PROJECT NO. 29140

PUC RULEMAKING PROCEEDING TO AMEND PUC SUBST. R. 26.37, RELATING TO TEXAS NO-CALL LIST	**§ § § §**	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER ADOPTING AMENDMENTS TO §26.37
AS APPROVED AT THE AUGUST 19, 2004 OPEN MEETING

The Public Utility Commission of Texas (commission) adopts amendments to §26.37 (relating to the Texas no-call list) with changes to the proposed text as published in the March 12, 2004 *Texas Register* (29 TexReg 2514). The amendments: 1) provide incentive for a telemarketer to purchase the Texas no-call list; 2) require a telemarketer to maintain and provide to the commission information, such as call logs or phone records; 3) allow the commission to investigate complaints of the Texas no-call list; 4) require that such records be maintained by the telemarketer for a period of 24 months; 5) establish presumptions relevant to enforcement of the Texas no-call list; and 6) specify certain types of evidence that are admissible in an action to enforce the Texas no-call list.

The commission received comments from MCImetro Access Transmission Services LLC (MCI), Southwestern Bell Telephone, L.P. d/b/a SBC Texas (SBC), Sprint Corporation (Sprint), Retail Electric Providers Coalition (REP Coalition), and the Office of Public Utility Commission (OPUC). The commission also received reply comments from MCI, the REP Coalition, SBC, and OPUC.

AT&T Communications of Texas, L.P., TCG Dallas and Teleport Communications Houston, Inc. (collectively, AT&T) did not submit initial comments, but submitted "reply" comments.

The commission conducted a public hearing on May 4, 2004, which MCI, Sprint, TXU Energy, Reliant Energy, AT&T, and SBC attended.

On May 21, 2004, SBC provided a follow-up letter to comments it made during the public hearing. SBC attached pages 249-264 of a transcript from a committee meeting conducted on February 13, 2001 by the State of Texas Committee on Business & Industry.

Subsequent to the public hearing, the commission specifically invited the Direct Marketing Association (DMA) to provide comments on the proposed rules. DMA responded only by email.

General Initial Comments

In its general comments, the REP Coalition urged the commission to consolidate the Texas no-call list with consumers subscribed to the no-call list required by §26.37 of this title and those subscribed to the Electric no-call list required by §25.484 of this title. The REP Coalition did not provide a specific example, but suggested that a telemarketer unfamiliar with the list required by §26.37 may believe that it needed to comply with only the Electric no-call list.

The commission declines to merge the no-call list required by §26.37 (Texas no-call list) with that required by §25.484 (Electric no-call list). First, the commission notes that the pricing structure for the Electric no-call list is different from the Texas no-call list. Second, each of the lists has different subscription periods. Third, the Electric no-call list is available to business customers, whereas the Texas no-call list is not. Moreover, the commission is not persuaded by the REP Coalition's assertion that a retail electric provider (REP) acting as a telemarketer would be confused by the existence of a separate Texas no-call list and an Electric no-call list; §25.484(b) clearly states that a REP acting as a

telemarketer is also subject to the provisions of §26.37. The commission believes that §25.484, therefore, provides sufficient notice to REPs of the existence and applicability of both no-call lists.

Subsection (a), Purpose

The commission did not receive comments on the proposed amendment to this subsection and, therefore, the commission adopts this section without modification.

Subsection (b), Application

The commission did not propose changes to this subsection and no changes to it were recommended by the commenters. Therefore, the commission adopts this section without modification.

Subsection (c), Definitions

The REP Coalition recommended, for clarity, adding the word "Texas" in front of references to the no-call definitions in this subsection.

The commission disagrees that adding the word "Texas" before the terms "no-call database" and "no-call registrant" serves to clarify or enhance the distinction between the two rules. The rules relating to the Texas no-call list and the Electric no-call list are in separate chapters of the commission's substantive rules and are, therefore, clearly distinguishable. Further, the definitions contained in subsection (c) of each section clearly distinguish the lists and databases from one another. Accordingly, the commission declines to make the clarifying changes suggested by the REP Coalition.

Subsection (d), Requirement of telemarketers

The REP Coalition asserted that the rule was not enhanced in any regard by adding a requirement for a telemarketer to purchase the Texas no-call list.

The commission believes that requiring telemarketers to purchase the no-call list enhances the rule because of the positive impact it should have on compliance with the no-call prohibitions and the commission's efforts to enforce those prohibitions. The proposed language will also facilitate a telemarketer's ability to demonstrate that a telemarketing call made to a number on the no-call list was an isolated occurrence.

The REP Coalition stated that many REPs contract with third parties who perform telemarketing services on their behalf rather than engaging in telemarketing themselves. Accordingly, the REP Coalition recommended revising subsection (d) to require that a REP whose services are offered by a telemarketer either purchase the no-call list itself or obtain representations from a third-party telemarketer that the telemarketer is a subscriber to the no-call list.

Business & Commerce Code §44.002(7) defines a telemarketer as one who makes *or causes to be made* a telemarketing call. Therefore, a REP who contracts with a third-party telemarketer to call consumers on its behalf has *caused to be made* a telemarketing call and must, accordingly, comply with the no-call prohibitions, including purchasing the no-call list itself. However, the commission believes it reasonable to allow the REP or other person to discharge their obligations to purchase the current no call list through contractual obligations with telemarketers. The commission has modified this section and subsection (h)(2) accordingly.

The REP Coalition also suggested replacing the word "telephone" in the proposed additional language of this subsection with the word "telemarketing."

The commission agrees and modifies the proposed language for the second sentence in subsection (d) to change "telephone calls" to "telemarketing calls." Consistent with this modification, the commissions has changed all references in the rule from telephone calls to telemarketing calls.

Finally, the REP Coalition asserted that the prohibition on telemarketing calls to telephone numbers that have been published on the no-call list for more than 60 calendar days is overly restrictive. The REP Coalition stated that telephone numbers are frequently reassigned when, for example, customers change premises. Accordingly, the REP Coalition recommended either not adopting subsection (d) or revising it to permit calls to numbers on the no-call list unless there is a match between both the customer name and the telephone number. In its reply comments, MCI supported the REP Coalition's recommendations.

OPUC disagreed with the REPs' assertion that subsection (d) is overly prescriptive and should be amended to allow calls unless there is a match between the customer name and phone number. Instead, OPUC suggested that the database be updated when numbers are actually reassigned. OPUC stated that this suggestion is consistent with MCI's recommendation to add a new subsection (f)(3)(D). OPUC noted, however, that it disagreed with MCI's suggestion to update the database when disconnections occur because this would provide no buffer zone for customers who are disconnected, but then quickly reconnected.

Business & Commerce Code §44.101(c) provides that the telephone number of a consumer on the Texas no-call list may be deleted from the list on the consumer's written request or if the telephone number of the consumer is changed. Section 44.101(c) does not mandate that consumers notify the commission or the no-call list administrator that the registered telephone number is no longer valid. Absent notification from the consumer, the commission and the no-call list administrator would have no reason to know the invalidity of a particular telephone number. If a telemarketer has reason to believe that a number on the no-call list no longer belongs to the consumer who originally registered the number, and the new owner of that number has not registered it on the no-call list, the telemarketer may petition the commission for removal of that number from the no-call list. Otherwise, the commission believes that obsolete numbers will be purged from the list at the expiration of the registration period.

Subsection (e), Exemptions

MCI recommended changing subsection (e)(2)(B)(ii) to extend the period for the established business relationship exemption from one year to 18 months. MCI asserted that the suggested change is consistent with the 18-month period provided for in 16 C.F.R. §310.2(h)(i), and that consumers who want to stop telemarketing calls from a company with which they have an established business relationship are not harmed because such consumers can simply ask to be placed on the company's own do not call list. MCI justified the recommendation by asserting that consistency between state and federal rules results in less confusion for consumers and lower operating costs for MCI. Those lower operating costs, MCI stated, permit MCI to actively and vigorously compete in the marketplace.

OPUC opposed MCI's recommendation to extend the period for the established business relationship from one year after termination to eighteen months. OPUC noted that the longer it has been since the relationship has ended, the more likely it is that the customer will consider the relationship to be non-existent. Moreover, OPUC stated, a customer that has been unable to utilize the company's services for an extended period, such as eighteen months, because the relationship has terminated should not expect that one of the consequences of that relationship is for calls to possibly resume a year and one-half later. OPUC concluded that the one-year time frame currently in the rule is a reasonable balance between protecting the peace of the consumer's home and encouraging competition.

The commission is in general agreement with OPUC's reply comments. The commission notes that it did not propose changes to subsection (e)(2)(B)(ii), and is not persuaded by MCI's comments to do so.

Subsection (f), No-call database

MCI urged the commission to adopt new language providing for "ongoing updates" to the no-call list. To maintain the accuracy of the no-call list, according to MCI, ongoing updates are necessary because "the growing need for new telephone numbers for wireless phones, computer modems, pagers, and fax machines results in many changed or disconnected numbers reassigned within only a few months."

In their reply comments, the REP Coalition and AT&T agreed with MCI's suggestion to add a new subsection (f)(3)(D) to which would require "[t]he administrator of the no-call database [to] compare the no-call database against appropriate databases and [to] remove from the database all

telephone numbers that are disconnected or reassigned before publication of the entire Texas no-call list."

In its reply comments, MCI agreed with the language for subsection (d) that the REP Coalition suggested in its initial comments, with a minor revision. The language MCI recommended in its reply comments focused on requiring compliance with the "latest" Texas no-call list provided that both the telephone number and customer name match those in the Texas no-call database.

As noted by MCI, the commission did not propose changes to subsection (f) and, for reasons including those here and those above relating to subsection (d), the commission declines to adopt a rule that requires ongoing, i.e., continuous, updates to the Texas no-call list. First, the Business & Commerce Code §44.101(c) requires the Texas no-call list to be updated and published on January 1, April 1, July 1, and October 1 of each year. Second, the commission believes the suggestion to mandate an "ongoing" list would create confusion among telemarketers, the public, regulatory agencies and the courts when called upon to comply with or to enforce the no-call prohibitions. Third, there could be no reasonable assurance for a telemarketer that a list purchased on Monday would still be applicable on Tuesday. Finally, the commenters failed to propose language that addressed either the cost associated with or the method of purchasing a no-call list that is updated continuously, and the commission declines to propose one now without the benefit of public comment. For these reasons, the commission declines to adopt the recommended changes.

The commission has also made a clarifying change to proposed subsection (f)(3)(A) to correct a reference from Chapter 43, Business & Commerce Code, to Chapter 44 of that statute.

Subsection (g), Notice

The commission did not propose changes to this subsection and no changes to it were recommended by the commenters. Therefore, the commission adopts this section without modification.

Subsection (h), Violations

Most commenters combined their comments for subsection (h) with those for subsection (i). The commission's response to comments relevant to both subsections (h) and (i) are addressed in the commission's responses to comments on subsection (i).

Subsection (i), Record Retention; Provision of records, Presumptions

Record retention, subsection (i)(1):

Responding to the proposed changes to subsections (i)(1) and (2), SBC, AT&T, MCI, and the REP Coalition opposed the 24-month record retention requirement. SBC claimed it would have to purchase two additional servers, and that it would take six months to develop and test programming to retrieve data from those servers. SBC estimated the total cost for the hardware, programming and overall changes to its processes needed to implement the proposed rule to be $161,100. Because, according to SBC's argument, it is likely that a customer who has signed up for the no-call list would immediately report such a violation, SBC requested limiting the record retention period to six months. The REP Coalition asserted that for ease of administration and to minimize compliance costs, the commission should align its requirements with those imposed at the federal level. MCI agreed with the initial comments of the REP Coalition, and urged

modification of the proposed record keeping requirements in subsection (i) to achieve consistency between federal and Texas requirements. MCI alleged that consistency reduces customer confusion and facilitates operations for companies operating in multiple jurisdictions.

DMA stated that the 24-month record retention requirement is consistent with federal regulations.

OPUC disagreed with SBC's recommendation to limit the record retention period to six months. OPUC specifically noted that shortening the record retention period could impede the statutory obligations arising under the Business & Commerce Code of the attorney general, state licensing agencies, or consumers who pursue their claims through the court system. OPUC concluded that the twenty-four month retention period is not unreasonable, and that it is consistent with the two-year statute of limitations period commonly applicable to other actions.

Primarily, the commission is not persuaded to change the proposed rule based upon the cost drivers described by SBC. The commission is not, through this rule, mandating maintenance of such records through the use of any particular technological equipment. If SBC or any other telemarketer elects not to incur those expenses described by SBC, the commission notes that this information can be retained by copying the file to a paper printout or some type of electronic media, such as a Compact Disc, which would require minimal incremental costs, if any.

As a secondary matter, the commission notes that SBC failed to justify or explain the need for a dedicated server, rather than using existing server capacity. Moreover, SBC did not specify the scope of the subject matter of the search to which it referred, the scope of the

records searched, or the number of employees and hours spent by each to affect the search. The commission cannot ascertain, therefore, whether or not SBC's referenced search is appropriately comparable or relevant to a search related to an investigation of an alleged no-call violation. Accordingly, the commission declines to modify the rule because SBC failed to explain with sufficient clarity the basis for the $161,100 it estimates it would have to spend to comply with the proposed rule or why it could not employ other, less expensive means to comply with this requirement.

The commission disagrees with the commenters who suggested reducing the record retention requirement to six months and declines to modify the proposed rule. Six months is inadequate to protect evidence necessary for the telemarketer to establish its affirmative defense, for the commission to establish a sustainable enforcement action and for the consumer to pursue its private cause of action. Although a consumer must file a formal complaint with the commission within 30 days of the unsolicited call as prerequisite to a private cause of action, the consumer must also wait for at least 120 days from the date the complaint is filed for the commission to initiate an administrative action. Therefore, under reasonably foreseeable circumstances, a six-month retention period provides only one month for a consumer to initiate its private cause of action and to take appropriate steps to ensure the preservation of the telemarketer's phone records. Further, the commission may pursue an "administrative action" relating to a no-call complaint regardless of whether or not a consumer files a formal complaint within 30 days of the unsolicited call. However, because there are many variables that influence the length of time between an unsolicited call and the initiation of an administrative action, the commission might not initiate an administrative action against a telemarketer within six months of an unsolicited call. A

short retention requirement, therefore, could result in the loss of evidence necessary to enforce the no-call rules and, thereby, thwart the commission's efforts to protect consumers from unwanted telemarketing calls.

AT&T asserted that there is no statutory basis for the proposed language in subsection (i)(1) requiring retention of records for *attempted*, but not completed, telephone calls. AT&T stated that the Business & Commerce Code permits the imposition of monetary penalties for calls made, not those telephone calls a telemarketer attempts to make. The REP Coalition also suggested modifying the proposed rule to apply only to *completed* telemarketing calls. Similarly, the REP Coalition contended that a REP or telemarketer should not be obligated to maintain records of multiple attempts of telemarketing calls to the same telephone number.

The commission declines to modify the rule's record retention requirement such that it applies only to *completed* telemarketing calls. Pursuant to Business & Commerce Code §44.102(a), a telemarketer may not make a telemarketing call to a telephone number that has been published on the Texas no-call list for more than 60 days. Section §44.003(a) defines "telemarketing call" as an unsolicited telephone call made for certain purposes. Next, §44.002(9) states that a "telephone call" is a call which is *made to or received at* a telephone number. The commission interprets the phrase "made to" as referring to an incomplete telephone or attempted telephone call. The commission therefore concludes that the statute applies to attempted calls as well as completed calls. Answering an unwanted telephone call is only part of the nuisance; consumers must be free of the annoyance in their own homes of their telephone being caused to ring by unwanted telemarketers.

In addition to its initial and reply comments, SBC provided a follow-up letter to comments it made during the public hearing to which it attached pages 249-264 of a transcript from a committee meeting conducted on February 13, 2001 by the State of Texas Committee on Business & Industry. SBC asserted that the transcript demonstrated that a consumer must submit an agency complaint within a very short period of time after the alleged violation occurs as a prerequisite to the filing of a civil action, and that the sequencing indicates the legislature's intent that these types of complaints should be made soon after the incident occurs and, if possible, resolved quickly by the agency. SBC contends that the consumer's private cause of action was provided as an option should the agency or the attorney general fail to take action on the consumer's behalf within a relatively short period. SBC argued, therefore, that the requirement to retain records of all telemarketing activity for 24 months runs counter to the legislature's intent when it created a process of handling no-call complaints.

The commission is not persuaded by SBC's interpretation of the transcript from the committee hearing. The commission believes that the transcript demonstrates only the intent to provide relatively quick relief for a consumer through a private cause of action in the event the commission does not pursue the issue within approximately 150 days. It does not demonstrate that records need only be retained for a short time period. The committee may have contemplated any number of alternative reasons for providing for a speedy private cause of action. The commission is not persuaded that this provision is related to a concern for a telemarketer's record retention concerns. Accordingly, the commission declines to modify the proposed rule as suggested by SBC.

Provision of records (i.e., 21-days), subsection (i)(2):

The REP Coalition suggested modifying subsection (i)(2) to address its concern that the phrase requiring the company to provide "all information" relating to the commission's investigation of complaints regarding the no-call list is not possible. The REP Coalition also argued that the proposed rule is too vague to give REPs sufficient notice of the specific telemarketing records that must be maintained and provided to the commission. Similarly, SBC noted the term "phone records" is not defined in the proposed rule, but that it believed the intent of the rule is to require a telemarketer to provide information that would establish an exemption. SBC also suggested clarifying subsection (i)(2) because, SBC asserted, it is impossible for a telemarketer to determine what information is responsive to "all information relating to the commission's investigation." In its reply comments, MCI agreed with the REP Coalition's assertion that the phrase "all information" in subsection (i)(2) is too vague and does not permit sufficient notice of what information is required for compliance with the rule.

OPUC observed that it is not necessary for the commission to clarify the rule such that the rule defines the scope of the commission's investigation or information request because, since the information sought by the commission would be determined on a case-by-case basis, the commission would detail the parameters of the request for information in the request itself. OPUC also noted, in its opinion, that the phrase "phone records" as used in this subsection would be limited to those types of records related to the telemarketer's activities as a telemarketer or to the complaint.

The commission agrees in part with the concerns expressed by the REP Coalition, SBC and MCI and has modified subsections (i)(3) and (4) to clarify that a telemarketer is required to

provide all information in its possession and upon which it relies to demonstrate compliance with section (d) and subsection (i)(2) of this rule.

SBC, in its initial comments, and MCI and the REP Coalition in their reply comments, suggested the commission specify in subsection (i) that a request for information made pursuant to subsection (i)(2) must be limited to calls made to a complainant's number on a specific date or a period not to exceed ten days. According to SBC, a recent search of data compiled over one year took four weeks to complete. The REP Coalition stated that a specified date range would permit retail electric providers to better implement cost-efficient processes to promptly respond to commission investigations.

OPUC noted that requiring consumers to provide the exact date or dates of unwanted telemarketing calls may be an unreasonable expectation. Some customers, OPUC stated, may not make a complaint until after several unwanted calls have occurred and, therefore, will be unable to provide a specific date or date range as proposed by those commenters.

The commission agrees with OPUC and declines to require that a request for information submitted to a telemarketer be limited to a 10-day time period. The consumer may not be able to provide in such a narrow time period its complaint and, consequently, the commission may not be able to limit its investigative efforts to such a narrow time period. Further, a broader search, whether in response to a complaint or the commission's own investigation, may reveal additional violations. Accordingly, the commission's efforts to protect the public should not be constrained or thwarted in a manner that could obscure a telemarketer's pattern or practice of violating the no-call prohibitions.

DMA stated that 21 days is only 15 business days, which, according to DMA is not a reasonable target for providing information relevant to consumer complaints. Accordingly, DMA requested amending the proposed rule to provide for 21 *business* days to provide requested information.

MCI argued the 21-day requirement is too restrictive because: 1) the provider may ultimately produce records that establish no violation occurred; and 2) in some cases it may not be possible to complete research of MCI's records relating to a dispute. MCI recommended revising the 21-day requirement for production of records to 30 days and modifying subsection (i)(2) to provide a good cause exception to that deadline.

SBC argued that there should be additional time permitted for responses if the commission requests information regarding multiple telephone numbers at the same time.

AT&T recommended changing the deadline in subsection (i)(2) from 21- to 30-days and granting commission staff "express permission and direction to grant limited waivers of the 21- or 30-day period as facts dictate."

SBC proposed, as an alternative to the proposed subsection (i)(2), requiring a telemarketer to respond to a complaint within 21 days, but extending the time for a carrier to provide the specific data in response to a commission request to 60 days.

The commission declines to change the deadline within which telemarketers must respond to the commission from 21 days to 30 days. Pursuant to P.U.C. PROC. R. 22.242(d), commission staff is required to attempt to resolve all complaints within 35 days of the date of receipt of the complaint. Unless carriers provide the required information sufficiently in advance of the 30th day after the request, commission staff would not have sufficient time

to resolve all complaints within the 35-day goal established by commission rule. Accordingly, the commission declines to modify the existing rule as proposed by some of the commenters.

The commission also declines to create an exception to the proposed rule as suggested by some commenters. P.U.C. SUBST. R. 26.30(b) separately requires a certificated telecommunications utility (CTU) to investigate a complaint forwarded to it by the commission and to advise the commission in writing of the results of its investigation within 21 days.

The commenters' anecdotal examples of various "hardships" responding to the commission's requests for responses to complaints or information that theoretically support their suggestion, do not outweigh the public's interest in prompt resolution of their complaints. The commission believes, therefore, that the rule appropriately balances the consumers' right to a prompt resolution of their complaints with the burden on the telemarketers to search their records and provide information to the commission that demonstrates their compliance with the no-call rule. Moreover, the 21-day requirement imposes minimal burdens on the telemarketers while simultaneously allowing for an expeditious resolution of no-call complaints, which, the commission believes, serves the interests of the public, the telemarketers and the commission in its enforcement efforts.

Finally, the commission notes that most companies regulated by it are required to be familiar with the commission's "21-day" rules and in general do respond within 21 days to complaints forwarded to them by the commission. The requirements in subsection (i) serve to better define, albeit in a different context, the appropriate and expected scope of a

company's response when information is requested by the commission. SBC's proposed alternative merely extends the time within which a telemarketer must be responsive to an investigation, including, for example, one relating to enforcement, to 60 days. Such an extension is inconsistent with the overriding interest to resolve expeditiously no-call complaints. Accordingly, the commission declines to modify the rule as suggested by SBC.

The REP Coalition stated that the requirement in subsection (i)(2) to respond to an informal complaint within 21 days is duplicative of §26.30(b)(1)(B) of this title, and, therefore, that it is unclear what benefit is gained by reiterating this deadline.

The commission disagrees with the REP Coalition's comment. Subsection (i) is not duplicative of §26.30. The provisions of §26.30 are applicable to certificated telecommunications utilities. The commission notes that not all telemarketers are certificated telecommunications utilities. Therefore, the 21-day requirement in this subsection is necessary to notify all telemarketers of their obligation to provide the commission with timely responses to complaints.

The REP Coalition suggested that subsection (i)(2) should be modified to add the word "alleged" before the phrase "violations of the no call list," which also appears in subsection (h)(1), because the phrase is, otherwise, unfairly presumptive.

The commission agrees with this comment and has made the requested change.

Presumptions, subsections (i)(3) and (4):

The REP Coalition suggested that subsections (i)(3) and (4) should be clarified to describe what a telemarketer was required to respond to pursuant to those subsections.

The commission agrees with the REP Coalition. Therefore, the commission modifies subsections (i)(3) and (4) to clarify that the telemarketer is required to provide all information in its possession and upon which it relies to demonstrate compliance with the provisions of this rule.

In its initial comments, MCI asserted that the commission lacks authority to designate, as it does in subsections (i)(3) and (4), that failure to provide requested records necessarily results in a no-call violation. MCI argued that the commission's jurisdiction over no-call is found in the Business & Commerce Code §44.101 *et seq*., and that the commission's enforcement authority arises specifically from §44.102. MCI concluded, and, in their reply comments, SBC and the REP Coalition agreed, that no provision of the Texas no-call statute permits designating the failure to provide requested records as a no-call violation.

OPUC argued, contrary to the assertions made by MCI, that the commission has authority to designate that a failure to provide requested records results in a no-call violation. OPUC based its argument on the specific and implied authority granted to the commission by the Business & Commerce Code §44.102(b) and §44.103(a), and concluded that the proposed rules are a reasonable expression of the commission's authority to make rules, receive and investigate complaints, and enforce the no-call statutes.

The commission disagrees with the commenters who asserted that the commission lacks authority to designate that a failure to provide requested records results in a no-call violation. The commission believes the proposed rule is a reasonable expression of the commission's authority to adopt rules, receive and investigate complaints, and enforce the

no-call statutes pursuant to its specific and implied authority granted to the commission in the Business & Commerce Code §44.102(b) and §44.103(a).

The commission notes that this issue is identical to one raised in a recent slamming rulemaking under Project Number 28324, adopted by the commission on April 29, 2004 (29 TexReg 4852). In that rulemaking, the commission reasoned that companies that have evidence supporting their claim can, and generally do, provide such information to the commission within 21 days. However, the commission also reasoned that at some point it must be presumed that a company, who fails or refuses to provide evidence supporting its position, must not have such evidence. Moreover, since this evidence is required to be maintained by the company in the regular course of business, it can be provided to the commission without imposing an unreasonable burden on the company. Thus, telemarketers failing to provide the information required under this rule are presumed to not have the supporting evidence. Moreover, a telemarketer by failing to provide the documentation, can thwart meaningful enforcement actions. Thus, the commission finds it reasonable and necessary to the exercise of its jurisdiction to discourage telemarketers from withholding relevant information from the commission.

SBC, in its initial comments, stated that there should be an opportunity for a telemarketer to cure any inadvertent failure to respond, and a finding in an enforcement proceeding of a failure to respond before such failure may result in the determination that a violation occurred or penalties imposed. SBC also asserted that the rule should be modified to require the commission to provide "notice" of the commission's request for information to the telemarketer by certified mail or other secure means.

In its reply comments, MCI took a stance similar to SBC and argued that proposed subsections (i)(3) and (4) violate the Public Utility Regulatory Act (PURA). MCI asserted that PURA §15.024, regarding administrative penalty assessment procedure, permits a respondent an opportunity to remedy any violation that is not a violation of PURA Chapters 17, 55, or 64. Since, MCI argued, the no-call statute is in the Business & Commerce Code, it follows that the commission must permit an alleged violator who fails to respond to a request for information within 21 days the opportunity to remedy that failure before a finding of a violation can be made.

The commission declines to require certified notice of complaints be sent to telemarketers. First, the commenters failed to cite to statutory authority mandating that all complaints be provided via certified mail. Second, the commission notes that not all complaints are determined to be actionable and the requirement to forward all complaints to telemarketers would be a waste of commission resources. Finally, the commission notes that PURA §15.024(b) states that notice of a violation "may" be given by certified mail. Since providing notice of violation by certified mail is permissive and not mandatory under PURA, the commission believes that it is not necessary to provide notice of a complaint by certified mail.

PURA §15.024 does not apply to no-call violations in the manner asserted by MCI and SBC. The commission derives its jurisdiction for the enforcement of the no-call prohibition from Business & Commerce Code §§44.251 - 44.253. PURA §15.024(c) applies to penalties assessed "under this section." In other words, PURA §15.024 outlines the assessment procedure for administrative penalties imposed under PURA §15.023, which applies to violations of PURA, or a rule or order adopted under PURA. Because the no-call rules are

adopted under authority granted by the Business & Commerce Code, PURA §15.024 "right to cure" provision does not apply to violations arising under the Business & Commerce Code. Moreover, the commission is not aware of how a party would cure a "no call" violation. Accordingly, the commission finds that the "right to cure" provision is not applicable to this type violation.

MCI, AT&T, SBC, and the REP Coalition recommended deleting subsections (i)(3) and (i)(4) in their entirety. MCI asserted, in particular, that the commission should delete the phrase "thorough response" because, according to MCI, it is too subjective and leaves service providers at the commission's mercy that record production is inadequate. SBC also asserted that the language in these two subsections is ambiguous and, thus, that it is unclear whether a telemarketer who responds that it has no records relating to a particular complainant's number would be deemed to have failed to provide a "thorough response." SBC asserted further that the proposed amendments fail to define the scope of information that a telemarketer should provide and, accordingly, that such terms should be listed and defined in order to ensure an objective standard is applied when determining whether a response would be considered thorough.

Although the REP Coalition and MCI asserted that subsection (i)(3) should not be adopted, these commenters proposed, alternatively, deleting the phrase "thorough response." In their view that phrase is overly broad and subjective.

OPUC disagreed with the REP Coalition, SBC, AT&T, and MCI that the phrase "thorough response" is too vague. OPUC stated that the phrase is clearly intended to prevent telemarketers from providing skeletal, token responses that frustrate the commission's investigative and

enforcement efforts. In addition, OPUC asserted, the rule does not need to anticipate every possible combination of information that could be required for every possible case.

The commission disagrees with the commenters who assert that the phrases "phone records," "thorough response," and "all information relating to the commission's investigation" are fatally vague. In response to comments, the commission has modified the phrase "thorough response" in subsections (i)(2), (3), and (4) to require telemarketers to provide "all information in their possession and upon which they rely to demonstrate compliance." The commission intends by this provision to prevent telemarketers from providing skeletal, token responses that frustrate the commission's investigative and enforcement efforts. However, it is impossible and unnecessary for the rule to anticipate every possible combination of information that could be required for every possible case.

The phrase "phone records" as used in this subsection would be limited to those types of records related to the telemarketer's activities as a telemarketer or to the complaint, and specifically, but not limited to, those identified in subsection (i)(1) of the rule.

Finally, the commission clarifies that by use of the phrase "telemarketing information," the commission requires a telemarketer to produce all information in its possession regardless of the source related to all defenses it might raise in response to a complaint alleging a violation of this section.

AT&T asserted that the commission's effort should focus on discerning and curing a telemarketer's failure to abide by the do-not-call requirements and not on imposing penalties for a telemarketer's failure to provide records demonstrating its compliance with those requirements.

The REP Coalition and AT&T asserted it is both unreasonable and misleading to pursue a no-call violation against a company for an administrative failure such as missing a deadline. Failure to provide records in a limited timeframe, these commenters continued, cannot be fairly characterized as a substantive violation of the rule. SBC opposed subsections (i)(3) and (4) unless they are modified to safeguard against a "default" finding of a violation prior to notice and opportunity to cure any claim that a telemarketer failed to respond. SBC cited concern that it did not know how a request for information would be conveyed from the commission to a telemarketer.

AT&T asserted that a failure to produce records within 21 days can only be a violation of that requirement and cannot establish a violation of the no-call rule. AT&T opined that the commission violates a telemarketer's due process rights and exceeds its authority under PURA and the Business & Commerce Code when it finds, by rule, that a violation occurred for failing to present exculpatory evidence.

DMA opposed subsections (i)(3) and (4), and suggested that a failure to provide the requested information should not establish a violation of the no-call rules provided the telemarketer is making every effort to comply in a timely fashion. DMA noted that customer confusion and the holiday schedules of its employees may impede timely responses to the commission's request for information.

The commission clarifies that a company's failure to respond within the time specified by this subsection establishes a violation of subsection (h)(1) (this section's "21-day rule") and also establishes a no-call violation.

The intent of this portion of the proposed rule includes establishing the occurrence of a no call violation in the event a telemarketer fails or refuses to provide it response within 21 days of the commission's request. In the commission's experience, parties that have evidence supporting their compliance can, and generally do, provide such information to the commission within 21 days. However, the commission has previously determined that at some point it must be presumed that a company, who fails or refuses to provide evidence supporting its compliance, must not have such evidence. In its comments during the public hearing in PUC Project Number 28324, *PUC Rulemaking Proceeding to Amend PUC Substantive Rules 26.32 and 26.130*, AT&T acknowledged that it likely did not have such information if it had failed to provide it within 30 days. Moreover, since this evidence is required to be maintained by the company in the regular course of business it can be provided to the commission without imposing an unreasonable burden on the telemarketer.

Since the only two relevant issues in an enforcement hearing are: 1) the occurrence of the violation, and 2) the appropriate amount of monetary penalties, the proposed rule effectively establishes the occurrence of the violation, *unless* the telemarketer presents, during the hearing, evidence that it did, in fact, provide evidence supporting compliance with the no call rule within the 21-day deadline. If the telemarketer did provide proof of compliance within the deadline, then the issue turns to the validity of the evidence provided. To establish the occurrence of the violation, the commission frequently must rely upon evidence provided by the company during the commission's investigation into alleged events. A scrupulous telemarketer can hide behind a cloak of secrecy and, by failing to provide the documentation, thwart meaningful enforcement actions and obscure the extent

of its culpable actions. The intent of this subsection, therefore, is to discourage telemarketers from withholding relevant information from the commission.

The REP Coalition also asserted that subsection (i)(4) conflicts with subsection (h)(2)(B)(i). According to the REP Coalition's argument, subsection (i)(4) imposes a penalty for not producing the information described by subsection (h)(2)(B)(i), the production of which the REP Coalition views as optional.

The commission declines to modify subsection (i)(4) because it disagrees with the REP Coalition's assertion that there is an internal conflict between subsection (i) and subsection (h)(2)(B)(i). The REP Coalition misinterpreted the nature of these two provisions. Subsection (h)(2)(B) establishes that the burden to prove that a telemarketing call was made in error and was an isolated occurrence rests upon the telemarketer who made the call. To meet its burden, and preserve the availability of an affirmative defense to a potential violation of the no-call rules, the telemarketer must produce evidence of the information listed in subsection (h)(2)(B)(i)-(iv). In other words, failure to purchase the list or otherwise comply with subsection (h)(2)(B)(i)-(iv) is inconsistent with a defense based on inadvertence. A telemarketer's failure to comply with subsection (h)(2)(B)(i)-(iv) waives the affirmative defense and effectively establishes a violation of the no-call rules. Subsection (i)(4) simply establishes a time period within which the telemarketer must provide the records specified by subsection (h)(2)(B) in order to avoid waiver of the affirmative defense provided by subsection (h)(2)(B).

Subsection (j), Evidence

MCI, Sprint, and SBC, citing PURA §11.007, stated that Administrative Procedure Act (APA) Chapter 2001, applies to enforcement proceedings unless it is inconsistent with PURA. MCI asserted that, because APA §2001.087 requires that alleged violators be permitted to cross-examine complainants is not inconsistent with PURA, the proposed amendment to subsection (j) is an impermissible "end run" around the hearing procedures in the APA. MCI stated further that the commission, by rule, and the State Office of Administrative Hearings (SOAH), by statute, apply the rules of evidence used in nonjury civil trials to contested cases. MCI asserted that an affidavit alone would not be sufficient to establish a slamming violation. MCI also contended that affidavits are hearsay and that admitting affidavits would deny Respondents due process (including the rights to cross-examine witnesses and to present and rebut evidence). Finally, MCI argued that affidavits cannot overcome a single prong of the three-prong test in APA §2001.081 because: 1) consumers could be deposed or appear at the hearing, 2) PURA doesn't permit the use of hearsay, and a rule without specific or implied statutory authority is void, and 3) a prudent person would not rely on the affidavit without a review of the facts in the conduct of their affairs. Accordingly, MCI concluded that each slamming complaint must be reviewed along with the actions taken by the company.

Sprint opposed this subsection and argued that admissibility issues should be decided on a case-by-case basis pursuant to APA §2001.081. Sprint stated further that it is questionable whether permitting customer affidavits would be necessary because a customer who complains about an improper telemarketer contact could testify in person. Finally, Sprint opposed a rule that would deny Sprint the opportunity to cross-examine a witness.

The REP Coalition suggested that the proposed rule may be constitutionally deficient in that it does not appear to contemplate making the customer available for cross-examination. The REP Coalition suggested a consumer affidavit might be admissible if the commission: 1) gave notice that the consumer would not be present at the hearing; 2) established a reasonable basis for the consumer's absence at the hearing; and 3) at the telemarketer's request, made the consumer available for "examination" or deposition prior to the hearing. According to the REP Coalition's argument, these criteria are necessary because the consumer is effectively the commission's witness. Further, the REP Coalition argued the reasonableness of the time(s) and place(s) of "examination" must be assured so that the telemarketer is not forced to bear unreasonable costs in accessing the consumer.

AT&T asserted that it is not necessary to cite to APA §2001.081 because it applies anyway. Use of consumer affidavits should be made on a case-by-case basis by the presiding officer. AT&T states that no call violations are reasonably susceptible to proof by requiring the complainant to appear and testify. AT&T believes that if staff doesn't have the complainant testify in person, then that impermissibly shifts the burden to the telemarketer, if it wants to cross-examine the complainant, to do so to prove facts upon which the enforcement action relies. AT&T also states that the possibility of $5,000 per day penalty per customer demands higher standard of proof and more reliable evidence than affidavits. AT&T stated that this subsection appears to be an attempt to bind, by rule, the administrative law judge and create a situation in which affidavits are presumptively admissible.

OPUC suggested including a reference to P.U.C. PROC. R. 22.221 (relating to Rules of Evidence in Contested Cases) in subsection (j).

OPUC disagreed with the REPs, MCI and Sprint to the extent those commenters urged that a complainant be subject to depositions and cross-examination as, essentially, a commission witness. OPUC expressed concern that requiring personal appearances by consumers in an administrative enforcement proceeding may create a disincentive for customers to complain about no-call violations. In addition, OPUC noted, the level of participation required by a complaining consumer who brings his or her own civil action pursuant to Business & Commerce Code §44.102(f) should not be the same as the level of participation required in an administrative enforcement proceeding.

As previously determined in a recent slamming rulemaking under Project Number 28324, adopted by the commission on April 29, 2004 (29 TexReg 4852), the commission disagrees that proposed subsection (j) predetermines the admissibility of a consumer affidavit in a proceeding to enforce the commission's no-call rules. Because a consumer affidavit is not presumptively admitted into evidence against a telemarketer accused of a no-call violation, the proposed rule does not infringe upon such a telemarketer's due process rights.

Consumer affidavits are not presumptively admitted into evidence against a telemarketer in a proceeding to enforce the commission's no-call rules. Subsection (j) specifically identifies consumer affidavits as information the commission believes *may*, and in many situations should, be admissible pursuant to the more expansive approach to evidentiary issues allowed by APA §2001.081. Pursuant to this proposed rule, a consumer affidavit, to be admitted into evidence in the absence at hearing of the consumer who made the affidavit, must meet the requirements set out in APA §2001.081. Accordingly, the proponent seeking to admit the consumer affidavit must demonstrate that it is: 1)

necessary to ascertain facts not reasonably susceptible to proof under the rules of evidence as applied in a nonjury civil case in a district court of Texas; 2) not precluded by statute; and 3) of a type on which a reasonably prudent person commonly relies in the conduct of the person's affairs. Any party opposing admission of the consumer affidavit may argue that one or more of these elements have not been satisfied by the proponent and, if successful, prevent admission of the affidavit.

However, as explained below in more detail, the commission believes that a consumer affidavit is the type of evidence that is appropriate for admission pursuant to APA §2001.081 in a proceeding to enforce the commission's no-call rules.

First, the information described by proposed subsection (j) is necessary to ascertain facts that are not likely to be reasonably susceptible to proof because it is generally too costly for consumers and the commission to require attendance by the consumers at an enforcement proceeding related to alleged no-call violations. The commission interprets the phrase "not reasonably susceptible to proof" as a reference to the ease with which the facts may be proved under the rules of evidence. How long it would take and how much it would cost to prove an issue are, therefore, relevant factors in determining whether some fact at issue is "reasonably susceptible of proof." In most no-call cases, the harm suffered by the consumer will be far outweighed by the cost of attending a hearing in Austin, Texas. Attendance at a hearing in Austin would, in most instances, require the consumer to incur un-reimbursed expenses, including, but not necessarily limited to, lodging, meals, and travel. In addition, attending a hearing in Austin would require consumers with daytime jobs to take time off from work. The commission does not have budgeted funds to pay

witnesses' expenses. Under these circumstances, the commission believes a consumer will rarely choose to come to Austin to testify in a no-call case.

Next, the commission is not aware of any statute that specifically precludes admitting consumer affidavits in no-call cases. Moreover, the commission finds that the due process rights of respondents to complaints are adequately protected because they have an opportunity to engage in discovery on the affiants and compel their attendance at hearing.

Finally, Staff experts commonly rely on a variety of information to determine whether a no-call violation occurred, including the consumer's complaint, whether sworn to in the form of affidavit or not, and the telemarketer's response to that complaint. Therefore, the commission believes that a consumer affidavit is the type of evidence that should be admissible as contemplated by APA §2001.081.

Some commenters also suggested that consumer affidavits were not admissible pursuant to APA §2001.081 because the affiant could easily be deposed by the commission or ordered to appear at the hearing by telephone. The commission disagrees. No-call enforcement proceedings share many characteristics of mass litigation (the complainant usually suffers relatively minor, albeit unwanted, "injuries," but the complainant may be one of hundreds or thousands of similarly situated consumers). The commission does not have the budget or manpower necessary to attend and conduct depositions of so many complainants, many of whom may live great distances from Austin. Also, telephonic participation may be reasonable for one or two witnesses, but since no-call proceedings can potentially involve hundreds of consumers, telephonic participation potentially presents substantial and unreasonable logistical difficulties, for the consumers, the commission, the telemarketer

and the Administrative Law Judge (ALJ) relating to scheduling an order of presentation for each consumer, their appropriate contact telephone number and the specific time each consumer will appear. Therefore, the costs to the consumer and to the commission of pursuing such alternatives to attendance at a no-call enforcement proceeding will generally far outweigh any benefit they may provide. Accordingly, the commission disagrees that either of these methods of consumer attendance will be reasonable in all enforcement proceedings related to alleged no-call violations.

Moreover, telemarketers' due process concerns are not infringed by proposed subsection (j). First, telemarketers may object and assert that one or more of the elements of APA §2001.081 have not been demonstrated by commission staff. Second, nothing in the proposed rule eliminates a telemarketer's ability to depose a consumer who has submitted an affidavit or consistent with the Texas Rules of Civil Procedure, to seek compulsory attendance at the proceeding by that consumer. Finally, a telemarketer may conduct discovery, depose, and cross-examine the commission's testifying expert about the basis for that expert's opinion, including the consumer affidavits if such were relied upon by the expert.

The commission also notes that the content of consumer affidavits is admissible through the testimony of the commission's staff expert. Pursuant to Texas Rules of Evidence 703 and 705, the staff expert may rely on consumer affidavits as the basis for his or her testimony and may disclose on direct, or must disclose on cross, the facts or data, including those affidavits, that form the basis of the commission staff's opinion. Therefore, even if the consumer affidavits are not admitted pursuant to APA §2001.081, those affidavits are

properly considered as the subject of the staff expert's testimony pursuant to Texas Rules of Evidence 703 and 705.

Based upon the comments, the commission modifies proposed subsection (j) to eliminate the redundant reference relating to the applicability of the Texas Rules of Evidence to no-call enforcement proceedings. The commission adopts the proposed subsection with amendments appropriate to the elimination of that reference.

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

These amendments are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998 & Supp. 2004) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. In addition, these amendments are proposed under the Texas Business & Commerce Code Annotated §§44.101-1.04 (Renumbered from §§43.101-.104 by Acts 2003, 78th Leg., ch. 1275, §2(3), eff. Sept 1, 2003) (Vernon 2002 & Supp. 2004) which grants the commission the authority to adopt rules to administer and enforce the no-call list.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002; Texas Business & Commerce Code Annotated §§44.101 – 44.104.

§26.37. Texas No-Call List.

(a) **Purpose.** This section implements the Texas Business & Commerce Code Annotated §44.103 (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 including, but not limited to, retail electric providers as defined in §25.5 of this title (relating to Definitions).

(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 §44.002(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, non-business telephone numbers and dates of registration for all Texas no-call registrants. 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 registrant** — 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 within an exchange in the state of Texas, including but not limited to:

(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 that is made to a telephone number in an exchange in the state of Texas.

(d) **Requirement of telemarketers.**

(1) A telemarketer shall not make or cause to be made a telemarketing call to a telephone number that has been published for more than 60 calendar days on the Texas no-call list.

(2) A telemarketer shall purchase each published version of the no-call list unless:

(A) the entirety of the telemarketer's business is comprised of telemarketing calls that are exempt pursuant to subsection (e) of this section; or

(B) a telemarketer has a written contractual agreement with a second telemarketer to make telemarketing calls on behalf of the first telemarketer and the second telemarketer is contractually obligated to comply with all requirements of this section. In the absence of a written contract that requires the second telemarketer to comply with all requirements of this section, the first telemarketer and the second telemarketer making telemarketing calls on behalf of the first telemarketer are both liable for violations of this section.

(e) **Exemptions.** This section shall not apply to a telemarketing call made:

(1) By a no-call registrant 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 registrant'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 entire Texas no-call list on January 1, April 1, July 1, and October 1 of each year;

(B) Fees. The no-call list shall be made available to subscribing 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 list 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 subscribing telemarketer.

(3) **Intended use of the no-call database and no-call list.**

(A) The no-call database shall be used only for the intended purposes of creating a no-call list and promoting and furthering statutory mandates in accordance with the Bus. & Com. Code, Chapter 44, relating to Telemarketing. Neither the no-call database nor a published no-call list shall be transferred, exchanged or resold to a non-subscribing entity, group, or individual regardless of whether compensation is exchanged.

(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 or a published no-call list 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 of the no-call list to each of 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 compliance with §26.26 of this title (relating to Foreign Language Requirements) that, at a minimum, clearly explains the following:

(A) Beginning January 1, 2002, residential customers may add their name, address and non-business 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 registers for inclusion on 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 non-business 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 registers for inclusion on 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 may include in the directory a prominently displayed toll-free number and Internet mail address, established by the commission, through which a person may request a form for, or request to be placed on, the Texas no-call list in order to avoid unwanted telemarketing calls.

(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 methods listed in clauses (i)–(v) of this subparagraph.

(i) an insert in the customer's billing statement. Electronic notification is permissible for a customer who, during the notification period, is receiving billing statements from the CTU in an electronic format;

(ii) a bill message;

(iii) separate direct mailing;

(iv) customer newsletter; or

(v) Customer Rights disclosure as provided in §26.31(a)(4) of this title (relating to Disclosures to Applicants and Customers).

(3) **Timing of notice.** Beginning in 2002, a CTU shall provide notice of the Texas no-call list to its residential customers using one of the methods listed in paragraph (2)(B)(i)-(v) of this subsection.

(A) A CTU that uses a notification method listed in paragraph (2)(B)(i)-(iv) of this subsection, shall provide the notice annually beginning in 2002. The annual notice shall be easily legible, prominently displayed, and comply with the requirements listed in paragraph (1) of this subsection.

(B) A CTU that elects the Customer Rights disclosure as its notification method as allowed in paragraph (2)(B)(v) of this subsection shall comply with the timing of distribution requirement in §26.31(a)(4) of this title. The no-call list information provided in the Customer Rights disclosure shall comply with paragraph (1) of this subsection.

(4) **Records of customer notification.** Upon commission request, a CTU shall provide a copy of records maintained under the requirements of this subsection to the commission. A CTU shall retain records maintained under the requirements of this subsection for a period of two years.

(h) **Violations.**

(1) **Separate occurrence.** Each telemarketing call to a telephone number on the no-call list shall be deemed a separate occurrence. Upon request from the commission or commission staff, a telemarketer shall provide, within 21 days of receipt of such

a request, all information relating to the commission's investigation of complaints regarding alleged violations of the no-call list such as call logs or phone records.

(2) **Isolated occurrence.** A telemarketing call made to a number on the no-call list is not a violation of this section if the telemarketer complies with subsection (d)(2) and the telemarketing call is determined 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 separate occurrence, 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 (or caused to be made) the call. In order for a telemarketer to assert as an affirmative defense that an alleged violation of this section was an isolated occurrence, the telemarketer must provide evidence of the following:

(i) The telemarketer has purchased the most recently published version of the Texas no-call list, unless the entirety of the telemarketer's business is comprised of telemarketing calls that are exempt pursuant to subsection (e) of this section and the telemarketer can provide sufficient proof of such;

(ii) 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;

(iii) The telemarketer has trained its personnel in the established procedures; and

(iv) The telemarketing call that violated this section was made contrary to the policies and procedures established by the telemarketer.

(i) **Record retention; Provision of records; Presumptions.**

(1) A telemarketer shall maintain a record of all telephone numbers it has attempted to contact for telemarketing purposes, a record of all telephone numbers it has contacted for telemarketing purposes, and the date of each, for a period of not less than 24 months from the date the telemarketing call was attempted or completed.

(2) Upon request from the commission or commission staff, a telemarketer shall provide, within 21 calendar days of receipt of such request, all information in its possession and upon which it relies to demonstrate compliance with this section, relating to the commission's investigation of alleged violations of the no-call list including, but not limited to, the call logs or phone records described in subsection (i)(1) of this section.

(3) Failure by the telemarketer to respond, or to provide all information in its possession and upon which it relies to demonstrate compliance with subsections (d) and (i) of this section within the time specified in paragraph (2) of this subsection establishes a violation of this section.

(4) Failure of a telemarketer to provide all telemarketing information in its possession and upon which it relies to demonstrates compliance with this section and, if

applicable, to establish an affirmative defense pursuant to subsection (h)(2)(B) of this section within the time specified in paragraph (2) of this subsection establishes a violation of this section.

(j) **Evidence.** Evidence provided by the customer that meets the standards set out in Texas Government Code §2001.081, including, but not limited to, one or more affidavits from a customer, is admissible in a proceeding to establish a violation of this section.

(k) **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 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 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 rule, as adopted, 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 §26.37, relating to relating to the Texas no-call list, is hereby adopted with changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE _____ DAY OF _____ 2004.

PUBLIC UTILITY COMMISSION OF TEXAS

_____

JULIE PARSLEY, COMMISSIONER

_____

PAUL HUDSON, CHAIRMAN

_____

BARRY T. SMITHERMAN, COMMISSIONER

Q:\PD\TXR-Rules Management\Rules\Rulemaking Projects\Telecom\29140\29140adt.doc