

Chapter IV. Commission Activities: 2001 - 2003

This section provides an overview of the Commission's activities since the *2001 Scope Report*. These activities represent the Commission's continued efforts to enhance competition, usher in broadband deployment, and promote and protect consumer interests. The Chapter begins with a discussion of the Commission's activities under the Federal Telecommunications Act of 1996 (FTA), and then leads into a synopsis of Commission activities under the Public Utility Regulatory Act (PURA).

A. Commission Activities Under the FTA

The Commission has participated in a number of activities to implement the regulatory mandate regarding fair access to the monopoly's network as required by the FTA. This includes key arbitration cases, and monitoring of Southwestern Bell Telephone Company's (SWBT)'s performance with respect to allowing access to its network by competitors.

1. Arbitrations and Dispute Resolution

The Commission plays a critical role in fostering local competition, by playing a key role in the negotiation and arbitration of interconnection agreements. The FTA allows competing carriers to choose the most efficient points at which to exchange traffic with incumbent local exchange carriers (ILECs). Initially, the requesting carrier and the ILEC will seek to negotiate mutually agreeable rates, terms and conditions governing the competing carrier's interconnection to the incumbent's network, access to the incumbent's unbundled network elements (UNEs), or the provision of services at wholesale rates for resale by the requesting carrier. FTA Section 251(c)(1) imposes on ILECs the "duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described" in sections 251(b) and (c).⁷⁰ Section 251(c) provides that "(t)he requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements."⁷¹

⁷⁰ 47 U.S.C. § 251 (c)

⁷¹ *Id.*

Parties have several options under FTA Section 252 for securing an interconnection agreement. In many instances, parties successfully reach agreement through voluntary negotiations. As reflected in Table 10, carriers in Texas conduct substantial numbers of voluntary negotiations for interconnection, services, and network elements.

Table 10 — Type and Number of Interconnection Agreements in Texas

TYPES OF INTERCONNECTION AGREEMENTS	FROM SEPTEMBER 1, 2000— JULY 2002
Negotiated Agreements	197
Amendments	287
Texas 271 Agreements	103

a. Texas 271 Agreement

Although carriers are free to negotiate unique, individualized contracts, many have chosen to adopt the standardized Texas 271 Agreement (T2A). The T2A is a Commission-approved interconnection agreement that, with the collocation tariff, contains SWBT's commitments made during SWBT's Section 271 application. The creation of this standard interconnection agreement reflects pro-competitive policies and terms that a few competitive local exchange carriers (CLECs) may have had difficulty negotiating on their own.

The T2A also allows a competitive carrier to enter the market quickly because it provides an expedited Commission approval. In many instances, negotiation can be avoided altogether. A competing carrier that wishes to interconnect with SWBT notifies SWBT in writing. Within five days, SWBT must provide a signed interconnection agreement that is substantively identical to the T2A. Within five days, the CLEC signs the agreement and files it with the Commission. By operation of law, the agreement becomes effective upon filing, without the need for public notice.

Pursuant to FTA Section 252(i), carriers can also choose to "opt-in" only a portion of the T2A. As such, negotiations can be targeted to address fewer issues. Within the negotiated agreements referred to in the chart above, a significant number use extensive T2A "boilerplate" and tailor selected contract terms to fit individual business plans.

Although the four-year term of the T2A expires on October 13, 2003, some benefits of this standardized agreement are likely to continue, perhaps in a different form. The FTA provides that carriers can "opt-in" to other carriers' agreements under FTA Section 252(i). Specifically, a local exchange carrier (LEC) must make available "any interconnection, service, or network element provided under an agreement...to which it is a party to any other requesting telecommunications carrier upon the same terms and

conditions as those provided in the agreement.”⁷² Accordingly, uncontested contract terms from past contracts are often carried over into subsequent agreements. On the other hand, contested terms and conditions that resulted from Commission decisions, or which were the subject of negotiated tradeoffs, both of which are true of the T2A, are likely to again prompt extensive negotiations. However, the Commission has noted on numerous occasions that the T2A interconnection language reflects the Commission’s policy decisions. As noted in more detail below, the Commission has already begun examining successor agreements to the T2A, building upon its prior decisions.

b. Compulsory Arbitration

When voluntary negotiations are unsuccessful, FTA Section 252(b) allows parties to seek arbitration as early as 135 days after an ILEC receives a request for negotiation under section 252. The FTA gives state commissions responsibility for arbitrating open issues. State commissions must ensure that resolution of any open issues and the imposition of appropriate conditions on the parties meet the requirements of FTA Section 251 and Federal Communication Commission (FCC) regulations.⁷³ Either party may also ask the Commission to mediate specific issues to facilitate an agreement during the negotiation process.

Under its procedural rules, the Commission distinguishes between arbitration proceedings that address existing terms and conditions and those that are developing new terms and conditions. The former, post-interconnection disputes, may involve interpretation or enforcement of existing terms and conditions. Negotiations of new terms or entirely new agreements give rise to arbitrations. As reflected in the Table 11, far fewer interconnection agreements are developed through arbitrations or dispute resolutions than through voluntary negotiations.

Table 11 — Type and Number of Arbitrations in Texas

TYPES OF DISPUTE RESOLUTION	FROM SEPTEMBER 1, 2000 THROUGH JULY, 2002
Arbitrations	26
Post-Interconnection Dispute	19
Mediation	2

Over the last two years, the Commission has been involved in several important decisions. These include decisions on issues regarding (1) policies and pricing for UNEs, and (2) line sharing. Following are brief descriptions of arbitrations in each of these issue areas and the federal decisions, which have had an effect on these proceedings. For a more detailed description of other Commission arbitration decisions, please see Appendix N.

⁷² 47 U.S.C. § 252(i).

⁷³ 47 U.S.C. § 251.

Before discussing the MCI and Rhythms arbitrations, it is necessary to lay the groundwork by briefly discussing the FCC orders and federal case law underlying those decisions, specifically with reference to the network elements that must be unbundled by the ILEC, the extent to which the ILEC must “combine” elements, and the cost standard used to set prices for those elements.

i. Unbundling of Network Elements

In the *First Report and Order*,⁷⁴ in determining which ILEC-owned network elements should be made available to CLECs under the FTA,⁷⁵ the FCC broadly interpreted the “necessary” and “impair” standards contained in the FTA to require unbundling of the following elements: circuit switching, local loops, subloops, the network interface device, directory assistance, operator services, signaling systems, interoffice transport, and operations support systems (OSS). ILECs challenged this rule and, in 1999, the United States Supreme Court vacated 47 C.F.R. § 51.329, and criticized the FCC for a standard it considered so broad that it required ILECs to give CLECs blanket access to their networks.⁷⁶

Pursuant to the Supreme Court’s directive, the FCC revisited the “necessary” and “impair” standards and established relevant factors.⁷⁷ When applying those factors, the FCC modified the list of UNEs by narrowing the requirement for providing two of the elements: switching and databases. With the exception of those two elements, the FCC otherwise found, without doing any geographic analysis, that elements originally unbundled in the *First Report and Order* should continue to be provided. The ILECs again challenged the rule in court, and in a 2002 decision, the United States Court of Appeals for the D.C. Circuit vacated the rule.⁷⁸ The court held that the FCC’s adoption of a uniform national rule regarding UNEs failed to take into account the differences

⁷⁴ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, and Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order*, CC Docket No. 96-98, CC Docket No. 95-185, FCC 96-325 (rel. Aug. 8, 1996) (Local Competition Order).

⁷⁵ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in 15 and 47 U.S.C.) 47 U.S.C. § 251(d)(2) states:

ACCESS STANDARDS — In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether—(A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

⁷⁶ *AT&T Corp. v. Iowa Utilities.*, 525 U.S. 366 (1999).

⁷⁷ *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*).

⁷⁸ *United States Telecom Association v. Federal Communications Commission*, 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*).

among the many markets covered by the FCC's general rule.⁷⁹ The court also found that the FCC failed to consider and take into account cost advantages CLECs might enjoy, such as freedom from the duty to provide under-priced service to rural customers.⁸⁰ Finally, the court found that the FCC failed to focus on the distinction between cost disparities attendant to the market structure and those disparities that would be faced by virtually any new entrant into any sector of the economy without regard to the existing level of competition.⁸¹ With respect to the *Line Sharing Order*, discussed below, 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).⁸²

On December 20, 2001, the FCC released a Notice of Proposed Rulemaking (NPRM) relating to its first triennial review of its policies on UNEs.⁸³ 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 in this NPRM the ILECs' wholesale obligations under Section 251 of the FTA to make their facilities available as UNEs to 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.

ii. UNE-P or other combinations of UNEs

In the *First Report and Order*, the FCC required that ILECs combine network elements at the request of entrants who cannot combine the UNEs themselves. The ILECs challenged this portion of the rule and the United States Court of Appeals for the Eighth Circuit vacated the FCC's regulations regarding the combining of UNEs (47 C.F.R. § 51.315(c)-(f)).⁸⁴ On appeal, the United States Supreme Court reversed the Eighth Circuit, holding that 47 C.F.R. § 51.315(c) requires an ILEC to "perform the functions necessary to combine unbundled network elements in any manner"—not necessarily to complete the actual combination—"even if those elements are not ordinarily combined in the incumbent's network," provided such combination is "technically feasible" and neither places the ILEC at a competitive disadvantage nor

⁷⁹ *United States Telephone Assoc., et. al. v. FCC*, 290 F.3d 415, 423-26 (D.C. Cir. 2002) (USTA).

⁸⁰ *Id.* at 424.

⁸¹ *Id.* at 426-28.

⁸² UNE Remand Order at 428-29.

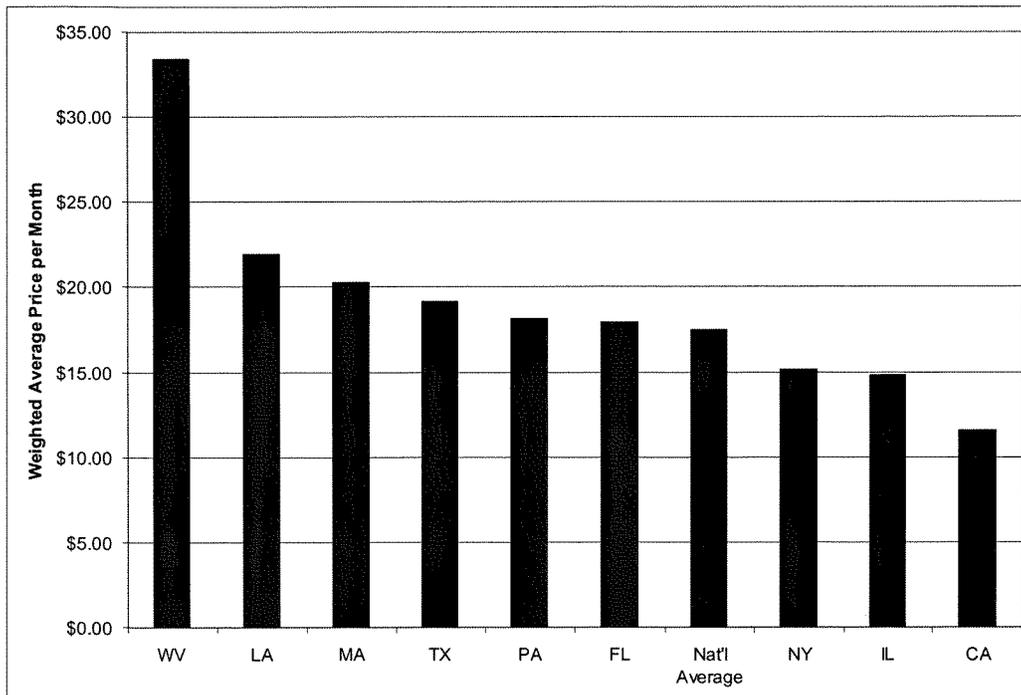
⁸³ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, and 98-147, Notice of Proposed Rulemaking, FCC No: 01-361. (rel. December 20, 2001)

⁸⁴ *Iowa Utilities Board v. FCC*, 120 F.3d 753, 795, 800, 819 (8th Cir. 1997) (vacating 47 C.F.R. §§ 51.601-51.611).

impairs the ability of other carriers to interconnect with the ILEC's network.⁸⁵ In reinstating the rules, the Court deferred to the FCC's construction of Section 251(c)(3).⁸⁶ In exchange, the entrant must pay a reasonable cost-based fee for whatever the ILEC does.⁸⁷

In comparison with other States, the weighted average unbundled network element platform (UNE-P) price in Texas of \$19.17 per month is slightly higher than the national average of \$17.48 per month.⁸⁸

Figure 25 — National UNE-P Rate Comparison



SOURCE: *A Survey of Unbundled Network Element Prices in the United States*, West Virginia Public Service Commission (July 2002).

iii. Costing of UNEs

⁸⁵ 41 C.F.R. § 51.315(c). *Verizon Communications, Inc. v. Federal Communications Commission*, 535 U.S. 467, 122 S.Ct. 1646, 1683 (2002) (*Verizon*) (“Combining” refers to the “mechanical connection of physical elements within an incumbent’s network, or the connection of a competitive carrier’s element with the incumbent’s network ‘in a manner that would allow a requesting carrier to offer the telecommunications service.’) (cited *In the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, FCC 96-325 ¶ 294, n. 620 (August 8, 1996) (“*First Report & Order*”).

⁸⁶ *Verizon* at 1684-87 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984) and *Local Competition Order* at ¶ 294).

⁸⁷ *Id.*

⁸⁸ West Virginia Public Service Commission, *A Survey of Unbundled Network Element Prices in the United States*, at Appendix 3 (July, 2002).

In the *First Report and Order*, the FCC also established the standards that state commissions would use to determine a “nondiscriminatory,” “just and reasonable rate for network elements.”⁸⁹ The FTA required the FCC to establish the cost methodology without “reference to a rate-of-return or other rate-based proceeding.”⁹⁰ In the *First Report and Order*, based upon the direction given in the FTA, the FCC chose to determine cost by looking at the total element long-run incremental cost (TELRIC), a “forward-looking economic cost” methodology.⁹¹ The ILECs challenged the TELRIC methodology on appeal. That appeal was final when the United States Supreme Court issued its decision in *Verizon Communications, Inc v. Federal Communications Commission*.⁹² The Supreme Court upheld the FCC’s requirement that the States set ILECs’ UNE rates based upon TELRIC, not based on the ILECs’ historical costs. The Court rejected ILECs’ arguments that “cost” can only mean historical cost. Further, the Court held that the ILECs’ arguments that the use of TELRIC rates would be a disincentive to development of facilities-based competition were contrary to fact.

c. MCIm Arbitration

Before the United States Supreme Court issued the Verizon decision upholding TELRIC and the ILECs’ requirement to combine network elements, MCIMetro Access Transmission Services filed a petition for arbitration with Southwestern Bell Telephone Company.⁹³ Subsequently, Sage Telecom, Inc. Texas UNE Platform Coalition, Mcleod UST Telecommunications, Services, and AT&T Communications of Texas, LP joined the proceeding. The primary issues addressed were the continued availability of certain UNEs, such as unbundled local switching and certain combinations, given that SWBTs promise to provide such UNEs was lapsing under the Texas 271 Agreement. (UNE costing was also brought up, and is being developed in a separate costing docket, Docket No. 25834.) This Award was issued in April 2002. The Commission made the following major determinations in the Award.

i. Unbundled Local Switching

In the UNE Remand Order, the FCC required ILECs to provide local switching as a UNE, except local switching used to serve end users with four or more lines in density zone 1 in the top 50 Metropolitan Statistical Areas (MSAs), provided that the ILEC provides nondiscriminatory, cost-based access to the enhanced extended loop (EEL)

⁸⁹ 47 C.F.R. §51.317.

⁹⁰ 47 U.S.C. 252(d)(1).

⁹¹ 47 C.F.R. §51.505.

⁹² *Verizon Communications, Inc. v. Federal Communications Commission*, 535 U.S. 467, 122 S.Ct. 1646, 1683 (2002) (Verizon).

⁹³ *Petition of MCIMetro Access Transmission Services, LLC, Sage Telecom, Inc., Texas UNE Platform Coalition, Mcleod USA Telecommunications Services, Inc., and AT&T Communications of Texas, LP for Arbitration with Southwestern Bell Telephone Company under the Telecommunications Act of 1996, Docket No. 24542, Final Order (Dec. 19, 2002). (“MCIm Arbitration”).*

throughout density zone 1.⁹⁴ In the MCI arbitration, the Commission found that SWBT failed to prove that it provides nondiscriminatory cost-based access to the EEL. The Commission, therefore, found that SWBT is required to continue providing unbundled local switching in density zone 1 until SWBT has demonstrated in a Commission proceeding that it is providing nondiscriminatory, cost-based access to the EEL. Consistent with the FCC's finding in the UNE Remand Order, the Commission held that CLECs would be impaired without access to unbundled local switching in zones 2 and 3, as well. The Commission also construed the requirements of PURA § 60.021 for the first time, finding that it is in the public interest and there is competitive merit for local switching to remain an unbundled network element in Texas.

ii. UNE-P or Combinations of UNEs

The Commission held that Section 251 of the FTA, as interpreted by the FCC, requires SWBT to provide CLECs with nondiscriminatory access to UNEs in a manner that allows CLECs to combine UNEs for themselves without having to collocate. Because SWBT was not providing CLECs with nondiscriminatory access that would allow CLECs to combine UNEs for themselves, the Commission ruled that SWBT must continue combining UNEs for CLECs. SWBT is obligated to continue making new combinations of UNEs until SWBT has demonstrated in a Commission proceeding that it is providing nondiscriminatory access to UNEs in such a manner that allows CLECs to combine UNEs for themselves without needing to collocate.

iii. Costing Issues

The cost issues severed from Docket No. 24542 are addressed in a follow-on proceeding, which was initiated in May 2002, and include loop rates, switching rates, line port rates, input/output port rates, daily usage feed rates, and digital cross-connect system rates, among others.⁹⁵ As a preliminary issue, the Commission determined that the three zones (urban, suburban, rural) for deaveraging of SWBT's rates would be maintained rather than disaggregated further to match USF disaggregation.

d. Rhythms' Line Sharing Arbitration

On December 9, 1999, the FCC released the *Line Sharing Order*, amending the FCC's unbundling rules to require ILECs to provide unbundled access to a new network element, the high frequency portion of the local loop, and encouraging state commissions to set interim rates for quick implementation of the Order. In early 2000, various parties petitioned to establish expedited Commission oversight concerning line sharing.⁹⁶ An

⁹⁴ *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 at ¶12, FCC 99-238 (rel. Nov. 5, 1999) (*UNE Remand Order*).

⁹⁵ *Proceeding on Cost Issues Severed from P.U.C. Docket No. 24542*, Docket No. 25834 (May 1, 2002).

⁹⁶ *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 (April 26, 2000).

arbitration award was issued finding that SWBT is required to continue providing ILEC-owned splitters for purposes of line sharing, and that SWBT must provide access to “Project Pronto” functionality. On an interim basis, the cost for the high frequency portion of the loop was set at \$0, based on an assumption that all of the ILEC’s costs for the loop were recovered via other charges; therefore, any amount above zero would amount to double recovery of costs.

Prior to a final Commission decision in this docket, as discussed above, the *USTA* decision was issued, vacating the FCC’s *Line Sharing Order*. Subsequently, SWBT made written commitments to continue to provide line sharing under its existing terms and conditions through July 2003 or until the FCC issues its Triennial Review, whichever occurs first. Accordingly, the Commission abated the decision as to line sharing.

Because the *USTA* decision was issued before the Commission made its final decision on Docket No. 22469, the Commission voted to reopen the proceeding to more fully examine the unbundling of Project Pronto functionality in accordance with the guidance of the *USTA* standards.⁹⁷ The Commission determined that it would need to conduct a full “necessary” and “impair” analysis, giving consideration to the standards outlined by the court in *USTA*. However, after taking into account the amount of time needed to fully address this evolving legal issue and the fact that the FCC’s pending Triennial Review may dispose of certain questions regarding line-sharing, the Commission chose instead to abate this proceeding. Upon issuance of the Triennial Review, this docket is expected to be reopened.

2. SWBT Performance Measures

In the *2001 Scope Report*, the Commission concluded that “competitive telecommunications providers now have fair access to networks to provide local exchange service in Texas.”⁹⁸ This statement was made on the heels of SWBT’s Section 271 approval and its subsequent entry into the interLATA long-distance market.

As detailed in Chapter 2 of the *2001 Scope Report*, after a lengthy proceeding at the Commission and an extensive application to the FCC, on June 30, 2000, the FCC released its order determining that SWBT had satisfied the 14-point checklist in Section 271 of the FTA, thereby allowing SWBT to enter the interLATA long-distance market. In its Section 271 application, SWBT relied upon the T2A to establish that it had met the 14-point checklist. The T2A is a Commission-approved interconnection agreement⁹⁹ that, together with SWBT’s collocation tariff, contains the commitments made by SWBT during the Section 271 proceeding. It is effective until October 13, 2003.

The T2A provides a comprehensive set of performance measures (PMs) and a performance remedy plan; the performance measures and performance remedy plan are

⁹⁷ *P.U.C. Proceeding for Resolution of Certain Issues Severed From P.U.C. Docket No. 22469*, Docket No. 26635. (pending).

⁹⁸ 2001 Scope of Competition Report at 7.

⁹⁹ The T2A was approved by the Commission on October 13, 1999 in Order No. 55 in Project No. 16251. The Commission issued two other orders addressing the T2A, Orders No. 50 and 53.

contained in Attachment 17 to the T2A. The Plan, through the PMs, is designed to measure the wholesale performance of SWBT and compare that wholesale performance to SWBT's retail performance to determine whether SWBT is providing wholesale performance at parity with the performance it provides to itself, its retail customers and/or its affiliates, or at a benchmark level that provides CLECs with a meaningful opportunity to compete.¹⁰⁰ Because the performance remedy plan is part of the T2A, it is scheduled to expire on October 13, 2003.

The Plan sets forth the details for SWBT's payment of liquidated damages to the CLECs (Tier 1 payments) and SWBT's payment of penalties to the State (Tier 2 payments) for performance that does not meet the necessary standards.¹⁰¹ Various measures have different levels of Tier 1 and/or Tier 2 classification (high, medium, or low) depending on the severity of the measure's effect on competition and/or customer satisfaction. Tier 1 payments are intended to compensate the CLECs for below-par performance that is customer affecting, thereby impairing the CLECs' ability to compete. Tier 2 payments are intended to compensate the citizens of this State for substandard performance that inhibits competition.¹⁰² In establishing Tier 1 and 2 payments, the Commission intended to ensure that the payments made because of subpar performance to the CLECs were not simply included within the cost of doing business for SWBT. The Plan is designed to be self-executing. SWBT provides the Commission and the CLECs with monthly data for each measure, calculates its payments, and remits those amounts to the appropriate parties.

As a part of the ongoing management of SWBT's post-Section 271 performance, the Commission conducts periodic reviews of the effectiveness of the PMs and the Plan. These reviews are intended to be an opportunity for SWBT, the CLECs and the Commission to reevaluate the PMs and determine whether existing measures continue to be necessary and whether new measures should be added or modified.

At its inception, the T2A contained 131 PMs with multiple subparts or disaggregations. After completing the third review on October 23, 2002, the Commission approved the deletion of 19 PMs and the addition of three new PMs, so that the Plan now contains 106 PMs with multiple subparts or disaggregations.¹⁰³ Overall, many of the original PMs have been deleted in part or in whole and many PMs have been added to reflect the changing needs of competitors and customers.

¹⁰⁰ Pursuant to 47 U.S.C. §251 and incorporated into the market-opening conditions in 47 U.S.C. §271, a BOC must offer interconnection and access to network elements on a nondiscriminatory basis.

¹⁰¹ For various reasons, some measures are diagnostic and result in no penalties.

¹⁰² 2001 SCOPE OF COMPETITION REPORT, at 11, (The goal of Tier 2 is to incent parity performance and to disincent anti-competitive behavior; that is, to make the cost of non-compliance more than the 'cost of doing business.)

¹⁰³ *Section 271 Compliance Monitoring of Southwestern Bell Tele. Co.*, Project No. 20400, Order No. 13 Approving Modifications to Performance Remedy Plan and Performance Measurements (July 19, 2000), Order No. 33 Approving Modifications to Performance Remedy Plan and Performance Measurements (June 1, 2001), Order No. 45 Approving Modifications to Performance Remedy Plan and Performance Measurements (Oct. 17, 2002).

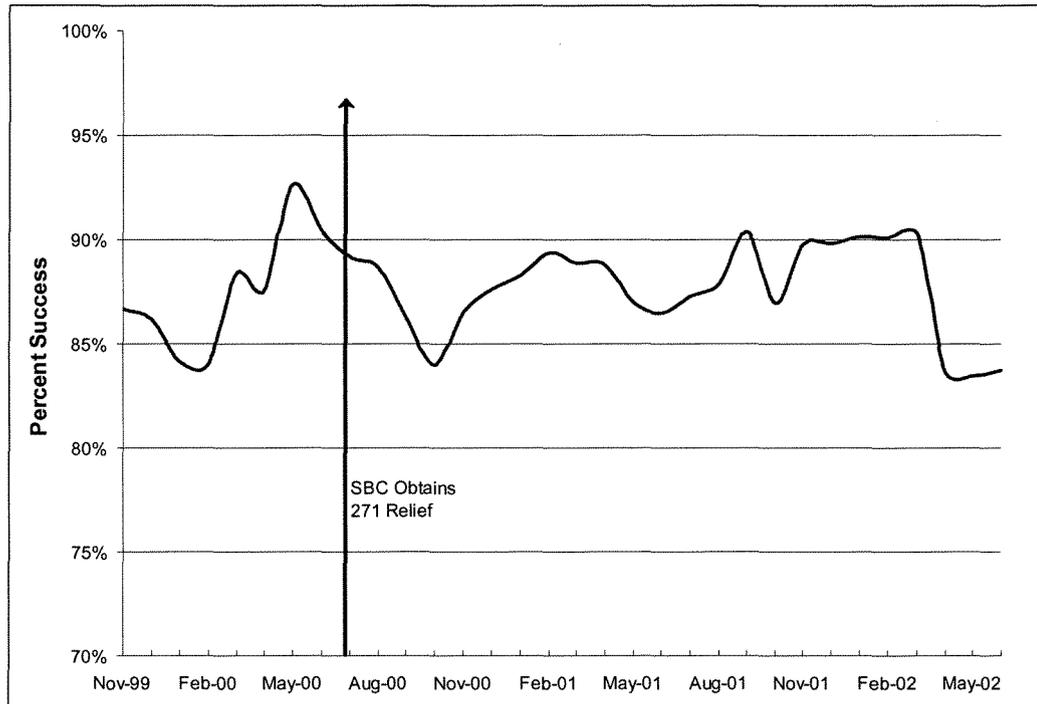
After working through the intensive process of three PM reviews, and seeing the results through the implementation of new measures and the resolution of collateral issues, the Commission believes the current review process has been an effective tool to provide the flexibility necessary to ensure that the PMs capture relevant and useful data and that the Plan continues to operate as intended.

a. Percentage of Performance Measures Met

The PMs measure several different areas relating to SWBT's provisioning of wholesale service¹⁰⁴ to CLECs versus its provisioning of service to its affiliates and or to itself. As indicated above, the total number of PMs and submeasures or disaggregations fluctuates with the Commission's PM reviews. To get a snapshot of SWBT's performance, this subsection examines the percentage of PMs that SWBT has met over time.

During the Section 271 process, SWBT and the Commission signed a Memorandum of Understanding on April 29, 1999, stating a goal of 90% of measures met two out of three consecutive months. Figure 26 illustrates SWBT's overall percentage of PMs met for each month since the inception of the Plan.

¹⁰⁴ Wholesale service includes Operation Support Systems (OSS) elements applicable to pre-ordering, ordering, and billing; provisioning and maintenance; trunking; 911; collocation; and coordinated conversions.

Figure 26 — SWBT Success Ratio for Performance Measures in Texas

SOURCE: SWBT Monthly Hit or Miss Reports (HOMR), provided to Texas PUC Staff upon request.

From November 1999 to June 2002, SWBT's performance has been above the 90% goal six months out of 31 months. A further review of this data indicates that SWBT's performance has generally been in the 86%-89% range with a high of 92.6% in May 2000 and a low of 83.4 % in May 2002. It should be noted that during July 2000, the first month after SWBT obtained Section 271 approval, SWBT's performance slipped below 90% and continued to decline until November 2000. During this time, SWBT was implementing 20 new measures ordered by the Commission during the first PM review.¹⁰⁵ Once these measures were in place, and SWBT began collecting data and making that data available for review to affected CLECs and the Commission, as well as making those measures subject to damages and penalties, SWBT's performance improved.

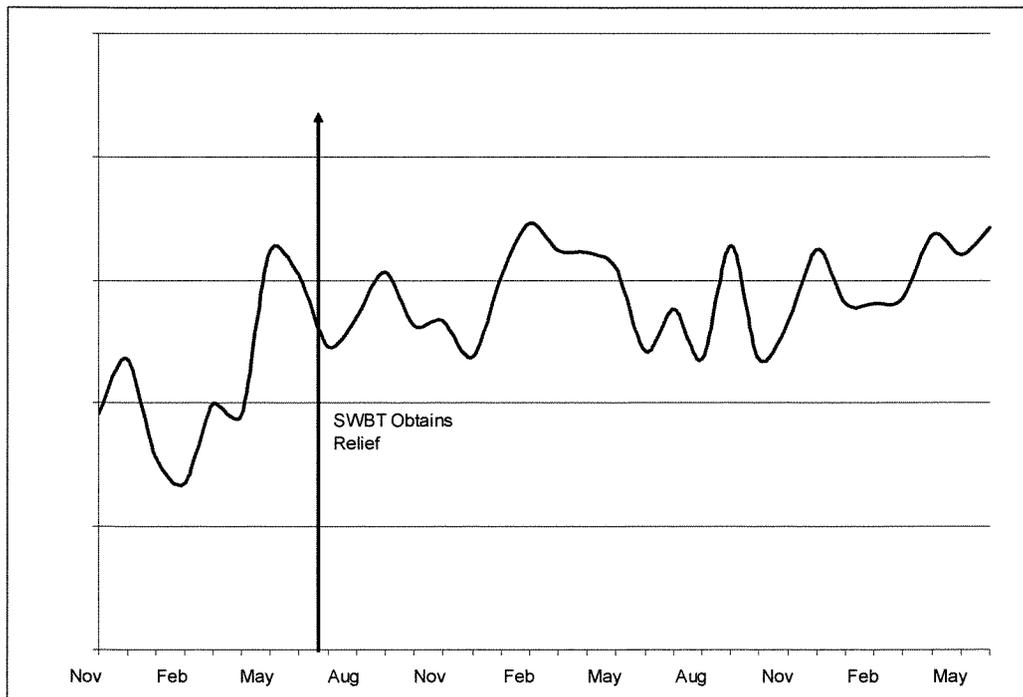
The decline in performance shown for the period of April through June 2002 was addressed in the most recent PM review completed by the Commission in October 2002. At the conclusion of the PM review, the Commission ordered modifications to the Performance Remedy Plan, as well as the PMs, to address this decline in performance.

¹⁰⁵ Project No. 20400, *supra* note 103, Order No. 13 Approving Modifications to Performance Remedy Plan and Performance Measurements (July 19, 2000).

The modifications included changes to the calculation of liquidated damages intended to encourage SWBT to improve wholesale performance.¹⁰⁶

As discussed above, the various PMs are classified as diagnostic or Tier 1 (customer affecting) and/or Tier 2 (competition affecting). Within the Tier 1 and Tier 2 designations, the various PMs, or even disaggregations among the PMs, are weighted, high, medium, or low. Figure 27 indicates the performance delivered by SWBT to CLECs for Tier 2 PMs that are designated “high” measurements, and are considered to be most competition affecting.

Figure 27 — Percentage of Performance Measurements Met – Tier 2



SOURCE: SWBT Monthly Hit or Miss Reports (HOMR) , provided to Texas PUC Staff upon request.

Figure 27 illustrates that the percentage of compliance for Tier 2 measurements is close to, or higher than, the 86.5% level SWBT had achieved in June 2000, the month of its Section 271 application approval at the FCC.

b. Damages and Penalties

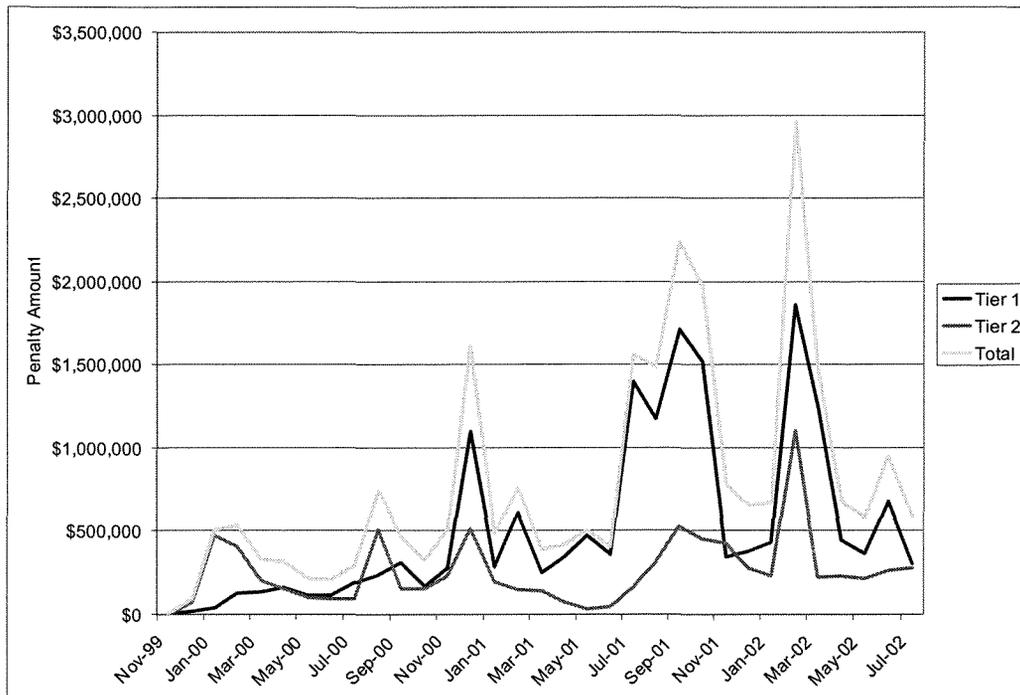
The Plan dictates that Tier 1 and Tier 2 payments be calculated according to a scheme that places a greater dollar amount on PMs or disaggregations designated “high” than on those designated “low.” The severity of the “miss” and the volume of the transactions measured by a particular PM are also taken into account by the Plan and are another basis for the calculation of payments. The severity and volume, and the

¹⁰⁶ Project No. 20400, *supra note 103*, Order No. 45 Approving Modifications to Performance Remedy Plan and Performance Measurements and Order No. 46 (Supplement to Order No. 45).

designation of high, medium, or low illustrate the weight and the relative importance of each PM or disaggregation. Therefore, an examination of the actual Tier 1 and Tier 2 payments helps to further focus on SWBT's performance and the impacts on customers and competition in this State.

Figure 28 includes all performance measures and summarizes all payments paid by SWBT for performance violations since November 1999, the first month that payments were made. The total amount of Tier 1 and Tier 2 payments made through July 2002 by SWBT is \$25,803,788. It should be noted that various measures include caps on payments, and some dollar amounts would be significantly higher in some months were it not for these caps.

Figure 28 — SWBT Texas 271 Tier 1 and Tier 2 Payments — November, 1999 through July, 2002



SOURCE: SBC

Significant spikes in payments occurred in December 2000, July through October 2001, and February 2002. These spikes in December 2000 and July-October 2001 are attributable to SWBT missing a higher than average number of PMs. Additionally, among the PMs that were missed was a higher-than-average number of high-volume transaction PMs and high per-dollar-amount PMs. The source of the spike in February 2002 was the payment by SWBT of \$900,000. As instructed by the Commission, SWBT restated and recalculated the Tier 2 payment amount for PM 13 and certain maintenance related loop maintenance operations system (LMOS) PMs and made one lump sum

payment to cover the difference between what had been paid and what was owed pursuant to the recalculation.¹⁰⁷ Therefore, it seems that the spike in February actually included payments for many months of subpar performance. Below is a further discussion of the independent audit of PM 13 and LMOS issues.

A further, more granular, review of the damage and penalty payments focuses on the specific PMs that demand the greatest dollar amounts. For the period of June 2000 through December 2001, SWBT remitted Tier 1 and/or Tier 2 payments on 76 performance measures.¹⁰⁸ The total amounts paid for that period ranges from a high of \$3,224,779 (PM 13) to a low of \$25 (PMs 63 and 76). The average total amount for this time period is \$203,295.¹⁰⁹

Many of the highest dollar amount PMs are such because the penalty amounts are calculated on a volume basis versus a per-measure basis. During the periodic PM reviews, the Commission is able to focus on the high dollar amount PMs and determine the root causes for the payments. For instance, the PM that has demanded the greatest amount of SWBT resources is PM 13, Order Process: Percent Flow Through. During the second PM review, it was revealed that SWBT had not implemented the business rule for PM 13 consistent with the Commission's order. As a result, consistent with the T2A, an audit of SWBT's flow-through processes, as well as its calculation of PM 13 data, was initiated.¹¹⁰ The Audit Report was issued in November 2002. Following the review of the Final Audit Report, the Commission will determine appropriate actions to address SWBT's performance.

B. Commission Activities under PURA

This section begins with an assessment of House Bill (H.B.) 2128 and Senate Bill (S.B.) 560, and leads into an analysis of the tools that assist the Commission in the creation of a level playing field in an ever-changing competitive market. This includes an analysis of ILEC pricing flexibility and earnings review. This is followed by a discussion of the Texas Universal Service Fund (TUSF). Other key issues discussed include an update on regulatory developments in Texas on access charges and advanced services, customer protection initiatives, municipal rights-of-way (ROW) franchise rates, building access, payphones, area codes, border issues, automatic dialers, 211, and 911 activities.

¹⁰⁷ Project No. 20400, *supra note 103*, Order No. 33 Approving Modifications to Performance Remedy Plan and Performance Measurements, Attachment at 32 (June 1, 2001). *See also* Order No. 39 Denying in Part and Setting Aside in Part Southwestern Bell Telephone Company's Motion for Rehearing and Clarification of Order No. 33 and Approving Modifications to Performance Remedy Plan (Dec. 21, 2001).

¹⁰⁸ This total does not include disaggregations or submeasures. For instance, if SWBT paid penalties on disaggregations of PM 13, such as PM 13-01, PM 13-02, and PM 13-03, it is included in the total as 1 measure.

¹⁰⁹ See Appendix O for further discussion and details.

¹¹⁰ Project No. 20400, *supra note 103*, Order No. 36 Approving Proposed Texas Public Utility Commission Audit Plan to Address PM 13 Flow-Through and LMOS Issues (Sept. 5, 2001).

1. Assessment of the H.B. 2128 and S.B. 560 Regulatory Framework

During the 1995 and the 1999 sessions, the Texas Legislature enacted major changes to the regulatory structure governing incumbent carriers in anticipation of increased competition in Texas's local telecommunications marketplace.

a. H.B. 2128: 1995 Legislative Session

During the 1995 Legislative Session, the Legislature established Chapters 58 and 59 of PURA, which allowed incumbent telecommunications providers the option of electing into a reduced regulatory framework. In return, the electing companies were required to make certain infrastructure investments (primarily providing digital switching) and to establish and fund the Telecommunications Infrastructure Fund. The reduced regulatory framework provided electing companies with immunity from rate regulation, established a price cap for basic network service, and provided for additional flexibility to adjust the prices of other telecommunications services.

b. S.B. 560: 1999 Legislative Session

During the 1999 Legislative Session, Chapters 58 and 59 of PURA were amended to allow electing ILECs the flexibility of modifying certain prices within ten days of notice to the Commission. The amendments also replaced the previous process that required advanced Commission approval of price changes with an informational notice filing process that required notice of the price change instead of Commission approval.

ILECs sought the amendment in order to respond to competitive challenges without having to go through the extended process reserved for tariff revisions. Sections 58.063 and 59.031 of PURA, and P.U.C SUBST. R. 26.226, 26.227, and 26.229 allow Chapter 58 and Chapter 59 "electing ILECs" to exercise pricing flexibility for basic network services,¹¹¹ including the packaging of basic network services with any other regulated or unregulated service or any service of an affiliate. Chapter 52 ILECs can also exercise pricing flexibility. Ten days after filing an informational notice with the Commission, the ILEC may exercise this ability, provided that the price is set above the lesser of either the long run incremental cost (LRIC) of the service or bundle of services, or the tariffed price of the basic service or bundle of basic services plus the LRIC of any nonbasic service.

Currently SWBT, Verizon, Valor, Sprint/United, and Sprint/CenTel are electing Chapter 58 companies. Sugar Land, TXU Communications, Fort Bend Telephone,

¹¹¹ TX. UTIL. CODE §51.001 (Vernon 1998, Supp. 2003). Basic Network Services include: (1) flat-rate residential local exchange telephone service, including primary directory listings and the receipt of a directory and any applicable mileage or zone charges; (2) residential tone dialing service; (3) lifeline and tel-assistance service; (4) service connection for basic residential services; (5) direct inward dialing service for basic residential services; (6) private pay telephone access service; (7) call trap and trace service; (8) access for all residential and business end users to 911 service provided by a local authority and access to dual-party relay service; (9) mandatory residential extended area service arrangements; (10) mandatory residential extended metropolitan service or other mandatory residential toll free calling arrangements; and (11) residential call waiting service.

Kerrville Telephone, CenturyTel of Lake Dallas, CenturyTel of Port Aransas, CenturyTel of San Marcos, Texas ALLTEL, and Big Bend Telephone Cooperative are electing Chapter 59 companies.

c. Pricing Flexibility

As mentioned earlier in this chapter, informational filings provide notice, instead of approval, to the Commission regarding a Chapter 58 or 59 company's intent to change pricing. These have encompassed promotions (*e.g.*, waiver of installation charges), packages (basic service with a combination of vertical services), increases in late payment fees, and, by far the greatest number of filings, changes to vertical service rates. Approximately 74% of Texans have telephone service through SWBT or Verizon, and could be affected by their informational filings. For this reason, the filings of SWBT and Verizon are representative of the general trend in informational notice filings.

i. SWBT's Use of Pricing Flexibility

Since September 1, 1999, SWBT has submitted over 230 informational filings.¹¹² Table 12 compares a list of common and popular SWBT vertical services rate changes before and after the availability of informational filings.¹¹³

Table 12 — Sample of Changes in SWBT's Pricing for Vertical Services in Texas

Service	Texas Residential Retail Price		
	Before September 1999	As of December 2002	% Increase
Three-Way Calling	\$2.10 for first and \$1.40 for each additional	\$5.00 for first and	138% for first and 186% for each additional
Call Forwarding		\$4.00 for each	
Speed Calling 8		additional	
Anonymous call rejection	\$1.00	\$1.50 for first and \$0.75 for each additional	At least 50%
Auto Redial	\$2.00	\$4.00	100%
Call Waiting	\$2.80	\$2.80	No change
Call Waiting ID	\$3.00	\$4.50	50%
Caller ID Name	\$4.95	\$7.00	41%
Caller ID Number	\$4.95	\$7.00	41%
Caller ID Name and Number	\$6.50	\$9.50	46%
Call Blocker	\$2.00	\$5.00	150%
Priority Call	\$2.50	\$2.00	-20%
Personalized Ring	\$4.00	\$5.00	25%
Call Return	\$0.50 each use (\$4 cap)	\$0.95 each use (no cap)	At least 90%
Three-Way Calling	\$0.75 each use	\$0.95 each use	27%
Call Trace	\$8.00 each use	\$7.00 each use	-13%
Directory Assistance	\$0.30 each use	\$1.25 each use	317%
Rate for Nonpublished Numbers	\$1.10/month	\$2.95/month	168%
Call Completion	\$0.30 add'l each use	\$0.05 add'l each use	-83%

SOURCE: Texas PUC filings

¹¹² As of October 1, 2002, 232 informational filings had been received from SWBT.

¹¹³ Note that many informational notice filings concern term changes for vertical services such as phasing out contracts for specified time periods.

ii. Verizon's Use of Pricing Flexibility

Similarly, though Verizon does not face the number of competitors in its territories that SWBT does and has not sought changes to the exact services or combinations as SWBT, there is still a pattern evident from Verizon's informational notice filings. Again, Verizon has used informational filings to create packaged services and to affect expeditious rate increases for popular services. Verizon filed approximately 136 informational notice applications between September 1999 and September 2002. Table 13 provides a similar representative summary of common and popular vertical services for Verizon.

Table 13 — Sample of Changes in Pricing in Verizon's Vertical Services in Texas

Verizon Service	Texas Residential Retail Price		
	Before September 1999	As of December 2002	% Increase
Three-Way Calling – Per Event	\$0.75	\$0.95	27%
Automatic Busy Redial – Per Event			
Automatic Call Return – Per Event			
Three-Way Calling - Monthly	\$2.70	\$4.00	48%
Automatic Call Return - Monthly	\$3.00	\$4.00	33%
Remote Call Forwarding - Monthly	\$14.50	\$17.00	17%
Caller ID Name and Number	\$6.50	\$7.75	19%
Caller ID Name and Number with Automatic Call Block	\$6.75	\$7.95	18%
Operator Verification – Per Event	\$1.35	\$2.50	85%
Operator Interrupt – Per Event	\$2.20	\$5.00	120%
Local Directory Assistance – Per Event	\$0.25	\$1.25	400%
National Directory Assistance – Per Event	Not Available	\$1.25	New Service & Charge
Additional Directory Listing – Per Listing	\$.55	\$1.10	100%
Return Check Charge – Per Event	\$10.00	\$25.00	150%
Rate for Nonpublished Number	\$1.65/month	\$1.65/month	No change

SOURCE: Texas PUC filings

The sample of changes in pricing of SWBT's and Verizon's vertical services provides assistance in understanding the effect that these filings have had upon ratepayers and competition. The bulk of these have been for the introduction of service packages (primarily business), and price changes to vertical services. Many of the more popular or frequently used vertical services have seen significant increases in price.

d. Rate Group Reclassification

In December 1997, SWBT filed an application to reclassify a number of telephone exchanges into different rate groups pursuant to Section 58.058 of PURA, which would have raised local rates in several cities, including Austin and Dallas. The Commission approved in part and denied in part SWBT's request.¹¹⁴

Specifically, the Commission rejected reclassification of certain exchanges, leaving those exchanges in their current rate group.¹¹⁵ SWBT appealed the Commission's order and in June 2002, the Texas Supreme Court issued an opinion reversing and remanding the Commission's order.¹¹⁶ In August 2002, SWBT filed a revised tariff with the Commission to institute the rate group reclassification for those exchanges that had been previously disallowed.¹¹⁷ For example, the monthly rate increased from \$10.40 to \$11.05 in Dallas, \$9.35 to \$9.85 in Austin, and \$8.15 to \$8.35 in Sweetwater. Those revised tariffs were approved by the Commission in an order entered on October 25, 2002.¹¹⁸ SWBT recently filed an application to levy a surcharge to collect the amounts SWBT would have received between December 1997 and October 2002 if the Commission had initially allowed the rate group reclassification proposed by SWBT.¹¹⁹ SWBT's proposed surcharge, including interest, totals \$142.7 million. SWBT's proposal has been contested by several parties and is currently pending before the Commission.

¹¹⁴ *Application of Southwestern Bell Telephone for Rate Group Reclassification*, Docket No. 18509, Final Order (Jan. 28, 1999).

¹¹⁵ *Application of Southwestern Bell Telephone Company for Rate Group Reclassification Pursuant to Section 58.058 of the Texas Utility Code*, Docket No 18509. Order at 3-4 (Jan. 27, 1999). (The Commission has used rate reclassification as a rate-design tool, implemented after establishing the telephone company's revenue requirement. The Commission priced rate bands by value of service rather than by cost. Value of service assumes availability of the access line to the public switched network. Because a customer in a larger exchange is able to call or receive calls from a greater number of lines at no cost than can a customer in a smaller exchange, the larger exchange has more value and should be priced higher.); and Docket No. 18509, Order Granting Appeal of Order No. 7 (May 7, 1998) (In addition, in its Order Granting Appeal of Order No. 7, the Commission concluded that SWBT was not entitled to benefit from pre-1995 access-line growth and should not consider any pre-1995 growth for purposes of this rate-group reclassification. In this case, SWBT initially requested reclassification of 52 exchanges; after the Commission's order eliminating growth from November 29, 1990, to September 1, 1995, the number of exchanges was reduced to 25.)

¹¹⁶ *Cities of Austin, Fort Worth and Hereford v. Southwestern Bell Telephone Company*, 2002 WL 1205185; 45 Tex. Sup. Ct. J. 767 (June 6, 2002), ___ SW3d ___ (Tex. 2002 unpublished).

¹¹⁷ *Compliance Filing of Southwestern Bell Telephone Company Resulting From District Court Remand of Docket No. 18509*, Docket No. 26516 (Oct. 25, 2002).

¹¹⁸ Docket No. 26516, Order on Remand (October 25, 2002).

¹¹⁹ *Southwestern Bell Telephone Company's Tariff Filing to Establish Rate Group Reclassification Surcharge Resulting From District Court Remand of PUC's Final Order in Docket No. 18509*, Docket No. 26719 (pending).

On October 26, 2001, Verizon filed two applications to reclassify rate bands for its exchanges.¹²⁰ On April 22, 2002, however, the parties entered a Unanimous Stipulation and Settlement Agreement that resolved all issues for all but two exchanges, Plano and Irving. In that settlement, Verizon agreed to withdraw its request to reclassify the exchanges of Reno, Falfurrias, and Grand Saline. The Cities of Plano and Irving contested the reclassification of the two remaining exchanges. The contested issue related to whether the exchanges should be reclassified to Rate Group 5, because although Verizons' tariff contained that rate group, it did not have a corresponding rate. Ultimately, the Commission determined that both the Plano and the Irving exchanges should be classified in Rate Group 4 because that was the highest rate band for which Verizon has a Commission-approved rate. The Commission further held that for Verizon to reclassify the exchange to Rate Group 5, Verizon must first apply for a tariff rate for Rate Group 5 pursuant to PURA § 58.057.

The new rates for both SWBT and Verizon resulting from the above-referenced proceedings represented an increase for customers in exchanges, which were moved to a higher rate-group classification. Higher rate-group classifications represent areas with higher populations. With the "value of service" retail pricing in Texas, phone rates are set higher for areas with larger populations. For detail on the exchanges reclassified, and the amount of rate increase, see Appendix P.

e. Earnings Review

By May 15 each year, ILECs file with the Commission earnings reports on Commission-prescribed forms that contain the company's pertinent financial information. The Commission Staff prepares an analysis comparing a reasonable rate-of-return (ROR) for each company with the company's actual ROR.¹²¹

That difference results in the excess earnings analysis, as shown below in Table 14 for year-end 2000 and 2001. Staff also develops a range (High to Low) for each company's excess earnings, as well as calculates the average excess earnings per line. As discussed above, certain carriers that have elected into PURA Chapters 58 and 59 are immune from a rate review by the Commission and are not subject to having their rates reduced when earnings exceed a regulated rate-of-return.

¹²⁰ *Application of Verizon Southwest TXC to Reclassify Exchanges to the Proper Rate Bands*, Docket No. 24917 (October 26, 2001).

¹²¹ The *reasonable* rate of return is the Commission Staff's current estimate of what would be the company's appropriate rate of return given prevailing market conditions. This estimate is analogous to the *allowed* rate of return granted by the commission in a rate case as that part of a company's cost of service that provides a return to the company's providers of debt and equity capital. The rate of return is a weighted-average rate — i.e., it is a composite rate that reflects the cost of each type of capital weighted by that capital component's proportion of the total capital structure. For a company's cost-of-service determination in a rate case, the allowed (i.e., reasonable) rate of return is applied to the company's rate base (invested capital) to prospectively calculate the amount of return dollars that should be included in the cost of service. In contrast, the *earned* rate of return refers to the accounting rate of return that a company actually earns on its books. It is an historical calculation that reflects the amount of return dollars — expressed as a percentage of invested capital — that a company has earned over and above the amount of operating expenses.

**Table 14 — Review of Earnings Reports for FY Ending 2000 and 2001
for Investor-Owned Telephone Utilities and Cooperatives**

REVIEW OF EARNINGS REPORTS SUMMARY OF STAFF FINDINGS INVESTOR-OWNED TELEPHONE UTILITIES										
Company	Access Lines		Excess Earnings - High ROR		Excess Earnings - Low ROR		Average Excess Earnings/Access Line		PURA Election	
	2000	2001	2000	2001	2000	2001	2000	2001	2000	2001
Alenco	1,967	2,030	1,053,810	1,326,345	1,098,330	1,365,774	626	663		
Big Bend	5,695	5,691	(495,167)	(1,441,216)	(307,203)	(1,229,677)	(135)	(235)		Chapter 59
Blossom	1,469	1,530	(382,789)	(400,732)	(373,322)	(391,274)	(260)	(259)		
Border to Border	82	78	59,005	(92,245)	65,248	(85,715)	(125)	(1,141)		
Brazoria	6,665	6,708	516,805	818,502	628,388	943,206	118	131		
Brazos Telecom	4,560	4,639	212,104	130,429	233,263	150,193	42	30		
Cameron	1,308	1,316	(132,202)	(65,548)	(117,928)	(47,841)	(63)	(43)		
Century Lake Dallas	12,623	12,987	1,878,419	2,781,701	1,957,418	2,882,234	192	218		Chapter 59
Century Port Aransas	4,997	5,140	503,875	268,030	524,252	302,294	83	55		Chapter 59
Century San Marcos	33,765	33,324	6,085,722	5,504,291	6,286,378	5,736,851	178	169	Chapter 59	Chapter 59
Central Telephone	238,634	235,283	2,309,373	11,494,186	3,749,936	13,100,999	35	52	Chapter 59	Chapter 58
Comanche County	5,688	5,685	(1,050,978)	(655,757)	(1,028,142)	(632,077)	(146)	(113)		
Community	1,908	1,843	(97,257)	(198,017)	(83,432)	(185,762)	(71)	(104)		
Electra	2,032	1,824	(539,242)	(184,835)	(514,367)	(163,063)	(167)	(95)		
Fort Bend	44,390	47,990	(5,801,806)	(6,517,906)	(5,513,441)	(6,146,050)	(131)	(132)		Chapter 59
GTE (Verizon)	2,604,281	2,630,240	(95,346,251)	(809,176)	(83,829,748)	9,840,894	(14)	2	Chapter 58	Chapter 58
Ganado	3,158	3,182	(493,690)	27,843	(422,687)	105,216	(50)	21		
Industry	2,225	2,346	(579,205)	(353,341)	(545,662)	(318,948)	(194)	(143)		
Kerrville	26,194	26,849	1,782,059	1,925,035	2,020,971	2,183,535	80	77		Chapter 59
La Ward	1,267	1,290	(2,521)	(66,073)	16,729	(45,069)	(11)	(43)		
Lake Livingston	1,167	1,163	57,132	28,423	72,595	49,211	52	33		
Lipan	1,469	1,543	138,163	166,768	155,450	185,197	116	114		
Livingston	7,879	7,947	439,840	98,809	480,741	148,130	40	16		
Muenster/Nortex	4,171	4,307	894,137	1,247,145	940,932	1,298,022	268	295		
North Texas	953	959	(260,247)	(228,272)	(252,946)	(221,538)	(249)	(235)		
Riviera	1,265	1,298	(376,938)	(283,737)	(347,126)	(252,164)	(237)	(206)		
Southwest Texas	4,475	4,562	917,904	921,780	980,329	998,748	221	210		
Southwestern Bell	10,422,876	10,121,985	820,708,143	429,212,020	862,442,793	477,238,501	64	45	Chapter 58	Chapter 58
Sugarland	83,296	82,062	10,870,034	13,861,367	11,323,068	14,338,362	154	172	Chapter 59	Chapter 59
Tatum	1,134	1,148	(36,676)	158,916	(23,749)	170,817	65	144		
Texas ALLTELL	31,978	32,599	1,136,913	1,167,510	1,406,472	1,446,179	45	40		Chapter 59
TXU Communications	118,732	120,829	8,256,034	10,296,625	9,167,291	11,203,842	86	89	Chapter 59	Chapter 59
United	170,208	171,385	4,623,957	11,799,382	5,947,581	13,215,432	56	73	Chapter 59	Chapter 58
Valor	300,899	308,853	(39,000,011)	9,751,097	(36,648,729)	11,378,911	(42)	34		Chapter 58
West Plains	5,951	5,342	362,459	334,944	384,192	354,639	62	65		

SOURCE: PUC Earnings Reports, FY 2000 and 2001

REVIEW OF EARNINGS REPORTS SUMMARY OF STAFF FINDINGS TELEPHONE COOPERATIVES								
Company	Access Lines		Operating Margin		Equity/Capitalization		Intrastate ROR	
	2000	2001	2000	2001	2000	2001	2000	2001
Brazos Telephone Cooperative, Inc.	1,291	1,323	12.93%	17.76%	72.53%	76.10%	23.85%	30.10%
Cap Rock Telephone Cooperative	4,973	4,945	25.70%	24.26%	75.93%	78.73%	18.71%	18.91%
Central Texas Telephone Cooperative	7,543	7,821	23.68%	22.90%	58.71%	61.03%	7.85%	5.86%
Coleman County Telephone Coop.	2,295	2,218	23.63%	35.99%	49.09%	46.87%	5.85%	15.78%
Cumby Telephone Cooperative, Inc.	944	972	1.91%	11.08%	100.00%	100.00%	16.23%	10.78%
Dell Telephone Cooperative, Inc.	714	804	16.58%	24.70%	38.03%	39.85%	4.64%	7.72%
Eastex Telephone Cooperative	31,314	33,418	18.30%	14.37%	84.87%	86.14%	9.89%	6.02%
Etex Telephone Cooperative, Inc.	15,814	972	22.68%	33.32%	67.91%	65.93%	14.71%	1.19%
E.N.M.R. Telephone Cooperative	917	16,457	27.24%	19.18%	63.00%	70.94%	-6.83%	14.61%
Five Area Telephone Cooperative	1,474	1,444	24.06%	23.84%	84.31%	86.55%	15.41%	20.16%
Guadalupe Valley Telephone Coop.	38,436	40,032	30.02%	28.90%	86.19%	89.31%	18.55%	17.32%
Hill Country Telephone Cooperative	16,291	16,839	24.31%	25.18%	85.99%	89.89%	15.26%	16.33%
Mid-Plains Rural Telephone Coop.	3,418	3,417	25.66%	18.85%	98.40%	98.68%	12.20%	11.21%
Peoples Telephone Cooperative, Inc.	13,036	13,626	20.27%	19.77%	49.41%	47.13%	9.75%	8.61%
Poka-Lambro Rural Telephone Coop.	3,855	3,562	16.33%	13.44%	36.06%	75.66%	-2.54%	-4.28%
Santa Rosa Telephone Cooperative	2,416	4,133	0.50%	8.10%	59.55%	48.09%	8.59%	-0.06%
South Plains Telephone Cooperative	5,488	5,573	17.91%	13.54%	93.09%	95.41%	13.52%	14.53%
SW Arkansas Telephone Coop.	576	591	11.11%	13.41%	56.08%	59.98%	2.31%	1.78%
Taylor Telephone Cooperative, Inc.	7,668	7,698	18.21%	21.29%	81.12%	85.92%	7.72%	12.91%
Valley Telephone Cooperative, Inc.	6,375	6,573	24.30%	30.03%	70.94%	73.12%	12.05%	14.64%
Wes-Tex Telephone Cooperative, Inc.	3,403	347	13.76%	11.91%	100.00%	99.50%	4.26%	0.51%
West Texas Rural Telephone Coop	2,114	2,120	8.40%	8.27%	65.49%	66.92%	8.23%	9.00%
XIT Rural Telephone Cooperative	1,385	1,586	25.51%	30.66%	56.56%	60.60%	9.85%	8.30%

SOURCE: PUC Earnings Reports, FY 2000 and 2001

As discussed in Chapter I, Chapters 58 and 59 of PURA allow incumbent telecommunications providers the option of electing into a reduced regulatory framework—including immunity from rate regulation, price caps for basic network service, and pricing flexibility for other services—in return for making certain infrastructure investments (primarily providing digital switching) and supporting the Telecommunications Infrastructure Fund.

2. Texas Universal Service Fund

The purpose of the Texas Universal Service Fund (TUSF), established by statute in 1987, is to implement a competitively neutral mechanism that enables all residents of the State to obtain basic telecommunications service needed to communicate with other residents, businesses, and governmental entities.

a. TUSF Programs

The size of the TUSF is based on program costs. The fund total was approximately \$613 million in fiscal year 2001. The cost to administer the TUSF in fiscal year 2001 was approximately \$1.5 million. Since the *1999 Scope Report*, the programs funded by the TUSF have not been significantly changed. However, in 2001, the Legislature passed H.B. 2156, which eliminated the Tel-Assistance program and established automatic enrollment procedures for the program's members into the Lifeline

program.¹²² In addition, in 2001, the Legislature passed H.B. 2388, which grants the Commission the authority to designate a telecommunications provider to provide voice telephone services to permanent residents or business premises outside the provider's certificated area.¹²³ The Commission will reimburse the designated telecommunications provider via TUSF support for providing the service.

The TUSF program, described in Chapter 56 of PURA, consists of the following major components:

- ***Texas High Cost Universal Service Plan (THCUSP)*** – provides financial assistance via TUSF support to eligible telecommunications providers (ETPs)¹²⁴ that serve high cost, rural areas of the State. The program seeks to ensure that all customers throughout the State have access to basic local telecommunications service at just, reasonable, and affordable rates.
- ***Small and Rural ILEC Universal Service Plan*** – establishes guidelines for financial assistance via TUSF support to ETPs that provide service in the study areas of small and rural ILECs within the State. The program seeks to ensure that all customers throughout the State have access to basic local telecommunications service at just, reasonable, and affordable rates.
- ***Relay Texas*** – establishes a Statewide telecommunications relay service to allow individuals that are hearing-impaired or speech-impaired to communicate via specialized telecommunications devices and operator translations.
- ***Lifeline*** – retail local service offering in which an ETP provides a discount of up to \$7.00 per monthly bill on its local service rates and waives the Federal Subscriber Line Charge (SLC) for qualifying low-income customers.
- ***Specialized Telecommunications Assistance Program*** – provides reimbursement via TUSF support to vendors and service providers that offer reduced rates for telecommunications equipment and services for hearing-impaired customers.
- ***Implementation of PURA § 56.025*** – provides reimbursement via TUSF support to ILECs serving fewer than five million access lines due to a reduction in the amount of the Commission's high cost assistance fund, a change in the federal universal service fund (FUSF), a change in the Commission's intraLATA dialing access policy, or other governmental agency action.
- ***USF Reimbursement for Certain intraLATA Services*** – provides reimbursement via TUSF support to ILECs that are not electing companies under PURA Chapters

¹²² Tex. H.B. 2156, 77th Leg., R.S., 1451 Tex. Gen. Laws 5160 (2001) Danburg, *relating to the Eligibility Process for Certain Utility Customer Discounts*. Under H.B. 2156, if an individual receives a greater benefit under the Tel-Assistance service program immediately before the effective date of the Act than would be received under the Lifeline program, the telecommunications provider would be required to continue to provide the higher benefit. The telecommunications provider is required to continue to provide that service until the person discontinues basic local service in the exchange in which service is being received.

¹²³ Tex. H.B. 2388, 77th Leg., R.S., 651 Tex. Gen. Laws 1217 (2001) Chisum, *relating to the Provision of Telecommunications Service to an Area not Included in a Certificated Service Area*.

¹²⁴ An ETP is a telecommunications provider designated by the Commission to receive support from the TUSF pursuant to P.U.C. SUBST. R. 26.417.

58 or 59 and provision intraLATA interexchange high capacity (1.544 Mbps) service at reduced rates for entities described under PURA § 58.253(a).

- ***Additional Financial Assistance (AFA)*** – provides additional financial assistance via TUSF support in addition to the TUSF reimbursement received under the THCUSP, Small and Rural ILEC Universal Service Plan, and implementation of PURA § 56.025 to ILECs serving high-cost, rural areas throughout the State. The program seeks to ensure that all customers throughout the State have access to basic local telecommunications services at reasonable rates.
- ***Service to Uncertificated Areas*** – provides financial assistance via TUSF support to ETPs that provide voice-grade services to premises that are not included within its certificated areas. The program seeks to enhance the availability of basic local telecommunications service throughout the State, especially in areas where service has not otherwise been provided.
- ***Administrative Costs*** – permits certain agencies, such as the Commission, the National Exchange Carrier Association (NECA), the Texas Department of Human Services (TDHS), and the Texas Department of Housing and Community Affairs (TDHCA) to recover their costs incurred in implementing the provisions of Chapter 56 of PURA.

The Texas High Cost Universal Service Plan (THCUSP) and the Small and Rural ILEC Universal Service Plan have by far the largest level of disbursements at approximately \$440.5 million and \$98.8 million respectively in 2001. After these two programs, the remainder of TUSF disbursements for all other programs combined, totals approximately \$30 million. The disbursements of the THCUSP grew by about \$55 million from 2000 to 2001, an increase of 12.5%. The disbursements for all of the programs are listed in Appendix Q.

b. TUSF Assessment

The TUSF is funded by a Statewide uniform charge or assessment rate payable by each telecommunications provider, *i.e.*, local, long-distance, and wireless carrier that has access to the Texas customer base. TUSF contributions are determined by multiplying the assessment rate by a telecommunications provider's monthly taxable telecommunications receipts¹²⁵ reported to the Texas Comptroller of Public Accounts.

¹²⁵ TEX. TAX CODE ANN. §151.0103 (Westlaw 2002) –

Taxable telecommunications services include electronic or electrical transmission, conveyance, routing, or reception of sounds, signals, data, or information utilizing wires, cable, radio waves, microwaves, satellites, fiber optics, or any other method now in existence or that may be devised, including but not limited to long-distance telephone service. Taxable telecommunications services do not include: (1) the storage of data or information for subsequent retrieval or the processing, or reception and processing, of data or information intended to change its form or content; (2) the sale or use of a telephone prepaid calling card; or (3) Internet access service.

As of January 1, 2001, the assessment rate is 3.6 percent. Beginning September 1, 2001, pay telephone services became exempt from the TUSF assessment.¹²⁶

c. TUSF Administration

The Commission is the official governing agency of the TUSF; however, it has delegated the ministerial functions of administering the TUSF to another entity through a contractual agreement. In accordance with P.U.C. SUBST. R. 26.420(c)(4), the Commission recently initiated a project to select a TUSF administrator via a competitive bidding process.¹²⁷ The Commission received proposals from bidders that were evaluated in light of factors such as technical capability, competence, and resources needed to perform the duties of the TUSF administrator, which are set forth in P.U.C. SUBST. R. 26.420(d)(2). On August 16, 2002, the Commission selected the NECA as the TUSF administrator. NECA has been the TUSF administrator since January 1, 1999. The Commission has the authority to monitor and audit the TUSF administrator's activities related to the operation and administration of TUSF. In addition, the Commission has the authority to initiate annual performance audits and financial audits of the TUSF at its discretion.

¹²⁶ Tex. H.B. 1351, 77th Leg. R.S., 404 Tex. Gen. Laws 738 (2001) Brimer and Armbrister, *relating to the Funding and Operation of the Universal Service Fund*.

¹²⁷ *Request for Proposals for Provider of Administrative Services for the Texas Universal Service Fund*, Project No. 26178 (July 1, 2002).

d. TUSF Revenue

Table 15 shows the amounts of TUSF revenue as reported by the companies in the Commission's Earnings Reports for the fiscal years ending in 2000 and 2001. Table 15 represents those companies receiving over \$1 million in TUSF revenues. A complete list of all companies receiving TUSF can be found in Appendix Q. The two top recipients of TUSF funds for FY 2000 and 2001 were Southwestern Bell Telephone Company and GTE Southwest Inc. d/b/a Verizon Southwest. Southwestern Bell Telephone Company received \$150,271,965 in FY 2000 and \$135,731,792 in FY 2001. GTE Southwest Inc. d/b/a Verizon Southwest received \$166,090,944 in FY 2000 and \$108,391,493 in FY 2001.

Table 15 — TUSF Revenues to Companies, FY 2000 and FY 2001

Company	2000	2001
Southwestern Bell Telephone Company	150,271,965	135,731,792
GTE Southwest Inc. d/b/a Verizon Southwest	166,090,944	108,391,493
Valor Telecommunications of Texas	33,641,489	101,410,317
Central Telephone Co. of Texas	22,660,496	24,279,583
United Telephone Company of Texas	19,152,399	17,933,754
Lufkin-Conroe Telephone Exchange	13,525,854	14,444,569
Century Telephone of San Marcos, Inc.	5,821,972	5,846,107
Valley Telephone Cooperative, Inc.	5,197,880	5,310,125
Guadalupe Valley Telephone Coop.	4,984,619	5,279,799
Eastex Telephone Cooperative	5,058,058	5,207,352
Fort Bend Telephone Company	4,140,807	4,392,906
Hill Country Telephone Cooperative	3,213,694	3,346,456
Big Bend Telephone Company of Texas	3,087,809	3,202,592
Etex Telephone Cooperative, Inc.	2,919,248	3,082,637
Kerrville Telephone Company, Inc.	2,719,544	2,797,514
Brazoria Telephone Company	2,439,400	2,383,873
Central Texas Telephone Cooperative	1,992,014	2,085,623
Southwest Texas Telephone Company	1,967,656	2,021,228
ALENCO	1,835,515	1,949,061

SOURCE: Texas PUC Earnings Reports

e. TUSF Rulemaking Proceedings

The Commission adopted rules to change the equitable sharing mechanism for the TUSF where UNEs are used to provision the service.¹²⁸ This rule was appealed and the parties entered a settlement that requested a remand to the Commission to reconsider on a

¹²⁸ *Rulemaking to Amend the USF Rules Regarding the Unbundled Network Element Sharing Mechanism*, Project No. 24526, Order Adopting Amendments to §26.403, as Approved at the July 11, 2002 Open Meeting (July 19, 2002). SWBT filed an appeal on August 12, 2002 in the Travis County District Court.

stand-alone basis or in the context of the forthcoming proceeding to re-evaluate the entire TUSF.

The Commission also adopted two new rules to provide voice-grade services to permanent residential or business premises that are not included within the certificated area of a certificate of convenience and necessity (CCN) holder by providing reimbursement for costs from the TUSF. In one project, the Commission established procedures for residential or business customers in uncertificated areas to petition the Commission for voice-grade telecommunications services.¹²⁹ In another project, the Commission established guidelines to provide high cost assistance for the voluntary provision of voice-grade telecommunications service in uncertificated areas of the State.¹³⁰

Furthermore, the Commission has also initiated a rulemaking project to establish procedures for the automatic enrollment of qualifying individuals in Lifeline and Link-Up programs to save such individuals the extra paperwork.¹³¹

f. TUSF Review

In accordance with P.U.C. SUBST. R. 26.403, beginning on September 1, 2002, the Commission began its review of the definition of services to be supported by the Texas High Cost Universal Plan (THCUSP), forward-looking cost methodology, revenue benchmark levels, and/or base support amounts associated with the TUSF.¹³² In this project, the Commission is reviewing these specific issues and considering other issues related to the TUSF. The Commission conducted a public workshop on November 13, 2002, to discuss such issues and the processes in which these issues will be addressed.

3. Switched Access Charges in Texas

Last session the Commission provided the Legislature with a report on Intrastate Switched Access Charges. This section provides additional information on developments since that time.

¹²⁹ *Rulemaking to Implement H.B. 2388, 77th Legislature, Provision of Telecommunications Services to an Area not Included in a Certificated Service Area*, Project No. 24519, Order Adopting New §26.421 and §26.422 Concerning Designation of ETPs to Provide Service to Uncertificated Areas, as Approved at the April 5, 2002 Open Meeting (Apr. 22, 2002).

¹³⁰ *Rulemaking Regarding High Cost Assistance to a Telecommunications Provider that Volunteers to Provide Voice-Grade Service to an Uncertificated Area*, Project No. 24527, Order Adopting New § 26.423 Regarding High Cost Assistance for the Voluntary Provision of Basic Local Telecommunications Service, as Approved at the April 18, 2002 Open Meeting (May 3, 2002).

¹³¹ *Rulemaking to Implement H.B. 2156 as it Concerns Enrollment in Telephone Discount Programs*, Project No. 24900 (pending).

¹³² *P.U.C. Review of the Texas Universal Service Fund (TUSF) Pursuant to Substantive R. § 26.403(d)(2)(A)(i) and § 26.403(e)(2)(A)(i)*, Project No. 26647 (pending).

a. Developments Since the 2001 Legislative Session

Switched access charges are the wholesale rates paid to local exchange telephone companies by long-distance companies to originate and terminate long-distance calls over the public switched network. Between 1999 and 2000, as prescribed by PURA and, in part, effected by implementation of the TUSF, rates for switched access charges in Texas were reduced—from approximately 12 ½ cents per minute to less than 6 cents. No changes to either the rate structure or rate level of Texas switched access charges have been made since that time.

Switched access charges remain a contentious issue. Even though the “Midland to Marfa” argument has not reached the fevered pitch of years past, the fact remains that in-state long-distance calls usually cost more than state-to-state long-distance calls, due in large measure to the much higher intrastate switched access charges.

The cost disparity between in-state and state-to-state long-distance will not likely diminish since interstate switched access charges continue to decline toward cost, while Texas intrastate access charges remain stagnant. Interstate switched access charges are currently about \$0.01, while intrastate rates are in the \$0.055–\$0.06 range for Southwestern Bell Telephone (SWBT). Thus, the differential between the two has now climbed to 500%.

The *2001 Switched Access Report*, which was prepared in response to Section 58.303 of PURA, discussed various restructuring and/or rate reduction options, the objective of which was to establish cost-based rates, or at a minimum move rates closer to cost. While intrastate switched access charges have not changed since the issuance of that report, usage-sensitive interstate access charges continue to decline, thereby exacerbating the rate differential between intrastate and interstate switched access charges. Included in Appendix R are excerpts from the *2001 Switched Access Report*. This continues to represent the state of affairs regarding switched access charges.

b. Switched Access Charge Case

On September 22, 2002, AT&T Communications of Texas, L.P. (AT&T) complained against SWBT and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long-distance (SWB-LD) for allegedly engaging in intra-corporate cross-subsidization,¹³³ which creates a price structure aimed at creating a price squeeze that is anti-competitive, predatory, discriminatory, and unreasonably preferential.¹³⁴ The primary remedy sought by AT&T was the reduction of SWBT’s switched access charges.

During the pendency of the proceeding at the State Office of Administrative Hearings (SOAH), SWBT sued in the Travis County District Court, seeking a declaratory order, mandamus against the Commission, and temporary and permanent injunctions

¹³³ Cross-subsidization may be defined as the use of proceeds from the sales of one set of products or services to subsidize below-cost prices of another set of products or services.

¹³⁴ *Complaint of AT&T Communications of Texas, L.P. against Southwestern Bell Telephone Company and Southwestern Bell Long Communications Services, Inc. d/b/a Southwestern Bell Long Distance*, Docket No. 23063 (pending).

against the Commission to prevent the consideration of a reduction in its switched access rates or a hearing for that purpose. On March 14, 2001, the District Court denied SWBT's request for a temporary injunction. SWBT filed an interlocutory appeal of the District Court's decision with the Third Court of Appeals.

On July 26, 2001, the Third Court of Appeals held that the District Court should have granted a temporary injunction to preserve SWBT's right to immunity from Commission regulation of its switched access rates.¹³⁵ The Court of Appeals remanded the case back to the District Court for issuance of a proper temporary injunction consistent with its opinion. On August 20, 2002, the District Court issued an order granting SWBT's motion for summary judgment, and granting a permanent injunction against the Commission from proceeding on any matter relating to the validity of SWBT's current switched access rates.¹³⁶ The District Court held that the Commission could not make any changes to switched access charges of ILECs who have elected into incentive regulation under Chapter 58. Based upon this court decision, the Commission is effectively barred from redressing the differential between intrastate and interstate switched access charges. Both AT&T and the Commission have appealed this ruling.¹³⁷

4. Advanced Services

While the availability of advanced services continues to increase, a continuing challenge for Texas is how to encourage widespread deployment and adoption of these services, especially in rural areas of the State. Factors such as population density, income levels, and distance challenges may lead to slower rates of deployment in these areas. In January 2001, the Commission reported to the Legislature on the availability of advanced services in rural and high-cost areas.¹³⁸ Since the *2001 Advanced Services Report*, some increases in broadband deployment have occurred across the State.¹³⁹

The public policy goals of the Commission continue to support a technology neutral, pro-competitive approach to encouraging the deployment of broadband services. In other words, the Commission does not favor any particular technology as a delivery platform for advanced services. However, it should be noted that the Commission's authority is limited to regulating telecommunications services, which would not include cable. These goals also include encouraging local solutions, and avoiding a "one size fits all" solution. As the pace of technological change increases, the Commission believes it

¹³⁵ *Southwestern Bell Tele. Co. v. Public Util. Comm.*; Max Yzaguirre, Chair of the Public Utility Commission of Texas, Rebecca Klein, Commissioner of the Public Utility Commission of Texas; Brett A. Perlman, Commissioner of the Public Utility Commission of Texas; and AT&T Communications of Texas, L.P., No. 03-01-00114 CV, 72 S.W.3d 23, (Tex. App. Austin July 26, 2001, writ dismissed w.o.j.).

¹³⁶ *Southwestern Bell Tele. Co. v. Public Util. Comm.*, 72 S.W.3d 23 (Tex. App. – Austin 2001 pet. filed).

¹³⁷ *Public Util. Comm'n, et al. v. Southwestern Bell Tel. Co.*, No. 03-02-00602-CV, (Tex. App. – Austin 2002) Court of Appeals, Third District (Docket No. 23063) (pending).

¹³⁸ Public Utility Commission of Texas: Report to the 77th Legislature on the Availability of Advanced Services in Rural and High Cost Areas (January 2001).

¹³⁹ For an overview of Advanced Services Technologies, please see Appendix S.

important to avoid excessive regulation; however, where competitive service is not available, appropriate regulation may be needed. Although the supply of and demand for any service may be affected by many variables, the Commission believes population demographics, distance, and technology factors currently are the principal elements that influence the supply of and demand for broadband services. The Commission has undertaken action in several areas to encourage the deployment of advanced services to all areas of the State.

a. DSL Service in Texas

As discussed in Chapter III, digital subscriber line (DSL) services continue to grow rapidly in Texas. Most subscribers to DSL service are residential customers and small businesses. Because DSL service uses the high frequency portion of the “loop” or phone line and voice service uses the low frequency portion of the loop, DSL and voice service are nearly always provisioned together over a single loop. In fact, SBC and other ILECs have instituted a policy that requires an end-use customer to subscribe to their voice service on a line in order to obtain DSL service on that line.

SBC and other ILECs have also refused to provide DSL service over a loop used by a CLEC to provide voice service to the customer. This is true whether the CLEC uses resale, UNE-P, or unbundled network element loop (UNE-L) to provide the voice service. The effect of this policy is to keep customers who wish to retain SBC’s (or another ILEC’s) DSL service from switching to a CLEC for voice service. Customers desiring a CLEC’s voice product must give up their SBC (or other ILEC) DSL service in order to switch voice providers. CLECs view SBC’s policy as anti-consumer and anti-competitive. Because of the proliferation of DSL, this policy affects a growing number of residential and small business customers who cannot change their local voice provider without giving up their DSL service, something few customers are willing to do. SBC asserts that refusing to provide DSL service to CLEC voice customers is a business decision, which it has the right to make under federal law. The Commission has commenced an investigation, Project No. 26943,¹⁴⁰ to examine this issue in greater detail.

b. Advanced Services in Rural Texas

In response to the Legislature’s enactment of section 55.014 of PURA¹⁴¹ during the 77th Legislative Session, the Commission has adopted a new rule regarding the provision of advanced services in rural areas of Texas, P.U.C. SUBST. R. 26.143.¹⁴² This rule was promulgated to promote deployment of advanced services in rural areas of Texas and to promote the Texas policy that customers in all regions of the State have

¹⁴⁰ *PUC Investigation into the Availability of SBC’s DSL Service to End Users Subscribing to CLEC Voice Service*, Docket No. 26943 (pending).

¹⁴¹ Public Utility Regulatory Act, TEX. UTIL. CODE ANN. § 55.014 (Vernon 1998 and Supp. 2003)

¹⁴² *Rulemaking to Address the Provision of Advanced Services by Electing Companies, COA or SPCOA Holders in Rural Service Area*, Project No. 21175, Order Adopting New P.U.C. SUBST. R. 26.143, relating to Provision of Advanced Services in Rural Areas (April 18, 2002).

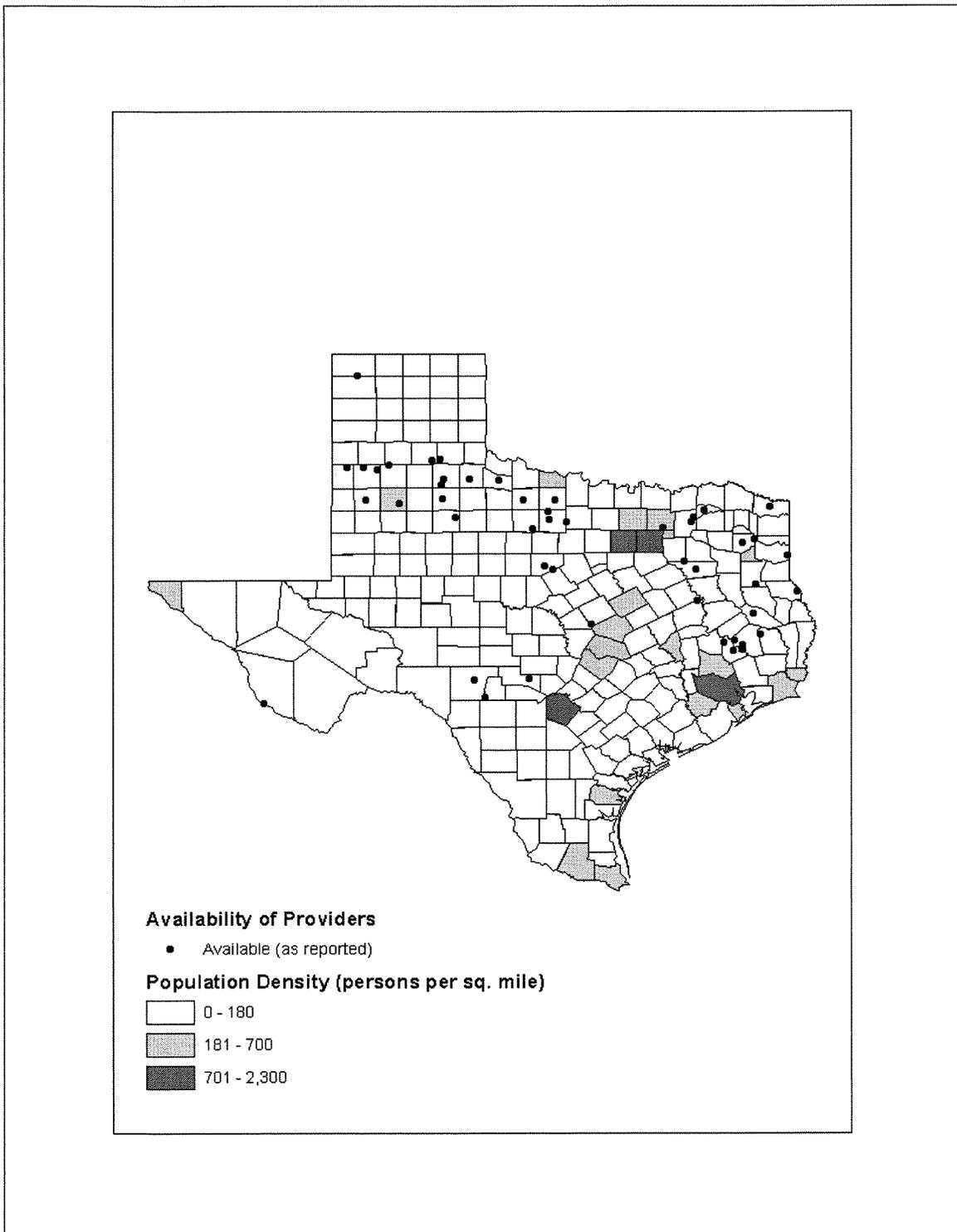
access to advanced telecommunications and information services that are reasonably comparable to those services provided in urban areas and that are available at prices reasonably comparable to those prices charged for similar services in urban areas.¹⁴³ The rule applies to all of Chapter 58 electing companies¹⁴⁴ and holders of a certificate of operating authority or service provider certificate of operating authority. As depicted in the map in Figure 4.5, numerous cities that meet the criteria of the advanced services rule have providers of broadband services located in their area.¹⁴⁵

¹⁴³ PURA § 51.001(g).

¹⁴⁴ Electing companies are companies that elect incentive regulation pursuant to P.U.C. SUBST. R. 26.143, and make the corresponding infrastructure commitments under Chapter 58 of PURA (SWBT, Verizon, Sprint/United, Sprint/CenTel, and Valor) or Chapter 59 of PURA (Kerrville Telephone, CenturyTel of San Marcos, CenturyTel of Lake Dallas, CenturyTel of Port Aransas, Texas ALLTEL, Big Bend Telephone Cooperative, TXU Communications, Sugar Land Telephone Company, and Fort Bend Telephone Company).

¹⁴⁵ P.U.C. SUBST. R. 26.143(c)(6) defines a rural community as: "Any community located in a county not included within any Metropolitan Statistical Area (MSA) boundary, as defined by the United States Office of Management and Budget, and any community within an MSA with a population of 20,000 or fewer not adjacent to the primary MSA city."

Figure 29 – Availability of Broadband Providers in Communities Subject to the Advanced Services Rule



SOURCE: Texas PUC 2003 Scope of Competition Data Responses

The advanced services rule sets forth procedures whereby a retail customer within a rural service area may seek advanced services in order to access the internet. The rule establishes a “competitive response process” for retail customers in a rural area to seek advanced services from any advanced services provider. Under this portion of the rule, rural retail customers may submit a written request to the Commission for advanced services. The Commission will post relevant portions of the request on the Commission website so that providers become aware of the customer demand. Within 50 days after posting, any advanced services provider may submit a proposal to the rural area’s contact person for provision of advanced services. Based on submitted proposals, the persons seeking the advanced services would then negotiate and select a provider for service. This market-based process allows the rural area and the provider to develop an appropriate strategy for deployment, including prices, terms, and conditions of service.

If, however, no advanced services agreement is reached in the competitive response process, the rule provides a mechanism whereby retail customers in the rural area may secure access to services that are reasonably comparable to the advanced telecommunications services offered by companies within urban service areas via a Bona Fide Retail Request (BFRR). The rule addresses the specific parameters for determining reasonably comparable advanced telecommunications services, including reasonably comparable prices, terms, and conditions. The rule outlines the requirements of service and establishes Commission proceedings for selection of serving companies pursuant to a BFRR.

The Commission has established a website for posting advanced services requests and information about the Commission activities.¹⁴⁶ While the agency has received inquiries regarding the rule, to date, only one formal written request has been submitted to the Commission for advanced services. The Commission received the request from the City of Sealy on December 2, 2002.¹⁴⁷

c. LBJ School Pilot Project

In the fall of 2001, the Commission funded a graduate policy research project at the Lyndon Baines Johnson School of Public Affairs at the University of Texas at Austin to investigate facilitation of deployment of advanced services in under-served and remote communities, particularly in rural Texas. Selected rural communities participated with students to investigate policies, techniques, innovations, and information that may be used by state and local officials to accelerate the deployment broadband services in rural Texas. From these case studies, the students created a “toolkit” for potential users to consider when developing broadband connections in their communities. The project culminated in the creation of the Lonestar Broadband website, which provides information, guidelines, educational material, case studies, and contacts for use by community leaders in Texas communities to help deliver broadband services to their

¹⁴⁶ This information can be found at <http://www.puc.state.tx.us/telecomm/advserv/index.cfm>.

¹⁴⁷ See *Request for a Competitive Response for Advanced Services for the City of Sealy*, Project No. 27041 (December 2, 2002).

communities. The website, <http://www.lonestarbroadband.org>,¹⁴⁸ was launched in May of 2002. The website describes Lonestar Broadband as “a toolkit for rural leaders and officials interested in securing high-speed telecommunications services essential for economic development, education and health care in their communities.”¹⁴⁹

d. Broadband Work Team

Due to the emerging and complex issues involved with advanced services, the Commission has created a Broadband Team to better address customer questions and to facilitate interaction with other State agencies in the hopes of more continuity and consistency for State policy. Members of the broadband team are available to answer customer questions regarding the Commission’s rule concerning the deployment of advanced services, to participate in inter-agency working groups, and to serve as resources regarding broadband data inquiries.

In July of this year, the Commission Staff participated in an inter-agency working group meeting sponsored by the Office of Rural Community Affairs (ORCA). The purpose for establishing this inter-agency group is to coordinate state, federal, and non-profit entities dealing with rural issues and efforts. In addition, there have been meetings between the Commission’s Broadband Team and ORCA’s Technology and Telecommunications Program Specialist on matters primarily dealing with high-speed internet availability in Texas, and the Commission’s recently adopted advanced services rule. These meetings serve as a way for ORCA Staff to become familiar with Commission initiatives that are geared towards deployment of advanced services.

e. Governor’s Broadband Forum

The Commission has also participated in the Governor’s Policy Broadband Forum, which was convened by staff of the policy office of Governor Rick Perry to provide stakeholders with an opportunity to explore broadband deployment issues. The policy forum was asked to examine (1) whether “the market is deploying broadband in an efficient, effective manner,” and (2) if not, does “broadband deployment merit government intervention.” The Commission was a participant in this forum and along

¹⁴⁸ *Disclaimer:* The students developed and created this site including all of the content, associated recommendations, and the selection of live links to other internet addresses. The PUC hopes that the public will find the work of the students to be useful and instructive in developing broadband opportunities through out Texas. However, PUC staff did not participate in the development of the Lonestar Broadband site or the decisions about its content. Accordingly, the PUC does not endorse, approve, certify, or control the content of this site or the content found at the external internet addresses. The PUC does not guarantee the accuracy, completeness, efficiency, or timeliness of information located on this site or at the linked external addresses. Use of any information obtained from such addresses is voluntary, and reliance on it should only be undertaken after an independent review. Reference herein to any specific service provider, commercial product, process, or service by trade name, trademark, service mark, manufacturer, or otherwise does not constitute or imply endorsement, recommendation, or favoring by the PUC.

¹⁴⁹ See <http://lonestarbroadband.org>---/L.B.J. School of Public Affairs at the University of Texas, *About Us, PRP Objective*, (2002), <http://lonestarbroadband.org>.

with over 100 individuals and 55 organizations joined in an effort to discuss nascent broadband matters important to all Texans.¹⁵⁰

f. TIF Board

The Texas Infrastructure Fund (TIF) was established in 1995 to promote the deployment of equipment and telecommunications infrastructure for distance learning, information sharing programs of libraries, and telemedicine services. Since its creation in 1995, the TIF Board has awarded over \$1.1 billion in grants to public schools, institutions of higher education, public libraries, and not-for-profit health care entities. TIF will award an additional \$400 million in order to reach its legislatively mandated cap of \$1.5 billion. These funds have been used to provide hardware, connectivity, and training in an effort to help Texas become a leader in telecommunications infrastructure.

In October 2002, the TIF Board approved and authorized funding for a scoping study to “identify the elements and issues to be addressed by a major follow-on study that will evaluate alternatives and develop recommendations for a statewide infrastructure to serve the long-term (15-20 years) telecommunications needs of Texas.”¹⁵¹ At the time of publication of this Report, the scoping study was expected to be presented to the TIF Board in December 2002, and discussions were to occur with higher education institutions regarding implantation of a broader “follow-on” study.¹⁵²

This broader study is expected to include an examination of the following topics:¹⁵³

- Current and projected demand for telecommunications services Statewide;
- Current and projected private and public investment in telecommunications infrastructure;
- Projected gaps that could be met by public investment or services;
- Alternatives for bridging the gaps identified, with discussion of related design, cost, governance, legislative, and regulatory issues;
- Review of national, regional, and other states’ infrastructures and plans; and
- Recommendations.

¹⁵⁰ The forum culminated with a Broadband Stakeholder Report to Staff of the Governor’s Policy Office. The paper can be viewed at:
<http://www.puc.state.tx.us/about/commissioners/perlman/perlman.cfm>.

¹⁵¹ Internal documents were provided by TIF that summarize the scoping study initiative, which was approved by the TIF Board in October 2002, as cited in the House State Affairs Interim Report to the Texas House of Representatives 78th Legislature, December 17, 2002, page 96. Online available: http://www.house.state.tx.us/committees/reports/77interim/state_affairs.pdf.

¹⁵² House State Affairs Interim Report to the Texas House of Representatives 78th Legislature, December 17, 2002, page 96. Online available: http://www.house.state.tx.us/committees/reports/77interim/state_affairs.pdf.

¹⁵³ *Id.*

5. Customer Protection

PURA Section 64.001 required the Commission to adopt rules to establish customer protection standards and to protect customers from fraudulent, unfair, misleading, deceptive, or anti-competitive practices. The Commission adopted customer protection rules pursuant to mandates established by S.B. 86,¹⁵⁴ which was passed during the 76th Texas Legislature.

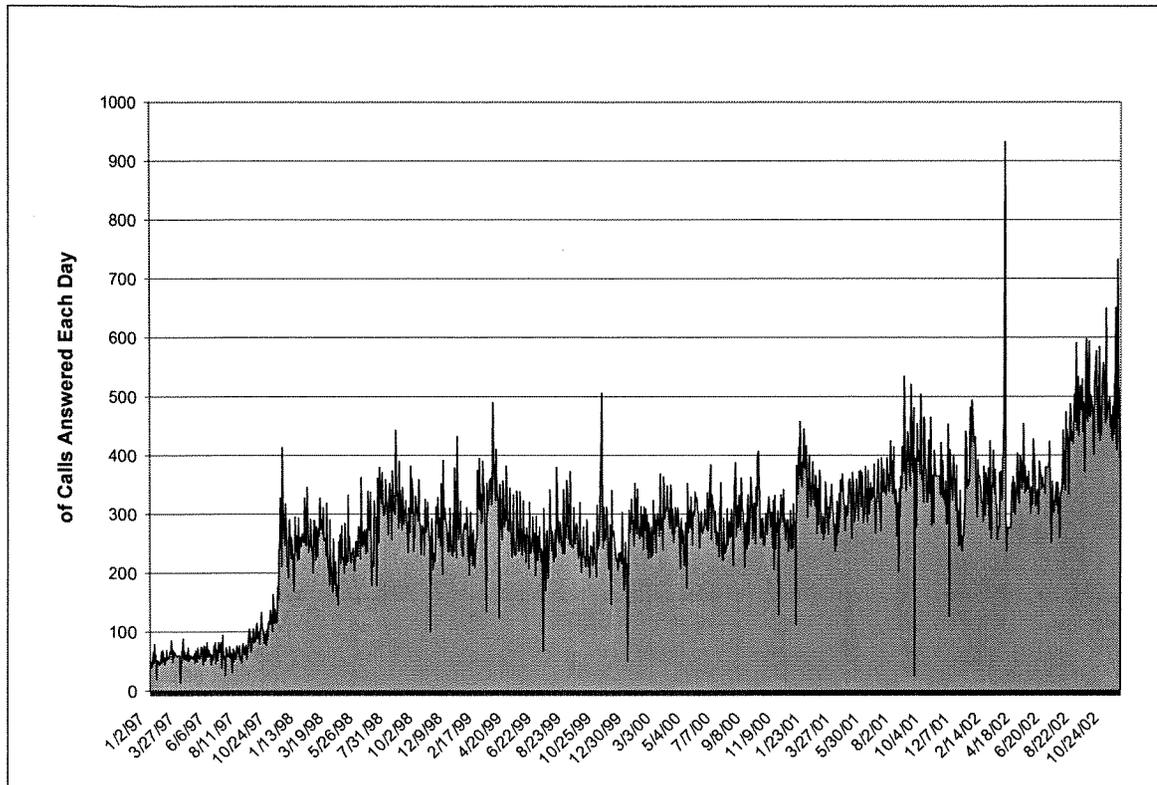
a. Complaint Handling

The Customer Protection Division (CPD) of the Texas Public Utility Commission was created in 1997 in response to an increased need to respond to complaints against telecommunications and electric service providers. CPD answers public inquiries through a toll-free customer assistance hotline, investigates and resolves complaints, and develops and disseminates customer education material. Since its creation, CPD has increased in size to 15 complaint investigators, 11 call center representatives, and five information and education employees. CPD also oversees the Relay Texas program, the Statewide telephone interpreting service for the hearing-and speech-impaired.

¹⁵⁴ Tex. S.B. 86, 76th Leg. R.S. (1999) Senator Jane Nelson and Representative Debra Danburg, 1579 Tex. Gen. Laws 5421.

CPD receives complaints and inquiries by mail, fax, email, and telephone. The average time to investigate and resolve a customer complaint is 38 days. Even given the large volume of calls received by the CPD each day, CPD staff are handling customer complaints in a timely manner.

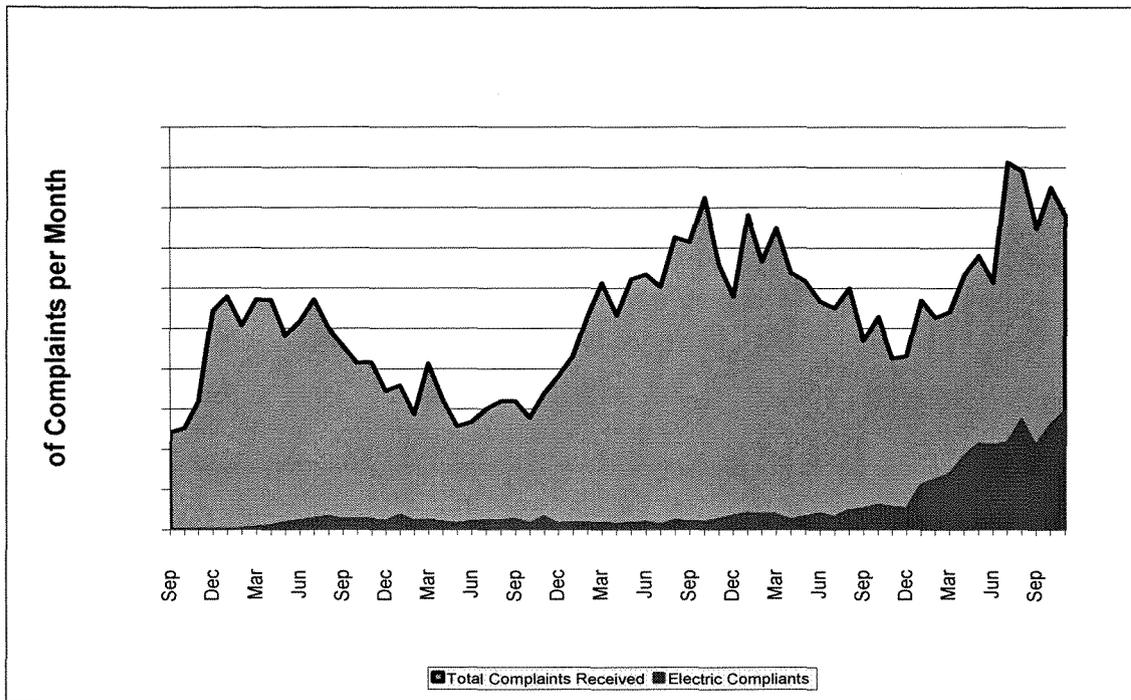
Figure 30 — Number of Calls Answered Each Day in Customer Protection



SOURCE: Texas PUC Customer Protection Division

Complaint volumes have steadily increased since September 1997, especially over the past two years. In 2002, the Commission increased the number of customer service employees to handle this increase in the number of inquiries and complaints. While the majority of complaints are telephone or service related, there has been a noticeable increase in complaints related to electric service since the beginning of 2002 when retail electric competition began in most areas of the State. In addition, a large increase in July 2002 was attributable to the effective date of the “No-Call list.”

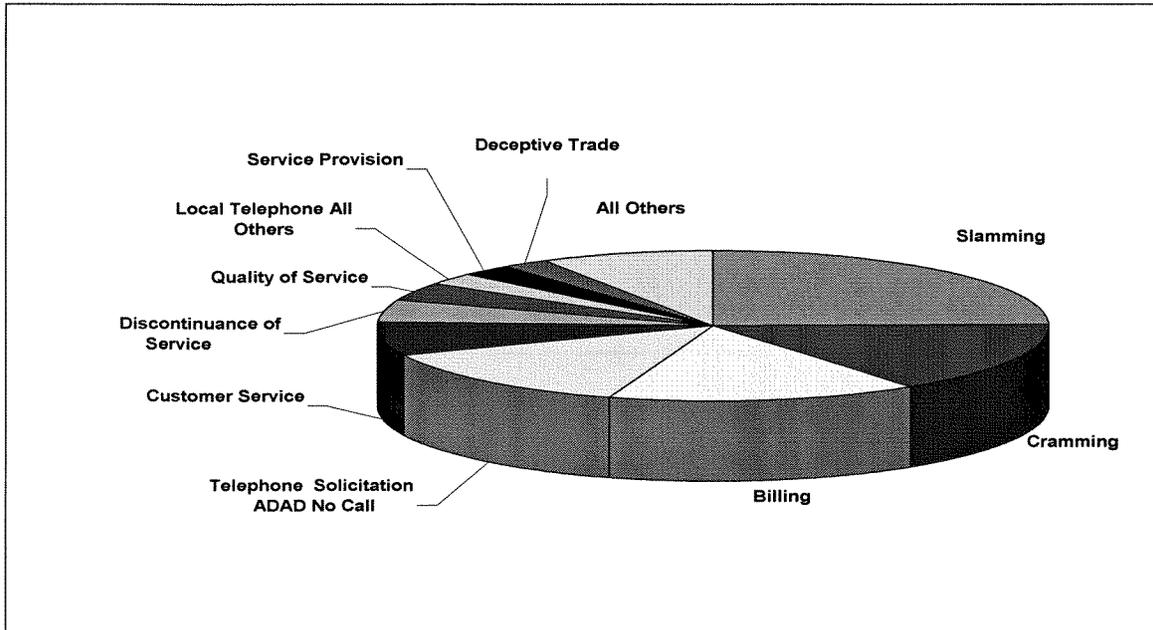
Figure 31 — Total Complaints Received by the Commission



SOURCE: Texas PUC Customer Protection Division

As shown in Figure 32, the majority of telecom complaints received by CPD are for slamming (25%), cramming (15%), and billing (15%) allegations for FY 2002.

Figure 32 — Composition of Telecom Complaints Received, FY 2002 (September 1, 2001 – August 31, 2002)



SOURCE: Texas PUC Customer Protection Division

i. Slamming/Cramming

Slamming is the switching of a customer's long-distance service without proper authorization and verification, in violation of PURA §§ 55.303-306 and P.U.C. SUBST. R. 26.130. The Commission adopted P.U.C. SUBST. R. 26.130 to "ensure that all customers within the State are protected from an unauthorized change in a customer's local or long-distance telecommunications utility."¹⁵⁵ The Commission, like the FCC, maintains a zero tolerance policy regarding the prevention and elimination of slamming.

Cramming is the result of an unauthorized charge on a customer's telecommunications utility bill without proper consent and verification of the authorization from the customer. This constitutes a violation of PURA §§ 17.151-.158 and P.U.C. SUBST. R. 26.32. The Commission's rule includes requirements for billing authorized charges, verification requirements, responsibilities of billing telecommunications utilities and service providers for unauthorized charges, customer notice requirements, and compliance and enforcement provisions.

¹⁵⁵ P.U.C. SUBST. R. 26.130(a).

While the Commission has assessed penalties for slamming and cramming in the past, those penalties were paid based on settlements with service providers against whom complaints had been filed.

In 2002, for the first time, the Commission assessed an administrative penalty against a company after a fully litigated proceeding at the SOAH. Specifically, Commission Staff alleged that Axces, Inc. violated PURA¹⁵⁶ §§ 55.303-.306 and P.U.C. SUBST. R. 26.130 by switching the long-distance service of 186 customers without proper authorization and verification. Staff recommended \$930,000 in administrative penalties and the revocation of Axces's registration as an interexchange carrier. At the November 7, 2002 open meeting, the Commission adopted in part and reversed in part the proposal for decision (PFD) and supplemental proposal for decision (SPFD) issued by the SOAH on November 19, 2001 and July 23, 2002, respectively. The Commission ruled that a total of \$360,000 in administrative penalties should be assessed against Axces. The Commission is expected to issue a final order outlining these rulings in early 2003. There are three other cases alleging slamming violations currently pending against Axces.

This case is significant because it was the Commission's first opportunity to consider important issues concerning the type of proof required to establish a violation of the statutes and rules prohibiting slamming. The Commission's rulings in this case will have an influence on virtually all enforcement actions undertaken in the future.

In many cases, customer complaints are solved through the informal complaint process, obviating the need for a formal contested proceeding. In addition, Commission Staff routinely monitors service providers' compliance with Commission rules, and in most cases, service providers quickly remedy non-compliance when it is brought to their attention. The Commission also utilizes calls and complaints received in its call center in assessing whether a more formal investigation and/or enforcement action is warranted against a particular service provider.

ii. Texas "No-Call" List

On January 1, 2002, Texas joined 24 other States with statutory "No-Call" lists intended to shield telephone customers from unwanted telemarketing sales calls. Texans may now register their telephone number for one or both of two "No-Call" lists maintained by the Commission. Customers may place their name, address, and telephone number on these lists to identify themselves as individuals who do not want to receive unsolicited telemarketing calls at home.

(a) Statewide "No-Call" List

The statewide "No-Call" list was established by H.B. 472 enacted by the 77th Legislature in 2001, and applies to all telephone marketers operating in Texas. A registered residential telephone numbers remains on the list for three years. Business telephone numbers cannot register for this list.

¹⁵⁶ Public Utility Regulatory Act, TEX. UTIL. CODE §§ 11.001-63.063 (Vernon 1998 & Supp. 2002).

(b) “Electric No-Call” List

The “Electric No-Call” list was established by S.B. 7, the electric restructuring utility bill enacted in 1999. The “Electric No-Call” list prevents calls only from retail electric providers and telemarketers calling about electric service. Both businesses and residential numbers can be added to the list, and numbers remain on the list for five years.

(c) “No-Call” Registration

The first registration period for the “No-Call” list closed on March 27, 2002. The first “No-Call” list was published on April 1, 2002, and included 386,046 telephone numbers. The second registration period closed on June 26, 2002. The second list was published on July 1, 2002, bringing the total registered telephone numbers to 658,749. As of November 30, 2002, 769,540 telephone numbers have been included in the no-call registry.

(d) Complaints

The Commission is authorized to investigate complaints and to assess administrative penalties for violations of the Texas “No-Call” list involving all entities except state licensees.¹⁵⁷ From July 1, 2002 through November 30, 2002, the CPD received 4,965 customer contacts related to the Texas “No-Call” list. The Commission is currently investigating these complaints to determine if formal enforcement action is warranted.

iii. Rulemaking on Fraudulent Collect Calls

The portion of Texas bordering Mexico faces several service issues that are unique to this region, including collect call fraud.¹⁵⁸ In June 2001, the Attorney General of Texas filed suit against an Austin-based telecommunications company for perpetrating a collect call scam in which Texas customers were excessively billed when they accepted collect calls from people in Mexico representing themselves as long-lost relatives.¹⁵⁹ Thereafter, on February 28, 2002, the Commission amended its substantive rules to specifically address collect call fraud.¹⁶⁰ The Commission’s amended rule requires that carriers more closely monitor their billing charges and effectively discontinue business with entities that continually exceed a complaint threshold.

¹⁵⁷ Tex. Bus. & Com. Code Ann. § 43.102(b).

¹⁵⁸ For purposes of this report, the Texas Border Region includes the following counties: Brewster, Brooks, Culberson, Duval, El Paso, Crockett, Cameron, Dimmit, Edwards, Ellis, Hidalgo, Hudspeth, Jeff Davis, Jim Hogg, Kenedy, Kinney, La Salle, Maverick, Pecos, Presidio, Real, Reeves, Starr, Terrell, Uvalde, Val Verde, Webb, Willacy, Zapata, and Zavala.

¹⁵⁹ *State of Texas vs. Southwest Telecom, Inc. d/b/a Intelcom, Inc., et. al* No. 6V1-01601 (201st Jud. District Ct., Travis County, Texas) (April 12, 2002).

¹⁶⁰ *Rulemaking to Amend Subst. R. 26.315 to Discourage the Practice of Unscrupulous Collect Calls*, Project No. 24105, Order Adopting Amendments to § 26.315 (Feb. 28, 2002).

b. Service Quality

P.U.C. SUBST. R. 26.54 establishes retail performance objectives for dominant certificated telecommunications utilities (DCTUs) or dominant carrier. These retail performance objectives establish company-wide and individual exchange performance benchmarks that a dominant carrier should meet or exceed when providing basic telecommunications services. Following is a summary of retail service quality for the study period consisting of the Third Quarter 2000 through First Quarter 2002 for SWBT, Verizon, Valor, and Sprint.

i. Performance Objectives

- **Installation Related** - Objectives related to the length of time it takes to respond to a customer's request for telephone service. To meet these objectives a dominant carrier must complete: 95% of Primary Service Orders in 5 days, 90% of Regular Service Orders in 5 days, 90% of its installation commitments, 99% of Service Orders in 30 days, and 100% of Service Orders in 90 days.
- **Maintenance Related** - Objectives related to the number of trouble reports received from customers having problems with their telephone service. To meet these objectives a telephone company must be able to clear 90% of the out-of-service complaints within eight working hours. In addition, a dominant carrier must maintain its network so that its trouble report rate does not exceed 3% per 100 lines, and receive no more than 22% repeat trouble reports on residential and single business lines.
- **Miscellaneous** - Objectives related to the length of time it takes for a customer service representative to answer a call from a customer. To meet these objectives a dominant carrier's customer service center must answer 90% of business office calls in 20 seconds and 90% of repair service calls within 20 seconds.

ii. Recent Service Quality Review

P.U.C. SUBST. R. 26.54(c) requires dominant carriers to comply with the service objectives and performance benchmarks, as well as file with the Commission quarterly reports on performance indicators. The report must include the monthly performance for each category of performance objectives and a summary of the corrective action plan for each exchange in which the performance falls below the benchmarks identified previously for three consecutive months. Moreover, the corrective action plan must include, at a minimum, details outlining how the needed improvements will be implemented within three months and result in performance at or above the applicable benchmark. The report provides a summary and analysis of the data reported by dominant carriers for the study period beginning third quarter of 2000 through first quarter of 2002.

In general, the performance data related to provisioning and maintenance show improvement, although not total compliance, for the study period for all four companies. The performance related to business office answer time was missed for six or more

months by SWBT, Sprint, and Valor. However, Valor's business office answer time performance was compliant for three consecutive months in the Second Quarter of 2002.

The performance related to repair service answer time was missed for six or more months by Sprint and Valor. However, Valor has met the benchmark for the last five months of the study period. Following is a detailed analysis of the performance data reported by each dominant carrier during the quarterly review, as required by P.U.C. SUBST. R. 26.54(c).

Installation Related Standards

- **95% of Primary Service Orders Completed in Five Working Days**

SWBT's and Verizon's company-wide performance met the benchmark for the entire study period. Sprint's and Valor's company-wide performance missed the benchmark for seven and ten consecutive months, respectively. Sprint and Valor have shown improvement through out the study period.

- **90% of Regular Service Orders Completed in Five Working Days**

SWBT's, Verizon's, and Sprint's company-wide performance exceeded the Commission benchmark for the entire study period. Valor's company-wide performance exceeded the Commission benchmark for all but two months of the study period.

- **90% of Installation Commitments Should Be Met**

SWBT's, Verizon's, and Sprint's company-wide performance exceeded the Commission benchmark for the entire study period. Valor's company-wide performance missed the Commission benchmark for thirteen consecutive months. However, Valor's performance was compliant throughout the First Quarter of 2002.

- **99% of Service Installation Orders Completed in 30 days**

SWBT's, Verizon's, and Sprint's company-wide performance exceeded the Commission benchmark for the entire study period. Valor's company-wide performance missed the Commission performance objective for nine consecutive months. However, Valor's third quarter performance in 2001 shows compliance.

- **100% of Service Installation Orders Completed in 90 Days**

SWBT's, Verizon's, and Sprint's company-wide performance exceeded the Commission benchmark for the entire study period. Valor missed the Commission performance benchmark for ten consecutive months. However, Valor's fourth quarter performance in 2001 shows compliance.

Maintenance Related Performance

- **90% Out-of-Service Complaints Cleared Within Eight Working Hours**

SWBT's company-wide performance was below the Commission performance level for three consecutive months during both the Third Quarter of 2000 and the First

Quarter of 2001. Verizon's company-wide performance exceeded the Commission benchmark for all months except for one in the study period. Sprint's company-wide performance met the Commission benchmark for all months except for two in the study period. Valor missed the Commission performance benchmark for the entire study period.

- **Trouble Report Rate Shall Not Exceed 3%**

SWBT's and Verizon's company-wide performance exceeded the Commission benchmark for all months of the study period. Sprint's company-wide performance missed the Commission performance benchmark for six consecutive months. Valor missed the company wide performance for all but one month in the study period.

- **Not More Than 22% Repeat Trouble Reports on Residential and Single Business Lines**

SWBT's, Verizon's, and Sprint's company-wide performance exceeded the Commission benchmark for all months in the study period. Valor missed the Commission performance benchmark for five months in the study period.

Miscellaneous Standards

- **90% of Business Office Calls Answered in 20 Seconds**

Verizon's company-wide performance met the benchmark for all months during the study period. SWBT has missed this measure for all but two months of the study period. Sprint has missed this performance objective for all but one month of the reporting period. Valor has missed this performance for eleven of the fifteen months of data reported. However, Valor's company-wide performance met the Commission benchmark in the Second Quarter of 2002.

- **90% of Repair Service Calls Answered in 20 Seconds**

SWBT's and Verizon's company-wide performance met the Commission benchmark for all months in the study period. Sprint missed the performance objective for this measure for all but five months in the study period. Although Valor missed the performance measure for numerous months, it met the objective for the last five months of the study period.

Additional information on the procedures for calculating and processing administrative penalties for violations of P.U.C SUBST. R. 26.54(c), relating to telephone service quality standards, may be found in Appendix T.

6. Municipal Rights-of-Way

As part of an ongoing effort to bolster competition in the telecommunications industry by removing barriers to entry, the 76th Legislature enacted House Bill 1777, which became Texas Local Government Code, Chapter 283, *Management Of Public Right-Of-Way Used By Telecommunications Provider In Municipality* (Chapter 283).

This law established a uniform method for certificated telecommunications providers (CTPs) to compensate municipalities for the use of public ROWs, and charged the Commission with implementation of the bill.¹⁶¹

By establishing this uniform method, this legislation intended to reduce barriers to competition by allowing easier entry into municipal markets for CTPs. Historically, telecommunications companies paid franchise fees to cities for the use of the public ROWs based on varying scales. With this legislation, all CTPs use the same methodology to calculate their municipal fees.

The stated goal of this legislation is to establish a uniform method for compensating municipalities that: (1) is administratively simple for municipalities and CTPs; (2) is consistent with state and federal law; (3) is competitively neutral; (4) is nondiscriminatory; (5) is consistent with the burdens on municipalities created by the incursion of CTPs into a public ROW; and (6) provides fair and reasonable compensation for the use of a public ROW.

The FCC and numerous other state legislatures are considering legislation similar to the Texas law.¹⁶²

a. Implementation Projects

The Commission began the ongoing process of implementing Chapter 283 of the Local Government Code in the summer of 1999. In the initial round, the Commission adopted rules, which established categories of access lines (P.U.C. SUBST. R. 26.461), established a uniform method for calculating and reporting of a municipality's base amount (P.U.C. SUBST. R. 6.463), established a uniform method for counting and reporting access lines by CTPs (P.U.C. SUBST. R. 26.465), and established rate determination, default allocation, base amount and allocation adjustments, municipal compensation, and associated reporting requirements (P.U.C. SUBST. R. 26.467).¹⁶³

In addition, the Commission adopted a rule in fall of 2001 to clarify how lines passing through multiple jurisdictions should be compensated, and set limits on those fees a municipality can charge a CTP for use of public rights-of-way.¹⁶⁴

In early 2002, the Commission adopted a new rule that ensures that quarterly access line reporting will be performed in a uniform and timely manner, and applies the

¹⁶¹ 154 TEX. LOC. GOV'T CODE ANN. §§ 283.001-283.058 (Vernon 1998 & Supp. 2003); Tex. H.B. 1777 76th Leg., R.S., 840 TEX. GEN. LAWS, 3499.

¹⁶² Andrew Caffrey, *States Limit Cities' Street Fees*, WALL STREET JOURNAL, April 10, 2002, p. B7.

¹⁶³ See *Municipal Rights of Way, Implementation of H.B. 1777*, Project No. 20935, Order Adopting New § 26.461 (October 28, 1999); Order Adopting New § 26.463 (October 28, 1999); Order Adopting New § 26.465 relating to Methodology for Counting Access Lines and Reporting Requirements for CTPs (December 20, 1999); Order Adopting New § 26.467 relating to Rates, Allocation, Compensation, Adjustments, and Reporting (February 10, 2000).

¹⁶⁴ See *Rulemaking Relating to Outstanding H.B. 1777 Implementation Issues*, Project No. 22909, Order Adopting Amendments to § 26.465 (September 25, 2001).

Commission's already-existing enforcement procedures for failure to comply with quarterly reporting requirements.¹⁶⁵

Currently, the Commission has proposed a new rule to address the issue of municipal authorized review of CTP line-count information and an amendment to consolidate the reporting requirements into a single place. The proposed new rule outlines the documentation that municipalities should be able to access from the CTPs in order to conduct an authorized review and how the issues of confidentiality and proprietary information should be handled.¹⁶⁶

Chapter 283 requires that by September 1, 2002, the Commission "determine whether changes in technology, facilities, or competitive or market conditions justify a modification in the Commission-established categories of access lines, or if necessary, the adoption of a definition of 'access line'."¹⁶⁷ Under a rulemaking to address this requirement, the Commission solicited written comments, held a workshop for stakeholders, and considered the issues, law, Commission rules, current state of technology, market conditions, and stakeholders' positions.¹⁶⁸ In July 2002, the Commission determined that no amendment was justified at that time. However, the comments indicated that the Commission should undertake a modification in the definition of "transmission path," for which the Commission proposed a rule amendment in late 2002.¹⁶⁹

On an ongoing basis, the Commission establishes access line rates for newly incorporated and newly participating municipalities on an ad hoc basis.¹⁷⁰ Other participating municipalities may modify their existing rates in September of each year. Additionally, the Commission has streamlined both the reporting process by CTPs and the line count retrieval process for municipalities by automating this process with an internet application that collects access line count information and allows municipalities to have online access.¹⁷¹ The Commission has also initiated a forum for providers and

¹⁶⁵ See *Rulemaking to Implement Enforcement Procedures Relating to Quarterly Access Line Reports*, Project No. 24639, Order Adopting New §26.468 (July 17, 2002).

¹⁶⁶ See *Rulemaking to Address Municipal Authorized Review of Access Line Reporting*, Project No. 25433 (pending).

¹⁶⁷ See *Rulemaking to Address the Redefinition of "Access Line" and Other Related Outstanding Access Line Implementation Issues*, Project No. 25450 (July 25, 2002).

¹⁶⁸ *Rulemaking to implement H.B. 1351, 77th Leg., Funding and Operation of the Universal Service Fund as it Applies to Pay Telephone Providers*, Project No. 24520 (July 25, 2002)

¹⁶⁹ See *Rulemaking to Amend P.U.C. SUBST. R. 26.465*, Project No. 26412 (pending).

¹⁷⁰ See *Issues Related to Annual Revisions to Access Line Rates for Texas Municipalities*, Project No. 24640 (pending).

¹⁷¹ The online reporting application is called the Municipal Access line Reporting System (MARS) per the designation in P.U.C. SUBST. R. 26.468. Public information is available online: http://www.puc.state.tx.us/HB1777/application/app_frame.asp.

municipalities to address all Alternative Dispute Resolution cases brought to staff for mediation of issues related to Chapter 283.¹⁷²

b. Outstanding Issues

In implementing Chapter 283 of the Local Government Code, there are two areas in which the Commission has had some difficulty in finding administratively efficient solutions: 1) how to deal with carrier's carriers; and 2) how to distinguish between long-haul and local exchange facilities.

The carrier's carriers are companies that install facilities in the ROWs, but that have minimal or no plans to start offering local exchange service over these lines. Because the current certification rules give newly certificated providers up to four years to launch their service, the carrier's carriers appear to be CLECs. However, the carrier's carriers often have different business plans from CLECs, and having their numbers among the CLECs inflates the apparent scope of competition in Texas and could flood the ROWs with lines for which municipalities receive no compensation. A new category of certification could allow the Commission to distinguish these carriers from retail-service-based companies, thus providing a more accurate assessment of the scope of competition in Texas and allowing greater ease in establishing appropriate municipal compensation for use of the ROW.

Chapter 283 includes only facilities designed to deliver local exchange service. Long-haul facilities are specifically excluded. However, many companies today provide local exchange and interexchange service over the same facilities, leading to municipalities having to rely on carriers themselves to accurately report how a facility is to be used before it is even in the ground. Because carriers cannot accurately assess how their business plan will change over time, some facilities intended for long-distance use and some facilities intended for local exchange have been misclassified. The Commission has no way to change the status of a facility such as this, as providers indirectly compensate municipalities for these facilities. The cost of facilities was included in the municipal base amounts, and is distributed over the rates for all end-use access lines in the municipality. Without a legislative reassessment of the calculation of the initial base amount to now include all of the supporting facilities that use a ROW within a municipality in Texas, there would be no question as how to classify particular lines.

7. Building Access

The first case in which the Commission has been petitioned to resolve a dispute under P.U.C. SUBST. R. 26.129, *Standards for Access to Provide Telecommunications Services at Tenant Request*, was brought before the Commission in September 2001. This case involves a telecommunications carrier's request for access to space in a building for the purpose of providing high-capacity telecommunications services to a tenant who has requested these services.

¹⁷² See *Forum to Address Municipal and Provider Concerns Relating to ROW Issues*, Project No. 23557 (pending).

Specifically, on September 5, 2001, Time Warner Telecom of Texas, L.P. (TWTC) filed a complaint against Emissary Group and Tanglewood Property Management seeking non-discriminatory access on reasonable terms and conditions to an office building in Houston for purposes of providing high-capacity telecommunications services to a tenant of that building.¹⁷³ TWTC sought immediate access to the building to enable it to serve its customer and ultimate resolution by the Commission of the parties' negotiation of license fees. PURA §§ 54.259-54.261, enacted in 1995, and P.U.C. SUBST. R. 26.129, adopted in 2000, are designed to promote competition in the telecommunications market by allowing a tenant under a real estate lease to choose the provider of its telecommunications services.¹⁷⁴ This is the first proceeding in which the Commission has been petitioned to resolve a dispute under the rule.

As the case was proceeding at SOAH, the Texas Association of Building Owners and Managers (BOMA) challenged the constitutionality of PURA §§ 54.259-54.261. BOMA, in conjunction with Emissary and Tanglewood argued that the statutory provisions on their face were an unconstitutional taking. On June 3, 2002, the Travis County District Court issued an order upholding the constitutionality of PURA §§ 54.259-54.261.¹⁷⁵ That decision has been appealed to the Third District Court of Appeals.¹⁷⁶

Currently, the case is pending at SOAH. On September 18, 2002, the Commission issued an interim order and order remanding compensation issues. On October 10, 2002, the SOAH Administrative Law Judges (ALJs) denied Tanglewood's motion to abate the proceeding.

8. Pay Telephone Service in Texas

a. Registration

To promote further competition in the payphone industry, the FCC in 1996 deregulated coin rates for all local calls made from payphones. That same year, the Commission began to register and certify pay telephone service (PTS) providers as required under the PURA. In that year, the Commission registered 539 providers, including many already doing business in the State.

To date, the Commission has registered 1,616 PTS providers, with the number of new registrants decreasing each year. (See Table 16 for the number of payphone providers registered each year in Texas since 1996.) As of November 7, 2002, there were 271 registered pay phone providers. This includes new and re-registered providers and

¹⁷³ *Complaint of Time Warner Telecom of Texas, L.P. Against Tanglewood Property Management and Emissary Group*, Docket No. 24604 (pending).

¹⁷⁴ The relevant provisions of PURA, as well as Commission rules are necessary to promote competition because ILECs often have pre-existing access to buildings due to their status as the incumbent.

¹⁷⁵ *Texas Building Owners and Managers Ass'n, Inc., et al v. Public Util. Comm., et al.*, No. GN2-0014, Travis County District Court.

¹⁷⁶ *Texas Building Owners and Managers Ass'n v. Public Util. Comm.*, Cause No. 03-02-00611, (Tx. App. – Austin 2003) (pending).

does not include those whose re-registration is incomplete. Of the 271 registered providers, 22 have headquarters out-of-state; 10 provide service to inmate facilities; 127 are corporations; 6 are government agencies, including cities and counties are tabulated; 16 are limited liability companies; 24 are limited partnerships; 3 are non-profits; and 96 are sole proprietors.

Table 16 — Payphone Providers Registered in Texas

YEAR	NUMBER OF PROVIDERS
1996	539
1997	315
1998	251
1999	192
2000	142
2001	105
2002	271

SOURCE: PUC filings

Approximately half the registered providers have five payphones or fewer. To better monitor and understand this segment of the telecommunications market, in 2001 the Commission amended P.U.C. SUBST. R. 26.102 to require all PTS providers to re-register by July 31 of each year to retain their status.

In 2001, SWBT informed the Commission that it was reducing the number of payphones in public buildings and in other locations, which is allowed under deregulation. However, SWBT is not the only telephone company removing payphones; others, such as Verizon, are also removing payphones, which they have deemed unprofitable. This decision, based on economics, has resulted in the loss of payphones that could be designated as public interest payphones. Those individuals most affected by the removal of these payphones are people without residential telephone service or a cell phone.

Private property owners, cities, and counties have begun to fill the void. In the past year, payphone registrations have been approved for Texas cities and counties—such as the cities of Bonham, Brownwood, and Weatherford, and the Department of Airports for the City of Midland—needing to offer payphone service at public facilities. Hill County recently registered in order to place payphones in the county courthouse.

b. Providers Sue SWBT

A case in which nineteen Texas payphone providers are alleging SBC used its monopoly power to thwart competition is scheduled to go to trial in December of 2003.¹⁷⁷ At issue is whether SBC coerced payphone location owners into restrictive long-term contracts with severe termination penalties in an anti-competitive manner, in order to lock down the payphone market. In September 2002, the United States Court of Appeals

¹⁷⁷ Vikas Bajaj, *Texas pay-phone firms applaud ruling on SBC*, DALLAS MORNING NEWS, September 26, 2002, p. 5D.

for the Tenth Circuit in Denver upheld a decision that awarded nine payphone companies in Oklahoma approximately \$29 million. In the Texas case, the nineteen payphone operators are now seeking a summary judgment based on the precedent of the Oklahoma ruling. The amount at stake could exceed \$300 million, as the Texas case involves 16,000 payphones, ten times as many payphones as were at issue in the Oklahoma case.

9. Area Code Relief

As shown in Figures 33 and 34, Texas utilized 24 area codes across the State as of 2002. Area code relief is one means of conserving telephone numbers. In the past two years, Texas has enacted an overlay of the 903 area code and a geographic split of the 915 region as numbering relief measures.

Figure 33 — Texas Area Codes - 2002

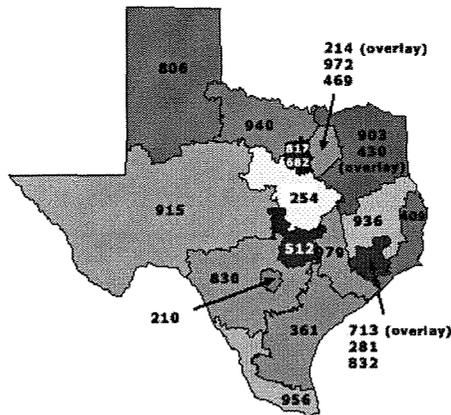
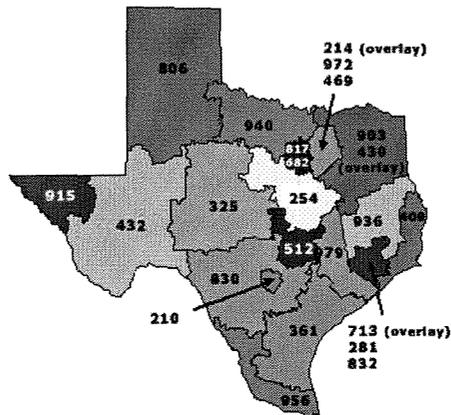


Figure 34 — Texas Area Code - 2003



a. 903 — Northeast Texas

On December 17, 2001, the Commission approved an all-services overlay for the 903 area code, which encompasses the Cities of Sherman, Texarkana, Longview, and Tyler.¹⁷⁸ An all-services overlay requires that customers dial ten, instead of seven, digits for all local calls (the area code + seven digits). Beginning February 15, 2003, ten-digit dialing will be required for local calls in the 903 region.

¹⁷⁸ *Numbering Plan Area Code Relief Planning for the 903 Area Code*, Project No. 22749, Order Adopting Numbering Plan Area Relief (Dec. 17, 2001).

b. 915 — West Texas

Rather than utilizing an overlay, a geographic split was selected for the 915 region, which includes the cities of El Paso, Midland, Odessa, Abilene, San Angelo, and Llano.¹⁷⁹ In a geographic split, one region retains the 915 area code, while new area codes are assigned to the other regions. The geographic split adopted for the 915 area divides the entire region into almost proportional thirds. It is estimated that the lifetime for the new area codes will be 20 years. The new area codes will become effective on October 5, 2003.

c. Texas's Area Code Outlook for the Future

A recent FCC decision enables the Commission to explore the use of service-specific overlays, which would allow for a specific service—such as ATM machines, pagers, cell phones, or other wireless services—to be designated a specific area code.¹⁸⁰ The Commission's number conservation approach will now include service-specific overlay options as well as overlays and area code splits.

10. Cross Border Toll-Free Calling

In December 1999, Elizabeth G. Flores, Mayor of the City of Laredo, appealed to then-PUC Chairman Pat Wood to exert jurisdictional authority over SWBT's southbound traffic into Mexico for the purposes of building a "border-free telecommunications zone."¹⁸¹ The Commission initiated a proceeding to investigate the possibilities for a flat-rate expanded area calling plan between Laredo and Nuevo Laredo.¹⁸²

The Cities of Laredo and Nuevo Laredo jointly filed a "collaborative agreement" with the FCC requesting that the cities be considered a local calling area.¹⁸³ In its Declaratory Ruling issued on February 4, 2002, the FCC stated that while it fully supported the initiative, its jurisdictional authority was limited in scope.¹⁸⁴ The FCC encouraged the relevant carriers to petition for a negotiation of alternative traffic settlements between the U.S. and Mexico, and to involve COFETEL (Mexico's

¹⁷⁹ *Numbering Plan Area Code Relief Planning for the 915 Area Code*, Project No. 24546, Order (Feb. 28, 2002).

¹⁸⁰ *Numbering Resource Optimization*, Third Report and Order and Second Order on Reconsideration in CC Docket No. 96-98 and CC Docket No. 99-200, CC Docket Nos. 99-200, 96-98, 95-116 (Rel. Dec. 28, 2001).

¹⁸¹ Discussion and possible action regarding operating budget, appropriations request, agency business plan, project assignments, correspondence, staff reports, agency administrative issues, fiscal matters and personnel policy, Letter from Elizabeth G. Flores, Mayor – City of Laredo, to PUC Chairman Pat Wood (Dec. 8, 1999).

¹⁸² *Request for the City of Laredo for a Pilot Project for Extended Area Service between Laredo and Nuevo Laredo*, Project No. 21951 (pending).

¹⁸³ *Collaborative Agreement Between the Municipality of Nuevo Laredo, Tamaulipas (Mexico) and the City of Laredo, Texas (USA)*, DA 01-554 (filed Nov. 30, 2000).

¹⁸⁴ *Proposal by City of Laredo, Texas, and Nuevo Laredo, Mexico, To Create a Cross-Border Local Calling Area*, Declaratory Ruling at 1, FCC 02-14 (Feb. 4, 2002).

equivalent to the FCC) in the negotiations.¹⁸⁵ To date, the carriers have not filed such a request with the FCC.

COFETEL also ruled on the Cities' joint petition explaining that, at this time, such an arrangement cannot be done across the border because it would be counter to Mexico's current telecommunications laws.¹⁸⁶

As a follow up to telecommunications trade barriers between the U.S. and Mexico, when the U.S. Trade Representative solicited comments on such, the Commission took the opportunity to comment. On May 29, 2002, the Commission filed comments with the U.S. Trade Representatives outlining the telecommunications border concerns that Texas has experienced.¹⁸⁷

11. ADADs in Texas

An Automatic Dial Announcing Device (ADAD) is the mechanism that automatically dials a telephone number and then plays a recorded message or leaves a recorded message on voicemail. As of October 25, 2002, there were 167 ADAD permit holders in Texas.

The Commission began issuing ADAD permits for a fee in June 1986. During the 16 years, the Commission has collected these fees, an average of 30 ADAD permits have been issued every 12 months. The ADAD permit fee of \$500, and renewal fee of \$100, remained unchanged until July 2002, when the Commission amended P.U.C. SUBST. R. 26.125 to reduce the permit fee to \$50 and renewal fee to \$15. The Commission reduced the fee in an attempt to increase compliance with its rules, and provide a clearer picture of the market segment that uses ADADs to dial telephone subscribers in Texas.

12. 211 Implementation in Texas

In July 2000, the FCC assigned the 211 dialing code to social service information and referral providers in order to allow centralized referrals to social service resources, such as housing assistance, maintaining utility service, obtaining food aid, finding counseling, hospice services and services for the aging, substance abuse programs, or dealing with physical or sexual abuse.¹⁸⁸ The FCC found that there was a need for an

¹⁸⁵ *Id.*, Declaratory Ruling at 6.

¹⁸⁶ May 20, 2002 Letter from COFETEL President Jorge Arredondo Martinez to C.P. Jose Manuel Suarez Lopez, City Manager of Nuevo Laredo, Tamaulipas, Mexico.

¹⁸⁷ Comments of the PUC filed with the U.S. Trade Representatives on Docket No. WTO/DS-204 (May 29, 2002).

¹⁸⁸ Federal Communications Commission, *FCC Fact Sheet on "Abbreviated Dialing Codes-N11."* (Abbreviated dialing codes enable callers to connect to a location in the phone network that otherwise would be accessible only via a seven or ten-digit telephone number. The network must be pre-programmed to translate the three-digit code into the appropriate seven or ten-digit telephone number and route the call accordingly.) Available at:

http://ftp.fcc.gov/Bureaus/Common_Carrier/News_Releases/2000/nrc0036a.html.

easy to remember, easy to use abbreviated dialing code that enables callers to obtain free information and referrals to community service organizations.¹⁸⁹

In April 2001, the Commission amended its rules to allow 211 implementation.¹⁹⁰ In this rulemaking, the Texas Information and Referral Network (TIRN), a public private partnership administered by the Texas Health and Human Services Commission, was designated as the administrative body for 211 development, coordination, and implementation. During the last session, the Legislature provided funding for the establishment of a statewide 211 network.

Texas is at the forefront of implementing 211 services as a result of the Legislature's efforts in the last session. Texas currently provides 211 services to more of its citizens than any other state. As of December 2002, fourteen of the 211 sites are currently operating, covering 83% of the Texas population, serving 139 of 254 counties, and accounting for about 50% of Texas geography. In fiscal year 2004-2005, 11 additional sites are scheduled to become operational, contingent upon funding from the legislature.

These sites allow Texans to obtain access to a one-stop, comprehensive source of social service resources in Texas, including federal, state, and local government agencies, community-based organizations, and private non-profits. Dan Williams, the National 211 Director, has commented that "Texas's significant efforts in establishing strong public private partnerships, utilization of a common statewide community based approach and deployment of advanced technology systems has positioned 211 Texas to consistently be viewed as a national leader."¹⁹¹

13. 911 Initiatives

New competitors' entrance into the local telecommunications market and the FCC mandate to implement and deploy wireless Enhanced 911 (E911) services have required upgrades to the existing 911 wireline infrastructure and 911 databases. These upgrades have caused many technical and operational 911 issues. The Commission has been focused on addressing these issues to maintain the integrity and reliability of Texas's emergency 911 systems.

In addition to the new competitors, the emergence of an alternative statewide 911 database provider has raised issues related to the disclosure of proprietary customer information, unbundling of 911 network and database services, establishing an uniform cost recovery mechanism, and purchasing of network and database services at reasonable prices. To address these issues the Commission adopted P.U.C. SUBST. R. 26.433 and 26.435. P.U.C. SUBST. R. 26.433 (Project No. 19203) established specific reporting and notification requirements and mandated standards related to interoperability, service quality, and database integrity. This rule required dominant certified telecommunications utilities (CTUs) to unbundled 911 network and database services. P.U.C. SUBST. R.

¹⁸⁹ *Id.*

¹⁹⁰ PUC SUBST. R. 26.127 (Abbreviated Dialing Codes).

¹⁹¹ PUC, Public Hearing, Testimony by Dan Williams, National 2-1-1 Director, (Sept. 5, 2002)

26.435 (Project No. 24305) developed uniform cost recovery mechanisms for 911 dedicated transport for incumbents as well as all CTUs.

In 1996, the FCC mandated the implementation and deployment of wireless E911 service in two phases. Under Phase I, the 911 service routes the emergency wireless caller to the appropriate 911 center and delivers the call back number of the wireless phone for responding to the emergency call. Under Phase II, the 911 service not only routes the caller and delivers the call back number to the appropriate 911 center but also provides the location information of the wireless telephone for responding to the emergency call. The Commission on State Emergency Communications (CSEC) is responsible for implementing Phase I and Phase II service. The Commission worked closely with CSEC on the deployment of Phase I service. CSEC has implemented Wireless Phase I capability at all of the 354 911 centers under its jurisdiction. CSEC is just beginning to implement Wireless Phase II. About one-third of the 911 centers within CSEC jurisdiction have begun to implement the capability to display caller location information graphically. Implementation of the Wireless Phase II service by the wireless service providers is expected to occur within six months of the 911 centers being ready to display the location information. The upgrades to the wireline infrastructure database in order to implement and deploy wireless E911 have prompted dominant CTUs to revise existing 911 tariffs and in some cases file brand new 911 tariffs. The Commission is in the process of reviewing and approving these filings.

As a result of the Commission's efforts over the last few years, Texas citizens will be protected through both wireline and wireless 911 networks that work efficiently and effectively in a competitive market. However, more work needs to be done. The recent events that occurred on September 11, 2001 reinforce the requirement for effective and reliable 911 service and for awareness of threats to the security of 911 systems. CSEC has identified potential single points of failure in the wireless and wireline telephone switches, 911 circuits, 911 routing switches, and circuits to the 911 centers responsible for delivering 911 calls in Texas. The Commission will work with CSEC to identify and address the problems associated with the single points of failure in the telecom network, in addition to completing the approval process of outstanding E911 tariffs and working to maintain the integrity and reliability of the 911 system in Texas.