

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of )  
 )  
Appropriate Framework for Broadband ) CC Docket No. 02-33  
Access to the Internet over Wireline )  
Facilities )

**Comments of the Public Utility Commission of Texas**

On February 15, 2002, the Federal Communications Commission (Commission) released a *Notice of Proposed Rulemaking (NPRM)* in this proceeding. In this *NPRM*, the FCC seeks comment on a tentative conclusion that wireline broadband Internet access services, whether provided over a third party's facilities or self-provisioned facilities, are information services, with a telecommunications component, rather than telecommunication services. Specifically, if wireline broadband Internet access services are information services subject to Title I regulations in the Federal Telecommunications Act (FTA), the Commission seeks comment on what role the states would assume in the regulation of such services. The Commission seeks comment on whether to impose certain *Computer III* requirements on Bell Operating Companies (BOCs) that would be removed on a state-by-state basis once it has achieved certain performance measurement levels in providing non-broadband services, and/or once it has received FTA § 271 approval from the Commission. Moreover, the Commission seeks comment on whether to modify or eliminate existing access obligations on providers of self-provisioned wireline broadband Internet access services. Finally, the Commission seeks comment on whether facilities-based providers of broadband Internet access service provided via wireline or other platforms, including cable, wireless, and satellite, should be required to contribute to the universal service fund.

The Public Utility Commission of Texas (Texas PUC), having general regulatory authority over public utilities within our jurisdiction in Texas, submits these comments in response to the *NPRM*.

The Texas PUC supports the FCC's policy goals of ensuring ubiquitous availability of broadband service and a minimal regulatory environment that encourages investment, deployment, competition, and innovation within the broadband market. The Texas PUC believes that broadband deployment is critical to continued growth in the telecommunications industry and to competition in the local market for telecommunications services. Therefore, the Texas PUC encourages the Commission to be cautious in making any determination in light of current market conditions. Accordingly, the Texas PUC believes continued cooperation between the states and the Commission remains key to encouraging deployment of broadband services.

### **STATUTORY CLASSIFICATION AS INFORMATION SERVICE**

The Commission seeks comment on the tentative conclusion that wireline broadband Internet access services, whether provided over a third party's facilities or self-provisioned facilities, are information services, with a telecommunications component, rather than telecommunication services. (¶17) The Texas PUC notes that the classification of wireline broadband Internet access service as an information service has far-reaching implications within the competitive broadband marketplace. The Texas PUC believes this statutory classification could remove wireline broadband Internet access services from numerous competitive, customer protection, and quality of service requirements imposed at the state and federal level on common carriers that provide telecommunications services.

Texas Law does not consider providers of enhanced or information services within the meaning of telecommunications providers.<sup>1</sup> Therefore, the Texas PUC believes that this statutory classification could affect its jurisdictional authority over existing telecommunications services as the number of wireline broadband Internet access service providers provisioning digital telecommunications services, such as voice grade service, increases. Consequently, the Texas Legislature would likely have to conduct a substantial re-write of PURA to avoid diminishing the Texas PUC's jurisdictional authority over standard telecommunications services, such as basic local services.

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<sup>1</sup> Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 11.001-64.158 (Vernon 2000 & Supp. 2002) (PURA § 51.002 (10)(B)(i)).

Moreover, the Texas PUC is currently conducting a rulemaking proceeding<sup>2</sup> that was established to implement PURA § 51.001(g) and § 55.014 regarding the provisioning of advanced services in rural areas. In 1999, the Texas Legislature enacted PURA § 55.014 to effectuate the deployment of advanced services in rural areas of the state and facilitate the connection of end users to the Internet. Furthermore, the Texas Legislature enacted PURA § 51.001(g) to ensure that all customers within the state, including low-income customers and customers in rural and high cost areas, have access to advanced services and information services that are reasonably comparable to those services provided in urban areas and that are available at prices reasonably comparable to those prices charged for similar services in urban areas.

The proposed Texas rule sets forth procedures whereby a retail customer within a rural service area may seek advanced services in order to access the Internet. In order to promote a market-based solution to enhanced deployment in Texas, the proposed rule establishes an innovative, competitive forum for all retail customers in a rural area to seek advanced services from any advanced services provider, be it wireline, cable modem, or wireless.

The Texas PUC urges the Commission to consider the states' role in promoting advanced services deployment before it formally classifies wireline broadband Internet access services as an information service. Such a finding could significantly reduce the Texas PUC's authority to enhance widespread deployment within its jurisdiction. The Texas PUC believes that its advanced services rulemaking will provide positive solutions to the digital divide, thereby ensuring that all citizens in Texas have access to advanced communications technology. Therefore, the Commission should be mindful of restricting such state market-based innovations. The Texas PUC is concerned that the Commission categorization of broadband Internet traffic as an information service could impact the directive in PURA § 55.014, which obligates certain telecommunications providers in Texas to deploy advanced telecommunications services comparably in rural and urban areas upon a bone fide request for service.

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<sup>2</sup> *Rulemaking to Address the Provision of Advanced Services by Electing Companies, COA, or SPCOA Holders in Rural Service Areas*, Project No. 21175 (pending).

The Commission should seriously consider whether a finding concerning wireline broadband services could prevent states from implementing their current and planned projects, especially those possessing strong, wide-ranging support. The Texas PUC urges the Commission to craft a rule that neither discourages nor casts doubt upon the critical role of the states in employing policies that enhance and promote the ubiquitous deployment of advanced services. In more forceful terms, we strongly encourage the Commission to avoid adopting a rule that diminishes the state's authority to encourage advanced services deployment to implement its own legislatively-enacted policies and that affects the state's traditional role in overseeing customer protection and service quality standards.

Additionally, the Texas PUC believes that the classification of wireline broadband Internet access services as information services could possibly reduce the Texas PUC's regulatory authority over municipal franchise fees for the use of public rights-of-way. In 1999, the Texas Legislature passed House Bill 1777 (HB 1777)<sup>3</sup> which authorized the Texas PUC to develop a uniform method for calculating municipal franchise compensation for access to public rights-of-way by Certified Telecommunications Providers (CTPs). The legislation was enacted both to achieve standard application of costs and to encourage telecommunications competition for all citizens. In order to obtain CTP status and the benefits of the Texas statute, a carrier must be a telecommunications provider that has obtained a telecommunications certificate from the Texas PUC. The Texas PUC points out that the classification of wireline broadband Internet access service as an information service may prevent these providers from gaining access to public rights-of-way pursuant to the state-appointed municipal franchise fee formula offered to CTPs under HB 1777. Arguably, these entities could no longer claim that they are telecommunications providers as required by the Texas statute, and, thereby not entitled to the settled framework adopted by the Texas PUC. Wireline broadband Internet access providers might have to negotiate municipal franchise fees with each city in which it uses the public rights-of-way. As such, wireline broadband Internet access providers could incur higher municipal franchise fees for the use of public rights-of-way and the substantial added costs of individual negotiations. The Texas PUC believes such an action could impose a significant financial burden on wireline broadband Internet access providers, thereby stifling

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<sup>3</sup> *Management of Public Rights-of-Way Used By Telecommunications Provider in Municipality*, House Bill 1777, 76<sup>th</sup> Legislature (1999).

competition and potential investment within the wireline broadband market. Consequently, the Texas PUC strongly urges the Commission not to act in a manner that could disturb the pro-competitive solutions advanced by the states in this regard.

### **Effect on States Previously Granted § 271 Approval**

The Commission seeks comment on whether to impose certain *Computer III* requirements on BOCs that would be removed on a state-by-state basis once the BOC has achieved certain performance measurement levels in providing non-broadband services, and/or once it has received FTA § 271 approval from the Commission. (¶48) In Texas, Southwestern Bell Telephone Company (SWBT) has been granted § 271 approval.<sup>4</sup> Although performance measurements (PMs) were adopted for SWBT, the Texas PUC did not consider the competitive market for xDSL services, or any other wireline broadband Internet access service, in determining whether sufficient competition existed in the state for SWBT to qualify under FTA § 271.<sup>5</sup> If the Commission were to adopt PMs for the purpose of removing *Computer III* requirements, the Texas PUC is unclear as to whether the *Computer III* requirements would still apply to SWBT. In addition, if the Commission develops different PMs for non-broadband services for the express purpose of *Computer III* removal, the Texas PUC is also unclear whether it would have the opportunity to shape what these PMs might be and assess whether or not SWBT has met them in Texas.<sup>6</sup>

Although the T2A includes provisions relating to xDSL PMs<sup>7</sup>, the Texas PUC points out that the T2A was established primarily to promote competition in the basic local service market. The Texas PUC believes that the statutory classification of wireline broadband Internet access

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<sup>4</sup> *Application by SBC Communications, Inc. Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance, Memorandum Opinion and Order*, CC Docket No. 00-65 (rel. June 30, 2000).

<sup>5</sup> *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Third Advanced Services Report (rel. Feb. 6, 2002) (“Broadband service over cable accounts for 54% of total high-speed lines as of the end of June 2001, as compared to 28% for ADSL and 39% for all wireline products. ILECs serve approximately 93% of ADSL subscribers, while CLECs serve about 7%. The Texas PUC noted that CLEC growth in the last year in obtaining DSL customers has been negative or substantially less than ILEC growth.

<sup>6</sup> *See In the Matter of Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, CC Docket No. 01-318, Comments of the Public Utility Commission of Texas (Jan. 22, 2002).

services as information services could potentially impair its regulatory oversight authority over the basic local service and long-distance market in Texas. As a deregulated entity, a wireline broadband Internet access provider could provision xDSL services, such as voice over xDSL, which would allow the placement of local calls without being subject to Texas regulatory oversight.

## ACCESS OBLIGATIONS

The Commission also seeks comment on whether to modify or eliminate existing access obligations on providers of self-provisioned wireline broadband Internet access services. (¶61) The Texas PUC notes that it has previously determined, as did the Commission, that the high-frequency portion of the loop should be unbundled in order to speed the deployment of advanced services. The Texas PUC notes that a significant amount of time and resources have been devoted to the implementation of the Commission's directive in the *Line Sharing Order*. Specifically, in the T2A, the Texas PUC approved a section for Competitive Local Exchange Carrier (CLEC) access to the high-frequency portion of the loop UNE that is necessary to provide data transmission services.

Along with eliminating access obligations, the statutory classification of wireline broadband Internet access service as an information service would also cause Total Economic Long Run Incremental Cost (TELRIC) rates for xDSL, which are generally determined by state commissions, to be replaced by "market-based" or "commercially reasonable" rates. Thus far, the Texas PUC has exercised its authority over wireline broadband Internet service primarily through arbitration decisions, and pursuant to the FTA § 271 process, which required it to evaluate SWBT's provisioning of network elements, including loops used to provide xDSL services, at parity to competitors. The Texas PUC notes that a statutory classification change would appear to diminish its oversight of xDSL rates, terms, and provisioning conditions.

The Texas PUC believes that these nonstructural safeguards coupled with regulatory enforcement authority are necessary to prevent anti-competitive behavior within the broadband market. The Texas PUC encourages the Commission to consider the importance of the xDSL PMs in determining whether wireline broadband Internet access services are information services that are not subject to access obligations. The Texas PUC believes that a flexible approach in the

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<sup>7</sup> Texas 271 Agreement, Attachment 17 (T2A).

development of PMs is necessary because of the continuing technological advances in the telecommunications industry. For example, the Texas PUC reiterates its support for the development of PMs for special access services.<sup>8</sup> Additionally, the Texas PUC believes the Commission's proposal to remove the high-frequency portion of the loop, as discussed in the Triennial UNE Review NPRM<sup>9</sup>, coupled with the elimination of access obligations may no longer require SWBT to engage in "line splitting"<sup>10</sup> or "line sharing" because ILECs are required to unbundle UNEs solely for the provision of a "telecommunications service."<sup>11</sup> The Texas PUC points out that it will soon decide whether "line sharing" applies to the entire loop, even when an ILEC has deployed fiber-fed Digital Loop Carrier (DLC) facilities.<sup>12</sup> Importantly, the Texas PUC will consider whether transmission facilities that comprise SWBT's Project Pronto, such as next generation remote terminals and digital loop carriers, are part of the unbundled loop element and whether without access to those facilities a CLEC's ability to provision line sharing would be impaired. In issuing the Arbitration Award, Texas PUC Staff has relied upon authority granted by the Commission in both the *Line Sharing Order* and *Line Sharing Reconsideration Order* to set rates, terms and conditions for the high-frequency portion of the loop by SWBT.<sup>13</sup> The Texas PUC, therefore, encourages the Commission to consider the substantial evidentiary record being developed by states before making final the tentative conclusion that wireline broadband Internet access service is an information service, especially when the broadband marketplace is at such a nascent stage of development.

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<sup>8</sup> See *In the Matter of Performance Measurements and Standards for Interstate Special Access Services*, CC Docket No. 01-321, Comments of the Public Utility Commission of Texas (Dec. 20, 2001).

<sup>9</sup> *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 01-338, Triennial UNE Review, (rel. Dec. 20, 2001).

<sup>10</sup> Line Splitting – "where one competitive provider offers broadband Internet access on the data frequency portion of the loop and another competitive provider offers analog voice."

<sup>11</sup> See 47 C.F.R. § 51.307(a)-(c), 47 C.F.R. § 51.5, *Line Sharing Order on Reconsideration* at ¶18, *Texas 271 Approval Order* at ¶325.

<sup>12</sup> *Petition of Rhythms Links, Inc. Against Southwestern Bell Telephone Company for Post-Interconnection Dispute Resolution and Arbitration Under The Telecommunications Act of 1996 Regarding Rates, Terms, Conditions and Related Arrangements for Line Sharing*, Docket No. 22469, Revised Arbitration Award at 63-64 (Line Sharing Arbitration Award) (Sept. 21, 2001).

<sup>13</sup> *Line Sharing Arbitration Award* at 8-9, 15-16.

## UNIVERSAL SERVICE

The Commission invited comment on whether facilities-based providers of broadband Internet access service provided via wireline or other platforms, including cable, wireless, and satellite, should be required to contribute to the universal service fund. (§66) In determining whether advanced or high-speed services should be included, the Texas PUC encourages the Commission to consider the criteria outlined in FTA § 254 (c)(1) and P.U.C. Substantive Rule 26.403 (d) (2) (B).<sup>14</sup> In sum, the Texas PUC believes that the Commission should avoid a “one size fits all” decision that could lead to economically or technically inefficient solutions. As discussed in its Advanced Services Report to the Texas Legislature,<sup>15</sup> the Texas PUC believes that policy solutions regarding the deployment of advanced services should be technology-neutral, creative, innovative, and simple, thereby avoiding excessive regulation.

Moreover, the Texas PUC concurs with Commissioner Martin in his assessment that the additional financial burden placed on broadband Internet access providers could create barriers to the deployment of advanced services rather than encouraging their deployment.<sup>16</sup> The additional financial burden could ultimately raise costs and decrease demand for broadband Internet access. In addition, if facilities-based broadband Internet access providers are required to pay into the Federal universal service fund (FUSF) or the Texas universal service fund (TUSF), the Texas PUC believes these providers will rightfully seek universal service support, thereby warranting a change in the definition of services supported by universal service.

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<sup>14</sup> The four definitional criteria require consideration of telecommunication services that: (1) are essential to education, public health, or public safety; (2) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers; (3) are being deployed in public telecommunications networks by telecommunications carriers; and (4) are consistent with the public interest, convenience and necessity. Telecommunications Act of 1996 § 3, 47 U.S.C.A. § 254 (c) (1) (West 1991 & Supp. 1999) (FTA § 254).

<sup>15</sup> *Report to the 77<sup>th</sup> Legislature on the Availability of Advanced Services in Rural and High Cost Areas* at 61 (Jan. 1, 2001) (*Texas Advanced Services Report*).

<sup>16</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Separate Statement of Commissioner Kevin J. Martin, Approving in Part and Dissenting in Part (rel. Feb. 15, 2002).

The Texas PUC further notes that it is required pursuant to FTA § 254(f)<sup>17</sup> to remain consistent with the Commission's rules to preserve and advance universal service. For example, currently Internet access service providers do not contribute nor do they receive support from the TUSF. Therefore, if the FCC finds that facilities-based broadband Internet access service providers are required to pay into the FUSF, the Texas PUC and the Texas Legislature may have to consider changes to the current regulatory scheme to ensure consistency with federal law.

## CONCLUSION

We appreciate the opportunity to offer our comments in this proceeding. The Texas PUC believes that ensuring the deployment of broadband services should be a collaborative effort between the Commission and the states. The Texas PUC points out that it has effectively attempted to balance the need to promote broadband deployment against potential over-regulation through xDSL PMs and well reasoned arbitration decisions. Although these mechanisms have been effective, the Texas PUC notes that much work remains to be done at the state and federal level to ensure the development of a vibrant broadband market. The Texas PUC believes that it is particularly important that any federal policies adopted as a result of this *NPRM* or other Commission action not counter advances already made in Texas. While excessive regulation must be avoided to encourage broadband deployment,<sup>18</sup> the Texas PUC cautions the Commission that the statutory classification of wireline broadband Internet access service as an information service may have far-reaching implications that could adversely impact today's nascent broadband market. The Texas PUC believes these efforts must be done in close cooperation with the states and remain true to the market opening provisions of the FTA.

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<sup>17</sup> FTA § 254(f) ("A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service").

<sup>18</sup> *Texas Advanced Services Report* at 64.

Respectfully submitted,

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April 5, 2002

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**BRETT A. PERLMAN**  
Commissioner

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**REBECCA KLEIN**  
Commissioner