

## **CHAPTER 49-21**

### **TELECOMMUNICATIONS COMPANIES**

**49-21-01. Definitions.** As used in this chapter, unless the context otherwise requires:

1. "Access" means telecommunications services to connect a telecommunications customer or end user with a telecommunications company that allows for the origination or the termination, or both, of WATS, 800, and message toll telecommunications services and private line transport services.
2. "Competitive local exchange company" means any telecommunications company providing local exchange service, other than an incumbent local exchange carrier, whether by its own facilities, interconnection, or resale.
3. "Eligible telecommunications carrier" means a telecommunications company designated under section 214(e) of the federal act as eligible to receive universal service support in accordance with section 254 of the federal act.
4. "Essential telecommunications service" means the following services:
  - a. Switched access;
  - b. Installation of the service connection for other essential services from the end user's premises to the local exchange network; and
  - c. Primary flat rate residence basic telephone service including the following service elements:
    - (1) Billing and collecting of the telecommunications company's charges for the service.
    - (2) Primary directory listing.
    - (3) Access to directory assistance.
    - (4) Access to emergency 911 service and emergency operator assistance in local exchange areas in which emergency 911 service is not available.
    - (5) Except as provided in section 49-02-01.1, mandatory, flat-rate extended area service to designated nearby local exchange areas.
    - (6) Transmission service necessary for the connection between the end user's premises and the local exchange central office switch including a trunk connection that has inward dialing and necessary signaling service such as touchtone used by end users for the service.
5. "Federal act" means the federal Communications Act of 1934, as amended by the federal Telecommunications Act of 1996 [47 U.S.C. 151 et seq.].
6. "Incumbent local exchange carrier" means a telecommunications company that meets the definition of section 251(h) of the federal act.
7. "Inside wire" and "premise cable" mean the telecommunications wire on the customer's side of a demarcation point or point of interconnection between the telecommunications facilities of the telecommunications company and the customer or premise owner established under title 47, Code of Federal Regulations, part 68, section 68.105.

8. "Interexchange telecommunications company" means a person providing telecommunications service to end users located in separate local exchange areas.
9. "Local exchange area" means a geographic territorial unit established by a telecommunications company for the administration of telecommunications services as approved and regulated in accordance with chapter 49-03.1.
10. "Management costs" means the reasonable direct actual costs a political subdivision incurs in exercising its police powers over the public rights of way.
11. "Mutual telephone company" means a telephone cooperative organized and operating subject to the provisions of this chapter, and such a cooperative shall also be subject to the general law governing cooperatives, except where such general law is in conflict with this chapter.
12. "Nonessential telecommunications service" means any telecommunications service, other than those essential telecommunications services listed in subsection 4 that a customer has the option to purchase either in conjunction with or separate from any essential telecommunications service.
13. "Price" means any charge set and collected by a telecommunications company for any telecommunications service offered by it to the public or other telecommunications companies.
14. "Private line transport service" means a telecommunications service to a customer over a circuit dedicated to the customer's exclusive use, within a local exchange area, or between or among local exchanges. Private line transport service includes services to customers who are end users and services to telecommunications companies.
15. "Public right of way" means the area on, below, or above a public roadway, highway, street, bridge, cartway, bicycle lane, or public sidewalk in which a political subdivision has a legal interest, including other dedicated rights of way for travel purposes, utility easements, and all the area within seventy-five feet [22.86 meters] of the centerline of any county or township highway right of way over which a board of county commissioners or a board of township supervisors has control under section 24-01-42. The term does not include the airwaves above a public right of way with regard to cellular or other wireless telecommunications or broadcast service or utility poles owned by a political subdivision or a municipal utility or a telecommunications company, in whole or part.
16. "Rural telephone company" means a telecommunications company that meets the definition of section 153(37) of the federal act.
17. "Service element" means a telecommunications function or service component that is not useful to the user unless it is combined with one or more other telecommunications functions or service components.
18. "Switched access" means access to include:
  - a. Local exchange central office switching and signaling;
  - b. Operator and recording intercept of calls;
  - c. Termination of end user lines in the local exchange central office;
  - d. The carrier common line charge for the line between the end user's premises and the local exchange central office;

- e. Billing and collection recording for interexchange carriers to which the local exchange carrier provides access service; and
  - f. Telecommunications service, including connections, provided to allow transmission service and termination between an interexchange company's premises and the local exchange central office switch for the origination or termination of the interexchange company's switched telecommunications services.
19. "Telecommunications company" means a person engaged in the furnishing of telecommunications service within this state.
20. "Telecommunications service" means the offering for hire of telecommunications facilities, or transmitting for hire telecommunications by means of such facilities whether by wire, radio, lightwave, or other means.

**49-21-01.1. Inapplicability of provisions of chapter.** Telecommunications service does not include and the provisions of this title do not apply to:

- 1. The one-way transmission of radio or television signals for broadcast purposes, including the one-way transmission of videoprogramming or other programming service by a cable system as well as subscriber interaction, if any, which is required for the selection of such videoprogramming or other programming service.
- 2. A hospital, hotel, motel, or similar place of temporary accommodation owning or operating message switching or billing equipment solely for the purpose of reselling telecommunications services to its patients or guests.
- 3. Telegraph service.
- 4. Except as provided in section 49-21-01.5, home, business, and coinless or coin-operated public or semipublic telephone terminal equipment and the use of such equipment.
- 5. The lease of telecommunications equipment by a telecommunications company from a person whose business is the leasing or sale of such equipment.
- 6. Billing and collection services.
- 7. Inside wire and premise cable installation and maintenance.
- 8. Directory services that are not essential.
- 9. Private line transport service.
- 10. Services or facilities provided by a system or institution of higher education to:
  - a. Institution employees or students at institution facilities or housing owned or leased by the institution;
  - b. Affiliated organizations, including alumni operations and research foundations, formed for the purpose of supporting the institution or leased by the institution and offering products and services intended primarily for the benefit of institution employees, students, or guests;
  - c. Other persons or entities located on property owned or leased by the institution and offering products and services intended primarily for the benefit of institution employees, students, or guests;

- d. Casual users using the institution's facilities for conferences, seminars and other similar special events, and broadcasters of athletic events;
- e. Occupants of technology parks, or business incubators receiving secretarial or business startup support in facilities owned or leased by the institution during a business startup phase for a term not to exceed four years or until August 1, 2005, whichever is later; and
- f. Educational, governmental, and nonprofit users of system or institution interactive videoconferencing site facilities and associated network services.

Institutions may not unreasonably restrict access by a telecommunications company to institution facilities for the purpose of furnishing telecommunications services to residents in institution housing or to other persons or entities leasing institution facilities, except institutions may limit access to residence halls. Institutions may require reasonable payment for and adopt reasonable restrictions on the use of institution telecommunications infrastructure to avoid service interruptions or increased maintenance or administrative burdens.

**49-21-01.2. Exemption - Rate regulation.** Except as provided for in this chapter and sections 49-02-01.1, 49-02-21, 49-02-22, and 49-04-02.1, telecommunications companies and all telecommunications services are exempt from the provisions of chapters 49-02, 49-04, 49-05, and 49-06. Telecommunications companies and services are not subject to rate or rate of return regulation. Any telecommunications company may elect not to be subject to the provisions of this section and section 49-21-01.3, and to be subject to rate and rate of return regulation, by filing an election with the commission in writing. For telecommunications companies with over fifty thousand subscribers, the election not to be exempt from rate and rate of return regulation is a one-time, irrevocable election. Notwithstanding an election filed under this section, a telecommunications company is not obligated to pay any fee for filing a price schedule or tariff.

**49-21-01.3. Certain price increases prohibited - Essential telecommunications services.** Changes in essential telecommunications services prices are prohibited except as specifically provided for in chapter 49-21 and section 49-02-01.1.

- 1. All increases or decreases in governmentally imposed surcharges and any financial impact on cost of essential telecommunications services caused by governmentally imposed changes in taxes, accounting practices, or separations procedures or resulting in relocation, change, or removal of facilities must be fully reflected in any price for those services within thirty days of the effective date of the surcharge or change, except price changes related to the costs of relocation, change, or removal of facilities are not subject to a thirty-day implementation requirement. This section does not prohibit the lowering of a price of an essential service based on reasonable business practices in a competitive environment provided that no price change may be anticompetitive or otherwise in violation of antitrust or unfair trade practice laws.
- 2. Whenever a price change provided for in this section is less than three percent of the existing price, notwithstanding any time limitations in this section, a telecommunications company may accumulate such changes in price subject to the following conditions:
  - a. Price increases may be accumulated up to a percentage total of five percent.
  - b. Price decreases may be accumulated only to the extent that there is an offsetting accumulated price increase of an equal or greater percentage. Accumulated price decreases may never exceed accumulated price increases.
  - c. Price decreases may be accumulated only for two years beginning January first of the year in which the change is allowed.

- d. Accumulated price increases may be implemented at the discretion of the telecommunications company.
  - e. The effective date of implementation of an accumulated price change may be prospective only, and in accordance with the filing requirements of section 49-21-04.
3. The monthly price of residence service for telecommunications companies with over fifty thousand subscribers may be up to eighteen dollars.
  4. Subject to the limitations of this section, this chapter does not prohibit an incumbent local exchange carrier from deaveraging local exchange service prices provided the incumbent local exchange carrier agrees to amend its commission-approved interconnection agreements to allow for deaveraged interconnection prices effective concurrently with the deaveraged retail prices.

**49-21-01.4. Purchase of essential telecommunications services.** Customers of any telecommunications company that provides essential telecommunications services must be permitted to purchase essential telecommunications services separate from all other telecommunications services. A telecommunications company may disconnect local exchange or essential telecommunications services only pursuant to rules adopted by the commission.

**49-21-01.5. Access code number usage.** A person who, in the ordinary course of operations, makes telephones available to the public or to transient users of that person's premises, for intrastate telephone calls using a provider of operator services shall ensure that each of its telephones presubscribed to a provider of operator services allows the consumer to use "toll free '8XX'", "950", or "101XXXX 0+" access code numbers to obtain access to the provider of operator services desired by the consumer. Each such person shall ensure that no charge to the consumer for using a "toll free '8XX'", "950", or "101XXXX 0+" access code number is greater than the amount charged for calls placed using the presubscribed provider of operator services.

**49-21-01.6. Call identification services - Charges prohibited - Notice - Exceptions.**

1. Any telephone call identification service offered in this state by a telecommunications company must allow a caller on a per-call and a per-line basis to withhold display of a caller's telephone number from the telephone instrument of the individual receiving the telephone call placed by the caller.
2. A telecommunications company offering call identification services may not charge any person who requests that the call identification services be blocked on a per-call basis. Per-line blocking must be provided without charge for residential customers and business customers with special needs, such as law enforcement and domestic violence agencies.
3. A telecommunications company offering a call identification service shall notify its subscribers that their calls may be identified to a called party at least thirty days before the service is offered.
4. This section does not apply to:
  - a. An identification service that is used within the same limited system, including a Centrex, Centron, or private branch exchange (PBX) system, as the recipient telephone.
  - b. An identification service that is used on a public agency's emergency telephone line or on a line that receives the primary emergency telephone number (911).

- c. An identification service provided in connection with legally sanctioned call tracing or tapping procedures.
- d. An identification service provided in connection with any "700", "800", or "900" access code telecommunications service, or any voice or data store and forward service.
- e. Any other service that, after investigation by the commission, the commission finds that a nondisclosure or similar agreement will protect the privacy interests of a calling party.

**49-21-01.7. Powers in general.** The commission has the power to:

1. Investigate all methods and practices of telecommunications companies.
2. Require telecommunications companies to conform to the laws of this state and to all rules, regulations, and orders of the commission not contrary to law.
3. Require reports as to rates, prices, and terms and conditions of service in effect and used by the company, and all other information deemed relevant and necessary by the commission in the exercise of its authority.
4. Compel obedience to its lawful orders by proceedings of mandamus or injunction or other proceedings, in the name of the state, in any court having jurisdiction of the parties or of the subject matter.
5. Hold hearings on good cause being shown, upon notice and subject to the provisions of chapter 28-32.
6. Employ and fix the compensation of experts, engineers, auditors, attorneys, and other such assistance for complaints, investigations, and other proceedings relating to telecommunications companies. The expense of any hearings, and the compensation and actual expenses of any employees of the commission while engaged upon any such hearings must, upon the order of the commission, be paid by the telecommunications company involved in such hearings. The commission shall ascertain the exact cost and expenditure. After giving the telecommunications company notice and opportunity to demand a hearing, and after a hearing, if any, is held, the commission may render a bill and make an order for payment. The bill and order must be delivered by certified mail or personal delivery to the managing officer of the telecommunications company. Upon receipt of the bill and order for payment, the telecommunications company has thirty days within which to pay the amount billed. All amounts not paid within thirty days after receipt of the bill and order for payment thereafter draw interest at the rate of six percent per annum. Amounts collected by the commission under this subsection must be deposited in a special account within the public service commission.
7. Act upon an application for a certificate of public convenience and necessity under chapter 49-03.1 consistent with section 253 of the federal act, provided a telecommunications company is not required to obtain a certificate of public convenience and necessity to resell telecommunications services.
8. Mediate or arbitrate agreements for interconnection, services, or network elements under sections 251 and 252 of the federal act.
9. Approve or reject agreements for interconnection, services, or network elements under sections 251 and 252 of the federal act.
10. Receive and approve or reject a statement of generally available terms under section 252(f) of the federal act.

11. Determine whether to terminate a rural telephone company's exemption under section 251(f) of the federal act.
12. Designate telecommunications companies as eligible telecommunications carriers to receive universal service support under sections 214 and 254 of the federal act.
13. Designate geographic service areas for the purpose of determining universal service obligations and support mechanisms under the federal act.
14. Investigate and resolve numbering issues relating to assignment of NII dialing codes and resolve numbering resource conservation administration and area code assignment issues in accordance with the federal communications commission's numbering resource orders. The commission's jurisdiction with regard to numbering resource conservation administration is limited to those prefixes that are unassigned on January 1, 2005.
15. Adopt rules consistent with state law as are necessary to carry out the powers in subsections 7 through 13 provided the rules may not impose obligations on a telecommunications company that are greater than obligations imposed under the act.
16. Grant suspensions or modifications under section 251(f) of the federal act.

**49-21-01.8. Eligible telecommunications company requirements.** A telecommunications company may not be an eligible telecommunications carrier unless the company offers all services supported by federal universal service mechanisms throughout the study area.

**49-21-02. Telecommunications companies - Common carriers - Public policy.** All persons providing telecommunications service within this state shall be common carriers and are hereby declared to be affected with a public interest and subject to regulation and general supervision by the commission. Among the purposes to be served by such regulation and supervision are:

1. To make available to all people of this state modern and efficient telecommunications services at the most economic and reasonable cost.
2. To allow the development of competitive markets for telecommunications services where such competition does not unreasonably distract from the efficient provision of telecommunications services to the public, and to lessen regulation in whole or in part of those telecommunications services which become subject to effective competition.
3. To establish and maintain reasonable charges for telecommunications services without unreasonable discrimination, or unfair or destructive competitive practices.
4. To ensure that regulated charges do not include the costs of unregulated activities.
5. To encourage the establishment and maintenance of a strong telecommunications industry.

**49-21-02.1. Authority to exempt from regulation.** Repealed by S.L. 1999, ch. 411, § 13.

**49-21-02.2. Cross-subsidization prohibited.** Revenues obtained from essential telecommunications services may not be used to subsidize or otherwise give advantage to a telecommunications company in its nonessential telecommunications services.

**49-21-02.3. Directors, trustees, officers, and managers - Immunity from civil liability.** Directors, trustees, and officers of mutual telephone companies, and the manager of a mutual telephone company who is the person most responsible for carrying out the policies and directives of the trustees, officers, or board of directors, are immune from civil liability for any act or omission relating to their service or function as a director, trustee, officer, or manager, unless the act or omission constitutes gross or willful negligence or gross or willful misconduct.

**49-21-02.4. Unauthorized telecommunications service.**

1. A telecommunications company shall comply with the provision of title 47, Code of Federal Regulations, part 64, subpart k, in effect on January 1, 2001, regarding changes in a subscriber's selection of a provider of telecommunications service. The commission shall enforce the provisions of title 47, Code of Federal Regulations, part 64, subpart k, in effect on January 1, 2001.
2. A telecommunications company may not initiate an intrastate telecommunications service to a subscriber without authorization. A subscriber for whom an intrastate telecommunications service is initiated without authorization is absolved from liability for charges imposed by the service provider if the subscriber notifies the service provider within thirty days after the first billing for the unauthorized service. Upon being informed by the subscriber that an unauthorized initiation of service has occurred, the telecommunications company providing the service shall cancel the service, inform the subscriber of the thirty-day absolution period, and refund any payments made by the subscriber for the service during the absolution period. The telecommunications company may rebill for the service provided before cancellation if the company determines the service initiation was authorized. The remedies provided in this section are in addition to any other remedies available at law.
3. If the commission finds an emergency exists that requires ex parte action, the commission may issue a cease and desist order without prior notice against a telecommunications company that the commission has reason to believe is in violation of this section or title 47, Code of Federal Regulations, part 64, subpart k, in effect on January 1, 2001. The cease and desist order must be:
  - a. Directed against the telecommunications company's marketing of telecommunications service, not the company's provision of service to current customers;
  - b. Accompanied by service on the telecommunications company of a commission order opening an investigation or a formal complaint regarding the company's compliance with this section; and
  - c. Accompanied by service on the telecommunications company of a notice of opportunity to be heard on the cease and desist order within fifteen days of issuance of the cease and desist order.
4. A telecommunications company that violates this section is deemed to have committed an unlawful practice in violation of section 51-15-02 and is subject to all the provisions, procedures, and penalties of chapter 51-15.

**49-21-03. Articles of incorporation - Telephone - Telegraph.** Repealed by S.L. 1985, ch. 515, § 26.

**49-21-04. Price schedules filed with the commission.** Each telecommunications company shall file with the commission in the form and detail as the commission may require, subject to considerations for maintaining trade secrets or commercial confidentiality:

1. Schedules showing all prices for essential services, including those prices set by contract and the individual unbundled or unpackage price of any essential service,



in effect at the time for any essential telecommunications service rendered by the telecommunications company within this state;

2. All rules that in any manner affect the prices charged or to be charged for essential service; and
3. All new prices and any price increases of essential services at least twenty days before the effective date of the new price or price increase, unless the commission upon application and for good cause allows a lesser time. A price or price change is not effective until filed in accordance with this chapter.

**49-21-04.1. Maximum and minimum rates - Changes.** Repealed by S.L. 2005, ch. 399, § 9.

**49-21-05. Schedule of prices to be available for public inspection.** The commission may require any telecommunications company to make available to the public, subject to considerations for maintaining trade secrets or commercial confidentiality, a printed or electronic schedule of prices for telecommunications services offered by the telecommunications company as the commission may deem necessary.

**49-21-06. Complaint against prices.** There is a rebuttable presumption that prices for essential telecommunications services in effect on July 1, 1989, are fair and reasonable. Any person may complain to the commission, or the commission on its own motion may complain and begin investigation, of the reasonableness, fairness, or adequacy of any price for any essential or nonessential service. Any notice and hearing by the commission will be provided in accordance with chapter 28-32 and the commission can only set aside, after notice and hearing, any price for a service it investigates pursuant to this section which it determines to be unreasonable, unfair, or inadequate. This section must be construed to authorize the commission to set aside any unreasonable, unfair, or inadequate price set by a telecommunications company for the connection between facilities of two or more telecommunications companies and for the transfer of telecommunications, provided this section may not be construed to set aside any price set by contract between telecommunications companies and in effect on July 1, 1989, upon complaint by one of the parties to the contract that the price is unreasonably high.

**49-21-07. Discrimination unlawful.** It shall be unlawful for any telecommunications company to make any unjust or unreasonable discrimination in prices, practices, or service for or in connection with like telecommunications service, or give any undue or unreasonable preference or advantage to any person or telecommunications company or to subject any person or telecommunications company to any undue or unreasonable prejudice or disadvantage in the service rendered by it to the public or to a telecommunications company, or to charge or receive for any such service rendered, more or less than the prices provided for in the schedules then on file with the commission. A telecommunications company providing intrastate interexchange message toll services shall charge uniform prices on all routes where it offers such services. A telecommunications company providing local exchange service and message toll and private line services shall cover, in its price for message toll and private line services, the price of providing access service in its own exchanges. Nothing in this chapter shall be construed to prevent any telecommunications company from offering or providing volume or other discounts based on reasonable business practices; from introducing promotional offerings, including special incentives, competitive discounts, and price waivers; from passing through any state, municipal or local taxes or fees to the specific geographic areas from which the taxes or fees originate; from contracting with a retail subscriber to provide telecommunications services at prices negotiated with the subscriber to meet service requests of the subscriber or competitive offerings of another telecommunications company; or from furnishing free telecommunications service or service at reduced prices to its officers, agents, servants, or employees.

**49-21-08. Unnecessary duplication of exchanges prohibited.** Repealed by S.L. 2005, ch. 399, § 9.

**49-21-08.1. Dialing parity - IntraLATA equal access.** Every local exchange carrier shall provide 1 + equal access dialing parity.

**49-21-09. Telecommunications - Connections.** Whenever a connection can be made reasonably between the facilities of two or more telecommunications companies for the transfer of telecommunications and public convenience and necessity will be subserved thereby, the commission may require that such connection be made and may order that telecommunications be transmitted and transferred by the companies, as provided in this section. When, after notice and hearing in accordance with chapter 28-32, the commission finds that public convenience and necessity require the use by one telecommunications company of facilities or services of another telecommunications company, and that such use will not result in irreparable injury to the owner or other users of such facilities or services, nor any substantial detriment to the facilities or services, and that such telecommunications companies have failed to agree upon such use or the terms and conditions or compensation for the same, the commission, by order, may direct that such use be permitted, and may prescribe reasonable compensation, terms, and conditions. If such use is directed, the telecommunications company to which the use is permitted is liable to the owner or other users of such facilities or services for such damage as may result therefrom to the property of such owner or other users thereof.

**49-21-10. Transmitting telecommunications from other telecommunications companies.** Every telecommunications company operating in this state shall receive, transmit, and deliver, without discrimination or delay, the telecommunications of every other telecommunications company with which a connection has been made.

**49-21-10.1. Excessive charges - Refunds.** When complaint has been made to the commission or by the commission on its own motion concerning any price for a telecommunications service, and the commission has found, upon a hearing after notice given as required by law, that the telecommunications company has charged for such service a price in excess of the price permitted under section 49-21-01.3, has discriminated unreasonably, or has otherwise violated a statute, rule, or order, the commission may order that the telecommunications company make due refunds or reparations, with interest from a date not earlier than two years from when the complaint was filed.

**49-21-10.2. Quality of service.** Any customer, and the commission on its own motion, may complain concerning the quality of service provided by a telecommunications company providing telecommunications services in the state. The commission may not adopt any rule or order under this section applicable to retail services unless the standards of service required by the rule or order are applicable to all telecommunications companies providing similar service in the relevant market area.

**49-21-10.3. Complaints.** A person, and the commission on its own motion, may complain concerning any violation of law, rule, or order of the commission. In accordance with chapter 28-32, the commission shall provide notice of the complaint and the time and place of hearing. After hearing under chapter 28-32, if the commission finds that a service of a telecommunications company is inadequate or a company is in violation of a law, rule, or order, the commission may direct the telecommunications company to take reasonable and necessary remedial action to provide adequate service or to bring the company into compliance with the applicable law, rule, or order. The remedies of this section are in addition to the penalties under chapter 49-07.

**49-21-11. Mutual telephone company - Company carrier.** Repealed by S.L. 1985, ch. 515, § 26.

**49-21-12. Assessments - Expenses - Sinking fund.** Repealed by S.L. 1985, ch. 515, § 26.

**49-21-13. Extension of line and system.** Repealed by S.L. 1985, ch. 515, § 26.

**49-21-13.1. Telephone cooperatives - Sale of physical plant - Approval.** No mutual aid cooperative or cooperative association that is a telecommunications company as defined in section 49-21-01 may sell, transfer, or convey, within the period of any single calendar year, physical plant in excess of five percent in value of the cooperative, based upon the most recent audit of the books of the cooperative, unless consent has been obtained by vote of not less than two-thirds of the entire membership of the cooperative cast at any regular or special meeting called for that purpose, after notice in writing to all the membership of the cooperative not less than twenty nor more than thirty days prior to the date of such meeting. Nothing in this section prohibits the transfer of assets in exchange for physical plant of equal monetary value to any public or private person or organization.

**49-21-14. Connections with other telephone systems permitted.** Repealed by S.L. 2005, ch. 399, § 9.

**49-21-15. Physical connections.** Repealed by S.L. 2005, ch. 399, § 9.

**49-21-16. Forfeiture for failure to comply with order.** Repealed by S.L. 1985, ch. 515, § 26.

**49-21-17. Additional definitions.** Repealed by S.L. 2005, ch. 399, § 9.

**49-21-18. Party line - Refusal to surrender - Emergency.** Repealed by S.L. 2005, ch. 399, § 9.

**49-21-19. Distributors of telephone directories to print notice therein.** Repealed by S.L. 2003, ch. 403, § 10.

**49-21-20. Penalty.** Repealed by S.L. 2005, ch. 399, § 9.

**49-21-21. Fraudulent telecommunications - Penalty.** Repealed by S.L. 1975, ch. 106, § 673.

**49-21-22. Regulatory reform review commission - Appointments - Compensation - Report to legislative council.** Repealed by S.L. 1991, ch. 600, § 17.

**49-21-22.1. Regulatory reform review commission - Appointments - Compensation - Report to legislative council.** Expired under S.L. 1995, ch. 453, § 2.

**49-21-22.2. Regulatory reform review commission - Appointments - Compensation - Report to legislative council.** Repealed by S.L. 2009, ch. 482, § 99.

**49-21-23. Construction of facilities - Cost recovery.**

1. A telecommunications company is not required to construct, modify, or extend telecommunications facilities at the request or for the use of another telecommunications company except as required by the federal act.
2. The commission must allow a telecommunications company to recover in advance from the benefited company or customer any nonrecurring costs incurred at the request of another telecommunications company, a particular customer, or to comply with a commission order, including any order issued under section 49-21-10.2, for construction, modification or extension of the company's network in excess of the normal course of business and primarily for the benefit of another telecommunications company or for a particular customer, and not due to any negligence or misconduct on the part of the company. This subsection does not apply to:
  - a. Costs incurred to extend or modify a network to provide for interconnection, collocation, network access, or the sale of unbundled network elements, unless

those costs are identifiable and specific to a particular end-user customer, or wholesale services to another telecommunications company under the federal act;

- b. Costs incurred to remedy discriminatory or unequal treatment that has been found to exist by the commission or an arbitrator; or
- c. Costs for which some other recovery treatment is specifically provided in federal or state law.

**49-21-24. Prohibited acts - Arbitration.**

1. A telecommunications company may not:
  - a. Discriminate against another provider of telecommunications services by refusing or delaying access to the company's services;
  - b. Discriminate against another provider of telecommunications services by refusing or delaying access to essential facilities on terms and conditions no less favorable than those the telecommunications company provides to itself and its affiliates. A local telecommunications facility, feature, function, or capability of the telecommunications company's network is an essential facility if all of the following apply:
    - (1) Competitors cannot practically or economically duplicate the facility, feature, function, or capability or obtain the facility, feature, function, or capability from another source.
    - (2) The use of the facility, feature, function, or capability by potential competitors is technically and economically feasible.
    - (3) Denial of the use of the facility, feature, function, or capability by competitors is unreasonable.
    - (4) The facility, feature, function, or capability will enable competition; or
  - c. Degrade the quality of access or service provided to another provider of telecommunications services.
2. A claim that a telecommunications company has violated this section may be resolved by arbitration or by a complaint filed with the commission. Arbitration of a claim must be conducted by a single arbitrator engaged in the practice of law under the rules of the American arbitration association. All expedited procedures prescribed by the American arbitration association rules apply. The arbitrator's award is final and binding and may be entered in any court having jurisdiction thereof. A complaint filed with the commission must be referred to the office of administrative hearings for hearing and issuance of recommended findings of fact, conclusions of law, and an order pursuant to chapter 28-32. Each party shall bear its own costs and attorney's fees and shall equally share in the fees and expenses of the arbitration or administrative hearing.

**49-21-25. Competitive local exchange companies.** All competitive local exchange companies are subject to the requirements of this chapter regarding purchase of essential telecommunications services, section 49-21-01.4; access code number usage, section 49-21-01.5; call identification services, section 49-21-01.6; cross-subsidization, section 49-21-02.2; unauthorized telecommunications service, section 49-21-02.4; price schedules, sections 49-21-04 and 49-21-05; price complaints, section 49-21-06; discrimination, section 49-21-07; dialing parity, section 49-21-08.1; connections, sections 49-21-09 and 49-21-10; refunds, section 49-21-10.1; and quality of service, section 49-21-10.2.

**49-21-26. Fees.** Unless the governing body of a political subdivision has submitted to the qualified electors of that political subdivision the question of whether to impose a fee other than a fee for management costs and a majority of the voters approved the fee, a political subdivision may not impose after December 31, 1998, any fee to recover from a telecommunications company for the use of its right of way, other than a fee for its management costs. If requested by a political subdivision, in order to accomplish a necessary public improvement on the right of way, a telecommunications company promptly shall remove its facilities from the public right of way or shall relocate or adjust its facilities within the public right of way at no cost to the political subdivision. Necessary public improvements are limited to construction and maintenance activities directly related to improved transportation and safety. A political subdivision may recover from a telecommunications company only those management costs caused by the telecommunications company activity in the public right of way. A fee or other obligation under this section must be imposed on a competitively neutral basis. When a political subdivision's management costs cannot be attributed to only one entity, those costs must be allocated among all users of the public rights of way, including the political subdivision itself. The allocation must reflect proportionately the costs incurred by the political subdivision as a result of the various types of uses of the public right of way. This section does not prohibit the collection of a franchise fee as permitted in section 49-21-29.

**49-21-27. In-kind services.** A political subdivision, in lieu of a fee imposed under section 49-21-26, may not require in-kind services by a telecommunications company right-of-way user or require in-kind services as a condition of the use of the political subdivision's public right of way.

**49-21-28. Arbitration.**

1. A telecommunications company that is denied the use of or access to a political subdivision right of way, that has its right-of-way permit revoked, or that believes that the fees imposed on that company by the political subdivision do not conform to the requirements of section 49-21-26 may request in writing that the denial, revocation, or fee imposition be reviewed by the governing body of the political subdivision. The governing body of the political subdivision shall act within thirty days of the request. A decision by the governing body affirming the denial, revocation, or fee imposition must be in writing and supported by written findings establishing the reasonableness of the decision.
2. Upon affirmation by the governing body of the denial, revocation, or fee imposition, the telecommunications company may do either of the following:
  - a. With the consent of the governing body, submit the matter to final, binding arbitration. Binding arbitration must be before an arbitrator selected by the political subdivision and the telecommunications company. If the parties are unable to agree on an arbitrator, the matter must be resolved by the three-person arbitration panel made up of one arbitrator selected by the political subdivision, one arbitrator selected by the telecommunications company, and one arbitrator selected by the other two arbitrators. The cost of a single arbitrator must be paid equally by the political subdivision and the telecommunications company. If a three-person arbitration panel is selected, each party shall pay the cost of its own arbitrator, and the parties shall jointly pay the cost of the third arbitrator and of the arbitration. Each party to the arbitration shall pay its own costs, disbursements, and attorney's fees.
  - b. Bring an action in district court to review a decision of the governing body made under this section.

**49-21-29. Franchise ordinance not superseded.** Sections 49-21-26, 49-21-27, and 49-21-28 do not modify or supersede the rights and obligations of a political subdivision and the telecommunications company established by the terms of any existing franchise. A city that collects a city franchise fee under a franchise may not collect a fee from that entity under section

49-21-26. A political subdivision that collects a fee prohibited by section 49-21-26 on January 1, 1999, may continue to collect that fee.

**49-21-30. Cost recovery.** A telecommunications company that is assessed either management costs by a political subdivision pursuant to section 49-21-26 or a city franchise fee pursuant to section 49-21-29 is entitled to recover those costs. If the telecommunications company serves customers within the boundaries of the political subdivision imposing the management costs, the costs may be recovered only from those customers.

**49-21-31. Performance assurance fund - Continuing appropriation.** The performance assurance fund is a special fund in the state treasury. The commission shall deposit payments received by the commission under the performance assurance plan in the performance assurance fund until the balance of the fund equals one hundred thousand dollars. Up to one hundred thousand dollars per biennium of moneys in the fund are appropriated on a continuing basis to the commission to monitor the operation and effect of the performance assurance plan. All the payments received by the commission in excess of the one hundred thousand dollars balance in the performance assurance fund must be deposited in the general fund.