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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
Request of Limited Modification of )  
LATA Boundaries to Provide ELCS )  
Between the Morgan )  
Exchange and the Meridian )  
Exchange. )

96-159

DOCKET FILE COPY

**PETITION**

**I. INTRODUCTION**

Southwestern Bell Telephone Company (SWBT), pursuant to Section 3(25) of the Communications Act of 1934, as amended,<sup>1</sup> and in accordance with the guidelines established in the Commission's Memorandum Opinion and Order (MO&O) released July 15, 1997 in CC Docket No. 96-159,<sup>2</sup> hereby makes application for a limited modification of LATA boundaries to provide ELCS between the Morgan exchange and the Meridian exchange.

**II. SUPPORTING INFORMATION**

As prescribed in paragraph 23 of the aforementioned Commission MO&O, SWBT provides the following information in support of its application:

1. Type of service: Flat-rate, non-optional Expanded Local Calling (ELC);
2. Direction of service: Two-way;

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List ABCDE

<sup>1</sup> The Communications Act of 1934, as amended, 47 U.S.C. *et al.*

<sup>2</sup> Memorandum Opinion and Order, Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service at Various Locations, CC Docket No. 96-159, released July 15, 1997. By way of this MO&O the Commission adopted a format for and criteria under which such petitions would be granted. The format and criteria are detailed in paragraphs 23 and 24.

3. Exchanges involved: Morgan in the Dallas, TX LATA and Meridian in the Waco, TX LATA;
4. Name of carriers: Morgan of Contel/GTE Southwest, Inc. and Meridian of Southwestern Bell Telephone;
5. State commission approval(s): See Attachment A;
6. Number of access lines or customers: The Morgan exchange has 287 access lines, and the Meridian exchange has 1,198 access lines;
7. Usage data: Usage data is not available to Southwestern Bell Telephone. SWBT does not currently carry traffic across LATA boundaries;
8. Poll results: Percentage of Morgan customers returning ballots who voted in favor of ELC to Meridian: 76.70. Where SWBT is the petitioning exchange, there is no proposed rate increase. Where SWBT is not the petitioning exchange, SWBT does not have information as to any proposed rate increase.
9. Community of interest statement: The Public Utility Commission of Texas includes a Community of Interest Finding in their Order(s). See Attachment A.
10. Map: See Attachment B; and,
11. Other pertinent information: None

### III. *PRIMA FACIE* SHOWING

SWBT believes that it has made a *prima facie* case supporting grant of the proposed modification because the instant ELCS petition (1) has been approved by the state commission; (2) proposes only traditional local service (i.e., flat-rate, non-optional ELCS); (3) indicates that the state commission found a sufficient community of interest to warrant such service; (4) documents this community of interest through such evidence as poll results and descriptions of the communities involved; and, (5) involves a limited number of customers or

access lines. These requirements for a *prima facie* case are detailed in the aforementioned Commission MO&O paragraph 24.

#### IV. CONCLUSION

Wherefore, SWBT request that the Commission approve its application for a limited modification of LATA boundaries to provide ELCS between the Morgan exchange and the Meridian exchange.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

By Marjorie Morris Weisman

Robert M. Lynch

Durward D. Dupre

Mary W. Marks

Marjorie M. Weisman

Attorneys for

Southwestern Bell Telephone Company

One Bell Center, Room 3520

St. Louis, Missouri 63101

(314) 235-2507

AUGUST 29, 1997

DOCKET NO. 12335

PETITION FOR EXPANDED LOCAL	§	PUBLIC UTILITY COMMISSION
CALLING SERVICE FROM THE TROUP	§	
EXCHANGE TO THE EXCHANGE OF	§	OF TEXAS
TYLER	§	

ORDER NO. 13

DOCKET NO. 12413

PETITION FOR EXPANDED LOCAL	§	PUBLIC UTILITY COMMISSION
CALLING SERVICE FROM THE BLESSING	§	
EXCHANGE TO THE EXCHANGE OF	§	OF TEXAS
BAY CITY	§	

ORDER NO. 17

DOCKET NO. 12922

PETITION FOR EXPANDED LOCAL	§	PUBLIC UTILITY COMMISSION
CALLING SERVICE FROM THE MORGAN	§	
EXCHANGE TO THE EXCHANGE OF	§	OF TEXAS
MERIDIAN	§	

ORDER NO. 13

DOCKET NO. 13226

PETITION FOR EXPANDED LOCAL	§	PUBLIC UTILITY COMMISSION
CALLING SERVICE FROM THE TEAGUE	§	
EXCHANGE TO THE EXCHANGE OF	§	OF TEXAS
FAIRFIELD	§	

ORDER NO. 9

DOCKET NO. 13248

PETITION FOR EXPANDED LOCAL	§	PUBLIC UTILITY COMMISSION
CALLING SERVICE FROM THE GRAND	§	
SALINE EXCHANGE TO THE EXCHANGE	§	STATE OF TEXAS
OF TYLER	§	

ORDER NO. 8

DOCKET NO. 12335  
DOCKET NO. 12413  
DOCKET NO. 12922  
DOCKET NO. 13226  
DOCKET NO. 13248  
DOCKET NO. 13268  
DOCKET NO. 13318  
DOCKET NO. 13323

ORDER NO. 13  
ORDER NO. 17  
ORDER NO. 13  
ORDER NO. 9  
ORDER NO. 8  
ORDER NO. 10  
ORDER NO. 9  
ORDER NO. 8

DOCKET NO. 13268

PETITION FOR EXPANDED LOCAL § PUBLIC UTILITY COMMISSION  
CALLING SERVICE FROM THE PETTUS §  
EXCHANGE TO THE EXCHANGES OF § OF TEXAS  
KENEDY AND KARNES/FALLS CITY §

ORDER NO. 10

DOCKET NO. 13318

PETITION FOR EXPANDED LOCAL § PUBLIC UTILITY COMMISSION  
CALLING SERVICE FROM THE §  
FRANKSTON EXCHANGE TO THE § OF TEXAS  
EXCHANGES OF TYLER §

ORDER NO. 9

DOCKET NO. 13323

PETITION FOR EXPANDED LOCAL § PUBLIC UTILITY COMMISSION  
CALLING SERVICE FROM THE SUNSET §  
EXCHANGE TO THE EXCHANGE OF § OF TEXAS  
BOWIE §

ORDER NO. 8

UNABATING AND DIRECTING LOCAL EXCHANGE COMPANY  
TO FILE FOR LIMITED MODIFICATION

On July 28, 1997, the Commission Staff recommended that, in light of the recent Federal Communications Commission (FCC) order addressing the procedures for Southwestern Bell Telephone Company (SWBT) to request limited modifications of local access and transport area (LATA) boundaries for the provision of expanded local calling service (ELCS), that these applications be unabated. A community of interest has previously been established in these cases and a waiver

DOCKET NO. 12335  
DOCKET NO. 12413  
DOCKET NO. 12922  
DOCKET NO. 13226  
DOCKET NO. 13248  
DOCKET NO. 13268  
DOCKET NO. 13318  
DOCKET NO. 13323

ORDER NO. 13  
ORDER NO. 17  
ORDER NO. 13  
ORDER NO. 9  
ORDER NO. 8  
ORDER NO. 10  
ORDER NO. 9  
ORDER NO. 8

request was filed by SWBT with the Department of Justice under the *Modified Final Judgment*. Therefore, these applications are unabated.

Within thirty days of the effective date of this order, SWBT shall file a request for limited modification of the LATA boundary in accordance with the procedures outlined *In the Matter of Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS) at Various Locations*, CC Docket No. 96-159, FCC 97-244, (rel. July 15, 1997) *Memorandum Opinion and Order*, §§ 23 & 24.

Additionally, within 10 days of the receipt of orders or notices from the FCC relating to these petitions, SWBT shall file such orders or notices with the Commission.



ISSUED BY THE OFFICE OF POLICY DEVELOPMENT  
ON BEHALF OF THE PUBLIC UTILITY COMMISSION OF TEXAS  
ON THE 31ST DAY OF JULY, 1997



## II. Background

### A. Waiver of Modified Final Judgment

Judge Harold H. Greene established the LATA boundaries for Southwestern Bell Telephone Company (SWB) in the Modified Final Judgment<sup>1</sup>, and for GTE Southwest, Inc. and Contel of Texas, Inc. (collectively GTE) in the Decree.<sup>2</sup> (The collective orders of Judge Greene will hereinafter be referred to as MFJ). A LATA is a geographic area in which SWB and GTE can provide telecommunication services within its boundaries. They "encompass one of more contiguous local exchange areas serving common social, economic or other purposes."<sup>3</sup>

Also in the MFJ, Judge Greene restricted the two local exchange carriers from providing interLATA transport. In order for the companies to span the LATA boundaries established by the MFJ, the Companies must obtain a waiver from Judge Greene. In Judge Greene's order establishing the LATAs, he stated the following:

Thus, ... the purpose of the establishment of the LATAs is only to delineate the areas in which the various telecommunications companies will operate; it is not to distinguish the area in which a telephone call will be "local" from that in which it becomes a "toll" or long distance call.... [T]he LATA is not an entity designed to supplant the local "exchange" as telephone users know it, nor will the establishment of the borders of the LATAs affect what is commonly known as the local calling area, *i.e.* those areas, typically combining more than one local exchange, within which subscribers may place telephone calls without paying an extra charge. *The distance at which a local call becomes a long distance toll call has been, and will continue to be, determined exclusively by the various state regulatory bodies.*

*United States v. Western Elec. Co., Inc.* at 995. (D.D.C. 1983) (footnotes deleted) (emphasis included in original).

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<sup>1</sup> United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982) and United States v. Western Elec. Co., Inc., 569 F.Supp. 990 (D.D.C. 1983).

<sup>2</sup> United States v. GTE Corp., 1985-1 Trade Cas (CCN) 646,355 (D.D.C. 1985).

<sup>3</sup> United States v. AT&T at 229.

Therefore, it was Judge Greene's intent to continue allowing the State regulatory commissions the ability to determine local calling areas.

Judge Greene has relied upon three issues for SWB or GTE to obtain a waiver of his orders. One issue is the impact on competition; this issue is not before the Commission. Judge Greene also considers whether the calling plan has the attributes of a long distance toll call. Judge Greene has denied petitions for waivers based upon such plans. Instead, he requires a flat-rate local call, which contains the features of a basic local exchange service. The rates proposed in the three dockets before the Commission contain flat-rate, non-optional charges. Lastly and as will be discussed later, Judge Greene also requires a showing of a community of interest between the two exchanges for such a waiver to be granted.

### B. Expanded Local Calling in Texas

On October 19, 1993, the Commission amended P.U.C. SUBST. R. 23.49 by adding a section pertaining to ELCS in accordance with Senate Bill 632<sup>4</sup> and § 93A of PURA. The rule became effective on December 7, 1993. The statute and the rule provide certain requirements for petitioning exchanges to meet in order to receive ELCS. One such requirement is a showing of a community of interest. The standards for establishing a community of interest between two exchanges will be discussed below.

### C. Three Pending Proceedings

The three pending dockets that are the subject of this Interim Order were filed prior to the adoption of the Commission's rule,<sup>5</sup> yet the criteria contained within the rule must be met in each

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<sup>4</sup> Act of May 11, 1993, 73rd Leg. R.S., ch.271, 1993 Tex. Sess. Law.Serv. 1276 (Verman)(to be codified as an amendment to TEX. REV. CIV. STAT. ANN., Art. 1444c, §93A).

<sup>5</sup> Docket No. 12335 was filed on September 22, 1993; Docket No. 12922 was filed on September 27, 1993; and Docket No. 12413 was filed on October 18, 1993.

respective docket. The petitions are before the Commission for a determination of whether a community of interest exists between the petitioning exchanges and the petitioned exchanges. The parties to the proceedings are listed on Attachment A to the proposed interim order. The hearing on the merits convened on August 24, 1994, and was adjourned on August 25, 1994. There is no statutory deadline for this proceeding. In the event that the Commission enters an interim order finding that a community of interest exists between the exchanges involved in the three petitions, SWB and GTE will seek a waiver of the MFJ from Judge Greene so that they may provide ELCS in those exchanges.

AT&T Communications of the Southwest, Inc. (AT&T) opposes the three requests for a finding of community of interest between the exchanges. AT&T opposes the requests on the basis that the petitioners have failed to prove a sufficient community of interest between the exchanges. AT&T urges the Commission to require the petitioners to provide usage data and demographic data to satisfy the community of interest standard. General Counsel supports a finding that a community of interest exists in the three petitions, yet argues that the sole standard to be used is the contiguous criteria or 22-mile criteria of P.U.C. SUBST. R. 23.49(c)(3)(B)(ii). General Counsel urges the Commission to base its interim order upon this criteria, and refuse to utilize further standards. GTE and SWB do not take a position on whether a community of interest exists between the exchanges. Instead, the involvement of both companies was limited to the issue of the standard the Commission should use in determining if a community of interest exists.

### III. Interim Order

The ALJ recommends that the Commission enter an interim order finding there exists a community of interest between the exchanges in question. Once the Commission enters such an order, SWB and GTE must request waivers from Judge Greene before they may provide ELCS across LATA boundaries. The amount of time to obtain a ruling from Judge Greene on the waivers is unknown. If a waiver is granted, the proceedings will return to this Commission for the continued processing of the cases under P.U.C. SUBST. R. 23.49(c).<sup>6</sup> In the event Judge Greene denies the waiver, the proceedings before this Commission should be dismissed, because SWB and GTE cannot provide ELCS

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<sup>6</sup> Once Judge Greene has ruled upon these requests for waivers, the remaining abated dockets will proceed in a manner dependant upon his ruling.

across the LATA boundaries.<sup>7</sup> Thus, the future of the current proceedings depends upon the actions of Judge Greene. The ALJ does not recommend the adoption of a final order at this stage. If one were adopted, it must be contingent upon the actions of Judge Greene; thus, it would not be considered a final order of the Commission.

#### IV. Jurisdiction

The Commission has jurisdiction in this proceeding pursuant to the Public Utility Regulatory Act (PURA), Tex. Rev. Civ. Stat. Ann. art. 1446c, §§ 16, 18, 27, 35, 37, 50, and 93A (Vernon Supp. 1994).

#### V. Community of Interest Standard

##### A. Federal Standards

Requests for waivers of boundaries by petitioners in states other than Texas have been presented to Judge Greene. The evidence indicates that some requests are denied, while others have been granted. As noted earlier, this interim order addresses the issue of community of interest. While Judge Greene has not articulated his criteria for determining a community of interest, it is clear that he requires a showing of community of interest in order to grant a waiver. In each case before Judge Greene, the Department of Justice (DOJ) reviews the request for a waiver and makes a recommendation to the court. The DOJ has articulated in its recommendations the criteria it uses for recommending approval of a waiver. As stated in a DOJ report,<sup>8</sup> "[t]he majority of those requests have involved small numbers

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<sup>7</sup> If Judge Greene, in denying the waivers, states the necessary elements for a waiver for the exchanges, it is possible that the dockets could proceed for further evidence on the issue of community of interest to address Judge Greene's concerns.

<sup>8</sup> Report for the United States Concerning Requests by BellSouth and the Alabama Public Service Commission for Waivers to Enable Them to Implement InterLATA Flat Rate Intra-County Calling (Sept. 18, 1992).

of subscribers or communities, usually situated near a LATA boundary, who have had their community of interest interrupted by the drawing of the LATA." AT&T Ex. 6, 7, & 8, Att. B at 2.<sup>9</sup>

Because Judge Greene has not previously stated criteria for granting a waiver, one can only speculate as to the necessary justification for obtaining a waiver of the LATA boundaries. The DOJ has previously stated that the "...strength of a community of interest between two exchanges can be measured by the willingness of the subscribers in Exchange 'A' to pay a higher monthly basic service rate for the ability to make calls to Exchange 'B'." Petitioners Ex. 4. In recommending approval of various waivers, the DOJ has relied upon a vote of 90 percent, 84.7 percent, 81 percent, and 53 percent of the responding subscribers as a showing of community of interest. *Id.* The DOJ has also considered that the two exchanges share some of the following factors: local governments; employment; shopping; and use of educational and medical services. *Id.*

### B. State of Texas Standards

#### 1. *Per Se* Standard

The standards for community of interest for ELCS in the State of Texas are established in §93A(a)(2) of PURA and in P.U.C. SUBST. R. 23.49(c)(3). A petitioning exchange is required to have either a contiguous boundary with the petitioned exchange or the exchanges must be within a distance of 22 miles. P.U.C. SUBST. R. 23.49(c)(3)(B). If the exchanges are greater than 22 miles apart, but less than 50 miles, the petitioners must show a community of interest through schools, hospitals, local governments, business centers, or other relationships so that, without ELCS, a hardship on the residents of the petitioning exchange would occur. P.U.C. SUBST. R. 23.49(c)(3)(C).

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<sup>9</sup> AT&T witness Thomas J. Archer filed three separate pieces of testimony. AT&T Ex. 6 was his testimony in Docket No. 12335; AT&T Ex. 7 was Docket No. 12922; and AT&T Ex. 8 was Docket No. 12613. Hereinafter, the exhibits will only be cited as AT&T Ex. 6, unless specific reference is necessary.

The petitioners and the local exchange companies (LECs) argue that the Commission should determine a community of interest based upon the contiguous or 22-mile criteria, because each petitioning exchange is either contiguous or within 22 miles of the petitioned exchange. These parties also urge the Commission to adopt findings based upon additional showings of community of interest. The parties believe that Judge Greene is more likely to grant a waiver based on a combination of the two, rather than simply upon the contiguous or 22-mile criteria.

AT&T urges the Commission to adopt a stricter standard for community of interest than those contained within § 93A of PURA and P.U.C. SUBST. R. 23.49(c)(3). AT&T's arguments will be discussed in greater detail below in separate sections. General Counsel supports the determination that a community of interest exists between the exchanges in the petitions. Yet, General Counsel argues that the Commission should base its order only upon the criteria of contiguous exchanges or 22-mile distance, and not to allow the petitioners to present testimony concerning other community of interest standards after the 35th day of Staff review.

The ALJ agrees that in an ELCS docket in which the two exchanges are within 22 miles of each other or contiguous to each other, a *per se* showing of community of interest is demonstrated. Yet, because Judge Greene seems to require a greater showing of community of interest in order to grant a waiver of the MFJ, it would be prudent for the Commission to make such additional findings, if the evidence supports such. Therefore, the ALJ does not find General Counsel's arguments to limit the interim order solely to the 22-mile or contiguous boundary criteria to be persuasive.

## 2. Standard Contained Within P.U.C. SUBST. R. 23.49(b)(2)

AT&T advocates the mandatory use of calling data and demographic data for proof of a community of interest between two exchanges involving interLATA issues. AT&T argues that the Commission should use an objective standard for determining community of interest similar to the one contained within P.U.C. SUBST. R. 23.49(b)(2), which addresses petitions for extended area service (EAS). AT&T witness Thomas J. Archer also testified that the petitioning exchange must show that a hardship will be suffered if the local calling scope is not extended. AT&T Ex. 6 at 4. Because the

petitioning exchanges failed to present usage data or demographic data, AT&T argues that the petitioners failed to provide sufficient evidence of a community of interest.

The ALJ rejects AT&T's position. As previously stated, the criteria urged by AT&T applies to EAS petitions. The Legislature chose to establish a separate and distinct procedure for rural areas, outside of a metropolitan area, to obtain extended local calling service between communities with similar interest and activities. In so doing, the Legislature and the Commission utilized different standards for obtaining ELCS, than for petitioners in an EAS proceeding. Thus, the ALJ finds that the standards for community of interest contained within the EAS rule, P.U.C. SUBST. R. 23.49(b), do not apply to these proceedings.

### 3. Procedures Contain Within P.U.C. SUBST. R. 23.49(c)

AT&T argues that the Commission utilized a different procedure than that contained within P.U.C. SUBST. R. 23.49(c) to process the ELCS cases involving interLATA issues. AT&T states that in adopting the rule the Commission did not contemplate the docketing of ELCS cases for a hearing on the merits. Also, AT&T believes that the Commission did not consider the issue of interLATA boundaries when adopting the rule. Because the petitions were docketed and a hearing on the merits was convened to determine whether a community of interest exists, AT&T argues that the standards for community of interest contained within § 93A of PURA and the P.U.C. SUBST. R. 23.49(c) do not apply.

The ALJ does not find persuasive AT&T's arguments that the standards contained within § 93A and P.U.C. SUBST. R. 23.49(c) no longer apply because a hearing was held in these proceedings. Neither the statute nor the Commission's rule contain a disclaimer to the standards contained therein in the event a proceeding is docketed. P.U.C. SUBST. R. 23.49(c)(10) envisions the necessity for a hearing in a contested proceeding, yet does not state that the standards contained within the rule and statute no longer apply to that proceeding. It is more reasonable to interpret the rule so that the established standard applies to both contested and uncontested ELCS proceedings, instead of applying a standard for a different service (*i.e.*, EAS service) to only contested proceedings. The standards

contained within § 93A(a)(2) of PURA and P.U.C. SUBST. R. 23.49(c)(3)(B) apply to these proceedings whether contested or uncontested.

AT&T also argues that P.U.C. SUBST. R. 23.49(c) of the Commission's rule should not apply to these proceedings, because the Commission did not contemplate interLATA waivers in adopting the rule. AT&T's argument is based upon the testimony of General Counsel witness Isabel Flores, who stated that the Commission did not consider the interLATA issue in its deliberations on the rule. This position, however, is contrary to the statements contained within the transcript of the Final Order Meeting of October 19, 1993. During the discussion on P.U.C. SUBST. R. 23.49(c), Deputy General Counsel Martin Wilson and Commissioner Goodfriend had an exchange on the issue. Mr. Wilson stated the following:

[P]etitioners maybe should bear in mind when they're submitting their petitions, that if it implicates LATA boundaries, they may be better off, for Judge Greene's purposes, submitting it not under the 22-mile I-automatically-get-it boundary type thing but under a community of interest test where they establish that at this Commission and the take that to Judge Greene.

Final Order Meeting Tr. at 289 (Oct. 19, 1993).

From a review of the transcript of the meeting, it is apparent that the Commission was aware of issues relating to the implications of an interLATA boundary application. Therefore, all persons were on notice that the Commission adopted P.U.C. SUBST. R. 23.49(c) with the knowledge that an ELCS petition might require a waiver of the prohibition of interLATA service by a LEC. In addition, the Deputy General Counsel put all parties on notice that the General Counsel does not believe a contiguous or 22-mile criteria was sufficient for Judge Greene. He further suggested that the General Counsel believed that more evidence of a community of interest should be advanced by the petitioners. Thus, not only did the Commission contemplate the issue in adopting the rule, there was also discussion on the record of what might constitute the necessary standards to obtain a waiver from Judge Greene.

#### 4. Affirmative Vote of Subscribers

In order for an ELCS petition to be considered by the Commission, the statute and the Commission's rule require that at least 70 percent of those subscribers responding to the balloting must

vote in favor of the service. In each of the pending cases, the affirmative vote was in excess of 70 percent. The Petitioners argue that the fact a significant percentage of those subscribers returning ballots voted in favor of the service is a showing, in and of itself, of a community of interest.

AT&T states that the percentage only measures those subscribers returning ballots and not the total number of subscribers in the exchanges. Therefore, according to AT&T, the affirmative vote is not a showing of community interest for two reasons. AT&T alleges that the vote must be 70 percent of the total subscribers to show a community of interest. In addition, AT&T states that the vote merely shows a vote for lower rates.

The 70 percent affirmative vote of the responding subscribers is necessary for a petition to proceed through the process. Without such a vote after balloting, the petition would be denied because it would not comply with the statute or the rule. P.U.C. SUBST. R. 23.49(c)(5)(D)(ii). Nevertheless, the criteria in the statute and rules require further showings for a determination of a community of interest. As previously discussed, the DOJ and Judge Greene have granted waivers based upon the mere showing of a substantial affirmative vote of those subscribers returning ballots. In Texas, the mileage distance between exchanges is a *per se* showing of a community of interest. The ALJ finds that the affirmative vote is an indication of a community of interest. The ALJ finds that the percentage of affirmative votes from those subscribers returning ballots is a compelling showing of a community of interest. This factor can and should be considered with the same weight as that afforded other factors, such as the sharing of local government, schools, employment, and commercial centers.

The standards in PURA and the Commission's rules establish a criteria for the affirmative voting based upon those ballots returned by subscribers. AT&T requests that the Commission apply a stricter standard than the language contained within PURA and its own rules. There is no basis or authority to deviate from the clear language of the statute and rule. In respectively enacting such, the Legislature and the Commission believed that a percentage of those subscribers returning the ballots was sufficient to show that the subscribers within the petitioning exchange desire the service.

In addition, on the federal level, the DOJ has based its recommendations for granting some waivers solely on the percentage of ballots returned by subscribers, instead of the percentage based on

the total number of subscribers within the exchange. Judge Greene has likewise granted waivers on this basis. Thus, § 93A(a)(1) of PURA, P.U.C. SUBST. R. 23.49(c)(5)(D)(i), the DOJ, and Judge Greene all utilize a standard based on the number of subscribers returning ballots, instead of the number of all subscribers in the exchange. Therefore, AT&T's contrary position that such balloting results do not indicate a community of interest should not be adopted.

### C. Recommendation

The contiguous boundary or 22-mile distance criteria applies to these proceedings, and is a *per se* showing of a community of interest between two exchanges. Due to the necessity to obtain a waiver of the MFJ from Judge Greene, however, the Commission should include additional findings of a community of interest in its interim order. The standards for a community of interest contained within P.U.C. SUBST. R. 23.49(b) do not apply to an ELCS proceeding for the reasons stated above. The Commission adopted the ELCS rule with the knowledge that an ELCS petition might involve interLATA service and, therefore, might require a waiver of the MFJ. In fact, it did not alter any portion of the rule to change the standards for cases involving such interLATA issues. Lastly, the affirmative vote of at least 70 percent of the subscribers returning ballots is one consideration in determining if a community of interest exist between two exchanges.

## VI. Docket No. 12335

### A. Community of Interest Between the Troup and Tyler Exchanges

#### 1. Description of Petition

Docket No. 12335 involves a petition by the Troup Exchange for ELCS to the Tyler Exchange. The Troup Exchange is served by United Telephone Company of Texas, Inc. (United), and it is in the Dallas LATA. Petitioners Ex. 1, ¶14 & 15. The Tyler Exchange is served by SWB, and it is in the Longview LATA. *Id.*

In support of the petition, the petitioners presented the testimony of Ms. Jyl Moose, who is the City Administrator for the town of Troup. *Id.* at ¶1. She was born in the City of Tyler, and has lived in the Troup Exchange since 1949. *Id.* at ¶3.

The town of Troup has a population of 1,640,<sup>10</sup> and is the only municipality in the Troup Exchange. *Id.* at ¶5 and Tr. 40. The entire exchange contains 2,000 persons. Tr. 39. The town of Troup is 17 miles from the City of Tyler, which has a population of 75,000. Petitioners Ex. 1, ¶4 & 5. At the closest point, the Troup Exchange is within two miles of the Tyler Exchange. *Id.* at ¶4.

In this petition, unlike the others addressed in the interim order, the petitioners allege discrimination. In addition to the Troup Exchange, the Bullard, Lake Palestine East, and Chandler Exchanges are in the Dallas LATA. *Id.* at ¶16. Yet, calls between those exchanges and the Tyler Exchange are not subject to the MFJ because local calling between the exchanges was in existence prior to the MFJ. The petitioners argue that it is discriminatory for the three other nearby exchanges in the Dallas LATA to have the ability to make interLATA calls to the Tyler Exchange without incurring long distance charges, while the Troup Exchange does not have the same ability. AT&T states that the situations cannot be compared because the other three exchanges enjoyed the ability to call the Tyler Exchange on a local calling basis prior to the entry of the MFJ.

While, on its face, the different situations appear to be discriminatory, the local calling scopes for those exchanges were in place prior to the MFJ. Nevertheless, the ALJ does not believe that this issue is determinative of whether a community of interest exist between the Troup and Tyler Exchanges. The fact that the other three exchanges can call the Tyler Exchange without incurring long distance charges does not establish a community of interest between the Troup and Tyler Exchanges. Rather, other issues should be considered. For the reasons set out below, the ALJ finds that a community of interest exists between the Troup and Tyler Exchanges, and rejects AT&T's assertions that the petitioners have failed to prove a community of interest

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<sup>10</sup> All references to populations and mileage are approximations.

**2. Per Se Standard**

The northern boundary of the Troup Exchange and the southern boundary of the Tyler Exchange come within two miles of each other. *Id.* at ¶4. Consequently, the two exchanges are within 22 miles of each other, as required by the statute and the rule. Thus, under the standards in Texas, there is a *per se* community of interest

**3. Additional Findings of Community of Interest****a. Affirmative Vote of Subscribers**

The petition filed before the Commission included the signatures of 156 subscribers in the Troup Exchange. *Id.* at ¶7. The signatories had notice that the non-optional service included a surcharge of \$3.50 for residential customers and \$7.00 for business customers. *Id.* An affirmative vote of 83.2 percent of those subscribers that voted in the balloting favored expanding the Troup Exchange's local calling scope to the Tyler Exchange. *Id.* at ¶19. The ballots also stated that the service was non-optional and specified the costs for the service.

**b. Local Government**

The Tyler Exchange and over 80 percent of the subscribers in the town of Troup, which is in the Troup Exchange, reside in Smith County. *Id.* at ¶6. Thus, the City of Tyler is the predominant county seat for the area. The town of Troup has its own police and fire department. Tr. 51. Its ambulance service is dispatched from the Tyler Exchange by the East Texas Emergency Medical Services (EMS). *Id.*

AT&T contests the issue of whether the two communities share a common local government. AT&T cites to the cross-examination of Ms. Moose in support of its position. In her prefiled testimony, she stated that over 80 percent of the subscribers in the town of Troup reside within Smith County. Upon cross-examination, Ms. Moose stated that she did not know the number of subscribers in the Troup Exchange within the counties of Smith and Cherokee.

The testimony in this area is confused due to the fact that Ms. Moose was discussing subscribers in the town of Troup, while counsel for AT&T was cross-examining her based upon the entire Troup Exchange. Upon taking the stand to testify, Ms. Moose corrected her prefiled testimony to state that 80 percent of the subscribers within the town of Troup reside in Smith County, instead of referring to the entire exchange. From a review of the record, it seems that AT&T's cross-examination of Ms. Moose was based upon the entire exchange. Therefore, the ALJ finds it persuasive that Ms. Moose corrected her testimony to refer only to the town of Troup, and that she was likely confused by the line of questioning. Based upon a determination that Ms. Moose knowingly and with forethought corrected her testimony upon taking the stand, the ALJ finds that the subscribers within the town of Troup and the Tyler Exchange share common local governments. From the record, a determination as to what constitutes the county seat for the remainder of the Troup Exchange is impossible. The evidence of commonality of local government is sufficient to show a community of interest between the two exchanges.

c. Commercial Center

The town of Troup is home to various businesses, including one grocery store and one bank. Tr. 50. Most stores, professional services, and entertainment providers in the area, however, are located in the City of Tyler. Petitioners Ex. 1, ¶24. The City of Tyler represents the commercial center for those who live in the Troup Exchange. *Id.*

AT&T disputes that the City of Tyler is the commercial center for the Troup Exchange, because "a number of businesses" are located in the town of Troup. While it is true that the evidence shows that the town of Troup has a number of businesses providing essential and non-essential commodities and services, it also shows that only some are located within that municipality. There are many remaining commodities and services that are not located within the Troup Exchange. Ms. Moose testified that those in the Troup Exchange rely upon the City of Tyler as a commercial center for those and other items. Ms. Moose was a credible witness with personal knowledge of the area and its citizens; no other witness possessed this personal knowledge. Based upon the credible testimony of Ms. Moose, the ALJ finds that the area in and around the City of Tyler is the commercial center for the Troup Exchange.

d. Hospitals and Medical Providers

The City of Tyler has three major hospitals, while the Troup Exchange does not have a hospital nor a laboratory. *Id.* at ¶20 &22. The closest hospital other than in the Tyler Exchange is located in Jacksonville, which is 20 miles from the town of Troup. Tr. 48. The citizens within the Troup Exchange utilize the hospitals in the City of Tyler for the provision of inpatient and traumatic care, instead of the hospital in Jacksonville. The town of Troup has two doctors with limited practices; there are no specialist physicians in the Troup Exchange. Petitioners Ex. 1, ¶23. There are two dentists in the town of Troup. Tr. 48. The evidence of the use of hospitals and medical providers in the City of Tyler is sufficient to show a community of interest between the two exchanges.

e. Schools

The children within the Troup Exchange attend schools in the Troup Independent School District. Petitioners Ex. 1, ¶25. This district consists of elementary, middle, and high schools.

f. Employment

Businesses or government agencies located in the City of Tyler employ most of the working population of the Troup Exchange. Petitioner Ex. 1, at ¶ 25. Parents must call between the exchanges to contact either children, teachers, or administrators within the school district, and vice versa. *Id.*

AT&T disputes that the Tyler Exchange is the employment center for citizens in the Troup Exchange because the petitioners did not provide demographic data on the number of workers commuting from the Troup area to the Tyler area. In her direct testimony, Ms. Moose states that "most of the working population of Troup are employed by businesses or government agencies which are located in Tyler." There is also evidence that the town of Troup has one plastics company, employing 100 people. AT&T Ex. 1. There are farms, dairies and ranches in the exchange that employ 450 people, yet a significant portion of those employees are migrant workers from other places than the Troup Exchange. AT&T Ex. 2.

AT&T's assertions are not persuasive. Ms. Moose testified that most of the working population in the Troup Exchange made their living in the Tyler area. AT&T did not impeach Ms. Moose on this issue. The only solid evidence of employment relating to residents of the Troup Exchange acknowledges that 100 people residing in the Troup Exchange work within that exchange. As previously stated, the population of the town of Troup is 1,640. While many of these residents are obviously not working age, it is likewise obvious that more than 100 are of working age. Although there are some employment opportunities in the Troup Exchange, there is nothing in the record to indicate that Ms. Moose was incorrect in her statement. Ms. Moose was a credible witness with personal knowledge of the area and its citizens; no other witness possessed this personal knowledge. Based upon the credible testimony of Ms. Moose, the ALJ finds that the Tyler area is the employment center for the Troup Exchange.

#### 4. Recommendation

The ALJ concludes that a community of interest exists between the Troup Exchange and the Tyler Exchange. The exchanges are within 22 miles of each other. Thus, under Texas law, there is a *per se* community of interest. In addition, the petitioners proved a community of interest with the Tyler Exchange in the following ways: affirmative vote of 83.2 percent of the subscribers returning ballots; commonality of local government; common utilization as a commercial center; common utilization of hospitals and medical providers; commonality of employment opportunities; and location of schools within different exchanges from the employment center.

## VII. Docket No. 12922

A. Community of Interest Between the Morgan and Meridian Exchanges

## 1. Description of Petition

Docket No. 12922 involves a petition by the Morgan Exchange for ELCS between it and two other exchanges. One of the requests involves the Meridian Exchange and the other involves the Clifton Exchange, which will be discussed below in Section VII.B. The Morgan Exchange is served by Contel Telephone Company of Texas, Inc. (GTE), and it is in the Dallas LATA. Petitioners Ex. 2, ¶16 & 17. The Meridian Exchange is served by SWB, and is located in the Waco LATA. *Id.*

In support of the petition, the petitioners presented the testimony of Mayor Harold E. Vandiver, Jr. *Id.* at ¶1. He has resided within the town of Morgan since 1979, and has been the mayor of the town of Morgan for the past 14 years.

The town of Morgan has a population of 451. *Id.* at ¶8. The town of Morgan is seven miles from the town of Meridian, which has a population of 1,390. Tr. 73 & Petitioners Ex. 2, ¶8. The two exchanges share a common boundary. Petitioners Ex. 2, ¶6.

2. *Per Se* Standard

The southwestern portion of the Morgan Exchange and the northern part of the Meridian Exchange are contiguous. *Id.* at ¶6. Because the two exchanges are contiguous, there is a *per se* community of interest under PURA and P.U.C. SUBST. R. 23.49(c).

### 3. Additional Findings of Community of Interest

#### a. Affirmative Vote of Subscribers

The petition filed before the Commission included the signatures of 45 subscribers in the Morgan Exchange. *Id.* at ¶9. The signatories had notice that the non-optional service included a surcharge of \$3.50 for residential customers and \$7.00 for business customers. *Id.* An affirmative vote of 82.1 percent of those subscribers that voted in the balloting favored expanding Morgan's local calling scope to the Meridian Exchange. *Id.* at ¶20. The ballots also stated that the service was non-optional and specified the costs for the service.

#### b. Local Government

The two exchanges are in Bosque County, for which the town of Meridian is the county seat. *Id.* at ¶4. The appraisal district office, the tax office, the county senior citizens office, and the courts are located in the town of Meridian. *Id.* at ¶22. The town of Morgan does not have a police department, but depends upon the sheriff's department in the town of Meridian for law enforcement. *Id.* at ¶21. The ambulance service also is deployed from the town of Meridian. Tr. 73. There is a volunteer fire department in the town of Morgan. Tr. 69.

AT&T argues that a community of interest does not exist based upon local government because the town of Morgan has its own fire department, city hall, water department, and school district. While it is true that the town of Morgan has each of these vital functions within its township, the evidence is uncontroverted that all county services, as well as law enforcement services, are located within the Meridian Exchange. These functions are equally vital to the community within the Morgan Exchange, and constitute the existence of a community of interest between the two exchanges.

c. Commercial Center

The town of Morgan does not have a business district. In fact, it does not have grocery stores, physicians, dentists, auto dealerships, or other professional services. The town does have two family-run, gas stations that provide limited groceries. Tr. 69. The Mayor of Morgan testified that the majority of the citizens go to the cities of Meridian or Clifton for goods and services. Tr. 75. The cities of Meridian and Clifton represent the commercial centers for those who live in the Morgan Exchange.

AT&T argues that the town of Morgan has a variety of services to offer its own residents. The services to which AT&T refers are as follows: two gas stations with limited groceries; a man who mows yards and shreds; one to two beauty shops in homes; and a paint and body shop. Tr. 69-71. The Mayor's testimony that the commercial centers for the Morgan Exchange are within the cities of Meridian and Clifton is extremely credible when considering the very limited services provided within the Morgan Exchange. The few services relied upon by AT&T would not sustain the needs of the citizens of the Morgan Exchange.

AT&T also argues that there is no evidence on economic or social relationships with other communities in the area. In its brief, AT&T particularly discusses the town of Glen Rose, which is 20 miles from the town of Morgan, as possibly having stronger economic and social relationships with Morgan. To the contrary, Mayor Vandiver specifically stated during cross-examination and redirect examination that the Morgan community did not share interests with the communities of Glen Rose, Hillsboro, and Cleburne. Mayor Vandiver testified that he had no knowledge of anyone from the Morgan Exchange using hospitals, employment, grocery stores, or medical care in the other communities, except upon a rare occasion. Although AT&T is correct that these other towns are close to Morgan, the evidence is clear that a community of interest does not exist between those towns in the manner it does between the exchanges of Morgan, Meridian, and Clifton.