred in the administration of this Act. Thereafter the commission shall, subject to the approval of the Legislature, adjust this assessment to provide a level of income sufficient to fund the commission and the office of public utility counsel. *Any interexchange telecommunications carrier found dominant as to any service market under Section 100(b) or filing a petition under Section 100(f) of this Act shall be required to reimburse the Office of Public Utility Counsel for the costs of participation before the commission on behalf of residential ratepayers in any of the proceedings under Section 100 of this Act to the extent found reasonable by the commission. Recovery of costs under this section by the Office of Public Utility Counsel shall not exceed \$175,000 per annum. Nothing in this Act or any other provision of law shall prohibit interexchange telecommunications carriers who do not provide local exchange telephone service from collecting the fee imposed under this Act as an additional item separately stated on the customer bill as "Utility Gross Receipts Assessment."*

SECTION 4. The Public Utility Regulatory Act (Article 1446c, Vernon's Texas Civil Statutes) is amended by adding Sections 100 and 101 to read as follows:

Sec. 100. (a) *The provisions of this section are applicable only to interexchange telecommunications carriers which do not provide local exchange service. A carrier dominant under this section for a service market is a dominant carrier for that service market under Section 3(c)(2) of this Act.*

(b) The commission shall on or before November 1, 1987, initiate an evidentiary proceeding to determine whether any interexchange telecommunications carrier is dominant, as defined by Subsection 3(c)(2)(B) of this Act and in consideration of the relevant factors in Subsection (h) of this section, as to any service market as determined by the commission. The proceeding must result in a determination of dominance or nondominance in each service market no later than December 31, 1988. For the purposes of this section, the term "service market" shall mean the relevant market for each telecommunications service, and such markets shall be geographically statewide. The commission may group services which are closely related into one service market. Failure of the commission to make any determination required by this subsection by December 31, 1988, shall entitle any affected party to petition for a writ of mandamus or any other extraordinary relief from any court of competent jurisdiction to compel the commission to make the required determination.

(c) In connection with the proceeding required in Subsection (b) of this section, the commission shall determine the status of interLATA interexchange competition, the effect of such competition on the public interest, and whether any interLATA interexchange carrier has sufficient market power as to any service market or markets to enable it to control prices in a manner adverse to the public interest. The commission shall report its findings and its recommendations for legislation, if any, to the legislature before January 15, 1989.

(d) If the commission finds that an interexchange telecommunications carrier is not a dominant carrier as to any service market, such carrier shall be subject as to such service only to those provisions of this Act applicable to nondominant carriers. An interexchange telecommunications carrier shall remain subject to the provisions

of this Act applicable to dominant carriers in any service market in which that carrier remains or is found by the commission to be dominant. Any interexchange telecommunications carrier which is dominant as to any service provided in any service market shall be presumed dominant as to any new service which is the same as, equivalent to, or substitutable within the same service market for such dominant service. Any new service markets are subject to the approval and determination of dominance by the commission.

(e) The commission shall on or before November 1, 1987, initiate a rulemaking proceeding to determine a method and develop a framework for the separation of costs among any fully regulated services, regulated competitive services, and unregulated services for the purposes of Subsections (k) and (l) of this section. The purpose of this proceeding shall be to establish a methodology for separation of these costs in any subsequent proceedings relating to the rates for fully regulated services. This proceeding shall not be an inquiry into the specific costs or rates of any telecommunications carrier. The commission shall take evidence to assist in the development of a methodology and shall allow for cross-examination of witnesses limited to the purposes of this subsection. Information required by the commission to carry out the requirements of this section may be obtained pursuant to the authority granted by Section 101 of this Act. The commission shall adopt rules pursuant to this subsection no later than November 1, 1988. Failure of the commission to make the required determinations on or before November 1, 1988, shall entitle any affected party to petition for a writ of mandamus or any other extraordinary relief from any court of competent jurisdiction to compel the commission to make the required determination.

(f) Any interexchange telecommunications carrier found dominant in any service market in the proceeding required by Subsection (b) of this section may petition the commission for a determination of whether the carrier is no longer a dominant carrier in any one or more service markets. Upon the request of any affected party or on its own motion, the commission shall hold a hearing and shall make its determination under this subsection within 185 days of the filing of this petition. Unless otherwise authorized by the commission, no interexchange telecommunications carrier may file a petition under this paragraph until after January 15, 1990. The commission shall establish reasonable rules regarding the frequency of filing such petitions under this subsection.

(g) An interexchange telecommunications carrier seeking to be found nondominant in any service market pursuant to Subsections (b) and (f) of this section shall have the burden of proof to show such nondominance and shall provide all information required by the commission; provided that such carrier shall not have the burden to produce any information which is solely in the possession or control of another person or persons and which that person or persons refuse to provide; however, nothing in this subsection shall alter or reduce the overall burden of proof of such carrier as to dominance.

(h) In making any determination required by Subsections (b) and (f) of this section, the commission shall consider all factors it considers relevant to its determination, including but not limited to the following:

- (1) the number and size of telecommunications utilities and other persons providing the same, equivalent, or substitutable service in the relevant market;
- (2) the extent to which the same, equivalent, or substitutable service is available in the relevant market;
- (3) the ability of customers in the relevant market to obtain the same, equivalent, or substitutable services at comparable rates, terms, and conditions;
- (4) the ability of telecommunications utilities or other persons to make the same, equivalent, or substitutable service readily available in the relevant market at comparable rates, terms, and conditions;
- (5) the degree to which alternative interexchange facilities are available to resellers of interexchange telecommunications service;

(6) *the market share of interexchange telecommunications utilities or other persons providing the same, equivalent, or substitutable service or services in the relevant market;*

(7) *the existence of any significant barrier to the entry or exit of a provider of the service in the relevant market;*

(8) *the extent to which one-plus equal access is available to interexchange telecommunications carriers and end users;*

(9) *the financial condition of telecommunications utilities or other persons providing the same, equivalent, or substitutable service in the relevant market insofar as shown by public information and documents.*

(i) *The legislature finds that the rules adopted by the commission and published in the Texas Register, Vol. 12, Number 25 (12 Tex. Reg. 1083), are within the authority granted by this Act and are hereby validated. This section shall not be construed to expand the authority of the commission under Section 18(a) of this Act as adopted in 1983.*

(j) *For the purposes of this section, a regulated competitive service is defined as a service provided by an interexchange telecommunications carrier which is dominant in that service market for which the commission has determined that sufficient competition exists or for which the commission has determined that sufficient competition exists such that it is in the public interest to utilize a range of rates; a fully regulated service is defined as a service provided by an interexchange telecommunications carrier which is dominant in that service market and which is not a regulated competitive service.*

(k) *It is further the policy of this state to ensure that any fully regulated services of interexchange telecommunications utilities do not subsidize either directly or indirectly the unregulated services or regulated competitive services of such utilities. In that regard, fully regulated services shall not recover any of the direct, indirect, joint, or common costs, including any increased cost due to the risk of competition, not associated with fully regulated services. It is the purpose of this section to direct the commission and grant the commission the authority necessary to assure that any fully regulated services offered by interexchange telecommunications utilities do not subsidize unregulated services or regulated competitive services.*

(l) *The commission shall not allow any fully regulated services offered by interexchange telecommunications utilities to recover any of the direct, indirect, joint, or common costs, including any increased costs due to the risk of competition, not associated with the fully regulated services offered by such utilities.*

Sec. 101. Notwithstanding any other provision of this Act, the commission is granted all investigative and subpoena powers necessary to obtain any information necessary to carry out the requirements of Section 100 of this Act and in connection therewith may call and hold hearings and issue subpoenas to compel the attendance of witnesses and the production of papers and documents.

SECTION 5. Sections 2 and 3 of this Act take effect December 31, 1988. The remaining sections take effect September 1, 1987.

SECTION 6. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended.

Passed the Senate on April 8, 1987, by a viva-voce vote; May 29, 1987, Senate refused to concur in House amendments and requested appointment of Conference Committee; May 30, 1987, House granted request of the Senate; June 1, 1987, Senate adopted Conference Committee Report by a viva-voce vote. Passed the House, with amendments, on May 26, 1987, by a non-record vote; May 30, 1987, House granted request of the Senate for appointment of Conference Committee; June 1, 1987, House adopted Conference Committee Report by a non-record vote.

Approved June 17, 1987.

Effective Sept. 1, 1987, except §§ 2, 3 effective Dec. 31, 1988.