

Chapter V. Prospective Federal Initiatives Affecting Texas

Actions at the federal level will likely have a significant effect on Texas. First, several bills that could affect broadband services are pending in Congress. Second, the Federal Communications Commission (FCC) is considering a number of different important issues that may directly affect broadband and local competition in the telecommunications market.

A. U.S. Legislative Activity

1. Tauzin-Dingell Bill

Several legislative initiatives aimed at spurring broadband deployment in rural areas have been introduced at the federal level.¹⁹² Most prominent among these is a bill sponsored by Representatives Billy Tauzin (R-LA) and John Dingell (D-MI) called “The Internet Freedom and Broadband Deployment Act of 2001.” The legislation would make far-reaching changes to the telecommunications regulatory structure by relieving Regional Bell Operating Companies (RBOCs) (e.g., Southwestern Bell Telephone Company) of their obligations under the Federal Telecommunications Act of 1996 (FTA) to unbundle their data network to competitors. The bill would also eliminate the requirement to offer any high-speed data service for resale at wholesale rates. Barring reintroduction during future Congressional sessions, this bill is no longer in line for Congressional consideration.

2. Breaux-Nichols Bill

A similar bill in the Senate Bill (S.B.) 2430 would also have far-reaching effects on the broadband industry. Sponsored by Senators John Breaux (D-LA) and Don Nickles (R-OK) in May 2002, this legislation would impose the same regulations on all broadband platforms, whether digital subscriber line (DSL), cable modem or wireless. In particular, Section 271 of the FTA prohibits a Bell Operating Company (BOC) from entering into the long-distance market without first opening up its markets according to the 14-point checklist, and Section 251 establishes unbundling requirements for the incumbent local exchange carrier (ILEC). Under the proposed legislation, the four RBOC companies would no longer be required to share their DSL infrastructure with competitive companies.

Proponents, like Southwestern Bell Corporation (SBC), of imposing similar regulations on all broadband platforms have argued that:

Regulators have taken a hands-off approach to cable modem services offered by cable giants like AT&T Broadband, AOL, Time Warner, Comcast and others. Cable operators have been free to design their broadband services and to conduct their broadband

¹⁹² A detailed analysis of the each bill discussed in this section is available Appendix U.

business as any other company would in a competitive market, which has contributed to their dominant share of the market.¹⁹³

Those opposed have asserted a counterargument to the ILECs' claims that they should be treated the same as cable. In particular, AT&T, in its comments to the FCC in *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, has asserted that the RBOCs' claims that they bear more regulatory costs than cable ignores the regulatory burdens on cable.¹⁹⁴ AT&T argued that

Cable companies must comply with local franchising requirements and pay billions of dollars in franchise fees. They must build and donate 'institutional networks' to franchising authorities. They are subject to 'must-carry,' Public and Educational and Government (PEG) access channels, and other regulations that require them to share their networks – and, unlike the Bells' network sharing obligations, these cable sharing obligations are uncompensated.¹⁹⁵

The broadest changes to the telecommunications industry would come through a bill recommending "structural separation" of the current telephone network, sponsored by Senator Ernest Hollings (D-SC), Chairman of the Senate Commerce Committee, in August 2001. The "Telecommunications Fair Competition Enforcement Act of 2001," S.B. 1364, was introduced in response to the Breaux-Nickles bill. The bill requires incumbent carriers to structurally separate their wholesale operations from their retail operations for violating the competitive provisions (Sections 251, 252, 271 and 272) of the FTA, and would amount to a sea change in the way telephone networks are owned and operated. Barring reintroduction during future Congressional sessions, this bill is no longer in line for Congressional consideration.

3. Small Business and Farm Economic Recovery Act

In early 2002, Senators Max Baucus (D-MO) and Charles Grassley (R-IA) sponsored the "Small Business & Farm Economic Recovery Act" to address broadband provisioning in rural areas. The proposed bill, S.B. 88, would establish a tax credit to encourage the use of broadband technology. It provides a 10% investment tax credit for current generation broadband services to subscribers in rural and underserved areas. It also provides a 20% credit for next generation broadband services to subscribers in rural areas or underserved areas, and to residential subscribers. Barring reintroduction during future Congressional sessions, this bill is no longer in line for Congressional consideration.

¹⁹³ SBC, *Public Affairs, Broadband Policy Statement, "Opening our Markets"*, available online at: http://www.sbc.com/public_affairs/broadband_policy/0,5931,218,00.html.

¹⁹⁴ See *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33. Comments of AT&T Corp., May 3, 2002 at 73.

¹⁹⁵ *Id.*

4. Rural Issues Advisory Board Act

In October 2002, Representative Lee Terry (R-NE) introduced H.R. 5602, which would create a Rural Issues Advisory Board within the FCC. The purpose of the Board would be to assist the FCC in developing policies and procedures for rural customers and carriers, and to ensure that the FCC takes into consideration the size and the resources of affected parties in rural America. Barring reintroduction during future Congressional sessions, this bill is no longer in line for Congressional consideration.

B. FCC Activities

The FTA continues to place great responsibility on the FCC and State commissions to implement the Act. When the FTA was crafted, Congress was concerned with creating requirements that facilitated competition in the local telecommunications marketplace while providing RBOCs with a strong incentive to comply with these requirements quickly. The provisions dealing with local competition included preemption of some state restrictions that prohibit other entities from providing local telephone service; interconnection and unbundling requirements; negotiation of interconnection agreements; a competitive checklist for RBOC interLATA entry; universal service reform; and infrastructure sharing. In addition to requiring non-discriminatory access and interconnection to the RBOCs' local facilities, the FTA also sought to accelerate the deployment of advanced telecommunications and information services to all Americans by opening all telecommunications markets to competition. Deemed one of the most comprehensive overhauls of the telecommunications laws in more than 60 years, the sweeping regulatory changes embodied in the new law required extensive revisions to the FCC's rules and regulations. This process of rule revision is ongoing and entering a critical new phase.

Over the past two years, the FCC has launched a number of key local competition and broadband proceedings focused on the clarification of regulatory treatment of broadband infrastructure and services. Key proceedings at the federal level include the following: (1) Triennial Review of unbundled network elements (UNEs); (2) broadband over wireline facilities; (3) investigation of Performance Measures for UNEs; (4) line sharing; (5) consideration of dominant/non-dominant status; and (6) high-speed access to the internet over cable modems. In light of the knowledge gained from arbitrations, rulemakings, and contested case proceedings in Texas, the Commission submitted comments to the FCC in some of these proceedings. A summary of those proceedings and the Commission's comments are outlined below.¹⁹⁶

¹⁹⁶ For additional information regarding the Commission's comments in the specific proceedings, please see Appendix V.

1. Local Competition Proceedings

a. UNE Triennial Review

On December 20, 2001, the FCC released an Notice of Proposed Rulemaking (NPRM) relating to its first triennial review of its policies on UNEs.¹⁹⁷ This review provides the FCC with an opportunity to examine the framework under which ILECs must make UNEs available to competing carriers. Among other things, the FCC examined the ILECs' wholesale obligations under Section 251 of the FTA to make their facilities available as UNEs to competitive local exchange carriers (CLECs) for the provision of broadband services. The NPRM also sought comment on whether the FCC should apply unbundling requirements based on type of service, facility, geography, or other factors (*i.e.*, "more granular statutory analysis"). Additionally, the FCC requested comment on whether to retain, modify, or eliminate its existing definitions and requirements for UNEs, and on the role of State commissions regarding UNEs.

In its comments, the Commission cautioned the FCC against focusing primarily on facilities-based competition at the expense of alternative entry strategies for competitive carriers, such as the UNE platform (UNE-P). The Commission pointed out that UNE-P has proven to be an important entry strategy for many competitors in the local market for telecommunications services, and that the competition that does exist in Texas relies heavily on the use of UNEs as a means of offering customers the benefits of competition in markets for telecommunications and broadband services.

Further, the Commission urged the FCC to rely on the knowledge base within state commissions regarding the characteristics of markets and ILECs within their states, and the entry strategies that have worked best. The Commission urged the FCC to allow states to retain the authority to impose additional unbundling obligations on ILECs, provided they meet the requirements of § 251 of the FTA, the policy framework of the UNE Remand Order,¹⁹⁸ and any subsequent FCC policy. Should the FCC decline to let state commissions modify the national UNE list, the Commission recommended that all UNEs now on the list should remain in place. Further, should the FCC pursue a national standard, the Commission strongly recommended that the FCC give consideration to the Performance Measures (PMs) already in place in Texas,¹⁹⁹ and suggested convening a Federal-State Joint Conference on UNEs to inform and coordinate this review.

¹⁹⁷ *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 Nos. 01-338, 96-98, and 98-147, Notice of Proposed Rulemaking, FCC No: 01-361. (rel. December 20, 2001)

¹⁹⁸ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238. (rel. Nov. 5, 1999) (*UNE Remand Order*).

¹⁹⁹ *See Notice of Proposed Rulemaking 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) (*UNE Performance Measure NPRM*).

b. Wireline Proceeding

On February 15, 2002, the FCC released an NPRM regarding the appropriate statutory classification and regulatory framework for broadband access to the internet provided over domestic wireline facilities.²⁰⁰ In this NPRM, the FCC tentatively concluded 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 telecommunications services.²⁰¹ This proceeding investigated how Title I regulation applies to broadband services provided as information services.

While the Commission expressed support for the FCC's policy goals of ensuring the ubiquitous availability of broadband service and a regulatory environment that encourages investment, deployment, competition, and innovation within the broadband market, the Commission cautioned against the classification of wireline broadband internet access service as an information service. The Commission explained that such a 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, thereby risking both the options available to the customer and the quality of those options.

Further, the Commission urged the FCC to avoid adopting a rule that diminishes the State's authority to encourage advanced services deployment or to implement its own legislatively enacted policies, and that affects the State's traditional role in overseeing customer protection and service quality standards.

On the related topic of state enforcement authority to prevent anti-competitive behavior within the broadband market, the Commission also expressed concern that modification or elimination of existing access obligations on providers of self-provisioned wireline broadband internet access services could have negative effects. This concern was based on extensive evidence gathered by state commissions through hearings.

c. Performance Measures Review

On November 19, 2001, the FCC issued an NPRM regarding Performance Measurements and Standards for UNEs and Interconnection.²⁰² In this NPRM, the FCC

²⁰⁰ *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings (et al)*, CC Docket No. 02-33, and Nos. 95-20, 98-10, Notice of Proposed Rulemaking, FCC 02-42. (rel. February 15, 2002).

²⁰¹ The definition of telecommunications services means that under federal and state law, those offerings are subject to traditional common carrier obligations—that is, they must be offered to all customers, including ISPs, on nondiscriminatory rates, terms, and conditions.

²⁰² *In the Matter of Performance Measurements and Standards for Unbundled Network Elements and Interconnection, Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance, Deployment of Wireline Services Offering Advanced Telecommunications Capability, and Petition of Association of Local*

requested comment on whether it should adopt a limited number of measurements and standards for evaluating ILEC performance with respect to pre-ordering, ordering, provisioning, repair, and maintenance functions. The NPRM also requested comment on the use and scope of any national performance measurement standards, and the appropriate review or sunset mechanism should the FCC adopt national standards. The FCC was also interested in learning how to balance CLECs' concerns about poor provisioning of UNEs, interconnection trunks, and collocation with the ILECs' concern about the number and cost of state and federal measurements and standards.

The Commission filed comments in the response to the FCC's NPRM, emphasizing the important role states play in creating, implementing, and monitoring the performance of ILECs, and asserting that states should be involved with federal efforts to reform and minimize performance measures and standards. In addition, the Commission emphasized that action by the FCC that establishes consistent, minimum requirements or supplements the state plans will further facilitate competition, as long as the FCC ensures that any requirements it ultimately adopts are (1) at a minimum, as stringent as the strongest state plans, and (2) do not preempt the states from adopting additional measures to the extent they are necessary.

2. Broadband Proceedings

a. Line Sharing

As discussed above, the FCC's Triennial Review of UNEs may have implications on the future of competitive entry into the broadband market because most CLECs provide broadband service through line sharing. As mentioned in Chapter IV, the DC Circuit's decision in *United States Telecom Association v. Federal Communications Commission*,²⁰³ remanded the *Local Competition Order* and *Line Sharing Order* to the FCC after concluding that the FCC had committed errors in its reasoning regarding the creation of a uniform national list of UNEs and the unbundling of the high frequency spectrum of the copper loop, respectively.²⁰⁴ With respect to the *Line Sharing Order*, the court concluded that the FCC had failed to consider the relevance of competition in broadband services from other sources (*e.g.*, cable and, to a lesser extent, satellite).²⁰⁵

b. ILEC Broadband (Dominant/Non-Dominant)

This FCC proceeding would consider whether to develop a comprehensive and coherent means of measuring market power in the provision of services. In general, this

Telecommunications Services for Declaratory Ruling, CC Docket No. 01-318, No. 98-56, No. 98-147, No. 98-147, 96-98, 98-141, FCC No. 01-331. (Rel. November 19, 2001).

²⁰³ 290 F.3d 415 (D.C. Cir. 2002) (order staying issuance of mandate till 7 days after disposition of any timely motion for rehearing entered on May 24, 2002; petition for rehearing filed on July 8, 2002) (*USTA*).

²⁰⁴ *Id.* at 430.

²⁰⁵ *Id.* at 428-29.

proceeding would establish a new framework that could be used to deregulate on a carrier-specific or service-specific basis depending on the level of competition and market power. This framework may then be used to make determinations relating to the deregulation of advanced services and the appropriate point for sunseting § 272 long-distance requirements.

c. Cable Modem Proceeding

On March 14, 2002, the FCC released an NPRM and Declaratory Ruling regarding cable modem services.²⁰⁶ The FCC concluded in its Declaratory Ruling that cable modem service is properly classified as an interstate information service and is subject to FCC jurisdiction, and that cable modem service is not a “cable service” as defined by the Communications Act. Further, the FCC concluded that cable modem service does not contain a separate “telecommunications service” offering and is not subject to common carrier regulation. Further, in the NPRM the FCC is seeking comment on whether there are legal and policy reasons as to why it should reach different conclusions with respect to wireline broadband and cable modem service; whether there are constitutional limitations on the FCC’s authority to regulate cable modem services; whether it is appropriate to require multiple ISP access; and what is the role of state and local franchising authorities in regulating cable. While the Commission did not submit comments, the Commission is monitoring the development of this proceeding at the FCC.

3. Other FCC Activities

In addition to the core broadband proceedings, the Commission has been actively involved with FCC proceedings and activities related to accounting reform, customer proprietary network information, competitive access to multi-tenant environments, equal access and nondiscriminatory safeguards, numbering resource optimization, and sunset of RBOC’s separate affiliate and related requirements.²⁰⁷

²⁰⁶ *In the Matter of Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities; Internet over Cable Declaratory Order Proceeding; Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities*, GN Docket No. 00-185; CS Docket No. 02-52, Notice of Propose Rulemaking and Declaratory Ruling, FCC 02-77 (rel. March 14, 2002).

²⁰⁷ For additional information regarding the Commission’s comments in these proceedings, please see Appendix V.

Chapter VI. Homeland Security Measures

Since September 11, 2001, homeland security has been a priority in the United States and the State of Texas. Homeland security efforts are primarily divided into three areas: federal, state, and the agency level.

At the highest level of direction, the federal government develops the broad national policies regarding homeland security. On the State level, the Governor's Office has established several new committees to guide the State in developing partnerships among local, state and federal agencies, volunteer organizations and the private sector. At the agency level, the Commission's Emergency Management Response Team (EMRT) continues to participate in homeland security policy planning, while monitoring procedures in use by the telecommunications utilities.

A. Federal Homeland Security

On October 8, 2001, President George W. Bush's Executive Order established the Office of Homeland Security and the Homeland Security Council to develop and coordinate a comprehensive national strategy to strengthen protections against terrorists' threats or attacks in the United States. The President appointed Tom Ridge, former Governor of Pennsylvania, to head The Office of Homeland Security. The focus of the Office of Homeland Security is to coordinate all federal government terrorist prevention and protection activities within the U.S., and to interact with state and local governments on issues related to detection, preparedness, prevention, protection, response and recovery, and incident management. On November 25, 2002, President Bush signed the "Homeland Security Act of 2002" into law. The Act created the Department of Homeland Security—the Federal department whose primary mission will be to help prevent, protect against, and respond to acts of terrorism.²⁰⁸

Securing the United States' communications infrastructure and enhancing emergency response through communications are integral component of homeland security. On the federal level, the Federal Communications Commission (FCC) is responsible for securing the communications infrastructure. In response to the events of September 11, 2001, the FCC has adopted these two principal objectives: (1) to secure the nation's communications infrastructure, and (2) to enhance emergency response through communications.²⁰⁹ In order to accomplish these objectives the FCC created the Homeland Security Policy Council (HSPC). The HSPC is comprised of senior staff from each of the FCC's bureaus.

The HSPC's missions are as follows:

²⁰⁸ For more information, see White House, Department of Homeland Security, <http://www.whitehouse.gov/homeland/>.

²⁰⁹ Michael K. Powell, Chairman, Federal Communications Commission, Press Conference, October 23, 2001.

- to assist the FCC in evaluating and strengthening measures for protecting U.S. communications services;
- to assist the FCC in ensuring rapid restoration of communications services and facilities that have been disrupted as the result of threats to, or actions against, United States's homeland security; and
- to ensure that public safety, health and other emergency and defense personnel have effective communications available to them to assist the public as needed.

B. State Homeland Security

Texas has been involved with homeland security, defense, and disaster recovery since as early as 1975 when the Division for Emergency Management was created to reduce the vulnerability of citizens and communities to damage, injury, loss of property, and loss of life by providing a system for the mitigation of, preparedness for, response to, and recovery from natural or manmade disasters.²¹⁰

In response to the acts of terrorism of September 11, 2001, the Governor's Office created the Governor's Task Force on Homeland Security, the Homeland Security State Agency Operations Group (HSSAOG), and the Governor's Report on Strategies for Texas First Responder Preparedness.

The State Infrastructure Protection Advisory Committee (SIPAC) was created prior to the attack of September 11, 2001 to recommend ways to safeguard key components of the telecommunications infrastructure, including computer-linked water, utility, communications, transportation and financial networks.²¹¹

The Commission staff attends, participates, and provides resources on various levels for all of the committees and groups listed.

²¹⁰ The Department of Public Service Website is located at: www.txdps.state.tx.us - Introduction

²¹¹ State Infrastructure Protection Advisory Committee, The Texas Infrastructure Protection Center: "A State Model for Information Assurance and Information Sharing to Protect Critical Infrastructures" (SIPAC Report), at 1. (March 25, 2002).

1. Governor's Task Force on Homeland Security

The Governor charged the Task Force on Homeland Security with the following initiatives:

- assuring Texans of state and local preparedness to respond to threats;
- facilitating coordination among federal, state and local agencies;
- improving Texas's ability to detect and to deter and coordinate response to any terrorist events;
- assessing the ability of state and local government agencies to respond to threats and to effectively provide victims assistance; and
- coordinating Texas activities with those of the federal government, the federal Office of Homeland Security, Texas's neighboring states, and Mexico.²¹²

On October 1, 2001, Governor Rick Perry appointed PUC Chairman Rebecca Klein to the Governor's Task Force on Homeland Security.²¹³

As requested, the Commission staff provides technical information, utility inventories, utility preparedness reports, utility security conditions, and utility disaster status reports.

2. State Infrastructure Protection Advisory Committee (SIPAC)

SIPAC recommended the creation of the Texas Infrastructure Protection Center (TIPC), to be a State model for information assurance and information sharing to protect critical infrastructures. On March 25, 2002, SIPAC published its report stating that three subcommittees would be established: Information Assurance, Information Sharing, and Legal and Legislative issues.²¹⁴

The Information Assurance Subcommittee was charged with the development of State information operations that will protect and defend information and information systems by ensuring their availability, integrity, authentication, confidentiality, and non-repudiation.

The Information Sharing Subcommittee was charged with the development of a State information sharing network that will coordinate the efforts of interested parties to share important information about vulnerabilities, threats, intrusions, and anomalies to one another.

The Legal and Legislative Subcommittee was charged with the development of legal solutions to the constraints that law and the market currently place on information assurance and information sharing efforts.

²¹² *Governor's Task Force on Homeland Security, January Report to the Governor* (January 31, 2002) at 1, <http://www.governor.state.tx.us/homelandsecurity/TaskForceReport0102.htm>

²¹³ Governor Perry Creates Task Force on Homeland Security, Panel to Coordinate Efforts to Detect, Defer Threats, PRESS RELEASE: October 1, 2001.

²¹⁴ SIPAC REPORT, *supra note 211*, at 6.

The SIPAC Report made the following two primary and sixteen secondary recommendations for the State of Texas:²¹⁵

The Governor's Office should create a Critical Infrastructure Protection Board (CIPB), modeled after the President's CIPB, to advise the Governor on public policy matters affecting homeland security and critical infrastructure protection and assist with the implementation of a Texas infrastructure protection center (TIPC).

The TIPC should be created to design and implement aggressive and sophisticated information assurance and information sharing programs. The TIPC should be the central point of contact in Texas for federal, state, and local government private sector business; and individual transmission of information to protect physical and cyber assets that are critical to the health, safety, and welfare of Texas residents.

The 16 secondary recommendations were more specific recommendations dealing with information sharing and security.²¹⁶ Of the 16 secondary recommendations that the Commission's Information Technology (IT) Manager reviewed, three of the recommendations were found to apply to the Commission's network. It was determined that the Commission had already accomplished two of the recommendations (#2 and #15) and the third recommendation (#10) is an ongoing process, requiring the Commission to file periodic reports with the Texas Department of Information Resources (DIR). Those recommendations that apply to the Commission's information network are as follows:

- Recommendation #2 - Have a qualified systems security point of contact with the ultimate responsibility for monitoring the security status of their networks and servers.
- Recommendation #10 - Agencies and their contractors report significant server penetrations or intrusion detection alerts to the TIPC.
- Recommendation #15 - Adopt procedures for the proper disposal of personal computers and servers to ensure sensitive data are erased.

The Commission's computer network is in compliance with both the security requirements of DIR and the applicable TIPC recommendations. The Commission maintains and updates its network security policies and procedures when updates are available from its software vendors.

In December 2000, Sprint Enterprise Network Services, under contract with DIR, performed a cyber penetration test on the Commission's information network. The results indicated that the Commission has adequate perimeter security (firewalls) and access controls in place. IT network system administrators proactively manage information systems preserving the integrity, confidentiality and availability of data.

3. Homeland Security State Agency Operations Group

The Homeland Security State Agency Operations Group (HSSAOG) meets with representatives from over a dozen immediate response agencies, including the

²¹⁵ SIPAC REPORT, *supra note 211*, at 6 and 7.

²¹⁶ SIPAC REPORT, *supra note 211*, at 7 and 8.

Commission. The group exists to plan, implement, and facilitate homeland security initiatives, as well as to coordinate and avoid duplication of security measures. HSSAOG requested information from the Commission in its homeland security survey to help determine the Commission's role in homeland security. The results of the survey indicated that the Commission was exceptional in gathering information and facilitating activities of regulated utilities.

In an effort to better serve local jurisdictions, HSSAOG requested utility information be collected by Council of Government (COG) regions. The collection of information by COGs is proving to be helpful in security and disaster planning. The Texas First Responder Preparedness Program requires the development of regionally based, interlocking, and mutually supporting terrorism preparedness programs.

4. Texas First Responder Preparedness Program

In August of 2002, the Governor's Office presented a State agency strategic framework for addressing terrorist attacks. Strategies for the Texas First Responder Preparedness Program (TFRPP) were released to help develop policies, plans and procedures to maximize the ability of local and regional organizations to work together effectively in response to an act of terrorism.²¹⁷ The primary objectives of the TFRPP are as follows:²¹⁸

- Enhance Texans' capability and capacity to respond to acts of terrorism.
- Enhance local emergency response capabilities by encouraging the adoption of interlocal (mutual aid) agreements for emergency response.
- Improve the capability of local governments to prepare for and respond to terrorist and all other hazardous incidents by enhancing emergency planning, procuring emergency response equipment, providing suitable training for emergency responders, and conducting exercises to assess plans and procedures, training, and equipment.
- Support the collaborative efforts of local governments to develop regional, interlocking, and mutually supporting plans and responses to terrorist or other mass casualty events.
- Improve the capability of State agencies to assist local governments in responding to all hazards, including terrorist incidents.
- Identify resources that would provide local responders the ability to protect themselves and save lives in a chemical, biological, or radiological environment until additional resources arrive to provide increased response capabilities.
- Help local governments develop an effective frame work coordinated emergency response in the form of comprehensive local and regional emergency management plans.

²¹⁷ Letter from the Office of the Governor from the "STRATEGIES FOR TEXAS FIRST RESPONDER PREPAREDNESS" REPORT, August 9, 2002.

²¹⁸ *Id* at 3 and 4.

- Facilitate coordinated efforts by multiple local, state, and federal response organizations by encouraging the adoption of the Incident Command System with unified command structure as the standard local and state incident management system in Texas.
- Promote training and the procurement of equipment that has “dual use” (*i.e.*, enhances terrorist incident response capability and improves the local jurisdiction’s ability to respond to other hazards).

The Commission will take a proactive approach to the development of policies, plans, and procedures that concern disaster recovery and preparedness. The State Division of Emergency Management will take the lead role in the TFRPP providing planning guidance, proficiency standards, training, and assistance to local jurisdictions.

5. Homeland Security Efforts at the Commission

The Commission actively participated in security and emergency operations policies and procedures for regulated utilities long before the September 11, 2001 attack. However, post September 11, 2001, the Commission is taking a closer look at security measures used by both incumbent (ILECs) and competitive local exchange carriers (CLECs). The Commission issued a survey to determine the level of security and disaster preparedness of utilities providing telecommunications services. Results of the survey are described below. In addition, the Commission has a response team to respond in cases of telephone and electric utility emergencies.

a. Service Quality Oversight Project

The Commission established Project No. 24729, *Service Quality Oversight as it Relates to the Emergency Plans*, filed by Telephone and Electric Utilities and National Security.²¹⁹ The Commission sent out two surveys requesting information on the state of security measures among telecommunications utilities. The first survey was sent to the major ILECs to evaluate how a Weapons of Mass Destruction (WMD) situation would affect their disaster recovery plans. The second survey was sent to both ILECs and CLECs to determine the preparedness of telecommunications companies in the event of a WMD situation.

The Commission issued surveys to determine the level of security and disaster preparedness of utilities providing telecommunications services. The first survey demonstrated that all of the major ILECs had tightened security procedures and were closely checking identification, performing background personnel checks, changing security codes, and passwords, and limiting access to essential personnel in critical facilities. As a result of the September 11, 2001 attack, all of the major ILECs had activated their emergency operations centers and evaluated their emergency procedures.

A heightened sense of security was also focused on the Crawford Ranch (utilized by President Bush as the Western White House) and military installations. The major ILECs all reported that their current emergency procedures and equipment seemed

²¹⁹ Responses to Project No. 24729 were received in December 2001 and February 2002.

adequate with only a few additional electronic security devices being installed. The emergency procedures and equipment of the ILECs encompass major outages such as hurricanes, tornadoes, floods, forest fires, ice storms, vehicle accidents, and other occurrences. Due to the ongoing security warnings coming from the White House, ILECs implemented rigid network security measures to protect their infrastructure from cyber intrusions.

All of the major ILECs normally run anti-virus software and intrusion monitoring software as a part of their security procedures. Copies of system software are kept in secure areas in case of virus infections. Cyber protections (or firewalls) are reviewed and updated on a regular basis. Utilities have reinstated personnel background checks and identification card monitors and have restricted entrance to key personnel in critical areas. Emergency generators and battery backup systems have been strategically placed to handle complete power outages. Utilities performed reviews of their contingency and emergency procedures for major outages or disruptions and found them to be adequate. ILECs run emergency drills once or twice a year and also evaluate their performance after every disaster affecting them as standard practice. Only the ILECs that were directly affected by the September 11, 2001 attack took an active public relations role after the attack. The unaffected ILECs did respond to inquiries, but refrained from making proactive public statements.

The second survey was sent to all ILECs and CLECs. This survey requested more information, which included estimated costs of additional security actions and the details of emergency operations plans. CLECs were also asked if any measures implemented by the ILECs were causing any barriers to competition. The results of this second survey were gathered in the first quarter of 2002. The active ILECs and CLECs stated that they reviewed their current emergency procedures, and about 40% of them are planning to upgrade their security monitoring systems. The newer CLECs stated that they were installing electronic monitoring systems, such as cameras, key cards, identification badges, locks, and other types of devices.

About 70% of both ILECs and CLECs stated that their emergency operations plans were adequate for major outages or disruptions. About 75% of both ILECs and CLECs stated that they had either established or upgraded firewalls and virus protocols. Very few ILECs and CLECs had estimates for additional security actions concerning emergency operations. Most stated that upgrades to security would be part of their standard operating budget.

b. Emergency Management Response Team

The mission of the Commission's EMRT is to provide information regarding telephone and electric utility outages and restoration efforts to the State Emergency Operation Center during emergency situations. This information, in turn, is used for determining resource allocation during the course of the emergency situation. Emergency situations include but are not limited to wildfires, floods, tornadoes, hurricanes, ice storms, and matters concerning homeland security.

The EMRT consists of a dozen staff members representing nearly every division of the Commission. The EMRT also has two representatives on the State Emergency Response Team that provides first responder support during emergency situations. The EMRT has been part of the Governor's Emergency Management Council (EMC) since The Texas Disaster Act of 1975 was amended by the Texas Legislature in 1997. The Commission is one of 34 State agencies serving on the EMC.

Although the EMRT does not administer physical recovery to the utilities during emergencies, the EMRT actively monitors the total number of customers or/and communities affected, critical loads affected, and the estimated duration of outages or realistic restoration schedules. Furthermore, the EMRT proactively interfaces with utilities and EOC management, looking for solutions to facilitate the restoration process.

As a result of the September 11, 2001 attack, EMRT training has evolved to address biochemical and terrorist situations. The EMRT is periodically evaluating its role and how it can improve its response time to emergency events. The most recent improvement has been the creation of an Intranet page dedicated to facilitating the dissemination of information to team members. The EMRT's Intranet page can be reached from any location via the use of security passwords and user identification. The information stored on the Intranet page includes all electric and telecommunications utility contacts, service areas by county and COG, and a new feature that allows for the Commission to send direct notification to the utilities via email in the event of an emergency.

6. Summary

The telecommunications utilities in Texas are relatively secure and will continue to be so with the ongoing emergency operations procedure reviews, procedures reviews, emergency drills, and disaster performance reviews. The heightened level of security awareness, from Federal, State, and local agencies, and the utilities themselves, instills confidence that the telecommunications infrastructure will survive most natural or man-made disasters. Even if the worst disaster scenario actually occurs, the utilities have comprehensive emergency operations plans that will ensure the quickest possible recovery time.

The Commission will continue to participate in Federal, State, and local homeland security councils and emergency operations councils to ensure that industry and regulatory expertise will have a voice in the mitigation, preparedness, and recovery from natural and man-made disasters.

Chapter VII. Emerging Issues

This section of the Report discusses various issues that are significant to competition in the telecommunications market currently and will continue to be in the near future, both in Texas and nationally. The focus is on two primary areas. First, the wholesale market is addressed. This is done in terms of the interrelationship between the incumbent carriers, which primarily own the local network, and the competitive carriers, which enter the market using the incumbents' networks, building their own, or a combination of the two. Second, the retail market, or retail rates and rate structure, is addressed. This area is discussed in terms of appropriate and viable rate-making policy. These two broad areas, wholesale and retail, are the subject of ongoing debate in the industry, and of attention by legislative and regulatory entities.

A. Structural Separation

Currently, incumbent local exchange carriers (ILECs) are structured so that they have both retail and wholesale operations together in one company. An ongoing debate in the industry is the issue of whether the ILECs (or, specifically the Regional Bell Operating Companies (RBOCs) such as Southwestern Bell Telephone Company (SWBT) and Verizon) should be required to separate their wholesale and retail operations into separate companies in the interest of competitive neutrality. In fact, this concept of divestiture or structural separation in the telecommunications industry has been the topic of discussion, on and off, for the last fifty years.²²⁰ Over the past several years, it has been examined in detail in Pennsylvania, Florida, and New Jersey, although no State has yet implemented structural separation.

The argument for structural separation is that the anti-competitive behavior of the ILECs has adversely affected the competitive local exchange carriers (CLECs). CLECs allege that the RBOCs provide discriminatory service to the CLECs' customers, resulting in a substandard quality of service for CLECs and their customers. CLECs assert, just as the Department of Justice (DOJ) did in the early 1980s, that if the RBOCs are separated into a wholesale and retail company, the inherent economic and financial incentive to discriminate against the CLECs will be removed. After structural separation, both the RBOCs retail entity and the CLECs would purchase access to the local network from the wholesale entity, whose sole responsibility would be wholesale provisioning. The logic is that the separated wholesale companies will respond to their CLEC customers because there is a business interest in doing so that does not exist for the ILEC at present—when retail customers make up a major revenue stream and the CLEC may be seen as a threat to that revenue.

²²⁰ *United States v. American Tele. & Telegraph*, 552 F.Supp. 131 (1982) ("Modification of Final Judgment or MFJ"). The MFJ is based on a 1956 consent decree, which was the result of the government's 1949 antitrust lawsuit proposing divestiture. On November 20, 1974, the government filed the suit that resulted in the MFJ, alleging monopolization of telecommunications services and equipment in violation of the Sherman Act. The MFJ divested AT&T and Western Electric, the long-distance and manufacturing operations, from the 23 local Bell Operating Companies.

The RBOCs, in their opposition to structural separation, assert that they are not engaging in anti-competitive conduct and that their assertion is supported by performance measurement data that shows that they are actually providing superior service in many cases to their CLEC customers. The RBOCs counter that CLECs fail for a variety of reasons, including poor business planning. The RBOCs further assert that the current regulatory approaches contribute to CLEC failure by encouraging poor CLEC planning.²²¹ Opponents of structural separation further note that the CLECs that have succeeded have a number of things in common, the main one of these being a strong facilities-based business plan that eliminates many of the dependency problems experienced by CLECs engaging in resale of ILEC services. The RBOCs also claim that separation would actually result in increased costs to the ILECs' wholesale divisions, which will ultimately drive out all smaller CLECs.

This general debate has now emerged more pointedly in Texas with the filing of a complaint by Birch Telecom of Texas with the Commission alleging end-user service disruption, and a petition to open an investigation into structural separation of SWBT.²²² The case is currently pending before a Commission administrative law judge.

B. Third-Party Administrator

Under current federal law, incumbents are required to provide CLECs with access to all the electronic and manual systems necessary to support a customer service environment (including preorder, order, provisioning, repair, and billing). These systems are called operations support systems or OSS. The OSS systems are linked to all of the incumbents' back office systems and databases that contain the historic customer service information gathered in connection with the provision of local service. After the incumbents' OSS systems were unbundled by the Federal Communications Commission (FCC), the incumbents and CLECs worked together to establish connections between the incumbents' OSS systems and the CLECs' own computer systems. When CLECs entered the local market, they initially captured customers from the incumbent; therefore, many of the orders processed in the past several years were conversion orders from SWBT to a CLEC. As competition has evolved, customers are still migrating from the incumbent but, with increasing frequency, customers are converting from one CLEC to another or from a CLEC to the incumbent. The incumbents' OSS systems are not designed to handle this type of transaction and, although most CLECs have connected their systems to the incumbent, they have not connected their systems to each other, making the transfer of information from one CLEC to another problematic.

The Commission is working with the telecommunications industry to develop guidelines that dictate how the stakeholders will process conversion orders from a CLEC

²²¹ Comments of SBC Communications Inc. Before the Federal Communications Commission, In the Matter of CC Docket Nos. 01-338, 96-98, and 98-147 (April 5, 2002) (RBOCs assert that federal and state regulatory approaches to unbundled network elements (UNEs) have been too generous, thereby discouraging CLECs from aggressive independent business plans and encouraging a deferment of investment.)

²²² See *Birch Telecom of Texas, LLP'S Complaint of End User Service Disruption and Petition to Open Investigation into SWBT Structural Separation*, Docket No. 26817 (pending).

to another CLEC or back to an incumbent. In conjunction with that project, the Commission is also considering the prospect of moving all, or a portion of, the responsibility for OSS functions to an independent third-party administrator.²²³ The services performed by the third-party may vary, but the central premise is that a third-party administrator would perform all or part of the OSS functions in lieu of the incumbent. In addition to resolving the current operational problems caused by the transition of customers away from a CLEC, proponents of an independent third-party administrator assert that such a system would discourage anti-competitive conduct by the incumbent, much the same as structural separation would.

A third-party administrator could operate as a clearinghouse system that serves as the central point of contact for all carriers. Opponents of a third-party administrator contend that such a system is unnecessary and would require an investment in time and money that is not available to carriers at this time.²²⁴ Proponents, however, maintain that this system would eliminate the need for a carrier to maintain separate interfaces with other carriers²²⁵ and would accommodate multiple competitors with divergent systems, requiring few or no changes to existing carriers' operation systems, thereby reducing expenses. Proponents further maintain that the clearinghouse has the added benefit of providing a single database that can produce reports that will allow better tracking of competitive markers, such as the number of local service requests (LSRs) or frequency of customer service record (CSR) queries. The Commission is moving forward in exploring the propriety of using a third-party administrator. The Commission is exploring this concept in workshops and will be prepared to make a final decision in the spring of 2003.

C. Performance Measures

As discussed in Chapter III of this Report, a Performance Remedy Plan (Plan) and Performance Measures were implemented in 1999 to measure the performance of SWBT's wholesale operations (provisioning of UNEs to CLECs) and to compare that performance to SWBT's performance internally to its own retail operation. The goal is to ensure that SWBT is providing wholesale services to CLECs at parity with the service SWBT provides to itself, or, where no retail analogy exists, at a benchmark level designed to afford the CLECs a meaningful opportunity to compete. The Plan also provides for payment of liquidated damages to the CLECs or, in certain situations, penalties to the State for failure to meet a measure. While the Commission believes the Plan has been an effective tool to date, the Commission also believes it is critical to set penalties at a level that encourages SWBT to meet the performance goals of the Plan.

²²³ *Proceeding Regarding Third-party Administrator*, Project No. 26839 (pending).

²²⁴ At present, no state has ordered the establishment of a third-party administrator to serve some or all of the roles discussed above.

²²⁵ A third-party administrator could operate as a centralized data store for customer account information or just a subset of that relating to preferred interexchange carrier (PIC) information; or the third-party could serve as a clearinghouse for customer service records (CSRs) or local service requests (LSRs). In addition to other services, the third-party could provide the third-party verification services often used by carriers who chose to use oral letters of authorization (LOAs).

The establishment of performance penalties should deter anti-competitive or discriminatory behavior, if set at the proper level. As discussed in Chapter IV, SWBT continues to miss more than 10% of its performance measures a majority of the past reporting months. The Commission is concerned with the perception that potential penalty amounts may be seen as merely acceptable business expenses that do not serve as a true incentive to proper wholesale performance. SWBT disputes the Commission's ability to significantly modify the Plan.

D. Winback and Code of Conduct for Telecommunications Providers

In response to industry comments, the Commission established a rulemaking regarding restrictions on retention and winback activities by Chapter 58 Electing Companies.²²⁶ The new proposed rule was intended to prohibit Chapter 58 electing companies from making retention²²⁷ and winback²²⁸ offers directly to soon-to-be-former customers or former customers during a certain waiting period²²⁹ when those offers would tend to have an anti-competitive impact. The prohibition during the waiting period does not apply to customer-initiated communications with the electing company or to business customers subscribing to five or more access lines or an equivalent level of service. The public benefit anticipated as a result of the section would be to encourage a fully competitive telecommunications marketplace and promote diversity of telecommunications providers by preventing certain activities that would tend to have an anti-competitive impact. In December 2002, the Commission held a public hearing regarding the proposed rule. Competitive providers do not believe the winback restrictions go far enough to prevent anti-competitive behavior by the incumbent, while the incumbents believe the winback restrictions have the potential of dampening competitive responses by the incumbents.

In a related matter, in October of 2002, the Commission initiated an investigation into the business/marketing practices and conduct of local exchange companies.²³⁰ This

²²⁶ See *Rulemaking to Address Winback/Retention Offers by Chapter 58 Electing Companies*, Project No. 25784 (pending).

²²⁷ In the proposed rule approved at the October 10, 2002 open meeting, retention offers are defined as any service offering, including any form of pricing flexibility as defined by PURA § 51.002(7) (i.e., customer specific contracts, packaging of services, volume, term and discount pricing, zone density pricing, and other promotional pricing) involving any basic network service or nonbasic service, as defined by PURA §§ 58.051 and 58.151, that is made available by an electing company to a soon-to-be former customer (i.e., a customer for which another certificated telecommunications utility's (CTU's) local service request (LSR) is pending before the electing company.)

²²⁸ In the proposed rule approved at the October 10, 2002 open meeting, winback offers are defined as any service offering, including any form of pricing flexibility as defined by PURA § 51.002(7), involving any basic network service or nonbasic service, as defined by PURA §§ 58.051 and 58.151, that is made available by an electing company to a former customer.

²²⁹ In the proposed rule approved at the October 10, 2002 open meeting, the waiting period is defined as the period of time that begins on the day that a CTU submits a local service request (LSR) to an electing company and ends 30 days after the service order completion (SOC) date.

²³⁰ See *Audit of Existing Business/Marketing Practices and Conduct of Chapter 58 Electing Companies*, Docket No. 26868 (pending).

investigation was followed by a rulemaking to create a marketing code of conduct. The marketing code of conduct will likely address matters relating, but not limited, to false, deceptive and misleading advertising, as well as false, deceptive, and misleading communications between employees of the local exchange companies and their current and former customers.²³¹

E. Rates

There are essentially three types of rates currently at issue in the telecommunications market: basic local retail, local wholesale unbundled network elements (UNEs), and wholesale switched access charges. Universal service funding, which is an explicit support for basic local service rates, constitutes a fourth rate-affecting issue.

ILEC basic local service rates in Texas have been capped for some ILECs (including the largest companies) by State legislation and regulation for the public-policy purpose of maintaining “affordable” basic phone service. Many are set well below the ILECs’ costs. In addition, basic local rates are grouped into retail rate bands based on a “value of service” theory. In other words, local retail rates are set higher in areas with higher populations on the premise that more value is received from the ability to call and receive calls from more people locally. The value-of-service retail pricing scheme typically leads to pricing direction being the inverse of costs—basic local retail rates are higher in lower cost areas and vice versa. Vertical services are those retail local services beyond basic dial tone, i.e., Caller I.D., call waiting, three-way calling, etc. Since the ILECs received pricing flexibility resulting from legislation in 1999, many of the more popular or frequently used vertical services have seen significant increases in price.²³²

UNE prices, unlike basic local retail rates, are cost-based. Both the level of the costs and rates, and the costing methodology, are subject to disagreement in the industry. UNE costs are determined using cost models based on “total element long run incremental costs” (TELRIC) methodology, which was recently upheld by the Supreme Court.²³³ Members of the telecommunications industry disagree about the current level of UNE prices. In general, ILECs argue the many UNE prices are set too low and are below their actual costs. Conversely, CLECs in general argue that many UNE prices are set too high and are above appropriate TELRIC costs. UNE rates are current being reevaluated in Texas in Docket No. 25834.²³⁴ A hearing in this docket is expected to begin in early 2003.

Intrastate switched access charges are the wholesale rates paid to local exchange telephone companies by long-distance carriers to originate and terminate long-distance

²³¹ See *Rulemaking to Establish Marketing/Business Code of Conduct for Local Exchange Companies*, Docket No. 26955 (pending).

²³² See Chapter IV, *infra*.

²³³ *Verizon Communications, Inc. v. Federal Communications Commission*, 535 US 467 122 S.Ct. 1646 (2002) (Verizon).

²³⁴ *Proceeding on Cost Issues Severed from Docket No. 24542*, Docket 25834 (pending).

calls within Texas over the public switched network. The current differential between intrastate and interstate access charges in Texas is approximately 500%,²³⁵ an indication that the intrastate charges are well above costs (assuming interstate charges are near costs, not below). At issue in Texas is whether the intrastate charges should be lowered to the level of interstate charges or need to be left at current levels to serve as an implicit subsidy to basic local rates for high costs not recovered by the explicit subsidy of Texas Universal Service Fund (TUSF).

F. Voice-Over IP

One sector expected to emerge over the next two years is voice-over-internet protocol (VoIP) technology. This technology transmits voice conversations over a data network using internet protocol (IP).²³⁶ Southwestern Bell Corporation (SBC) and the cable industry are actively exploring deployment of VoIP throughout their networks.²³⁷

The regulatory implications of this new technology are wide-ranging and complex, from the potential impact on reciprocal compensation traffic arrangements between carriers, to ensuring that customers receive the same quality of service standards as those customers using traditional analog wires, to access the public switched telephone network (PSTN). In addition, the nature of VoIP is undefined in both the state and federal regulatory arenas, and it is unclear whether VoIP calls would be subject to federal or state regulation, or both.

The first issue to emerge will be whether VoIP traffic, which can be used to make long-distance, local, and internet-based telephone calls, should be exempt from the interstate and intrastate access charge regime. AT&T has recently filed a petition at the FCC requesting that AT&T's Phone to Phone VoIP traffic continue to be exempted from access charges.²³⁸ In its complaint, AT&T states that several ILECs have been refusing to accept VoIP traffic from AT&T. There are several competing policies, which must be examined.

First, federal and state policymakers have traditionally exempted all information and enhanced service providers (ESPs) from the requirement that they pay access charges, even if the enhanced or information service meets some of the traditional definition of access. Nearly all VoIP providers currently claim this exemption. The general purpose of this exemption policy is to promote invention, investment, and innovation by allowing adoption of new technology into the marketplace, which in turn leads to a better, more cost effective, multi-dimensional public network.

²³⁵ Report to the 77th Texas Legislature on Intrastate Switched Access Charges (January 2001).

²³⁶ NEWTON'S TELECOM DICTIONARY, (17th ed. 2001), published by CMP Books, New York, NY, at 757.

²³⁷ Keeping It Real: IP Centrex, IP PBX Address Today's Requirements, Paula Bernier, XCHANGE at 12 (August, 2002); Vendors Assess Cable VoIP Opportunity, Paula Bernier, XCHANGE at 30 (August 2002).

²³⁸ *AT&T's Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361 (Nov. 18, 2002).

Indeed, the Commission has applied a similar policy through various proceedings concerning reciprocal compensation issues, as it upheld ESP exemptions, and required calls to and from ESPs to be treated as local calls for CLEC/ILEC mutual compensation purposes. The Commission's policy has consistently been to stimulate an efficient market by approving mutual compensation rates that are reflective of the cost of interconnecting the networks and not historical classification rules.

Second, the appropriate regulatory treatment of IP telephony may hinge upon the FCC's current proceedings to define whether broadband is an "information service" (for which access charges are not paid) or a "telecommunications service" (for which access charges are paid).

The FCC has recently concluded that cable modem service is an information service and has reached the tentative conclusion that broadband services provided over telecommunications infrastructure is also an "information service."

On the other hand, the FCC earlier had concluded on a tentative and non-binding basis in the Stevens Report that VoIP is a telecommunications service. In fact, the FCC only reached a preliminary conclusion in the so-called "Stevens Report" that phone-to-phone IP telephony is likely to be classified as a "telecommunications service."²³⁹

The record before us suggests that certain 'phone-to-phone IP telephony' services lack the characteristics that would render them 'information services' within the meaning of the statute, and instead bear the characteristics of 'telecommunications services.' We do not believe, however, that it is appropriate to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings.²⁴⁰

Thus, the FCC and state regulatory commissions are faced with several possibilities in relation to VoIP. They could follow the public policy behind the ESP exemption and not apply access charges. The FCC instead could find in its current broadband proceeding that all broadband services, including VoIP, are "information services" and are therefore exempt from access charges under Title I of the Federal Telecommunications Act (FTA). The effect of either ruling, however, would be to continue large opportunities for regulatory and economic arbitrage between VoIP services, which would have cost-based mutual compensation charges, and traditional long-distance calls, which would pay access.

G. Broadband Policy

Broadband deployment continues to be an important area of policy discussion. During the last two years, there has been a growing consensus regarding the important role for consumer demand in stimulating broadband deployment and continued

²³⁹ *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, Report to Congress at 88 (rel. April 10, 1998) (STEVENS REPORT)

²⁴⁰ STEVEN'S REPORT, at ¶ 83, emphasis supplied.

controversy over the state of broadband supply and regulatory framework governing broadband deployment.

1. Demand

Customer demand for broadband services has been strong, but still lower than many had expected. On the other hand, customer adoption of broadband service has been faster than the adoption of other technology services, such as cell phones, in their early stages of availability. There is a general belief that the lack of a “killer application” (*i.e.*, a compelling reason to purchase) may be inhibiting consumer adoption of broadband services.

The key challenge to broadband deployment in urban areas may relate to issues surrounding the “digital divide,” since many low-income, older, or less-educated Texans are less likely to have or know how to use computers or have the desire to have access to the internet. In rural areas, deployment appears to be occurring at a slower rate and there is concern that those areas and citizens were being “left behind” the rest of the State.

2. Supply

As discussed in this Report, cable and telecommunications companies are in the process of upgrading facilities in urban and rural areas, although there remain significant gaps in coverage.

There has been much discussion regarding whether existing regulatory policies spur or hinder broadband deployment. Incumbent telecommunications providers have generally argued that imposing unbundling obligations on broadband diminishes their incentives to invest in new network infrastructure and is inconsistent with the regulatory framework applied to cable companies. These providers argue that cable, wireless, and satellite will provide “intermodal” competition. Competitive telecommunications providers have argued in contrast that “intramodal” competition created through regulatory access to telecommunications infrastructure brings lower prices, better quality, and induces ILECs to increase investment in their networks.²⁴¹

3. State Policies

In addition to the Commission’s efforts to accelerate broadband deployment described in this Report, the State has a number of other policies, and programs that impact broadband technology deployment. These programs include the Telecommunications Infrastructure Fund (TIF), the State telecommunications discounts for schools and libraries (H.B. 2128 discounts), the statewide telecommunications network (TEX-AN), and other state-supported university and educational networks. These programs were adopted in the mid-1990s prior to widespread internet deployment and there is widespread stakeholder agreement that these policies should be re-examined although no consensus exists as to the future role of these programs.

²⁴¹ Compare Willig, et. al., Stimulating Investment and the Telecommunications Act of 1996, (unpublished and available upon request from files of PUC), and Crandall, et. al, The Empirical Case against Asymmetric Regulation of Broadband Internet Access, 17 BERKELEY TECH. L.J., 953 (Summer 2002)

4. Broadband Policy Recommendations

The Commission extensively examined the state of broadband deployment in its *2001 Advanced Services Report* and many recommendations suggested in the report could still be adopted by the Legislature. In the *2001 Advanced Services Report*, the Commission made several “best practice” recommendations, including the following:²⁴²

- **Establish a Statewide goal for widespread Broadband deployment** – States such as Michigan and North Carolina have recently established goals for broadband deployment. North Carolina’s goal, for example, is to provide every State resident with broadband internet access by the end of 2003.
- **Explore New Deployment Models, such as Demand Aggregation and Anchor Tenancy** – Using large customers or aggregated customer demand of small customers may create sufficient demand to encourage telecommunications providers to make infrastructure investments. The TIF community networking initiative is an example of such demand aggregation.
- **Education and Training** – Education and training can increase computer usage, particularly among low-income, less-educated, and older Texans.
- **Economic and Tax Incentives** – States such as Michigan and North Carolina have used tax and other economic incentives to spur deployment of broadband infrastructure.

H. Towards a New Framework for Telecommunications Competition

This Report has discussed many significant policy issues currently facing the telecommunications industry that may be raised during the coming Legislative Session.

In past Sessions, various stakeholders have requested that the Legislature address some particular issue that affects their specific financial or business interest but that might negatively affect some other group’s interest or goal. As a result, this piecemeal approach generally has been contentious in past sessions. It can be expected that the issues raised by the stakeholders during the coming session will again be focused solely on their particular concerns and will cause similar divisive debates.

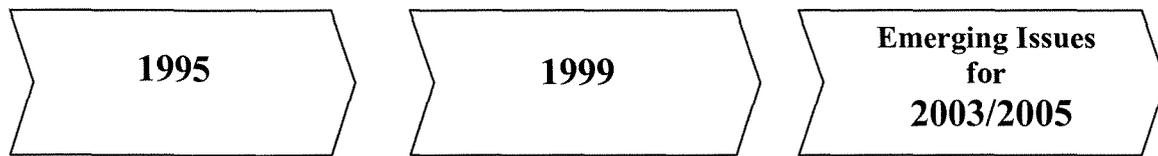
Another approach, however, would be to address State telecommunications policy in a more comprehensive manner. A comprehensive framework would need to be constructed not only to address every stakeholders’ interests but with the goal of creating a sustainable, competitive local telecommunications market and thereby lessening the need for regulatory oversight. This approach was successfully used during the 1999 Session to create a new framework for retail electric competition, which, by most accounts, has been successfully implemented over the past three years.

The debate regarding retail electric restructuring spanned both the 1997 and 1999 Legislative Sessions. A similar approach may benefit the telecommunications industry since the Commission will approach Sunset Review in 2005.

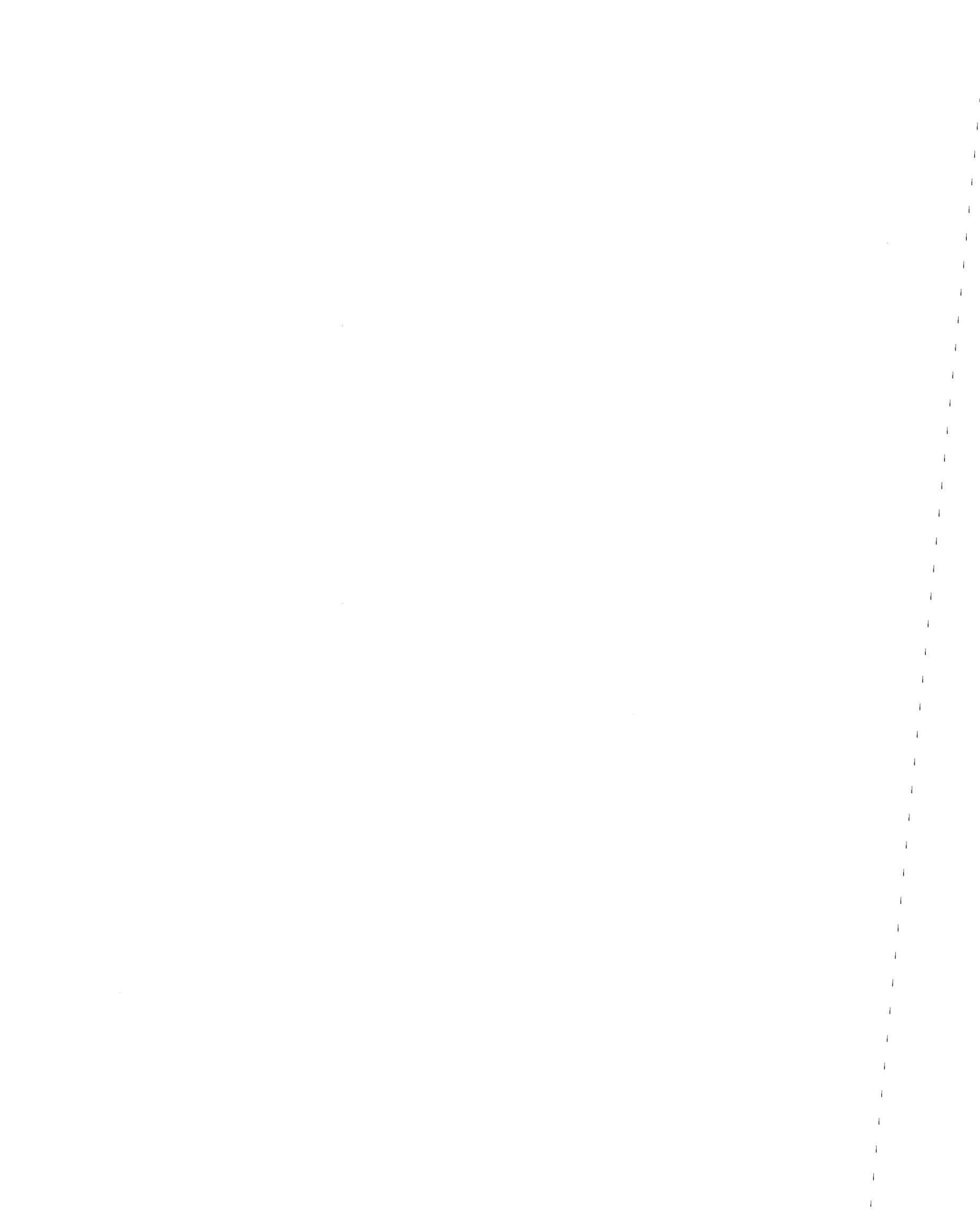
²⁴² Report to the 77th Texas Legislature, Report to the Legislature on the Availability of Advanced Services in Rural and High Cost Areas, January 2001.

The framework described in Table 17 is a first attempt to demonstrate what policy issues a new State telecommunications law might address and to illustrate how the policies adopted in that framework would be consistent with the Legislature's general policy objective of creating competitive telecommunications markets, as expressed in H.B. 2128 during the 1995 Legislative Session and S.B. 560 during the 1999 Legislative Session. In keeping with prior legislative initiatives, these different issues taken as a whole create a market design that continues a policy of movement to a market, which is less regulatory in nature. The framework outlined in Table 17, taken as a whole, could allow regulatory measures to decrease as competition increases over time.

Table 17 — Towards a New Telecommunications Framework



Issue			
Retail Pricing	Basic Service Rate Caps Tariffed Vertical Services	Packaging and Pricing Flexibility Informational filings	Rebalance local rates through transition to market-based rates No other retail pricing restrictions
Access Charges	High (12 cents) with implicit subsidies	Moderate (6 cents) removes some implicit subsidies	Cost-based with no implicit subsidies
USF	Small USF fund	Moderate-sized USF fund	Support for only true high cost areas Lifeline for low income
Network Element Access		UNE-P under FTA This includes loop, line port, end-office usage, signaling, and transport	Legacy (ILEC) infrastructure: Market-based prices for UNE-P Other UNEs at TELRIC prices as conditions warrant New infrastructure: No regulation except as it relates to customer protection, service quality, and continued necessary access to the network by competitors
Wholesale pricing	Chapter 60 of PURA	TELRIC under FTA	Primarily market-based, especially with structural separation (see row below)
Affiliate Relationships		Not addressed (vertically integrated)	Structural separation or Use third-party administrator
Enforcement		Performance Measures under FTA	Affiliate Code of Conduct Complaint Driven
Interconnection Obligations	Required	Required	Required



Chapter VIII. Legislative Recommendations

A. Access to Information

Each biennium in preparation of this report for the Legislature, Commission staff requests data from telecommunications providers that can be used to provide a meaningful view of the state of telecommunications service and competition in Texas. Telecommunications service providers consider access line count information and other data to be confidential, commercially valuable information.

The Legislature has recognized the sensitive nature of competitive information supplied to the Commission by holders of certificates of operating authority (COAs) and service provider certificates of operating authority (SPCOAs) in PURA § 52.207(b) by excepting reports from those providers from the Texas Public Information Act, Chapter 552 of the Texas Government Code. However, there is no similar protective provision for information provided to the Commission by other types of telecommunications service providers. With the growth of competition, there is a greater resistance than ever before by telecommunications providers to providing detailed information for staff review because of the risk that the Commission will not be able to protect the confidentiality of the information if a request is received under the Texas Public Information Act. Without the ability to guarantee that certain information can be maintained as confidential many carriers are willing to provide requested data in only an aggregated form, which is less useful for analysis of telecommunications competition in the State.

Under current law, the Commission has no argument of its own to support the need to maintain the information as confidential. Therefore, the Commission cannot even join forces with the companies that are seeking a favorable ruling from the Attorney General to protect commercially sensitive information. Under earlier interpretations of § 552.110 of the Texas Public Information Act using the “National Parks” test,²⁴³ the Commission could assert an argument for the protection of requested third-party confidential data if the release of such information would hamper the Commission’s ability to obtain the data in the future. That interpretation, however, is no longer recognized as a legitimate reason to withhold third-party data from the public under the Information Act.²⁴⁴ Further, in 1999 the Texas Legislature added a requirement to § 552.110 requiring a party asserting confidentiality over commercial and financial information to provide specific factual evidence of substantial competitive harm.

²⁴³ *National Parks & Conservation Comm’n v. Morton*, 498 F.2d 765 (D.C. Cir 1974). The *National Parks* case set forth a test for the federal statutory counter-part to the Tex. Gov’t Code § 552.110 exception from disclosure for third-party confidential information. The test excepted financial information from disclosure if the disclosure was likely to either impair the government’s ability to obtain the information in the future, or to cause substantial harm to the competitive position of the party from whom the information was obtained.

²⁴⁴ *Birnbaum v. Alliance of American Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied).

Generally, the Commission does not have access to specific factual evidence of competitive harm to support an assertion that the information should be maintained as confidential.

In 1995 the Attorney General, responding to a request from former PUC Chairman Robert Gee, opined that, in order to protect data provided by telecommunications providers for development of the Telecommunications Scope of Competition Report, the Commission should publish the information in a manner that avoids explicitly or implicitly identifies any of the responding utilities.²⁴⁵ For that reason, this Report provides data in the aggregate in order to conceal the identities of the reporting entities.

With regard to the privacy interests of Texans, the Commission is concerned about the availability of the no-call database pursuant to a Public Information Act request. Although the current statutes TEX. UTIL. CODE ANN. § 39.1025 and TEX. BUS. & COM. CODE, Chapter 43, implicitly express a legislative intent to restrict access to the “no-call” databases, there is no explicit exemption for the database information from disclosure under the Texas Public Information Act.

B. Specific Legislative Recommendations

If the Public Utility Regulatory Act (PURA) were amended to protect data provided to the Commission by all telecommunications carriers as it does for data provided by holders of COAs and SPCOAs in PURA § 52.207(b), Commission staff could conduct and provide a better analysis of the state of competition in the Texas telecommunications market.

If the legislature did not intend for consumer data collected for the purpose of implementing the no call provisions of TEX. UTIL. CODE ANN. § 39.1025 and TEX. BUS. & COM. CODE, Chapter 43, to be made publicly available under Chapter 552 of the TEX. GOV'T CODE, the Commission recommends that those statutory provisions be amended to explicitly except the data from disclosure under the Texas Public Information Act.

²⁴⁵ Tex. Attorney Gen. LR-043 (1995).