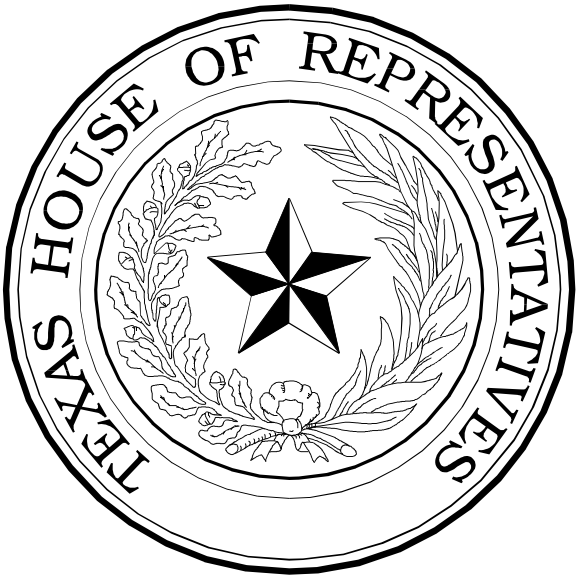
COMMITTEE ON STATE AFFAIRS



REPORT TO THE
TEXAS HOUSE OF REPRESENTATIVES
77TH LEGISLATURE

STEVEN WOLENS
CHAIRMAN

JEFF BLAYLOCK
COMMITTEE CLERK

COMMITTEE ON STATE AFFAIRS

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TEXAS HOUSE OF REPRESENTATIVES
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Steven Wolens
Chairman

Sylvester Turner
Vice Chairman

The Honorable James E. "Pete" Laney
Speaker, Texas House of Representatives
Texas State Capitol, Room 2W.13
Austin, Texas 78701

Dear Mr. Speaker and Fellow Members:

The Committee on State Affairs of the 76TH Legislature hereby submits its interim report for consideration by the 77TH Legislature.

Respectfully submitted,

SIGNED	SIGNED	SIGNED
Steven Wolens CHAIRMAN	Sylvester Turner VICE-CHAIRMAN	Leo Alvarado, Jr.
SIGNED	SIGNED	SIGNED
Kevin Bailey	Kim Brimer	David Counts
SIGNED	SIGNED	SIGNED
Tom Craddick	Debra Danburg	Paul Hilbert
SIGNED	SIGNED	SIGNED
Bob Hunter	Delwin Jones	John Longoria
SIGNED	SIGNED	SIGNED
Kenny Marchant	Brian McCall	Tommy Merritt

Members:
Leo Alvarado, Jr. • Kevin Bailey • Kim Brimer • David Counts • Tom Craddick • Debra Danburg
Paul Hilbert • Bob Hunter • Delwin Jones • John Longoria • Kenny Marchant • Brian McCall • Tommy Merritt

COMMITTEE ON STATE AFFAIRS

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INTRODUCTION

At the beginning of the 76th Legislature, the Honorable James E. "Pete" Laney, Speaker of the Texas House of Representatives, appointed 15 members to the Committee on State Affairs: Steven Wolens, Chairman; Sylvester Turner, Vice Chairman; Leo Alvarado, Jr.; Kevin Bailey; Kim Brimer; David Counts; Tom Craddick; Debra Danburg; Paul Hilbert; Bob Hunter; Delwin Jones; John Longoria; Kenny Marchant; Brian McCall; and Tommy Merritt, Members.

On December 20, 1999, Speaker Laney assigned four interim charges to the Committee on State Affairs:

1. Study the authority of state and local governments to require cable television companies to provide access to competitors and to affect the rates, terms, and conditions under which access is provided. Consider the speed of change in the telecommunications industry and the implications of the state assuming new regulatory responsibilities in this industry, including the question of whether any or all providers of broadband service should be required to provide access to competitors;

2. Review the current state of privacy laws in Texas as they relate to businesses' or government's ability to disseminate personal information without prior written permission;

3. Study the nature and extent of lobby influence on the legislative process; and

4. Conduct active oversight of the agencies under the committee's jurisdiction, including monitoring the implementation of Senate Bill 560, 76th Legislature, and changes in telecommunications markets resulting from the legislation.

Representative Wolens named chairmen for four interim subcommittees, and he asked committee Members to participate in the interim studies based on their own interests and schedules.

Representative Wolens chaired the Subcommittee on Cable & Broadband. Representatives Alvarado, Bailey, Brimer, Counts, Craddick, Danburg, Hilbert, Hunter, Longoria, Marchant, McCall, and Merritt served as Members. The subcommittee studied the various regulatory schemes placed upon different kinds of telecommunications companies by federal, state, and local levels of government. The subcommittee focused its examination upon broadband Internet access over a cable modem platform. The subcommittee held three public hearings in Austin and accepted testimony from invited witnesses representing various points of view regarding the

regulation of cable and broadband Internet access. The subcommittee requested extensive background reports on the legal and policy issues surrounding the open access debate from several of the witnesses who provided public testimony.

Representative McCall chaired the Subcommittee on Privacy. Representatives Danburg, Hilbert, Jones, Longoria, and Merritt served as Members. The subcommittee studied privacy issues in Texas. The subcommittee examined other states' privacy laws and new federal laws affecting the health care, financial services, and online sectors of the economy. The subcommittee held two public hearings and accepted testimony from invited witnesses representing various perspectives on the need for stronger state privacy protections. The Office of Attorney General (OAG) was asked to prepare a report cataloguing this state's privacy statutes.

Representative Hilbert chaired the Subcommittee on Lobby Influence. Representatives Bailey, Craddick, Danburg, Jones, Longoria, McCall, and Merritt served as Members. The subcommittee studied the state's laws regulating lobbyists and other statutes related to ethics in government, including "revolving door" laws and financial disclosure requirements. The subcommittee also examined campaign-related activities of lobbyists and, to a limited extent, campaign financing. The subcommittee held a public hearing in Austin and accepted testimony from invited witnesses presenting various perspectives on the lobby and public ethics. The Texas Ethics Commission (TEC) was asked to make recommendations related to revising personal disclosure statements, lobby laws, and revolving door statutes.

Representative Turner chaired the Subcommittee on Telecommunications. Representatives Alvarado, Brimer, Counts, Danburg, Hunter, Jones, Longoria, Merritt, and Wolens served as Members. The subcommittee explored issues related to telecommunications competition, particularly for residential local exchange service. It followed the efforts of the Public Utility Commission of Texas (PUC) to implement Senate Bill 560, Senate Bill 86, and House Bill 1777, 76th Legislature, and heard from industry and consumer representatives about the effects the legislation was having on consumer choice. The subcommittee studied issues that may have the potential to impede competition including operational aspects of interconnection, legislative and regulatory requirements, federal actions, and court decisions. The subcommittee examined the prospects of bringing advanced services and local exchange competition to rural Texas. It also heard public and industry testimony regarding the siting of wireless facilities. The subcommittee held two public hearings and accepted testimony from invited and public witnesses presenting various perspectives on these issues.

Committee staff worked with the executive directors of several agencies that are under the committee's jurisdiction. They were asked to evaluate potential problems with recent legislation, federal actions, and judicial decisions and advise the Legislature on issues affecting their agencies. No hearings were held. Committee staff also moderated a briefing for all legislative staff on the cable open access issue. The briefing was open to the public.

COMMITTEE ON STATE AFFAIRS

The full committee and its subcommittees held a total of seven public hearings and called 65 witnesses during the interim. Summaries of testimony presented during those hearings are organized by issue and included in relevant sections of the subcommittees' reports.

This report presents the committee's research and findings, organized by subcommittee. The committee recognizes that many issues before it have multiple solutions, and legislation needed to address these issues must necessarily be the products of compromise and negotiation that simply are beyond the scope of an interim subcommittee's work. Interim committee hearings do not provide sufficient opportunities for interested parties and the public to participate in the formulation of legislation and offer their perspectives on the issues, as they can during a full legislative hearing process. The committee does not offer specific legislative proposals at this time. The issues explored in this report will be important matters for the 77th Legislature to consider during the upcoming session, and this committee expects to address legislation related to these issues.

The committee would like to thank all of the witnesses who participated in its hearings, and would like to acknowledge the following individuals who have contributed to this report:

Rep. Kip Averitt
Jan Bargen
Adrianna Bernal
Carolyn Beynon
Ed Bloom
Stephen Bonner
Mark Bruce
John Capitano
Tammy Cooper
John Costello
Sean Cunningham
Jerald Daniels
Christina Deaton
Lesley French
Thomas Glenn
Ambrose Gonzales
Darrell Guthrie
David Haffelder
William Hale
Tom Harrison
Ron Hinkle
Lynne LeMon
Jacob Lipp
Karen Lundquist
Catherine Martin
Jozette Maxwell
Tom McCarty
Suzi Ray McClellan
Sidney McKinley
Jim Moellinger
Jim Muse
Donna Nelson
James Nier
Rebecca Payne
Commissioner Brett Perlman
Jim Phillips
Carolyn Purcell
Elango Rajagopal
Meena Thomas
Commissioner Judy Walsh
John Webb
Pam Whittington
Chairman Pat Wood

Every effort has been made to ensure that the information presented in this report is accurate as of October 13, 2000. However, many of the events and issues explored by the committee are in constant motion. Examples include federal consideration of the merger of America Online and Time Warner, the progress of federal cases related to open access in several jurisdictions, the rollout of advanced services, the adoption of federal rules to implement health care privacy laws, the petition for *certiorari* in federal cases related to telecommunications services, and the status of local exchange service competition. It is hoped that this report will serve as a reference for the 77th Legislature as it considers issues researched by the Committee on State Affairs during the interim.

COMMITTEE ON STATE AFFAIRS

SUBCOMMITTEE ON CABLE & BROADBAND

During the interim, the Committee on State Affairs was charged to study the authority of state and local governments to require cable television companies to provide access to competitors and to affect the rates, terms, and conditions under which access is provided; and to consider the speed of change in the telecommunications industry and the implications of the state assuming new regulatory responsibilities in this industry, including the question of whether any or all providers of broadband service should be required to provide access to competitors.

Subcommittee on Cable & Broadband

Chairman:	Steven Wolens
Members:	Leo Alvarado, Jr. Kevin Bailey Kim Brimer David Counts Tom Craddick Debra Danburg Paul Hilbert Bob Hunter John Longoria Kenny Marchant Brian McCall Tommy Merritt Sylvester Turner
Hearings:	March 2 May 2 August 17

A subcommittee was formed to study regulatory schemes placed upon different kinds of telecommunications companies by different levels of government, from local franchising authorities (LFAs) to the Public Utility Commission of Texas (PUC) to the Federal Communications Commission (FCC). The subcommittee held three public hearings in Austin and accepted testimony from invited witnesses representing various points of view regarding the regulation of cable and broadband access. In addition, committee staff moderated a briefing for all legislative staff featuring several experts who provided testimony to the subcommittee. The subcommittee focused its inquiry upon cable modem service, which is broadband Internet access provided over a cable system.

Broadband is a characteristic of advanced telecommunications capability, and it is defined "without regard to any transmission media or technology." In other words, any type of transmission technology capable of supporting bandwidth in excess of 200 kilobits per second (kbps) in the last mile, in both the upstream and downstream directions, is considered advanced telecommunications capability by the FCC.[1] More popularly, it is called broadband.

[1] 47 U.S.C. §706(c) defines advanced telecommunications capability "without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." The term "advanced services" is used interchangeably with "advanced telecommunications capability."

The FCC chose 200 kbps because it is a sufficient speed to transmit full-motion video and allow an end-user to "change web pages as fast as one can flip through the pages of a book."[2] Advanced services are a subset of "high-speed" services, which the FCC describes as having the capability to transmit data at speeds faster than 200 kbps in one direction.[3] Services offering speeds of less than 200 kbps are generally thought of as narrowband.[4] Dial-up Internet access over standard twisted-pair copper telephone wires is a narrowband connection with a maximum data transfer rate of 56 kbps.

Broadband Internet access allows users to transmit and receive data at speeds up to several hundred times faster than dial-up connections. It would take 24 minutes to download a 10 megabyte (MB) file—a short video clip—with the fastest dial-up connection. With a cable modem connected at 4 megabits per second (Mbps), the same file would take eight *seconds*. This increased speed allows consumers to access a wide range of Internet-based applications, such as streaming video, that are simply impossible over a narrowband connection. Broadband Internet access also alleviates the perceived need to have a second telephone line dedicated to dial-up Internet access because broadband connections are typically "always on."

Today, about 90 percent of Americans access the Internet via dial-up connections. Narrowband is expected to remain the predominant means of accessing the Internet well into this decade. However, broadband service providers are experiencing substantial growth. During 1999, the penetration of broadband services more than tripled, rising to 1 percent of households.[5] At the end of 1999, roughly 59 percent of U.S. zip codes had at least one broadband subscriber, and more than 90 percent of the country's population lived within those zip codes.[6]

Significant growth has continued throughout 2000. Though the timeliness of subscriber figures is fleeting, it is clear that several broadband service providers have more than doubled their subscriber base since the year began, and faster growth is expected in the near term. By 2008, the number of residential broadband users is estimated to exceed 78 million. At the end of September 2000, there were roughly 5 million broadband subscribers.

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[2]Federal Communications Commission, *Broadband Today* (October 1999) at 17.

[3]Federal Communications Commission, *Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Second Report, FCC 00-290 (August 21, 2000)(*Second 706 Report*) at ¶11.

[4]Integrated Services Digital Network (ISDN) has a maximum data transfer rate of 128 kbps, excluding it from broadband services. See *Broadband Today* at 19.

[5]*Second 706 Report* at ¶33.

[6]Ibid. at ¶84.

Overview of Broadband Technologies

High-speed Internet access is available over several different types of technologies, although not all types are available in all areas. Not all technologies provide true broadband capability in both directions today. However, several technologies that show tremendous potential to provide broadband service are nearly ready for market, while others are in the very early stages of deployment. Because of their various limitations, none of the broadband technologies available today can reach 100 percent of the potential market for broadband consumers, although some have the potential to do so in the near future. Broadband Internet access is currently available over four different platforms: cable modems, digital subscriber lines (DSL), fixed wireless, and direct broadcast satellite (DBS).

Currently, cable modems are the most prevalent means of acquiring broadband Internet access. They represented about three-fourths of the 1.8 million high-speed Internet subscribers as of the end of 1999.[7] Growth in subscribers of cable modem service has been phenomenal throughout the first two quarters of 2000. Cable broadband provider Excite@Home signed up its two millionth subscriber in August, making it the nation's eighth largest Internet service provider (ISP). Road Runner, another cable broadband provider, doubled its subscriber base in the first two quarters of 2000 and reached the one million mark in August.[8]

DSL's recent growth has also been strong. SBC's Project Pronto had 399,000 subscribers at the end of the second quarter of 2000. Verizon had 220,000 subscribers after adding 71,000 new subscribers in the second quarter of 2000. Covad Communications added 45,000 new DSL subscribers in the second quarter, giving them a total of 138,000 subscribers. Overall, DSL subscribers increased by about 445,000 in the second quarter, meaning that there were about 1.2 million DSL subscribers nationwide, compared with around 3 million cable modem subscribers, as of July 2000.[9] Wireless and satellite technologies are in early stages of deployment and are beginning to find a market share. Nonetheless, investment is pouring into those technologies, suggesting that they will command a significant market share in the next few years.

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[7] Ibid. at ¶33.

[8] Excite@Home news release, "Excite@Home Surpasses 2 Million Broadband Subscribers" (August 23, 2000); Road Runner news release, "Road Runner Hits a Million" (August 23, 2000).

[9] Information regarding Project Pronto can be found online at www.sbc.com/data/network/pronto.html, accessed August 28, 2000; Verizon Communications news release, "Verizon Communications Announces Second Quarter Results" (August 8, 2000); Covad Communications news release, "Covad Communications Announces Record Second Quarter Results" (July 26, 2000); Reuters news service, "DSL Lines Up 59 Percent in 2nd Quarter" (August 11, 2000). The subscriber total for cable modem service is an estimate considering data reported by Excite@Home and Road Runner.

Cable Modems

Many cable operators nationwide are transforming their closed, one-way systems into hybrid systems consisting of fiber-optic and coaxial lines. These hybrid fiber-coaxial (HFC) systems increase transmission capacity, reduce noise, and provide paths for clean two-way transmissions. These new networks allow cable operators to provide more than 100 analog video channels, hundreds of digital video and audio channels, Internet access at speeds up to several hundred times faster than dial-up connections, interactive video and games, and telephony. Many of these non-video services require additional upgrades to their networks. In order to provide Internet access, operators must build an end-to-end Internet Protocol (IP) networking infrastructure consisting of cable modem termination systems (CMTS) at the headends, Internet backbone connectivity, routers, servers, network management tools, security, and billing systems. Once a network is upgraded, it is capable of providing service to all homes passed.

Under optimal conditions, an upgraded cable system can provide downstream speeds of 27 Mbps and upstream speeds of 10 Mbps. In practice, cable systems deliver speeds of several hundred kbps to 1.5 Mbps because the cable network is a shared medium. All subscribers in a given area share bandwidth. Though data transfer rates remain considerably faster than dial-up connections, there is a decrease in performance as more subscribers are online. Transfer rates are also affected by the proportion of the cable system's capacity that is devoted to advanced services. Data transmissions are also vulnerable to interference and degradation caused by subscribers' equipment and network connection points.

Cable operators must allocate bandwidth based upon the overall system's limitations and the usage needs of people who are online. As such, "bandwidth hogs" may cause substantial performance degradation of the system and may need to have their usage curtailed by the cable operator in order to maintain the overall performance of the system. Thus, cable modem service may not deliver sufficient upstream bandwidth to handle applications such as videoconferencing, although it more than easily handles ordinary web surfing.

Cable companies, in conjunction with software and hardware firms, designed equipment and processes to allow cable customers to access the Internet via cable modems. Cable companies are expected to invest about $31 billion nationwide to upgrade their systems to provide cable modem service, telephony, and other improved cable services.[10] The companies agreed upon a single standard for high-speed data delivery over cable, which means that modems can be manufactured without regard to the system they will be attached to. Having a uniform standard ultimately decreases the price of end-user and cable plant equipment and makes both more

[10] *Broadband Today* at 26.

readily available in the marketplace.[11] Cable modems can now be found in retail stores, and in some cases can even be installed by the user as a "plug-and-play" peripheral on their personal computers.

Digital Subscriber Lines

DSL technology transforms an existing copper loop used for voice service into a conduit for high-speed data traffic. The wire's higher frequencies are used to transmit data, and the lower frequencies are used for voice and analog fax transmissions. DSL can function as an Internet connection and telephone line simultaneously. High-speed signals are sent over the upgraded copper loop until it reaches a DSL Access Multiplexer (DSLAM) located at a carrier's central office. The DSLAM combines the end-user's IP signal with the IP signals of other customers and forwards them onto higher-speed network backbones.

Downstream Bandwidth Comparison

Dial-up connection	0.01 - 0.05 Mbps
ISDN	0.12 Mbps
Satellite	0.4 Mbps
PCS wireless	1.0 Mbps
WCS wireless	1.5 Mbps
Asymmetric DSL	1.5 - 8 Mbps
MMDS wireless	0.8 - 11 Mbps
Cable modems	0.7 - 27 Mbps
T1 line	1.5 - 45 Mbps
Very-high-rate DSL	up to 51.8 Mbps
Upperband wireless	up to 155 Mbps

Sources: Second 706 Report, Broadband Today, *and corporate media releases. Approximate maximum downstream data transfer rates are shown as of July 2000. Technological advances and other factors can increase (or decrease) these rates.*

Because it works over existing telephone plant, DSL is significantly less expensive to deploy than HFC cable system upgrades. It is not necessary to upgrade the entire network before service can be sold to customers because subscribers' copper loops are reconditioned individually. DSL service has been offered by local exchange companies since 1996, and many telephone companies are investing billions of dollars to upgrade their copper loops so they will be DSL-capable.

DSL technology is not without its limitations. The most significant is signal attenuation, which refers to the dissipation of signal strength as it travels over the copper line. Because higher frequencies are more susceptible to attenuation, the data portion of DSL has distance limitations, which currently range up to 18,000 feet—about 3.4 miles—from a central office. About 80 percent of the country's copper loops lie within this distance. As the bandwidth increases, the effective maximum distance between the end user and the central office decreases. The highest-speed service is available only within 4,000 feet of a central office. Expanding DSL beyond its current range will require substantial investment or the development of newer technologies that are less sensitive to attenuation.

[11]The industry refers to its cable modem standards as DOCSIS, which means Data Over Cable Service Interface Specifications.

There are several types of DSL, each of which has different maximum data transfer rates and maximum distance limitations.[12] The two general categories are asymmetric DSL (ADSL), which offers slower, variable upstream data transfer rates, and symmetric DSL (SDSL), which offers the same transfer rate in both directions. In general, ADSL has a larger maximum distance from the central office and is much less expensive for consumers. Unlike cable modem service, DSL offers dedicated bandwidth, as the connection is not shared with other users. Not all customers in DSL-upgraded areas may be able to use DSL, also unlike cable modem service. DSL service is incompatible with bridge taps and load coils, which are installed by telephone companies on portions of their infrastructure to provide improved voice service. Thus, wires fitted with load coils between a customer's premises and the central office will restrict the ability for both the incumbent company and a competitor to offer DSL service to that customer.

The largest announced investment in DSL in the U.S. is SBC's Project Pronto, a $6 billion initiative aimed at providing DSL capability to 80 percent of its customers in its 13-state region by the end of 2002. According to SBC, rollout of Project Pronto would make it the largest broadband service provider in the U.S. BellSouth, Qwest, and Verizon are aggressively marketing DSL service in their service territories, and a variety of competitors, such as Covad and MindSpring, are rolling out their own DSL service and, in places, reselling incumbent companies' DSL service. Both SBC and Verizon have recently invested in DSL companies to enhance the rollout of their high-speed offerings.[13]

Fixed Wireless

Fixed wireless providers can utilize existing microwave networks to provide high data transfer rates over the last mile between the consumer's residence or business and the network connection. Substantial investment is being made to roll out new facilities as well. These systems have the potential to deliver high-speed services to residential, rural, and other under-served areas that wireline services cannot economically serve. Wireless services are in a much earlier stage of development than wireline broadband offerings. Technical limitations have limited their competitiveness, but that is changing. Significant growth is expected over the next five years, potentially leading to millions of subscribers of various fixed wireless services.[14]

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[12]DSL technology is generally referred to as xDSL, where the *x* represents any of a variety of DSL technologies. For convenience, this report uses the term DSL to represent any and all xDSL technologies.

[13]In September 2000, SBC purchased 6 percent of Covad Communications as part of a $600 million agreement that made Covad the in- and out-of-region DSL provider for SBC. In August 2000, Verizon announced that it was merging its DSL business operations with NorthPoint Communications Group. The merger gives Verizon a 55 percent stake in NorthPoint.

[14]*Second 706 Report* at ¶42. Much of the discussion on fixed wireless is based upon this report.

Several systems are being developed, tested, and deployed using several different bands of spectrum. Upperband technologies, which operate above 24 Gigahertz (GHz), generally support data transfer rates up to 155 Mbps. They utilize relatively small cell sizes, with an average cell radius of less than five miles. Upperband signals behave like visible light, meaning that they absolutely require a clear line of sight between transmitters and receivers. Upperband signals are also susceptible to signal loss in adverse weather conditions. The largest commercial deployments of upperband technologies are in the Digital Electronic Messaging Service (DEMS) and Local Multipoint Distribution Services (LMDS) portions of the spectrum. Teligent and WinStar are the furthest along in rolling out fixed wireless platforms using upperband spectrum.

Lowerband technologies (below 3 GHz) have a substantially greater average radius than upperband systems, and clear transmission is often possible up to 35 miles. Multipoint Distribution Service (MDS) signals generally do not degrade in adverse weather conditions, and they are capable of functioning without a direct line of sight between the transmitter and receiver. MDS functions between 2 and 2.7 GHz and includes the Multichannel Multipoint Distribution Service (MMDS) and Instructional Television Fixed Service portions of the spectrum.

In 1998, the FCC changed its rules to allow MMDS companies to provide two-way broadband services. Previously, MMDS could be used only to provide one-way video programming. Since the rule change, Sprint and WorldCom have invested at least $1 billion to purchase MMDS licenses to offer two-way broadband services. Linking their MMDS systems to their existing long distance networks provide these companies with the ability to provide nationwide (even global) end-to-end transmission. At least nine companies, including WorldCom, were offering high-speed Internet connections via MDS systems at the end of 1999.[15]

Cellular telephone and Personal Communications Services (PCS) spectrum is also capable of supporting high-speed services, but relatively few licensees are using their frequencies in this manner. For example, AT&T's Project Angel uses PCS spectrum to deliver broadband connections to customers generally located outside the company's cable footprint. Project Angel is being tested in the Dallas/Fort Worth market. As initially deployed, Project Angel permits two voice channels, data rates up to 512 kbps, and "always on" Internet access. AT&T envisions the system as supporting four voice channels, five personal computers, and Internet access at speeds up to 1 Mbps. The company anticipates full-scale rollout in 2001.[16]

Additional segments of spectrum can support high-speed Internet access, including Wireless Communications Service (WCS) spectrum. WorldCom is using WCS as the return path for fixed wireless trials in Baton Rouge, La.; Jackson, Miss.; and Memphis, Tenn. AT&T plans to use its

[15]Ibid. at ¶52.

[16]AT&T, "AT&T Background Materials" (submitted March 2, 2000).

WCS spectrum for some fixed wireless trials, and BellSouth has begun testing a WCS-based system with downstream speeds of 1.5 Mbps in Houma, La. BellSouth plans to upgrade its WCS trial to two-way service if the Houma test is successful.[17] Small start-up providers are using unlicenced bands of the spectrum (typically in the 2 and 5 GHz spreads) to establish highly localized, short-distance fixed wireless services, such as a multi-building local area network for business campuses, in at least 23 U.S. markets.

Wireless technologies have several economic advantages over wireline systems. Most notably, there is far less physical infrastructure required to roll out a fixed wireless system, and it can be done on a selective, customer-by-customer basis. Thus, wireless providers can enter a market very quickly with far less investment. However, because the spectrum is limited, there are few licenses in any given area for a given band of spectrum. Furthermore, these licenses can be quite costly.[18] However, technological advances may allow for more efficient use of present spectrum licenses, and thus dramatically reduce the acquisition costs for spectrum.

Direct Broadcast Satellite

Satellites offer tantalizing possibilities for economical broadband deployment across the U.S. Their coverage area is virtually unlimited, and they may be the best (and only) means of reaching rural populations and remote locations. Hughes, which offers video programming through its DirecTV satellites, is in a position to deploy broadband service with relatively little additional investment. Several other companies plan to launch satellite service by 2002 or 2003.

Hughes currently offers DirecPC, which provides high-speed Internet access of rates up to 400 kbps in the downstream direction via its existing satellites. Upstream connections must be made over a standard dial-up connection. True two-way broadband capability will be available by the end of 2000. Satellite systems are already available in all U.S. markets. However, there must be a clear line-of-sight between the consumer's satellite dish and the satellite. Generally, North American customers must have a clear view of the Southern sky to obtain a satellite's signal.

Not all consumers will be able to choose among all these different technologies. More choices between kinds of services or providers are likely to be found in larger metropolitan areas than in more sparsely populated areas of the state. In a fair number of locations, there may be only one high-speed service provider, at least in the near future.

[17] Ibid. at ¶54.

[18] To date, spectrum auctions have provided the federal government with over $24 billion in revenues, according to the FCC. See *Second 706 Report* at n. 58.

Open Access

A growing public policy debate centers on whether cable system operators should be required to allow customers to use non-affiliated ISPs without separately paying for the cable company's affiliated ISP. Proponents of open access argue that closed networks threaten consumer choice and the very nature of the Internet itself. Therefore, government must intervene to require cable operators to open their networks to non-affiliated ISPs. Opponents of open access argue that regulation of the Internet will stifle the deployment of cable modem service and other broadband technologies, thereby reducing competition. They believe government should allow the competitive market to work.[19]

An FCC staff report, *The FCC and the Unregulation of the Internet*, attributes the growth and continued success of the Internet to "the openness of both the Internet and the underlying telecommunications infrastructure."[20] In terms of narrowband access, customers are permitted to dial up any ISP of their choosing, because their modems are connected directly to the telephone network and the telephone companies are required to keep their networks open. ISPs utilize the telephone network to "offer an amazing array of Internet services to customers, and the affordable use of the telephone network has allowed these providers to offer inexpensive access to the Internet to virtually all Americans."[21] The telephone companies' DSL lines are similarly open, and customers are able to access any ISP via their DSL service. If the ISP charges for its service, then customers would pay that fee in addition to the monthly charge for DSL, but they would not be required to pay for their DSL providers' affiliated ISP. Access may be purchased separately from content.

When customers sign up for cable modem service, their Internet access is usually provided through the cable company's owned or affiliated ISP. Generally, cable customers of AT&T's systems receive their Internet access via Excite@Home, and Time Warner's customers receive access via Road Runner. When users first access the Internet, the first Web page they typically encounter is the Excite@Home or Road Runner start page, unless they have reconfigured their

[19]As a matter of convenience, this report uses the term "open access" to describe a policy that requires cable operators to provide non-affiliated ISPs with access to the cable systems' customers at rates, terms, and conditions that are no less favorable than those given to the operators' affiliated ISPs. This report's use of the term "open access" is not intended to prejudge the issue. "Open access" is widely used in public discourse on the issue, and the committee notes that there is no definitive value-neutral term to describe the policy and its surrounding debate.

[20]Jason Oxman, Federal Communications Commission, *The FCC and the Unregulation of the Internet*, Office of Plans and Policy Working Paper No. 31 (July 1999) at 5.

[21]Ibid.

cable modems to start with a different page or access an unaffiliated ISP. Subscribers who want to access the proprietary content of an unaffiliated ISP, such as EarthLink, must pay an additional fee for that service above their Road Runner or Excite@Home cable broadband subscription. Subscribers pay the same price for cable modem service even if they have chosen another start page and do not utilize the content of Excite@Home or Road Runner. Access cannot be purchased separately from content.

Ownership of the Two Largest Cable Modem ISPs

The publicly traded **Excite@Home** is controlled by AT&T, which also owns about 25 percent of the outstanding stock. Cable companies Comcast and Cablevision each own about 8 percent. The rest is owned by individual investors. **Road Runner** is a privately held venture between AT&T (through MediaOne) and Time Warner, which own roughly 35 percent each; and Advance/Newhouse, Compaq, and Microsoft, which own about 10 percent each. AT&T is likely to divest its interest in Road Runner to meet conditions imposed on its merger with MediaOne.

The issue of open access has become particularly relevant to the proposed $129 billion merger of America Online (AOL), the nation's largest ISP, and Time Warner, one of the nation's largest entertainment companies and the nation's second largest cable system operator.[22] Prior to the January 2000 merger announcement, AOL had been one of the most vocal supporters of open access. In an October 26, 1998, speech to the National Press Club, Steve Case, AOL's chief executive officer, described the need for government action on open access:

> Government has a responsibility to preserve an open playing field—to preserve the openness, innovation, and competition that are at the heart of the Internet.… There is currently one set of policies that governs telecommunications, and another governing cable. These legal, policy, and regulatory frameworks have little to do with each other, certainly not as much as you might expect for industries that are converging and moving into direct competition with each other, especially in Internet access. The DNA of the Internet is one of openness, competition, and rapid innovation. The DNA of cable is not. If cable's DNA does not change, cable broadband service will never reach its full potential. The bottom line is that competition in all last mile facilities should remain open so that consumers have the same kind of choices in broadband that they do in narrowband.[23]

AOL was the largest supporter of the OpenNet Coalition, an association of ISPs and other interests lobbying for open access at the local, state, and federal levels. In Texas, a representative of America Online testified before the Committee on State Affairs in favor of House Bill 3393, 76th Legislature, relating to the enhanced availability of broadband Internet access. That bill,

[22]Appendix C summarizes the ownership interests of several major telecommunications and media corporations, including AOL and Time Warner. Appendix B provides a timeline of telecommunications and media mergers and acquisitions since passage of the Telecommunications Act of 1996.

[23]Steve Case, "Speech of Steve Case at the National Press Club" (October 26, 1998), available online at http://corp.aol.com/press/speeches/102698npc.html, accessed September 24, 2000.

authored by Representative Brimer, would have required all operators of wireline broadband services to provide non-affiliated ISPs access to "transport services, unbundled from content, on rates, terms, and conditions that are at least as favorable as those" it provides to its affiliated ISP or to any other entity. The operator would have been required to provide access "at any technically feasible point selected" by the ISP.[24]

Not even a year later, AOL reversed itself and began telling its lobbyists to cease pushing for open access legislation. In a *Wall Street Journal* article, George Vradenburg, an AOL senior vice president, was quoted as saying that the combined company may not open its cable systems to multiple ISPs, and AOL never should have suggested that any cable company do so.[25] Just before Congressional hearings on the merger, AOL and Time Warner released a memorandum of understanding (MOU) pledging to open their cable networks to unaffiliated ISPs.[26] During FCC hearings on the merger, Mr. Case said the combined company "will be continuing our own efforts to ensure real choice among ISPs as quickly as possible."[27]

Regulators on both sides of the Atlantic Ocean are not as optimistic, and they have expressed reservations about the potential power of the combined company to control both content and systems for delivering that content. Other recent actions taken by the two companies have only increased skepticism. First, AOL has declined to open its instant messaging (IM) platform to unaffiliated applications. AOL's customers, which represent nearly 90 percent of IM users, can use IM to communicate only with other AOL customers. No one outside of AOL's network can communicate with an AOL user via AOL's instant messaging technology.

A coalition of AOL's rivals, including AT&T, Excite@Home, Microsoft, Prodigy, and Yahoo!, are lobbying the FCC to adopt interoperability standards as a condition of approving the AOL-Time Warner merger. AOL submitted a plan in June to open its IM system, but competitors remain concerned that it does not go far enough to ensure seamless communication.[28]

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[24]House Bill 3393 was considered by the Committee on State Affairs in a public hearing on April 26, 1999. AOL's representative Stephen Teplitz, the company's senior director for telecommunications policy, testified in favor of the bill. It was left pending.

[25]Kathy Chen, "AOL Changes Tune in Debate on Open Access," *Wall Street Journal* (February 14, 2000).

[26]*Memorandum of Understanding Between Time Warner, Inc. and America Online, Inc. Regarding Open Access Business Practices* (February 29, 2000).

[27]Steve Case, "Steve Case's Opening Remarks at FCC Hearing on Merger of America Online and Time Warner" (July 27, 2000), available online at http://corp.aol.com/press/speeches/072700/fccmerger.html, accessed September 24, 2000.

[28]CNNfn news service, "Rivals Unite Against AOL" (July 25, 2000), available online at http://cnnfn.cnn.com/2000/07/25/technology/im_org, accessed July 25, 2000; "FCC Unsure of Next Move" (September 13, 2000), available online at http://cnnfn.cnn.com/2000/09/13/technology/aol_warner/index.htm, accessed September 25, 2000 (CNNfn is an affiliate of Time Warner.).

Cable Network Ownership

Many of the networks offered on Time Warner's Austin system are partially owned by AT&T and Time Warner:

Channel	AT&T	Time Warner	Channel	AT&T	Time Warner
Animal Planet	#		Home Shopping Network	#	
BET	#		Learning Channel	#	
BET on Jazz	#		News 8 Austin	#	#
Cartoon Network	#	#	Odyssey	#	
Cinemax	#	#	Outdoor Life	#	
CNN networks	#	#	QVC	#	
Comedy Central	#	#	Sci-Fi Channel	#	
CourtTV	#	#	Speedvision	#	
Discovery Channel	#		TBS	#	#
E!	#		Telemundo	#	
Encore	#		TNT	#	#
Fox networks	#		Travel Channel	#	
Golf Channel	#		Turner Classic Movies	#	#
HBO	#	#	TV Guide Channel	#	
Health Network	#		USA Network	#	

AT&T, through its Liberty Media subsidiary, owns 25.51 percent of Time Warner Entertainment and 8 percent of News Corporation. For more information on ownership interests of communications and media corporations, see Appendix C.

Second, Time Warner's public clash with the Walt Disney Company angered consumers and regulators alike. As part of negotiations for retransmission rights, Walt Disney demanded that the Disney Channel be included in Time Warner's basic cable lineup instead of being offered on a higher-priced program tier. Time Warner refused, and negotiations broke down. Without a retransmission agreement, Time Warner pulled Disney's networks, which include the ABC broadcast network, from several of its cable systems, including its Houston system. The signal was restored several days later. Time Warner was probably correct on the legal merits of the case. However, the public relations fallout from the skirmish has only added to the uneasiness surrounding the merger.[29]

Third, Warner Music Group's now-canceled $20 billion merger with London-based EMI Group had sparked substantial opposition in Europe. The European Commission (EC) was concerned that the combined company would have been in a position to control the market for downloading music from the Internet, using AOL as its primary means of providing music online. The two

[29]Time Warner blamed Walt Disney for "trying to inappropriately use its ownership of ABC to extract excessive and unreasonable terms for its cable channels—terms that would add hundreds of millions of dollars in costs for Time Warner Communications and its cable customers." The general manager of ABC-owned KABC-TV in Los Angeles responded, "this blackout is a frightening foreshadowing of the implications of the Time Warner-AOL merger." See CNN, "ABC Returning to Time Warner Cable" (May 2, 2000), available online at www.cnn.com/2000/showbiz/tv/05/02/time.warner.02/, accessed October 8, 2000 (CNN is an affiliate of Time Warner.); Associated Press news service, "ABC, Time Warner in Houston TV Battle" (May 1, 2000).

companies offered to divest several record labels in hopes of securing EC approval of the merger. Adding to that fear is an existing marketing agreement between AOL and Germany's Bertelsmann Music Group (BMG) that would give AOL preferential access to BMG's vast music library.[30] Time Warner and EMI terminated their proposed merger in October 2000. Days later, the EC approved the AOL-Time Warner merger, conditioned on AOL's severing all structural ties with Bertelsmann. The FCC has not yet ruled on the merger and is waiting for the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) to act.

Summary of Testimony

Much of the activity related to open access has occurred at the local level, where most cable regulation occurs. Several local governments, including the city of Portland, Ore., and Henrico County, Va., have enacted open access ordinances requiring their cable franchisees to provide nondiscriminatory access to competing ISPs. These ordinances have been challenged in court by the cable operators. During the subcommittee's inquiry, several courts handed down rulings that had the effect of complicating the open access debate. In May 2000, a federal district court invalidated the Henrico County ordinance.[31] That case is on appeal to the Fourth Circuit Court of Appeals. A month later, the Ninth Circuit Court of Appeals invalidated the Portland ordinance—for a very different reason—overturning a lower court decision that had affirmed the ordinance.[32]

The judges in these cases arrived at their seemingly similar decisions by taking contradictory positions on the classification of cable modem service under federal law, and different sides of the open access debate have shown support for either the conclusion reached in Portland or the view espoused in Henrico. There remains a considerable disagreement as to how, or even whether, cable modem service should be classified under federal law. Though a thorough discussion of these cases and their implications for the open access debate will follow the summary of testimony, it is instructive to realize that the arguments of several of the witnesses changed during the subcommittee's inquiry as a consequence of these rulings.

The subcommittee held three public hearings on open access that featured panels of national experts on telecommunications law, consumer groups, and representatives of various providers of broadband services. Included in the investigation was a discussion of the state's potential role

[30]CNNfn, "EC to Bar EMI-Time Warner Deal?" (September 14, 2000), available online at http://cnnfn.cnn.com/2000/09/14/deals/time_emi/index.htm, accessed September 25, 2000.

[31]*MediaOne Group, Inc. v. County of Henrico*, 97 F.Supp.2d 712, 714 (E.D. Va. 2000), appeal pending, 4th Cir. No. 00-1680 (*Henrico*).

[32]*AT&T Corp. v. City of Portland*, 216 F.3d 871, 877 (9th Cir. 2000)(*Portland*).

to regulate cable operators generally. Because that discussion was integral to the overall debate on open access, it will not be separately addressed in this report. Committee staff also moderated a briefing on open access for all legislative staff that featured several of the witnesses who had appeared at the subcommittee's hearings.[33]

March 2 Hearing

PAT WOOD, Chairman of the PUC, said the awarding of the cable franchise is the key event in government regulation of cable. In Texas, that power is granted to home rule and general law municipalities, meaning that city councils serve as LFAs. The federal role is now limited. The FCC was heavily involved in regulating cable rates until 1992, when Congress deregulated rates. Consumer backlash against rapidly rising rates prompted a temporary reintroduction of rate regulation in 1996. It expired in 1999. The FCC serves as a limited court of appeals for customer protection issues, but LFAs now have the primary responsibility for issues of customer service, quality standards, rates for basic cable, and programming issues.

March 2, 2000
Committee on State Affairs
Witness List

Regulation of Cable & Broadband
Darrell Guthrie, Public Utility Commission of Texas
Pat Wood, Public Utility Commission of Texas

Broadband Access
Monte Akers, Texas Municipal League
Bill Arnold, Texas Cable & Telecommunications Association
Dale Bennett, AT&T Broadband
Bill Carey, Time Warner Cable
Paul Glist, Texas Cable & Telecommunications Association
Ed Shimizu, GTE

LFAs may also prescribe the kind of service and manner rendered. They may regulate the rate for the basic service tier, which typically consists of local broadcast channels and one or more public access channels. Local authority to regulate rates ends once the FCC makes a finding that "effective competition" exists for the basic service tier. Effective competition must come from an alternative wireline source; competition from DBS does not count. Regulation of rates for basic cable beyond that basic service tier—such as CNN or ESPN—ended in March 1999. Rates for premium channels, like HBO or Showtime, were never regulated.

Under current law, the PUC would have some authority over cable companies that chose to offer voice telephony over their cable systems. The voice telephony portion of service would be regulated by the PUC as it regulates other competitive local exchange carriers (CLECs). The PUC does not currently have the authority to require open access under state customer protection statutes, because "the cable company is providing a cable service" under federal law. The

[33] A summary of the staff briefing on open access appears in Appendix D.

Legislature could provide the PUC that authority by expanding the list of companies subject to Senate Bill 86, 76th Legislature, or by specifically amending the Public Utility Regulatory Act (PURA) to place cable companies under the PUC's jurisdiction. Of course, this assumes the state has not been preempted by the FCC from doing so.[34]

The City of Portland has argued that there is, in essence, a "regulatory void" between the authority held by the federal government and the authority exercised by the states and LFAs. Portland moved to fill this void by imposing a non-discriminatory access provision in its ordinance transferring control of TCI's franchise to its new owner, AT&T. In its *amicus* brief to the Ninth Circuit, the FCC argued that there was no regulatory void because it had preempted the states and LFAs from imposing open access provisions. In other words, the fact that the FCC has not declared a policy does not mean that it has ceded its authority to other governmental entities.

DALE BENNETT of AT&T said his company, Cox, and Time Warner are investing $2 billion in Texas to upgrade their cable infrastructure to offer high-speed data and voice telephony. Smaller companies are upgrading their infrastructure as well. Investment by these companies has triggered "a massive response" from SBC, which is rolling out Project Pronto, a $6 billion investment in DSL. Both AT&T and SBC now cover about 30 to 40 percent of their footprints with broadband capability, and both are committed to reach the 90 percent availability goal in the next 24 to 30 months. The race is even, but SBC has a built-in advantage because it already has the dial-up Internet users and local telephone customers.

Several new cable franchise applicants in Austin, Dallas, Fort Worth, Houston, and San Antonio have pledged investments of $500 million per marketplace to overbuild existing cable franchise footprints. AT&T does not oppose those new franchises, provided that they are under the same build-out restrictions as the incumbent AT&T franchise. In addition to these competitors, there is substantial competition in broadband coming from wireless providers. AT&T is also rolling out fixed wireless technology, Project Angel, even in some of its cable franchise areas. The company invested $200 million in Fort Worth, and it plans to expand to 20 additional Texas markets over the next two years. WorldCom has chosen Dallas as a test market for its MMDS technology. Vodafone is working to provide broadband services via wireless handsets. Hughes DirecTV is experimenting with two-way satellite broadband service.

There is no "longer any danger of domination of the Internet access business by companies that have historically been cable companies." By 2004, cable modems are projected to have about 22 percent of the broadband market. The telephone companies will have 71 percent, divided into 22

[34] As noted, there are substantial differences of opinions on these subjects. Following this summary of testimony presented during the hearings, a thorough discussion of the debate surrounding the "Proper Classification of Cable Modem Service" begins on page 33. An analysis of issues related to the "Determination of Preemption of State/Local Authority" begins on page 44.

percent for DSL and 49 percent for dial-up. Satellite companies and fixed wireless platforms will have 7 percent. AT&T and Time Warner are also "committed to open access as soon as it is practical and possible for both of us to get there given our existing contractual commitments and technology commitments."

BILL CAREY of Time Warner said his company has spent $6 billion nationally to upgrade its cable television plant to HFC technology since 1994. Cable modem service was introduced in El Paso in 1998, and it was rolled out in Austin, Houston, San Antonio, and Waco in 1999. Time Warner has about 50,000 cable modem customers statewide as of March 1.

Time Warner and AOL released its MOU on February 29 outlining their commitment to provide multiple ISPs to customers. There would not be a fixed limit to the number of ISPs that could connect to the network, and those ISPs would not be required to purchase broadband backbone transport from AOL Time Warner. The company would not discriminate against non-affiliated ISPs. It would allow the cable company and the ISP to have "a direct relationship with the consumers." The MOU would allow video streaming.

Current trends in the market will work the issue out in a "satisfactory manner without government intervention and without the risk of unintended consequences that is the inevitable result of government regulation, however well meant." Time Warner's exclusive contract with Road Runner ends on December 31, 2001.

ED SHIMIZU of GTE said any ISP in the country can reach any customer "because the phone network has been open through laws and regulation, and not because of market forces."[35] A company like AOL has been able to succeed primarily because the telephone network is open. At issue is a marketing practice on the part of the cable industry to package an affiliated ISP with their transport service "on a take-it-or-leave-it basis." Though GTE applauds the AOL Time Warner MOU, it has two distinct drawbacks. First, it leaves in place an exclusive arrangement between Time Warner's cable systems and Road Runner until the end of 2001, which is an eternity in a fast-changing marketplace. Second, the MOU covers only a single company's cable systems, which affects less than 20 percent of the nation's cable subscribers.

Ideally, there would be no regulations on telecommunications companies, and the marketplace—that is, customers choosing services—would dictate outcomes. However, the situation that is in place finds the traditional cable and telephone companies as the leaders in deploying high-speed service. The telephone companies have a set of obligations to keep their networks open to any and all providers, while the cable companies do not. Though it would be best ultimately to have

[35]During 2000, GTE was seeking regulatory approval of its merger with Bell Atlantic and the wireless units of Vodafone AirTouch and PrimeCo. Verizon became the official name of the combined company at the end of August. Because the hearings on this issue occurred before the official name change, this report uses GTE for convenience.

fewer regulations rather than more, at this time the Legislature must look at the situation and determine whether it must regulate now, until competition truly takes hold. At some future point, the regulation could be rolled back.

Open networks are desirable. "Very clearly, unequivocally, GTE supports cable open access." The Legislature should choose to achieve open access "with a little push of legislation or regulation" rather than trust AOL and Time Warner to make it happen on their own. All of the market's activities toward open access, such as the MOU, are the result of the "very real threat of legislation or regulation for open access." Unlike the MOU, any open access law must contain finite deadlines.

The city of Portland enacted its ordinance in 1998, and the cable industry continues to fight against open access today. By showing its commitment to open access, the Legislature can accelerate its implementation. "There is nothing that stops any of these companies here from starting to implement it today." This need not wait for two years until those exclusive contracts end, but they will not begin implementing until they are pushed to do so.

MONTE AKERS of the Texas Municipal League said that change of ownership or change of control provisions are standard in cable franchise agreements, here in Texas and across the country. The city of Portland had an opportunity to impose open access at the time it was considering the change in ownership of the TCI franchise to AT&T. The city determined that the cable system was an essential facility under antitrust law, and that AT&T could not prevent competitors from accessing that essential facility.

In light of this situation, the AOL Time Warner merger has proceeded differently. In February, Time Warner informed Texas LFAs of its proposed merger. However, unlike the AT&T-TCI merger, Time Warner described the transaction as resulting in "no transfer of the franchise," as Time Warner would become a wholly owned subsidiary of a new holding company, AOL Time Warner. Any city that might have an interest in challenging that position would "probably be buying itself a very expensive lawsuit."

PAUL GLIST, representing the Texas Cable and Telecommunications Association (TCTA), said that the area of law characterized by Chairman Wood as a void is actually "affirmative preemptive deregulation." As it has with many areas involving new technologies, the federal government has opted to preempt regulation "in order to attract investment capital."

It does not matter whether broadband cable modem service is considered a cable service or a telecommunications service under federal law, as amended by the Telecommunications Act of 1996 ("the Act"). The result is the same. If it is a cable service, federal law prohibits cable systems from being regulated as common carriers by reason of providing cable service. If it is a telecommunications service, then federal law requires access to unbundled network elements

(UNEs) only for incumbent local exchange carriers (ILECs), not competitors. Cable systems are CLECs, and they can only be declared ILECs by the FCC. It is true that the FCC has not yet determined its regulatory classification under the Act. In its *amicus* brief to the Ninth Circuit in *Portland*, the FCC said that there is "an excellent case that Internet over cable is a cable service." However, it might be an as yet undefined advanced telecommunications service, "which may be neither fish nor fowl." The Internet itself is an information service.

Access to cable systems is provided by several mechanisms under federal law, but ISPs do not qualify under any of them. ISPs are not broadcast signals, excluding them from "must carry" provisions. ISPs are not qualified to lease channels, excluding them from "commercial leased access" provisions. These areas of law are exclusively regulated at the federal level. States and LFAs have the authority to place customer service and customer protection conditions on a franchise. However, open access cannot be thought of as a customer service or customer protection issue under federal law. The report accompanying the Act and the FCC orders implementing it indicate these provisions only deal with fraud, misleading advertising, and "things like how quickly you pick up the telephone." The Act says that these regulations must be consistent with the rest of federal law, and federal law prohibits regulating cable systems as common carriers.

Indeed, the FCC believes that the Internet is flourishing because of a lack of regulation. The FCC has said that it would address any competitive problems "down the road," if there is need to do so. The "explosion in competitive response by facilities-based carriers" and the resulting price wars for broadband seem to indicate that we are not "down the road." When a service is being provided by a monopoly ILEC, then regulation makes sense. Cable systems are not monopolistic providers of broadband, and there is no "likelihood of monopoly conditions" surrounding cable modem service.

Proponents of open access are actually seeking "to tie their competitor up in regulatory knots," not look out for the public good. Many companies are pouring money into broadband, and not all will succeed. Forced access regulations handicap one of the players and say, "You may not pursue a regime that makes sense to you as a business matter." As a matter of public policy and law, the regulatory regimes that are appropriate for ILECs do not and should not apply to competitors who are risking their investment with no guarantee of return.

May 2 Hearing

CHAIRMAN WOOD discussed potential state authority to regulate various aspects of broadband platforms. Regulatory authority over cable content and rates is limited to the basic service tier, and that authority has historically resided with LFAs. If a cable company were to provide telephony, then the PUC would have similar authority over its provision of telephony as it would

over any CLEC. That authority could include rate-setting, but PURA currently provides such authority only toward ILECs. Federal law does not preempt the state from extending that regulation to CLECs.

When it comes to the bundling of regulated and unregulated services, the PUC's authority is to ensure that the rate is not predatory. Following through on that authority is difficult because the PUC has no jurisdiction over rates for Internet service, DBS, or cable television. The PUC would be able to deny the company from selling the bundle at the predatory price, but determining how the price is predatory would be difficult given the PUC's lack of jurisdiction and experience with some of the bundle's components.

PAUL GLIST, representing TCTA, asked whether a market dysfunction exists that requires regulation to remedy it. In this case, the "marketplace actually is delivering lots of choice." No cable modem customer is blocked from accessing the content of any website or ISP, and cable system operators are going a step further to "negotiate direct arrangements with multiple ISPs." In addition, customers can opt for other broadband platforms, not just cable modems. Twelve states and four state public service commissions have rejected or tabled forced access measures in the past year.[36]

May 2, 2000
Subcommittee on Cable & Broadband
Witness List

Regulation of Cable & Broadband
Bill Arnold, Texas Cable & Telecommunications Association
Henry Florsheim, KTRK-TV Houston
Paul Glist, Texas Cable & Telecommunications Association
Darrell Guthrie, Public Utility Commission of Texas
Dave Lopez, Southwestern Bell
John Raposa, GTE
Edwin Rutan, AT&T
Pat Wood, Public Utility Commission of Texas

Cable may look like a telephone line, "but it's really quite a different animal." The cable operator is selling entertainment and information. The coaxial cables are "basically his truck to deliver that to the home." Consumers buy cable services for the content, not the transport. By contrast, the telephone company is selling connectivity. In essence, consumers buy telephone service for the transport, not the content. Under federal law, Internet access over telephone lines demonstrates a "clear distinction between telecom transport as a common carrier and information services as content." Once the Internet access is integrated with the cable system, then it becomes a cable service. "The addition of the words 'or use' into the definition of 'cable service' turns Internet over cable into a cable service."[37]

[36]The 12 states are California, Florida, Illinois, Kansas, Maryland, Minnesota, New Hampshire, New Mexico, Oregon, Pennsylvania, Rhode Island, and Utah. The state public service commissions are Massachusetts, Minnesota, New York, and Vermont.

[37]47 U.S.C. §522(6).

Even if cable modem service were viewed as a telecommunications service, then the state still would not be able to mandate open access under existing law. The state's jurisdiction over telecommunications utilities draws distinctions between incumbents and competitors. Unbundling requirements apply only to ILECs, because of their dominant position, and not to CLECs. Regardless of cable's market share for video programming, it is not the dominant provider of Internet access or telephony.[38] That distinction is made at the federal level as well. The FCC has ruled that an electric utility that runs data traffic over its fiber is not a common carrier, because it is not the dominant provider of that kind of service.

If open access were viewed as a customer service or customer protection measure, federal law still prevents states from imposing it as a mandate. Laws or regulations adopted under a customer protection rationale must be "consistent with the rest of what is done in federal law." Open access is inconsistent with Title II (Telecommunications) and Title V (Cable) of the Act.

JOHN RAPOSA of GTE agreed with MR. GLIST that cable modem service is a cable service. However, he disagreed with MR. GLIST that the FCC has preempted state and local governments from regulating cable modem service or requiring open access. There is no express preemption, as Congress has not clearly manifested its intent to preempt the states, and that is the test that was applied in the *City of Dallas* case.[39] In fact, Congress has done the opposite. Optimally, there would be a federal solution, and Texas can "incent Congress" by passing its own law. Historically, Congress has codified regulations originating from the states.

The market will not work without "regulatory parity." If different companies marketing the same services are regulated differently, then the Legislature would be "choosing winners and losers." The focus should be on what the consumer sees, not on who owns the wires. DSL is a transmission service, providing connectivity between the end-user and the point of interconnection with an ISP, "and any ISP can buy this service." Cable is providing the same service, except cable provides it only to its own affiliated ISP.

To the end-user, it is the same essential service. It is insufficient that end-users can reach their ISPs' home pages through the cable service, because end-users are seeking the proprietary content of their chosen ISPs. DSL providers are required to let end-users access their chosen ISPs without additional cost; for cable modem subscribers, that kind of access comes only at additional cost.

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[38] As of the end of 1999, cable modem subscribers comprised about 3 percent of all households with Internet access. See *Second 706 Report* at ¶189.

[39] *City of Dallas v. FCC*, 165 F.3d 341, 347-48 (5th Cir. 1998), quoting *Gregory v. Ashcraft*, 501 U.S. 452, 460 (1991). Accompanying written testimony quotes the court, "If Congress intends to preempt a power traditionally exercised by a state or local government, 'it must make its intention to do so unmistakably clear in the language of the statute'" (Emphasis deleted).

HENRY FLORSHEIM, general manager of KTRK-TV in Houston, said the original retransmission agreements between ABC (a Walt Disney company) and Time Warner expired at the end of 1999. The companies agreed to several extensions. Under federal law, the network affiliate can elect to be covered under must-carry provisions, meaning that the local cable franchise must include the station in its basic cable package. In this case, the station waived its must-carry rights. Once that was done, the cable system could not carry the ABC transmission without a retransmission agreement.

MR. GLIST said that, by doing this, Disney in essence "removed itself from the Houston system." Disney obviously has a different point of view.[40]

August 17 Hearing

Witnesses testifying at the subcommittees' prior hearings all argued from an assumption that cable modem service was a cable service under the Act. On June 22, 2000, the Ninth Circuit handed down its *Portland* decision. It ruled that the city could not impose an open access requirement on a cable operator because cable modem service was a telecommunications service under the Act.

CHAIRMAN WOOD said the Ninth Circuit's *Portland* decision has changed the nature of the debate by calling cable modem service a telecommunications service under the Act, but the Ninth Circuit is not legally controlling in Texas.[41] As a result of *Portland*, the FCC will initiate a proceeding on open access and determine whether it will result from market forces or whether it should arise from a government edict. It will start looking at the issue in the fall.[42]

It seems clear that the *Portland* ruling has taken the local authorities out of the debate, leaving the states and the FCC as potential regulators. Because the FCC is just starting to look at the issue, it does not appear that it has filled any regulatory void or preempted any state law. Others will disagree. The FCC is still on the fence.

In various arguments before courts, the FCC has articulated some aspects of a position, but the FCC has never formally voted one out. Until the FCC clearly occupies the field, then the states

[40]On May 1, 2000, Time Warner's systems in several markets no longer carried ABC. In its place, was the message, "Disney has taken ABC away from you." ABC programming was not shown on the affected cable systems for 36 hours. Because Time Warner dropped the programming during a "sweeps" month, the FCC ruled that Time Warner's actions were unlawful. See *supra* n. 29.

[41]Texas is part of the Fifth Circuit. To date, the Fifth Circuit has not considered an open access case.

[42]The FCC issued a Notice of Inquiry on September 28, 2000. See *infra* n. 84.

have an opportunity to step in. A state policy might stand, although it would be challenged, until the FCC establishes a policy. In between, it would be up to a court to decide whether the FCC occupies the field, but we will never know until a state passes a statute. Doing so would force the FCC to clarify its policy and to assert what it believes is its authority.

August 17, 2000
Committee on State Affairs
Witness List

Regulation of Cable & Broadband
Bill Arnold, Texas Cable & Telecommunications Association
Dave Baker, OpenNet Coalition and EarthLink
Mark Cooper, Consumer Federation of America
Paul Glist, Texas Cable & Telecommunications Association
Darrell Guthrie, Public Utility Commission of Texas
Jim Higgins, Wide Open West
John Raposa, GTE
Pat Wood, Public Utility Commission of Texas
Christopher Wysocki, Net Compete Now

The Ninth Circuit did not have to stretch the federal definition of telecommunications service too far to encompass cable modem service. The court ruled, essentially, that cable modem service was the offering of telecommunications for a fee, directly to the public, regardless of the facilities used. If a company provides telecommunications service, then it is a telecommunications carrier, and then it has certain "general duties." One general duty is to interconnect with other carriers. Another is to refrain from installing network features or devices that scuttle interconnections. These issues are clearly under the FCC's jurisdiction, although the PUC enforces many of these provisions through arbitration processes. PURA reflects this.

Current state law is fairly silent on cable modem service. Under PURA, it may be possible to require open access under the state's customer protection laws, if the state accepts that cable modem service is a telecommunications service. There are different opinions on that, too. It would be helpful for the Legislature to provide the PUC guidance on how far it wants the PUC to go. If the Legislature intends for the PUC to regulate cable modem service, then PURA would need to be amended so that its interconnection provisions would cover all telecommunications carriers, not just local exchange companies.[43] In addition, PURA would need to be amended to grant the PUC the specific authority to enforce Section 251(a) of the Act.[44] However, the fate of the state's jurisdiction likely rests with what the FCC decides its policy is.

In practical terms, choice of ISPs may occur before a Texas open access law ultimately takes effect. The larger cable companies have publicly committed to open up their networks, so there may be no practical impacts of open access legislation on the market by the time the law could go

[43]PURA §60.121 defines interconnection in terms of local exchange companies. It would not apply to cable companies offering cable modem service as currently written.

[44]47 U.S.C. §251(a) requires telecommunications carriers to interconnect with the facilities and equipment of other carriers and not to install network features or capabilities that do not comply with federal requirements that transfers of calls appear seamless to the end user and laws related to access for the hearing-impaired.

Potential State Authority to Regulate Aspects of Broadband Platforms

	DSL	Cable	Wireless
Pricing:	# FCC has asserted jurisdiction # Extent of state authority unresolved	# State (LFAs) have authority over basic tier rates # 5 percent of cable service gross revenues can be assessed as franchise fees	# None
Access:	# Unbundling and interconnection required by FCC and implemented by states	# Internet access is unresolved # Telephony is resolved (cable company regulated as CLEC)	# State approves interconnection
Content:	# Not applicable # FCC considers DSL a transmission technology separate from content	# Very limited # LFA may require capacity be set aside for public, education, and government use	# Not applicable
Customer Service:	# FCC has asserted jurisdiction # Extent of state authority unresolved	# State and LFAs may establish minimum service requirements subject to the Act's limitations	# Authority given under "other terms and conditions"

The state has no authority over pricing, access, content, or customer service of broadband supplied by DBS.

Source: Adapted from materials provided by the PUC.

into effect, which would be September 1, 2001. Because the PUC would likely have to initiate proceedings to implement the law, it would probably be summer 2002 before open access could become effective.

BILL ARNOLD of TCTA said his association represents 48 cable companies which provide service to 3.6 million of the state's 3.7 million basic cable subscribers. Thirty-seven of those companies have fewer than 10,000 subscribers. The largest operator, Time Warner, has more than 1.8 million subscribers. Other large operators include AT&T (about 600,000 subscribers), Cox (about 400,000), and Charter (about 300,000).[45]

[45]These figures were ballpark figures provided by Mr. Arnold from memory and should not be relied upon as absolute subscriber totals.

In the last few months, DirecTV (Hughes) has begun to test two-way broadband via satellite. WorldCom has filed applications at the FCC to deliver fixed wireless service to an additional 60 markets in Texas. GTE has merged its DSL operations with NorthPoint, an entrepreneurial CLEC, to bolster its DSL rollout. AT&T is testing technology in Boulder, Colo., for use in an upcoming multiple-ISP trial. The FCC has also indicated that it will launch a proceeding on open access issues. It has declared in briefs to various appellate courts that this area is within the FCC's authority. The presumed outcome is that the FCC will forbear from regulating cable modem service.

In materials prepared for the hearing and the staff briefing the day before, GTE has indicated that one of its main concerns is with cable's market share. Those materials show cable modems as having 89 percent of the broadband market, compared with 11 percent for DSL. The problem with those numbers is that they are year-end 1999 figures. The trade press is reporting that there are about 3.2 million broadband customers, about 2 million of which use cable modems. About 1.2 million are DSL customers, of which 750,000 were added in the first two quarters of 2000. Analysts are reporting that the high-speed market will be evenly divided between cable modems and DSL by mid-2002.[46] This fight should be waged in the marketplace, not at the Legislature. The committee should wait until the FCC issues its findings before it acts.

MARK COOPER of Consumer Federation of America said the state has clear authority under federal law to regulate cable modem service. It should act, because "idle areas of law work to the benefit of the federal government at the expense of the states." By the end of the year, the FCC will issue a notice of inquiry, but it will not establish a public policy. Anyone who believes the FCC will finish its proceeding this year is being "very generous." Consumer advocates have been asking the FCC to open this proceeding for over two years, and it has refused. The FCC is trying to keep the issue cloudy so it can attempt "to occupy a very important field by doing nothing, creating confusion and ambiguity" which will be rewarded as federal courts defer to the agency's expertise. The Ninth Circuit did not defer to the agency in its *Portland* ruling; it looked at the law, and "the law is clear."

Some will argue that the Ninth Circuit's determination that cable modem service is a telecommunications service is *dictum*, or rambling. It is not. The court's determination is "a very clear and precise statement of a public policy." Such a policy is "essential" to preserve the freedom of the Internet, which is "the first really, truly competitive marketplace." The debate is not about whether cable will compete with DSL. It is about whether cable and DSL will be held

[46]There was much discussion and disagreement over the subscriber figures cited by both sides during the August 17 hearing and the staff briefing the day before. GTE's materials quote the FCC's *Second 706 Report*, which reflected year-end 1999 figures, and GTE's written materials indicate this. The executive summary of the FCC report was released on August 3, 2000, and the full report was released three weeks later. TCTA presented figures that were reported by various trade publications as being representative of the first two quarters of 2000, or six months after the figures reported by the FCC. A summary of the staff briefing on open access appears in Appendix D.

open so all the thousands of ISPs can compete. They need "a fair chance to buy transport services," which means that the terms are no less favorable than what the cable company (or DSL provider) charges its affiliate.

There is a "crystal clear preservation of state authority to regulate anything other than cable services provided by cable operators" contained in Section 541(d)(2) of the Act.[47] The Texas PUC knows how to open up closed markets, as evidenced by its opening of the local exchange market in a manner that won long distance approval for Southwestern Bell with the support of consumer advocates.

JIM HIGGINS of Wide Open West said his company is building new high bandwidth fiber-optic networks for the residential and small business markets, which is "the next generation of the infrastructure that was once the cable industry." It has obtained franchises in Fort Worth, Grand Prairie, and Irving, and it is working to obtain franchises in Dallas, Houston, and several cities surrounding Houston. Wide Open West "is very favorable to open access, and we are building our infrastructure to accept any number of Internet service providers." The company is staying away from switched telephony, because it "takes up a huge part of the return path." Instead, its new networks will send voice traffic using Internet protocols. Wide Open West will offer a minimum data transfer rate of 3 Mbps to all of its customers.

"I created, with the good people of Front Range Internet in Fort Collins, Colo., the first open access affiliation agreement." Wide Open West wants ISPs to be its partners, because the open network allows each ISP to deliver its content and service "in all its dynamic forms." The company has not waited for a government mandate to implement open access. It has chosen to do so as a business model. All it needs is a level playing field with other cable franchises so that it can come into a city and compete.

DAVE BAKER of EarthLink, representing the OpenNet Coalition, said his company is the second largest ISP behind America Online with 3.7 million customers. EarthLink merged with MindSpring earlier in 2000. The companies have several hundred thousand customers in Texas, and it employs 500 people in its Dallas office. The company's headquarters are in Atlanta. The OpenNet Coalition is "a real national coalition" of nearly 1,000 local, regional, and national ISPs and other communications providers.

The open access debate has great implications for consumers, ISP competition, and "the future architecture of the Internet." Open access legislation is needed because incumbent cable companies force consumers to purchase their affiliated ISP. Cable's dominance in the broadband

[47] 47 U.S.C. §541(d)(2) provides that "nothing in this subchapter shall be construed to affect the authority of any State to regulate any cable operator to the extent that such operator provides any communication service other than cable service, whether offered on a common carrier or private contract basis."

market prevents most broadband customers from choosing their preferred ISP. Many consumers, especially those in rural areas, will end up with only one choice for broadband, and that will be the closed cable modem platform. Thus, the existence of DSL and wireless systems in the overall U.S. marketplace do not solve the problems of the closed cable system.

In the past few months, there has been some progress toward open access in the market, "but there's still a long way to go." In December 1999, MindSpring and AT&T crafted a letter to the FCC that contained AT&T's "Statement of Principles" about access to its cable systems. It was the first written agreement from a cable company "to get to open access eventually." This does not serve as a substitute for rulemaking. It could not take effect until at least 2002, and even then, if AT&T "were to balk," it would not be enforceable. It is not a contract. The MOU between AOL and Time Warner is "the best thing anybody has put in writing." It is the most concrete and specific commitment by a cable company to open its network to unaffiliated ISPs.

OpenNet's members remain concerned that the cable industry "still seeks to delay open access for as long as possible" to gain a first mover advantage. A catalyst is needed to overcome this resistance, "and state open access initiatives would provide this catalyst." The cable industry did not start working toward open access until the world's largest ISP bought a cable company, and together they pledged to open the network. Consumers should not have to wait two or more years for cable companies to open their networks unilaterally. The state has the authority to act, and "there is a tradition here of not sitting back and waiting for things to happen."

CHRISTOPHER WYSOCKI of the Small Business Survival Committee, representing Net Compete Now, said the market is "working very well."[48] Government intervention "tends to slow competitive environments." If government begins picking winners and losers in the market, then investment dries up, and consumers and small businesses lose out on opportunities to utilize new technologies. The investment seen in broadband today is the result of "a conscious decision by federal and state officials not to get involved in regulating the Internet." If consumers are demanding choices of ISPs and cable companies do not provide them, then consumers will switch to DSL or satellite. The market will solve the problem.

Open access is simply an effort by DSL providers, who are behind in broadband deployment, to tie up the cable companies and then catch up. However, if cable is tied down, then the other competitors have less incentive to deploy their products quickly. Further, legal challenges will "surely delay" the deployment of high-speed Internet access in Texas. Following the Act's passage in 1996, two states have managed to open their local exchange markets while "lawyers

[48]Mr. Wysocki described Net Compete Now as "a group of Internet users, providers, information technology companies, small businesses, think tanks, consumers, and the like." Also among its 87 members are 28 state and regional cable associations and at least eight cable companies. See Net Compete Now, "Coalition Members" (undated), available online at www.netcompetenow.com, accessed September 11, 2000.

have gotten very rich and whole cottage industries of lobbyists have developed." We should leave the Internet alone and see where it takes us.

PAUL GLIST, representing TCTA, said the three court cases dealing with open access issues are pointing toward a resolution at the FCC, not at the Supreme Court. Resolution is certainly needed, because applying the Ninth Circuit's opinion here in the Fifth Circuit causes some immediate problems. For example, franchise fees are capped at 5 percent of cable service revenues. Following the Ninth Circuit's ruling, no portion of cable companies' Internet revenues would have to be paid to the city in the form of franchise fees. Cable operators in the states within the Ninth Circuit are already wrestling with this and other unresolved issues, such as Universal Service Fund (USF) regulation.

Federal Court Cases Related to Open Access

AT&T Corp. v. City of Portland
The district court had ruled that the city of Portland possessed the authority to require open access. The Ninth Circuit Court of Appeals overturned that lower court decision and ruled that the city has no authority to impose open access because cable modem service is a telecommunications service.

MediaOne Group, Inc. v. County of Henrico
The district court ruled that the Henrico County, Va., ordinance requiring open access is inconsistent with four sections of federal law. Cable modem service is a cable service. The case is on appeal to the Fourth Circuit Court of Appeals.

Gulf Power Co. v. FCC
The Eleventh Circuit Court of Appeals ruled that the FCC lacks the authority to set pole attachment rates for cable wires used for Internet access, because Internet over cable is neither a telecommunications service nor a cable service.

A discussion of these cases begins on page 34.

In *Portland*, the Ninth Circuit struck down local efforts to require open access. The court reached this conclusion by declaring that cable modem service is not a cable service, "suggesting that in some configurations it might be a telecommunications service." However, the Ninth Circuit did not adopt a national policy. It threw the issue back to the FCC, as the FCC had invited the court to do. The *Henrico* decision also struck down local efforts to compel open access, but it did so from an analytical framework that cable modem service was a cable service under the Act. In the *Gulf Power II* case, the Eleventh Circuit decided that it is neither cable service nor telecommunications service, and that decision is on reconsideration.[49] The FCC has decided to open a formal proceeding on cable modem service because the courts, through their contradictory rulings, have been telling the FCC that "it's not clear enough" to rule on.

JOHN RAPOSA of GTE disagreed with MR. GLIST'S analysis. The Ninth Circuit forced the FCC to consider that cable modem service is subject to federal requirements applicable to telecommunications services. The FCC did not appeal the decision, and AT&T did not appeal it, either. The FCC was forced to act, and it is now trying to "throw up some dust and create more ambiguity."

[49] *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1275-78 (11th Cir. 2000)(*Gulf Power II*).

Relevant Definitions from the Telecommunications Act of 1996

Cable service means "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." *47 U.S.C. §522(6)*

Other programming service means "information that a cable operator makes available to all subscribers generally." *47 U.S.C. §522(14)*

Telecommunications service means "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." *47 U.S.C. §153(46)*

Telecommunications means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *47 U.S.C. §153(42)*

Information service means "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." *47 U.S.C. §153(20)*

MR. GLIST disagreed with MR. RAPOSA'S assessment. In its *Henric*o brief, the FCC said it was an open question whether cable modem service is in fact a telecommunications service, "because there is a difference between defining something under federal law as telecommunications, which is A to B without manipulating the content," and as telecommunications service, which is holding out transport by tariff to anyone who wants to buy it. There are many issues that need to be worked out by the FCC, which has proper jurisdiction. Implementing phrases like "nondiscriminatory rates, terms, and conditions" can involve a whole host of rulemakings, tariffs, and other regulation. It has taken hundreds of pages of rules, at times, to "implement what seemed like otherwise simple phrases."

When Congress adopted the Act in 1996, it said that it was the "policy of the United States to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by federal or state regulation." That philosophy animates PURA as well. Advanced services are not heavily regulated. Open access is not an appropriate policy, and, as a matter of law, the issue is not "ripe" for a state legislature.

MR. RAPOSA said "it's absolutely ripe" for the Legislature to take up. The FCC is now faced with deciding what cable modem service is under law "after three years of ostrich-like maneuvers." The Ninth Circuit's ruling vents "its utter frustration" at the FCC. The best that could be hoped for from the FCC anytime soon is a notice of inquiry, where the FCC asks for everyone's thoughts on the matter. It will take them years to reach a conclusion.[50]

[50]The Notice of Inquiry was issued by the FCC on September 28, 2000. On October 12, the FCC extended the deadlines for comments because the initial deadlines coincided with the holidays. Parties wishing to provide comments must do so by December 1, 2000. Reply comments are due January 10, 2001. See *infra* n. 84.

DARRELL GUTHRIE of the PUC said the complexity of the issue makes "a long and winding road" out of any attempt to place cable modem service under the current PURA. Any of the parties involved could raise objections at almost any point. Absent an FCC determination, the state would have latitude to put cable modem service under a revised PURA and look at customer protection issues, quality of service conditions, and possibly even interconnection agreements. The FCC probably will not take years, but it will not rule very quickly, either. If the PUC is to have definite authority, then it must be more clearly defined in PURA.

Proper Classification of Cable Modem Service

Neither the FCC nor Congress has declared whether cable modem service is a cable service, a telecommunications service, an information service, or some advanced telecommunications capability beyond the Act's current classifications. Several federal courts have addressed the subject in three different federal cases, and they have all come to different conclusions.

The first, *AT&T Corp. v. City of Portland*, was decided by the Ninth Circuit on June 22, 2000, and is not being appealed. The district court concluded that cable modem service is a cable service, but the appeals court ruled it is a telecommunications service. In the second case, *MediaOne Group, Inc. v. County of Henrico*, the district court ruled that it is a cable service. It has been appealed by the County and is pending before the Fourth Circuit. The third, which did not deal directly with an open access, *Gulf Power v. FCC*, was decided by the Eleventh Circuit. The court ruled that Internet access over cable is neither a cable service nor a telecommunications service.

As the debate began, most parties were in agreement, or at least conceding for the present moment, that cable modem service was a cable service. It fell under the definition of "other programming service," which is information that a cable operator provides to all subscribers generally. For open access proponents, this was a necessary position, because most of the activity on this issue had occurred at the local level. LFAs cannot regulate something that is not a cable service. If cable modem service were a telecommunications service, then LFAs would have no authority to require open access under Title V of the Act, but there would be a potential role for the state to enforce it under Title II requirements for telecommunications carriers.

Following *Portland*, the open access proponents split into two camps. The first, comprised mostly of local governments, kept to the view that cable modem service is a cable service and thus under their jurisdiction. The second, comprised of incumbent phone companies, ISPs, and some consumer advocates, favored the view of cable modem service as a telecommunications service. Opponents of open access, including the cable industry, have been steadfast that it is a cable service under the Act. For its part, the FCC has been ambivalent.

AT&T Corp. v. City of Portland

AT&T was required to obtain the approval of the City of Portland and Multnomah County to transfer TCI's three cable franchises to AT&T's control when the two companies merged. The city and county ("Portland") adopted a mandatory access provision on December 17, 1998, as a condition for approving the transfer of control:

> Non-discriminatory access to cable modem platform. Transferee shall provide, and cause Franchisees to provide, nondiscriminatory access to Franchisee's cable modem platform for providers of Internet and on-line services, whether or not such providers are affiliated with Transferee or Franchisees, unless otherwise required by applicable law. So long as cable modem services are deemed by law to be "cable services," as provided under Title VI of the Communications Act of 1934, as amended, Transferee and Franchisees shall comply with all requirements regarding such services, including, but not limited to, the inclusion of revenues from cable modem services and access within the gross revenues of Franchisees' cable franchises, and commercial leased access requirements.

AT&T rejected this provision on December 29, 1998. Portland denied AT&T's request in January 1999. AT&T and TCI filed suit in federal district court shortly thereafter.

District Court Opinion. U.S. District Judge Owen M. Panner concluded that "the open access requirement is within the authority of the City and County to protect competition."[51] Section 556 of the Act demonstrates that "Congress intended to interfere as little as possible with existing local government authority to regulate cable franchises," and local authorities were regulating cable services long before the FCC assumed jurisdiction. If Congress wanted to preempt a power "traditionally held" by local authorities, then it must make its intent "unmistakably clear." The court was not required "to consider whether the open access requirement is good policy."

"Congress has specifically recognized the power of local franchising authorities to preserve competition for cable services." Local authorities have the power to determine whether a change in ownership or control would "eliminate or reduce competition." It is not the court's duty to determine whether AT&T's taking control of the franchise would reduce competition, but to determine whether Portland is acting within its jurisdiction. In this light, Portland has the authority to "impose conditions under which it will permit a change of control."

Judge Panner concluded that the ordinance does not regulate the cable system as a "common carrier." Requiring a business to allow its competitors access to an essential facility is not common carriage regulation. The ordinance also does not "condition or limit AT&T's use of

[51] *AT&T Corp. v. City of Portland*, 43 F.Supp.2d 1146 (D.Ore. 1999), reversed on appeal.

subscriber equipment or transmission technology." It is content-neutral and does not require AT&T to carry particular programming.[52] It does not violate the First Amendment, Commerce Clause, or Contract Clause of the U.S. Constitution, nor does it breach the existing franchise agreement. AT&T appealed the decision to the Ninth Circuit Court of Appeals.

Appeals Court Decision. The Ninth Circuit reversed the District Court's decision and concluded that the Act prohibits an LFA from imposing an open access requirement.[53] The court noted that "the FCC has declined, both in its regulatory capacity and as *amicus curiae*, to address the issue before us." Thus, the court must "chart a course by the law's words" because it cannot defer to an agency's statutory construction. "Like Heraclitus at the river," wrote Judge Sidney R. Thomas, "we address the Internet aware that courts are ill-suited to fix its flow."[54]

Because the city premised its ordinance on its determination that Excite@Home is a cable service, the court first examined whether it was indeed a cable service. The court concluded that it was not. A cable service "is one-way transmission of programming to subscribers generally," and such a definition could not include the "interactive and individual" nature of Internet access. Because cable modem service is not a cable service, the city has no authority to directly regulate it or condition a franchise renewal upon it.

Internet access consists of two separate services. The content of the Internet is an information service, which has never been subject to regulation. The connection between the end-user and the ISP is a telecommunications service. A provider of telecommunications service is treated by the Act "as a common carrier to the extent that it provides telecommunications to the public, 'regardless of the facilities used.'"[55] Like traditional dial-up connections, cable modem service consists of a pipeline—cable broadband instead of telephone lines—and the Internet service transported through that pipeline. Unlike traditional dial-up connections, Excite@Home "controls all of the transmission facilities between its subscribers and the Internet." To the extent that Excite@Home acts as a traditional ISP, its activities fall under information services. When Excite@Home provides Internet transmission over its cable broadband facility, "it is providing a telecommunications service."

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[52]These statements summarize the court's findings with respect to AT&T's contentions that the provision violates 47 U.S.C. §§ 544(f)(1), 531, 532, 534, and 535.

[53]*AT&T Corp. v. City of Portland*, 216 F.3d 871, 877 (9th Cir. 2000)(*Portland*).

[54]Heraclitus "the Obscure" (535-475 B.C.) was a pre-Socratic philosopher who lived in an area of Ancient Greece that is now part of Turkey. Scornful of the public, political leaders, and religion, he was also known by his contemporaries as "the weeping philosopher." He has been described as the first consistent materialist pantheist. The river was an important symbol, representing his idea that objects never persist as they are. "Upon those who step into the same rivers, different and different again waters flow." Like most pre-Socratic philosophers, none of his original works remain. His writings survive only as fragments quoted by other philosophers.

[55]See 47 U.S.C. §§ 153(20), (44) and (46).

Reactions to the *Portland* Decision

"Now that the court has made clear Congress' intent to bar ordinances like the one enacted by Portland, AT&T and other cable companies will be able to get on with investments that will bring advanced services to millions of Americans."
Jim Cicconi, AT&T

"Today's ruling … will open the door for other Internet service providers to gain access to upgraded cable systems. This is a tremendous victory for consumers across the country."
Greg Simon, OpenNet Coalition

"The appeals court's decision means 'checkmate' for the cable industry's attempt to monopolize broadband consumer access to the Internet."
John Raposa, GTE

"Today's decision means that the marketplace, rather than local governments, will determine the best business model for serving the broadband needs of consumers. That means faster deployment, more choices, and lower prices."
Julia Johnson, Net Compete Now

"Open access is now the rule of the road in the broader world of telecommunications, and the cable industry's monopolistic, proprietary Internet platform cannot stand."
David Olson, City of Portland

"Today's court decision recognizes that Congress established a national framework to govern high-speed Internet access."
William Kennard, FCC

Defining cable modem service as a telecommunications service "coheres with the overall structure" of the Act and the existing FCC regulatory regime. The Act centers on a competitive principle "embodied by the dual duties of nondiscrimination and interconnection." This principle "mandate[s] a network architecture that prioritizes consumer choice" and governs cable broadband "as it does other means of Internet transmission such as telephone service and DSL."

The court notes that the FCC has not yet regulated cable broadband, but that it "has broad authority to forbear from enforcing the telecommunications provisions if it determines" that such regulation is not necessary to "prevent discrimination and protect consumers." Nonetheless, Portland is prohibited from regulating cable broadband and cannot condition the transfer of a cable franchise on nondiscriminatory access to the broadband network.[56]

The Ninth Circuit's decision has not been appealed by any party in the case. Reactions to the ruling from people on all sides of the issue seem to indicate that all parties were pleased by the outcome and considered it a victory.

[56] 47 U.S.C. §541(b)(3)(A) If a cable operator or affiliate thereof is engaged in the provision of telecommunications services—

(i) such cable operator or affiliate shall not be required to obtain a franchise under this subchapter for the provision of telecommunications services; and

(ii) the provisions of this subchapter shall not apply to such cable operator or affiliate for the provision of telecommunications services.

(B) A franchising authority may not impose any requirement under this subchapter that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof.

MediaOne v. County of Henrico

AT&T requested local approval for change of control of the MediaOne franchise in Henrico County to AT&T in July 1999 as it was required to do in order to close its merger with MediaOne. On December 14, 1999, the county Board of Supervisors approved the transfer, but conditioned its approval on a mandatory access provision:

> No later than December 31, 2000, [MediaOne Virginia] shall provide any requesting Internet Service Provider ("ISP") access to its cable modem platform (unbundled from the provision of content) on rates, terms, and conditions that are at least as favorable as those on which it provides such access to itself, to its affiliates, or to any other person.

AT&T rejected the ordinance, and the county denied the request for a change in control of the franchise. AT&T filed suit in federal district court shortly thereafter.

District Court Opinion. U.S. District Judge Richard L. Williams ruled that the county ordinance was preempted by federal law.[57] The court examined statutory intent as its basis for determining that the local ordinance was preempted. In particular, the court noted that any state or local law or ordinance that is inconsistent with the Act "shall be deemed preempted and superseded."[58] The Henrico ordinance is "inconsistent" with four provisions of the Act:

- Section 541(b)(3)(D) prohibits any condition of a franchise that requires a cable operator to provide telecommunications service or facilities;
- Section 544(e) prohibits any franchising authority from requiring the use of particular types of subscriber equipment or transmission technology;
- Section 541(c) prohibits regulating cable systems as common carriers by reason of providing any cable service; and
- Section 544(f)(1) prohibits regulating the provision or content of cable services.

The court also ruled that the ordinance is invalid under Virginia law, which grants to local governments only those powers provided by statute.

The ordinance would require MediaOne "to operate its cable modem platform to provide transmission between the points selected by requesting ISPs and their customers, without change in content." As such, the requirement would constitute forcing MediaOne to provide a telecommunications facility. It would require MediaOne "to make technological modifications to

[57] *MediaOne Group, Inc. v. County of Henrico*, 97 F.Supp.2d 712, 714 (E.D. Va. 2000), appeal pending, 4th Cir. No. 00-1680 (*Henrico*).

[58] 47 U.S.C. §556(c).

its current system" to allow access to multiple ISPs. As such, the requirement would constitute forcing MediaOne to use particular types of transmission technology.

MediaOne's Road Runner service "contains news, commentary, games, and other proprietary content with which subscribers interact as well as Internet access, and therefore it falls under the statutory definition of 'cable service.'" The ordinance subjects MediaOne to the open access requirement only because it is offering Road Runner cable service. Courts have "uniformly held that a requirement that a cable system carry the programs or services of a specified category of users is a prohibited common carrier regulation." The private carrier, in this case the cable operator, would be prohibited from making decisions over the services, programs, and content that it offers under this ordinance.

Reactions to the Henrico Ruling

"The entire issue of forced access is currently on life support, and fading fast. The issue was always more a product of sound bites than sound law."
Jim Cicconi, AT&T

"The Court has taken the right to choose their own ISP out of the hands of consumers and placed it back in the hands of cable companies."
Rich Bond, OpenNet Coalition

"This is a great day for competition and a great day for consumers"
Julia Johnson, Net Compete Now

"There's no ambiguity whatsoever about Judge Williams' decision: local governments are preempted by federal law from forcing cable companies to provide any ISPs with government-regulated access to the cable infrastructure."
Jon Englund, Excite@Home

The county has appealed the decision to the Fourth Circuit Court of Appeals. GTE filed a separate brief as an intervenor. All of the briefs by the parties and amicus curiae were submitted to the Fourth Circuit after the Ninth Circuit issued its *Portland* decision. As such, those briefs contain the most recent positions on the legal issues surrounding open access. The subcommittee has relied on those briefs, as well as written testimony submitted at the subcommittee's request, to explore the legal implications of open access. Oral arguments were presented on September 27, 2000.

Gulf Power Co. v. FCC

Federal law gives providers of cable and telecommunications services the right to attach wires to the poles of power and telephone companies, who are often monopolist providers of poles.[59] Generally, the agreements between these companies have been reached voluntarily, and all parties agree to the rents charged by the pole owners. If the cable companies will not accept the rent the electric and telephone companies offer, then the FCC sets the rent. The FCC has asserted authority over pole attachments for wires used to provide Internet service in order to

[59] 47 U.S.C. §224, et seq.

implement its rent-setting rules. This case, also referred to as *Gulf Power II*, involves several related cases that were ultimately consolidated into the case before the Eleventh Circuit.[60] The proper classification of cable modem service was not an issue in the case. However, the court's ruling offered a different view from conclusions reached in open access litigation.

Appeals Court Decision. In April 2000, the Eleventh Circuit ruled that the FCC lacked the authority to regulate the placement of attachments for Internet service because "the 1996 Act allows the Commission to regulate the rates for cable service and telecommunications service; Internet service is neither." The inclusion of the words "or use" into the definition of cable service is too minor a change as to "radically expand" it to include Internet service, and the FCC made no argument that it is a telecommunications service. "Accordingly, there is no statutory basis for the FCC to regulate the Internet as a telecommunications service" or as a cable service.

However, the court failed to make any distinction between the Internet and any transmission component of data between an end user and some remote website. In its presentation to the State Affairs Committee, GTE concluded that either *Gulf Power II* would not stand or "its analysis will be specifically limited to the pole attachment context." TCTA said the court "ignored" the legislative history of the 1996 Act. Only the electric utilities seem pleased by the court's determination.

In September 2000, the court denied motions for rehearing. The FCC has declined to appeal to the Supreme Court. However, the cable industry has requested that the court stay issuance of its mandate while the industry petitions the Supreme Court for *certiorari*. They have 90 days.

Discussion

In general, opponents of open access have been consistent in their position that cable modem service is a cable service under the Act. Prior to *Portland*, most (if not all) proponents of open access also depicted cable modem service as a cable service. No party posited that cable modem service was a telecommunications service in its briefs or oral arguments before the Ninth Circuit's ruling.

Since *Portland*, the proponents of open access have become divided. Henrico County advised the Fourth Circuit not to "follow the Ninth Circuit's flawed Portland opinion" because MediaOne and the county agree that cable modem service is a cable service.[61] On the other hand, GTE

[60] *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1275-78 (11th Cir. 2000)(*Gulf Power II*).

[61] Henrico County Br., *MediaOne Group, Inc. v. County of Henrico* (submitted July 3, 2000)(Henrico County Br.) at 35.

argues that the Fourth Circuit should "follow the careful analysis of the Ninth Circuit and conclude that [MediaOne is] providing a telecommunications service indistinguishable from a dial up or DSL connection provided over telephone lines."[62] The county, AT&T, and the cable industry have asserted that the Ninth Circuit's discussion of cable modem service as a telecommunications service is *dictum*. GTE and consumers groups counter that the court's determination is not *dictum* but is in fact central to the decision.[63]

Cable Industry Position. Cable modem service is unequivocally a cable service under the Act. There is nothing "definitive or remotely binding" in the *Portland* decision as to the nature of cable modem service.[64] Both sides in the case stipulated that Road Runner is a cable service when they argued the case before the district court. There, too, the parties stated that cable modem services are cable services. The Ninth Circuit's discussion of the issue is "entirely unnecessary" to the court's ruling, that Portland's ordinance violated Section 541(b)(3)(D). The court would have reached that outcome no matter how cable modem service is itself classified under federal law.[65]

AT&T argues that Road Runner falls under the definition of "other programming service," which is a component of cable service under the Act. As noted, other programming service is defined as "information that a cable operator makes available to all subscribers generally." In 1996, Congress expanded the definition of cable service by adding the words "or use," which was meant to "reflect the evolution of cable to include interactive services such as game channels and information services." Road Runner makes five types of information available to all subscribers generally: local content, national news, links to third-party Web sites, Internet connectivity, and information from the public Internet. All of these are made available to each MediaOne subscriber and are thus "other programming services." The fact that Road Runner has incidental features that are not other programming services—such as e-mail or instant messaging—does not redefine Road Runner as something other than a cable service.[66]

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[62]GTE Br., *MediaOne Group, Inc. v. County of Henrico* (submitted July 3, 2000)(GTE Henrico Br.) at 30.

[63]The concluding paragraph of the Ninth Circuit's opinion reads, "We hold that subsection 541(b)(3) prohibits a franchising authority from regulating cable broadband Internet access, because the transmission of Internet service to subscribers over cable broadband facilities is a telecommunications service under the Communications Act. Therefore, Portland may not condition the transfer of the cable franchise on nondiscriminatory access to AT&T's cable broadband network. We need not reach AT&T's other statutory and constitutional arguments. REVERSED."

[64]AT&T Br., *MediaOne Group, Inc. v. County of Henrico* (submitted August 3, 2000)(AT&T Henrico Br.) at 45.

[65]Ibid. at 46.

[66]Ibid. at 46-54.

LFA Position. The county continues to argue that cable modem service is a cable service. In its brief to the Fourth Circuit, the county implores the court not to "make the leaps of faith attempted by the Ninth Circuit" in creating its own "flawed definition of telecommunications service based on, and conflated with, the defined term 'telecommunications.'"[67] If it were a telecommunications service, then the county, as an LFA, would have no authority over the service. Its ordinance would be invalidated, just like Portland's.

GTE Position. Prior to *Portland*, GTE did not publicly argue that cable modem service was a telecommunications service. In May, GTE provided written testimony to the subcommittee stating that it "accept[s] for the purposes of this discussion the cable industry's position that cable modem service qualifies as 'cable service' within the meaning of the Act."[68] Following *Portland*, GTE began arguing that cable modem service was a telecommunications service "indistinguishable from a dial-up or DSL connection provided over telephone lines."[69]

GTE currently contends that the provision of Internet access consists of two basic elements: a transmission pipeline and the capability for utilizing the information available on the Internet. The pipeline moves data indiscriminately between the end user and the ISP, which provides the connection to the Internet and the ability to interact with the information. The FCC has ruled that the transmission component of advanced services over a DSL is a telecommunications service. As telecommunications service providers, companies like GTE and Bell Atlantic are not able to "tie the transmission component of their DSL service to their own (or any other) ISP." This regulatory prohibition "has helped create an open and vigorous competition" among ISPs.[70]

Further, the transmission component of broadband Internet connections over cable is identical to the transmission component of Internet connections over any other platform. However, the complaint filed by AT&T "was filled with allegations that high-speed Internet access provided over cable lines is a 'cable service' under state and federal law." Internet access does not meet the definition of cable service, which is confined to information that the cable operator makes available to all subscribers generally, such as a program guide or weather radar information. Instead, the "two-way transmission component of Internet access provided by cable operators … fits squarely into the plain language of the definition of telecommunications service."[71]

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[67]Henrico County Br. at 36.

[68]John Raposa, *Jurisdictional Analysis Regarding the Authority of States Under the Federal Communications Act to Require Nondiscriminatory Open Access for Internet Service Providers Seeking Use of High-Speed Broadband Transport Via Cable Modem Platforms* (submitted May 2, 2000)(First GTE Paper) at 2.

[69]GTE Henrico Br. at 30.

[70]Ibid. at 7-8.

[71]Ibid. at 11, 14.

GTE argues that the Fourth Circuit should follow the Ninth Circuit's lead and rule that cable modem service is a telecommunications service. GTE recognizes that such a ruling would have the effect of nullifying the Henrico ordinance for which it is an intervenor. However, such a ruling would subject cable operators offering Internet access "to broader state and federal duties to interconnect with other telecommunications carriers and to offer their services to all ISPs on a nondiscriminatory basis." Such a ruling would thus achieve "regulatory parity" between providers of high-speed Internet access and achieve the goal of the county.[72]

FCC Position. As noted, the FCC has not reached a conclusion. In various proceedings related to the approvals of telecommunications mergers, such as the AT&T-TCI and AT&T-MediaOne mergers, the FCC has declined to impose open access requirements, adding that such proceedings do not provide a suitable forum to determine the proper classification of cable modem service.

In its *amicus* brief to the Ninth Circuit, the FCC notes "the existence of a serious dispute concerning the proper classification of cable modem service."[73] The FCC also acknowledges that "it has not yet resolved the issue." Because the FCC has not made a determination, the parties in this case may have premised their arguments "on a faulty legal assumption." Not all services provided via cable are "cable services." The House Report accompanying the 1984 Cable Act indicated that services providing subscribers with the capacity to engage in transactions or to store, transform, or otherwise process information would not be cable services. The 1996 Act inserted the words "or use" into the definition of cable service. The accompanying conference report suggests that Congress intended this amendment "to reflect the evolution of cable to include interactive services ... as well as enhanced services."[74]

However, the addition of "or use" does not change the "basic aspect of the definition" that a cable service must be either video programming or "other programming service." Other programming service is "information that a cable operator makes available to all subscribers generally." It is not clear that cable modem service falls within an "other programming service," because it is provided only to particular subscribers, not to subscribers generally. Simply providing subscribers the capability to gain access to the Internet does not necessarily mean that it is available to all subscribers generally.[75]

In its *amicus* brief to the Fourth Circuit, the FCC contends that the Henrico ordinance requires a cable operator to provide telecommunications facilities in violation of federal law no matter how

[72]Ibid. at 15.

[73]FCC Br., *AT&T Corp. v. City of Portland* (submitted August 16, 1999)(FCC Portland Brief) at 17.

[74]Ibid. at 22, citing S. Conf. Rep. No. 230, 104th Congress, 2d Sess. (1996).

[75]Ibid. at 23-24.

cable modem service is classified under the Act.[76] The Ninth Circuit "correctly held" that Portland was prohibited by Section 541(b)(3)(D) from requiring open access by ordinance.[77] The Fourth Circuit "need decide no more than that" to resolve this case. In fact, answering broader questions of telecommunications law raised by GTE and AT&T "could have profound and largely unforseen consequences in a variety of regulatory contexts."[78]

In the *Henrico* case, the district court was correct when it ruled that the ordinance requires MediaOne to provide telecommunications facilities. Its conclusion is consistent with the Ninth Circuit's ruling in *Portland*, except that the Ninth Circuit "took the unnecessary extra step" of defining the transmission component of cable modem service as a telecommunications service under the Act. Some uses of telecommunications facilities do not fall under the definition of telecommunications service.[79] Whether the transmission component of cable modem service does fall under that definition is "an open question," but one that the court need not decide.[80]

The county errs when it maintains that its ordinance is consistent with Section 541(b)(3)(D) because it does not require MediaOne to construct any new facilities. Its argument "ignores the statute's plain language." That section does not distinguish between new and existing facilities; it covers all facilities. The county's argument that the ordinance leaves the ultimate decision to provide cable modem service with MediaOne also has "no merit." Under the ordinance, MediaOne's decision to provide cable modem service triggers the requirement that it provide telecommunications facilities, which is "precisely" what Section 541(b)(3)(D) prohibits.[81] The county incorrectly contends that MediaOne's cable facilities cannot be said to include any telecommunications facilities because that system is used to provide video programming. The

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[76]FCC Br., *MediaOne Group, Inc. v. County of Henrico* (submitted August 8, 2000)(FCC Henrico Br.) at 15. This amicus brief reflects the views of four of the five commissioners. In a dissenting view, Commissioner Harold Furchtgott-Roth believed that the FCC should not reach a conclusion on the meaning of "telecommunications facilities" without the benefit of an official agency proceeding.

[77]47 U.S.C. §541(b)(3)(D) provides that "a franchising authority may not require a cable operator to provide any telecommunications services *or facilities*, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise" (Emphasis added).

[78]FCC Henrico Br. at 13.

[79]Ibid. at 18-21. The brief does not identify any use of a telecommunications facility that is not a telecommunications service. Presumably, cable modem service might be one such use, but it is "an open question." The brief uses an example of "an ordinary fax transmission" as being a form of telecommunications, and parallels this with the use of cable facilities by an ISP under Henrico's ordinance. The FCC posits that ISPs would be using MediaOne's facilities solely to obtain telecommunications, as defined by the Act, just like a fax being sent over telephone wires. However, the brief does not attempt to argue that the telephone company's transmission of a fax sent over its telephone wires is not a telecommunications service under the Act.

[80]Ibid.

[81]Ibid. at 22-24.

Act contemplates multi-purpose facilities that ought to "receive different regulatory treatment depending on which particular service they are being used to provide."[82]

A week after the *Portland* decision was handed down, FCC Chairman Kennard announced that the FCC would begin a formal proceeding on cable broadband access. "I continue to believe that there are powerful marketplace incentives that will move the cable platform to an open platform," Kennard said. "Now is the appropriate time for the FCC to address the legal issues and to assess the developments in the marketplace." Kennard said he agreed with municipalities that the goal should be an open platform, but the question was whether the market or the government should move cable toward that goal. "My preference is market forces, but if the market doesn't work then we'll have to step in," Kennard said.[83] The FCC issued a Notice of Inquiry in September 2000.[84] The initial comment period ends on December 1, 2000.

Determination of Preemption of State/Local Authority

Regardless of how cable modem service is classified, it is a separate question whether federal law preempts state or local authority over cable modem service. The cable industry argues that it does, broadly through the FCC's authority to forbear from regulating and specifically through several provisions of federal law. Open access proponents argue that state governments are not preempted by federal law generally, and an open access provision does not violate the specific provisions cited by the cable industry. Some open access proponents, particularly LFAs, argue that local governments are not preempted from regulating cable modem service through their franchising authority. It would appear, however, that the court cases mentioned previously have removed LFAs from of the debate.

In General

GTE argues that the state has broad authority to enact open access legislation "except where expressly preempted by Congress." The legal hurdle for "express preemption" is quite high. In the *City of Dallas*, the Fifth Circuit wrote that Congress must make its intention to preempt the states "unmistakably clear in the language of the statute." Congress has not included the Internet or access to it within any of its specific preemptions, many of which were enacted after the

[82]Ibid. at 24.

[83]Federal Communications Commission news release, "FCC Chairman to Launch Proceeding on 'Cable Access'" (June 30, 2000).

[84]Federal Communications Commission, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Notice of Inquiry, FCC 00-355 (September 28, 2000).

concepts of the Internet and broadband were definable and could have been included in law if Congress chose to do so.[85]

Instead of a broad preemption, GTE argues that Congress has created a broad authority for states and LFAs to act while carving out a series of specific preemptions that limit states' and LFAs' authorities in certain areas. Congress provided that nothing in the Act "shall be construed to restrict a state from exercising jurisdiction with regard to cable services consistent with" the Act. Similarly, Congress authorized states to enact "any consumer protection law, to the extent not specifically preempted" by the Act.[86] GTE argues that these sections of the Act support a "deliberately structured dualism" under which federal, state, and local governments share jurisdiction over cable operators. The absence of an express preemption demonstrates Congressional intent "to preserve state sovereignty to regulate the cable industry, except in certain precise situations."[87]

TCTA responds by arguing that there is no residual authority to compel open access at the local or state level because that authority has already been reserved at the federal level. "Deliberately structured dualism" limits local authority to "local incidents of cable operation such as delineating franchise areas, regulating the construction of cable facilities, and maintaining rights of way." The FCC maintains "exclusive jurisdiction over all operational aspects of cable communication, including signal carriage and technical standards."[88] GTE's assessment of the law contained "an exaggerated sense of what state lawmakers are allowed to do."[89]

TCTA asserts that Congress and the FCC have imposed a substantial set of rules on cable operators. "The very specificity of these rules undermines interpretations" that a state can impose an open access requirement.[90] In other words, it is not the preemptions that are

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[85]First GTE Paper at 2-3, citing *City of Dallas v. FCC*, 165 F.3d 341, 347-348 (5th Cir. 1999), quoting *Gregory v. Ashcraft*, 501 U.S. 452, 460 (1991).

[86]47 U.S.C. §§ 556(b) and 552(d)(1), respectively.

[87]First GTE Paper at 3.

[88]Texas Cable and Telecommunications Association, *An Analysis of Forced Access* (submitted April 14, 2000)(First TCTA Paper) at 46, quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 702-703 (1984)(*Crisp*).

Crisp involved the issue of whether a state—in this case, Oklahoma—could prohibit liquor advertising from being shown on cable systems that carried broadcast signals from stations in other states. The Supreme Court ruled that the FCC had fully occupied the field in regulating signal carriage. In testimony before the subcommittee, John Raposa of GTE countered that *Crisp* illustrates an exception to the reservation of state and local rights to enact legislation with respect to cable.

[89]Paul Glist, *Forced Access Hearing Before House State Affairs Committee* (submitted June 1, 2000) (Second TCTA Paper) at 4.

[90]First TCTA Paper at 35.

specifically carved out, but the authority to regulate. Congress has delineated limited, specific exceptions to cable operator control over access to the cable system. None of them covers ISPs. An ISP is not a local television station, and thus cannot qualify under must carry obligations.[91] ISPs cannot qualify under commercial leased access requirements, because video streamed over the Internet is not video programming.[92] Even if the Internet were somehow construed to be video programming, enforcement of commercial leased access provisions is exclusively the FCC's.

Instead, TCTA argues that policymakers should look to the purposes of the Act for guidance. Congress has declared that it is the policy of the U.S. "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by federal or state regulation."[93] This policy can be achieved only through "federal preemption of state and local regulation [that] can assure cable systems the breathing space necessary to expand vigorously and provide a diverse range of program offerings."[94]

The FCC contends, in its brief to the Ninth Circuit, that it has "acted affirmatively by declining to impose regulations on the developing, nascent broadband market." It reasons that statements contained in its *First 706 Report* cautioning regulators against taking "some actions [that] could contravene" the Act's policies represent some of the commission's affirmative actions.[95] It seems to be making an argument that it has occupied the field. However, much of its argument on this issue relates to its perceived ability to occupy the field.

For example, the FCC argues that it is the agency responsible for monitoring a national broadband policy "even in the absence of express statutory preemption." As such, it may "preempt local cable regulations that conflict with federal policy." It argues that the district court in *Portland* "erred when it stated that local regulation of cable service can *only* be preempted by an 'unmistakably clear' statutory provision." In *City of New York*, the Supreme Court held that the FCC may preempt local cable regulations that conflict with federal policy, so long as it acts "within the scope of its congressionally delegated authority." The Supreme Court concluded that a "preemptive regulation's force does not depend on express congressional authorization" so

[91]47 U.S.C. §§ 534 and 535. Even for broadcast signals, a cable operator is not require to carry any data component of the video broadcast.

[92]47 U.S.C. §532(b)(5) defines commercial use as "the provision of video programming," which itself as defined by §522(20) as programming by "or generally considered comparable to programming provided by a television broadcast station."

[93]47 U.S.C. §230(b)(2).

[94]First TCTA Paper at 46, quoting *Crisp* at 708.

[95]FCC Portland Br. at 29.

long as the FCC acts within its authority and "explicitly state[s] its intent to exercise exclusive authority ... and to preempt state and local regulation."[96] The Ninth Circuit's Portland decision agrees to the extent that the "FCC has broad authority to forbear from enforcing the telecommunications provisions if it determines that such action is unnecessary to prevent discrimination and protect consumers."[97]

§160. Competition in Provision of Telecommunications Service

(a) Regulatory flexibility

Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that—

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

The FCC backed off of its assertion of affirmative preemption in its *amicus* brief to the Fourth Circuit. The FCC did not make a definitive statement about its own authority. It could have instructed the court that it had filled any perceived regulatory void, and its hands-off policy had the effect of preempting any state or local regulation in the field. Instead, it notes that it has "so far refrained from imposing open access requirements on cable operators [while] some local franchising authorities have attempted to impose such requirements on their own."[98]

It could have provided more substantial guidance to the courts, but it chose not to. In other words, the FCC is arguing that it can preempt, not that it *has preempted*. It is arguing that it could choose to forbear from regulating, not that it *has chosen to forbear* regulation. Clearly, the FCC has not made a determination under its Section 160 authority to forbear from regulating. A Section 160 proceeding has not been initiated, in part because the proper classification of cable modem service is uncertain.[99]

In its merger orders, the FCC has indicated a preference of allowing companies to "privately negotiate mutually acceptable access arrangements" without government intervention.[100] Its

[96]FCC Portland Br. at 27, quoting *City of New York v. FCC*, 486 U.S. 57 (1988) at 63.

[97]47 U.S.C. §160(a).

[98]FCC Henrico Br. at 10.

[99]47 U.S.C. 160(c) allows any telecommunications service provider to petition the FCC to utilize its Section 160 authority to forbear from regulating a service or class of services. The FCC must rule on it within one year of receiving it. Section 160 is applicable here only if cable modem service were a telecommunications service.

[100]FCC Henrico Br. at 10.

commissioners and staff have made numerous public statements that there seems to be no reason to impose open access requirements, but there might at some future time. The FCC has indicated that it is keeping a watchful eye on the market. In the mean time, states are left to wonder what form preemption might take if the FCC ever chose to occupy the field. Indeed, GTE argues that the FCC has "abdicated its responsibility to state and local policymakers" by refusing to address a national policy solution, "which would obviously be the most sensible approach."[101]

Specific Provisions

Irrespective of whether the FCC has chosen to forbear regulations or not, no state law, local ordinance, or franchise condition can stand if it is inconsistent with other provisions of the Act.[102] The cable industry has identified four provisions of the Act that it asserts open access requirements are inconsistent with and therefore are preempted by:

- Section 541(b)(3)(D), which prohibits any condition of a franchise that requires a cable operator to provide any telecommunications service or facilities;
- Section 541(c), which prohibits regulating cable systems as common carriers by reason of providing any cable service;
- Section 544(e), which prohibits any franchising authority from requiring the use of subscriber equipment or transmission technology; and
- Section 544(f)(1), which prohibits regulating the provision or content of cable services.

If an open access requirement is found to be inconsistent with any of these provisions, then it is preempted by federal law. In *Henrico*, the district court found that the county's open access requirement was inconsistent with all four.

Section 541(b)(3)(D). This section provides that an LFA cannot require a cable operator to "provide any telecommunications service or facility" as a condition of a franchise grant, renewal, or transfer. The cable industry argues that this provision prohibits LFAs from conditioning franchises on open access regardless of whether cable modem service is a cable service, a telecommunications service, or something altogether different. AT&T argues that "the provision of transmission facilities unbundled from content is the provision of telecommunications." This section "categorically bars [LFAs] from imposing any carriage or access requirements other than those that are expressly authorized by other provisions of the Act." The only exceptions allow

[101]GTE, *GTE's Analysis/Response to the Texas Cable & Telecommunications Association's April 14, 2000 White Paper on Open Access* (submitted July 12, 2000)(Second GTE Paper) at 3.

[102]47 U.S.C. §556(c) provides that "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority which is inconsistent with this Act shall be deemed to be preempted and superseded."

LFAs to require cable operators to allocate channel capacity for public and educational access, construct institutional networks that connect government offices, and set aside channels for commercial leased-access. None of these exceptions covers ISPs.[103]

GTE counters that this section "creates a narrow exception to an LFA's general power to order upgrades of cable systems." In other words, an LFA is prohibited from using its cable franchise authority to force cable operators to "construct telecommunications facilities for the purpose of providing telecommunications services." Open access legislation does not require a cable operator to provide facilities because it is not triggered until the cable operator decides to provide cable modem service. Instead, it would "merely require a cable operator to share such a facility that has already been provided." GTE argues that its interpretation of the law is supported by *TCI Cablevision of Oakland County, Inc.*, in which the FCC found that the city had not violated Section 541(b)(3)(D) because it did not dictate the cable operator's decision to provide telecommunications service.[104]

§541. General Franchise Requirements

(b) No cable service without franchise; exception under prior law

(3)(D) Except as otherwise permitted by sections 531 and 532 of this title, a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise.

Sections 531 and 532 relate to setting aside channel capacity for public access channels and for unaffiliated commercial video programming channels.

TCTA responds that "GTE presents no authority for this extraordinary position." If GTE's contention were correct, then there would be "no such thing as private carriage or CLEC status." Applying this reasoning to video programming, cable operators could not choose to carry ESPN without being obligated, once they have chosen to carry ESPN, to carry every other sports network on the same rates, terms, and conditions they have with ESPN.[105]

The FCC argues that the transmission component of cable modem service is telecommunications but not necessarily a telecommunications service. Consequently, the cable modem platform is a telecommunications facility. It goes on to state that Henrico County and GTE's interpretation of Section 541(b)(3)(D) "ignore's the statute's plain language." The law applies to any and all telecommunications facilities, not just new facilities.[106]

[103]AT&T Henrico Br. at 40, 75.

[104]First GTE Paper at 10, 14-15, citing *TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd. 21396 (1997), aff'd on recon., 13 FCC Rcd 16400 (1998)(Emphasis removed).

[105]Second TCTA Paper at 11.

[106]FCC Henrico Br. at 22.

TCI Cablevision of Oakland County, Inc. "has no relevance to the dispute in this case." Instead, that proceeding centered on whether the City of Troy, Mich., could require a cable operator to obtain a telecommunications franchise when it had no intention of providing telecommunications services in Troy. The argument that the ordinance does not violate this section because it leaves the decision to provide telecommunications to the cable operator has no merit. Once a cable operator provides Internet access, then it must provide telecommunications facilities to other ISPs, "which is precisely what section 541(b)(3) prohibits."[107]

GTE calls the FCC's position "extraordinary." In its reply brief to the Fourth Circuit, GTE argues that the FCC is asking the courts to accept the undefined term "telecommunications facilities" encompasses MediaOne's transmission platform "without ever defining the nature of the service presently being provided by that facility." The FCC's position also runs counter to its assertion that multi-purpose facilities are regulated differently depending on what services they are being used to provide.[108]

GTE argues that the cable industry seeks to describe cable modem service as a cable service when its own affiliated ISP is using the transport system and somehow describe it as telecommunications—not a telecommunications service—when an unaffiliated ISP is using the same transport system. It can make this argument "only through an extreme case of statutory schizophrenia." Under that reasoning, the nature of the facility changes based upon who has access to it. If cable modem service is a indeed cable service, then it is impossible for open access laws to force cable operators to provide telecommunications facilities. In other words, the nature of the facility cannot change depending on who has access to it.[109]

Because the nature of the facility cannot change, Henrico County could only be regulating a telecommunications facility if MediaOne was already providing a telecommunications service over that facility. The county does not require MediaOne to provide that service, and it does not require MediaOne to provide facilities. "There is a clear distinction between requiring the provision of a facility and placing conditions upon its use."[110] If MediaOne is actually providing a telecommunications service, then it would be true that the county could not require open access using its cable franchising authority. Such a conclusion was drawn by the Ninth Circuit in *Portland*.

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[107]Ibid. at 23.

[108]GTE Reply Br., *MediaOne Group, Inc. v. County of Henrico* (submitted August 17, 2000)(GTE Reply Br.) at 24, referring to the FCC Henrico Br. at 24.

[109]First GTE Paper at 11-12.

[110]GTE Reply Br. at 24-25.

TCTA responds by saying that cable modem service is not just transport but also content. If cable systems were required to "unbundle their information services and create a 'pure' transport service available to any and all ISPs on nondiscriminatory rates, terms, and conditions," then they have been required to provide telecommunications separate and apart from whether it is a telecommunications service under the Act. Services can have a different status when provided over different facilities. A feature-length film is a motion picture in a theater, a broadcast movie when shown over network television, premium cable when shown by HBO, basic cable when shown by TNT, and pay-per-view when offered in that manner. In the same vein, when a dial tone is offered over an incumbent's network, the components of the network are subject to unbundling. When offered over a CLEC facility, nothing is subject to unbundling.[111]

The court rulings to date have seemed to make clear that there is a telecommunications aspect to cable modem service, although it may or may not rise to the meaning of telecommunications service under the Act. It does seem logical that LFAs do not have the authority to require the provision of telecommunications services or facilities under their *cable* franchising authority. The state may not be so constrained.[112] This debate over this section can be made even murkier by looking at it in context with Section 541(d)(2), which provides that "nothing in this subchapter shall be construed to affect the authority of any state to regulate any cable operator to the extent that such operator provides any communication service other than cable service, whether offered on a common carrier or private contract basis."

Section 541(c). This section prohibits cable operators from being regulated as common carriers because of their provision of cable service, so its application to cable modem service depends upon its being classified as cable service. TCTA argues that an open access regulation requires cable operators "to provide a general purpose platform available at nondiscriminatory rates for transport of content over which the cable operator has no control," which is precisely the obligation imposed by common carrier regulation.[113]

AT&T argues that the Henrico ordinance imposes common carrier regulation because it takes away MediaOne's ability "to make individualized decisions whether to share capacity" with ISPs and "on what terms." It would also remove MediaOne's control over content by requiring it to "accede to any ISP's request" for transmission capacity.[114]

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[111]Second TCTA Paper at 8.

[112]Indeed, the city of Portland may not be so constrained, either. Oregon law grants municipalities limited telecommunications franchising authority that may provide the city an alternative means to require open access at the local level.

[113]First TCTA Paper at 49.

[114]AT&T Henrico Br. at 60.

GTE replies that, as a cable operator, MediaOne has already lost control over the content provided by Road Runner. MediaOne's own affidavits and pleadings "definitively establish that the cable operator, here MediaOne, provides only a high-speed telecommunications loop."[115] It is that same loop that other ISPs are seeking access to, and access can be granted without resorting to regulations normally applied to incumbent telephone companies. Open access legislation is "different and more limited" than common carrier regulation. Section 541(c) was intended to "preclude the imposition … of such traditional regulatory practices as rate of return regulation." Open access proponents are not seeking to impose the entire regulatory scheme for telecommunications carriers on cable systems. Even if cable modem service were determined to be a cable service, the nondiscriminatory access requirements are not so much based on common carrier regulation as they are "analogous to antitrust remedies." No competitor in a market should be permitted to exercise exclusive control over essential facilities, and MediaOne controls essential facilities.[116]

§541. General Franchise Requirements

(c) Status of cable system as common carrier or utility

Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.

AT&T replies that the fact that there are specific provisions in the Act resembling common carrier obligations does not negate the general prohibition against such regulation.[117] The ordinance cannot be defended on the basis that it is an "economic regulation" similar to antitrust remedies because the ban on common carrier regulation is unconditional. Even so, MediaOne does not control any essential facilities.[118]

TCTA adds that a facility must be "necessary to compete [and] not merely convenient or less expensive" to qualify as an essential facility, and there must be "no reasonable alternative available."[119] There are a number of alternative providers of broadband and narrowband Internet access, so the cable modem platform cannot be seen as necessary to compete. Because it is not "appropriate" to consider broadband Internet access as a separate market, cable operators cannot

[115]GTE Reply Br. at 12.

[116]First GTE Paper at 18.

[117]For example, the Act requires that certain local broadcast channels must be carried by cable systems, which could be construed as a common carrier requirement. AT&T is arguing that these exceptions are expressly permitted by Congress. All other attempts to impose common carrier requirements on cable systems would violate the broad preemption of 47 U.S.C. §541(c).

[118]AT&T Henrico Br. at 58-60.

[119]Second TCTA Paper at 11, citing *Twin Labs, Inc. v. Weider Health & Fitness*, 900 F.2d 566, 568-569 (2d Cir. 1990).

exert market power or control facilities that are essential to compete.[120] GTE's antitrust claims were part of a class action lawsuit against AT&T that it dropped in August 2000.[121]

Going further, TCTA argues that the state of Texas will be forced to engage in common carrier regulation because it "cannot simply declare that prices must be nondiscriminatory." Open access legislation necessarily leads down the path of the state regulating wholesale prices for the transmission component of Internet access. The state would also need to determine requirements for service quality, volume discounts, and a whole host of other economic arrangements currently found on the Internet through private negotiations, peering contracts, and exclusive content arrangements.[122] By passing an open access law, the state "would undoubtedly find itself in the middle of rate regulation of Internet access and policy-making over the terms and conditions of every aspect of web commerce."[123]

GTE calls TCTA's assertions "hyperbole." The state would not be required to establish anything. Under various models of open access legislation, the aggrieved party—in this case, an ISP—must establish that it has been discriminated against. It may be left to the judiciary or a "binding arbitration arrangement" to resolve the complaint, but the state need not be involved. Open access advocates "have never suggested subjecting cable Internet access to rate base, rate of return regulation" (Emphasis removed). Open access legislation does not preclude cable operators from entering into a variety of term and volume discounts, so long as they are available to any ISP. "The terms and conditions of access remain under the control of the cable operator and not in the hands of any government regulator."[124]

Of course, all of the preceding discussion of Section 541(c) becomes moot if cable modem service is a telecommunications service. Any entity that offers telecommunications services, regardless of the facilities used, is designated as a telecommunications carrier under the Act and "shall be treated as a common carrier … only to the extent that it is engaged in providing

[120]First TCTA Paper at 62. It should be noted that DOJ has found that the broadband Internet access market is separate and distinct from the narrowband Internet access market. See *U.S. Department of Justice v. AT&T Corp. and MediaOne Group, Inc.*, Amended Complaint (May 26, 2000).

[121]The suit alleged that AT&T's bundling of its Excite@Home Internet access with its cable transport service was a violation of antitrust laws prohibiting "illegal tying." Terms of the settlement were not disclosed. See "GTE Drops 'Open Access' Antitrust Suit Against AT&T," *TR Daily* (August 14, 2000).

[122]Peering contracts are agreements between two parties to carry each other's traffic on their respective networks in mutually agreeable terms.

[123]First TCTA Paper at 24-27.

[124]Second GTE Paper at 16-17.

telecommunications services."[125] GTE argues that it is not seeking to impose the full range of common carrier regulation upon cable operators. Instead, it seeks to apply only the nondiscriminatory access requirements of Section 202 that are required of all telecommunications carriers.[126]

Even if it were decided that cable modem service is a telecommunications service under the Act, TCTA argues that the law still forbids states and local governments from imposing open access. When it comes to regulation, there are distinctions between incumbent companies that possess near-monopoly domination of access lines and competitors trying to enter a market. It is inappropriate to regulate a new entrant in a market as a common carrier. By law, the state cannot. The unbundling requirements of Title II of the Act apply only to incumbent carriers, not competitors. By federal policy, DSLAMs are not required to be unbundled by ILECs, even though they could be considered UNEs if the FCC chose to recognize them as such.[127] Besides, interconnection applies only to requirements that one telecommunications carrier connect its facilities with the facilities of another telecommunications carrier. ISPs are not telecommunications carriers. Even if an ISP could make a case that it qualified for interconnection under the Act, the FCC is the proper venue for that proceeding.

GTE argues that there is a difference between service unbundling, "in which the owner of a facility is required to provide nondiscriminatory access to requesting customers," and physical unbundling, which is correctly imposed only on ILECs. Open access applies to the former, and open access requirements have not suggested that cable operators be subject to physical unbundling, collocation, and other requirements imposed by Title II on ILECs. The FCC did not require unbundling of DSLAMs because they do not meet the statutory test for physical unbundling under federal law. DSLAMs are readily available in the commercial market, so "this determination has nothing to do with the FCC's so-called 'hands off' policy."[128]

GTE contends that the transport component of cable modem service is already subject to various nondiscriminatory provisions, including PURA Section 55.005(1), because it is a telecommunications service under the Act. However, it is far from clear whether PURA, as

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[125]47 U.S.C. §153(44).

[126]47 U.S.C. §202(a) provides that, "it shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

[127]Second TCTA Paper at 1-4, citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report & Order, FCC 99-238 (November 5, 1999).

[128]Second GTE Paper at 4.

currently constructed, applies to cable modem service.[129] As noted, the extent of the PUC's current authority over cable modem service is uncertain.

Section 544(e). This section prohibits any state or LFA from prohibiting, restricting, or conditioning a cable system's use "of any type of subscriber equipment or any transmission technology." In its brief to the Fourth Circuit, AT&T argues that Henrico's ordinance violates Section 544(e), regardless of whether or not cable modem service is a cable service under the Act. MediaOne's current plant in Henrico County cannot accommodate multiple ISPs. Thus, the Henrico ordinance would prohibit MediaOne's use of its current transmission technology. In 1996, Congress added the last sentence of Section 544(e) to categorically prohibit states and localities from adopting a "patchwork" of technical standards and equipment requirements. Open access ordinances do precisely that.[130] Section 544(e) is a categorical preemption against prohibiting or restricting a cable system's use of "any transmission technology." Even if the county's logic were correct, the ordinance still fails because it prohibits MediaOne's use of a specific technology, namely its current plant.[131]

§544. Regulation of Services, Facilities, and Equipment

(e) Technical standards

Within one year after October 5, 1992, the Commission shall prescribe regulations which establish minimum technical standards relating to cable systems' technical operation and signal quality. The Commission shall update such standards periodically to reflect improvements in technology. No State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology.

According to GTE, open access legislation does not dictate the use of any technology. It requires only that a cable operator that decides to offer Internet access via cable modems must "employ a portion of its facilities to provide competing service."[132] Using the cable industry's expanded definition of "transmission technology" would eliminate an LFA's authority to establish requirements for facilities and equipment configuration to ensure that a cable operator's plans are "reasonable to meet the future cable-related community needs and interests." It would also counter an express purpose of the Act to "assure that cable systems are responsive to the needs and interests of the local community."[133] Further, Section 544(e) cannot be said to prohibit open

[129]PURA §55.005(1) prohibits a "public utility," in providing a service to persons in a classification, from "grant[ing] an unreasonable preference or advantage to a person in the classification." PURA §51.002(8) defines a public utility as an entity that operates "a telephone system as a dominant carrier."

[130]AT&T Henrico Br. at 66-68.

[131]Ibid. at 72-73.

[132]First GTE Paper at 16.

[133]47 U.S.C. §§456(c)(1)(D) and 521(2).

access requirements because the section applies only to cable services. Cable operators cannot become "immune from state and federal regulation applicable to entities that provide telecommunications service."[134]

AT&T replies that this section applies only to matters of transmission technology. It will not affect an LFA's "range of vital tasks" necessary to preserve the physical integrity of public rights of way and to require cable service throughout a service area. In exercising these proper authorities, an LFA is still limited by Section 544(e). However, no LFA needs to dictate a type of transmission technology to manage rights of way or establish service areas.[135]

Using the FCC as a guide is somewhat hazardous. It has declared that the meaning of "transmission technology" can be either the conduit for transmission (the type of cable) or the form of transmission (digital or analog), and is essentially a "term of art."[136] The FCC's rulings on the applicability of Section 544(e) on LFAs' activities can be interpreted in almost any manner when applied to the open access debate.[137]

Section 544(f)(1). This section prohibits any governmental entity—federal, state, and local—from requiring the provision of cable services as part of the franchising requirements. Obviously, its applicability to this debate depends upon cable modem service being classified as a cable service under the Act.

In its brief to the Fourth Circuit, AT&T argues that the Henrico ordinance violates this section because it "imposes a requirement that MediaOne allow any requesting ISP to use its facilities if MediaOne chooses to provide a particular type of programming (cable modem service) to its subscribers." The prohibition contained in Section 544(f)(1) is not just content-based regulation, as some allege; it prohibits all requirements "regarding the provision or content of cable services." Even if this section did apply solely to content, the *Henrico* ordinance "is plainly content-based."[138] It is triggered by the decision to supply certain content from a certain type of

[134]GTE Henrico Br. at 31-33.

[135]AT&T Henrico Br. at 74-75.

[136]Federal Communications Commission, *Implementation of the Cable Act Reform Provisions of the Telecommunications Act of 1996*, CS Docket No. 96-85, 14 FCC Rcd 5296 at 141-42.

[137]*TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396 (1997), aff'd on recon., 13 FCC Rcd 16400 (1998). The city conditioned its grant of construction permits by requiring that the fiber optic facilities TCI planned to install would not be used to provide telecommunications services. The FCC ruled that the condition did not directly affect TCI's technological requirements but instead involved the regulatory requirements that an operator must comply with to operate its facilities. Open access proponents cite this as supporting their view. Opponents also cite this case as evidence of the FCC's efforts to prevent local governments from over-reaching their authority.

[138]AT&T Henrico Br. at 64-66.

provider. An open access requirement is analogous to forcing MediaOne to carry all sports channels if it chooses to carry ESPN.

GTE argues that this section applies to regulating "particular programming content," which open access requirements would not do. In *United Video*, the court concluded that Congress had intended the section to forbid only "rules requiring cable companies to carry particular programming." Content-neutral rules were allowed to stand. In *Storer Cable*, the court based its decision on *United Video* and upheld the LFA's requirement that the cable operator may not discriminate in the provision of video programming. In *Morrison*, the court upheld a state antitrust statute prohibiting a cable operator from tying the sale of certain programming to other, more expensive programming. All three cases indicate that this section applies only to requirements that are content based, GTE argues. Open access requirements are content neutral. Thus, this section does not apply, as it did not apply to other nondiscriminatory provisions in law and conditions in a cable franchise.[139]

§544. Regulation of Services, Facilities, and Equipment

(f) Limitation on regulatory powers of Federal agencies, States, or franchising authorities; exceptions

(1) Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter.

TCTA disputes GTE's analyses of the above cases. *United Video* involved FCC rules for signal carriage, and the case supports the argument that "signal carriage is exclusively a federal law issue." *Storer Cable* dealt with one cable operator's rights to obtain specific video programming, "not transport." It was later settled and vacated. The industry rejects the reasoning of *Morrison* generally, but it does not apply here because "cable is not tying Internet to the purchase of cable service," and that case applied solely to a claim made under California law.[140]

Policy Considerations

The FCC is the only agency that has some form of jurisdiction over all current providers of broadband and high-speed services. In its First report pursuant to Section 706 of the Act, the FCC notes that "some actions could contravene the intent of Section 706 that our broadband policy be technologically neutral and could skew a potentially competitive marketplace." LFAs have potential jurisdiction over only one form of broadband, and thus they are in no position to

[139]First GTE Paper at 25, citing *United Video, Inc. v. FCC*, 890 F.2d 1188 (D.C. Cir. 1989), *Storer Cable Communications v. City of Montgomery, Ala.*, 806 F.Supp. 1546 (M.D. Ala. 1992), and *Morrison v. Viacom, Inc.*, 52 Cal.App.4th 1531-32, 61 Cal.Rptr.2d. at 556.

[140]Second TCTA Paper at 12.

implement technologically neutral policies with respect to all competing technologies.[141] The authority of states varies from platform to platform. They have substantial authority over wireline telecommunications providers but virtually no authority over wireless services and none over DBS.

In 1996, Congress directed the FCC to monitor the deployment of broadband technologies, "without regard to any transmission media or technology," and to take steps to accelerate that deployment if necessary.[142] This came 30 years after the FCC first examined the use of telephone lines to provide data services. The FCC has generally declined to regulate computer data services that are provided over telecommunications facilities. For years it has distinguished basic telecommunications services from enhanced services. The Act codified many of these distinctions.

FCC staff believe the commission's regulatory restraint with respect to information services has significantly facilitated the growth of the Internet.[143] To date, the FCC has not sought to regulate the Internet—its content or transmission—and has not sought to regulate any of a variety of broadband technologies currently being deployed in the U.S. In its *First 706 Report*, the FCC concluded that "mandatory open access to cable modem platforms was unnecessary to promote broadband deployment." It concluded that "the deployment of advanced telecommunications capability to all Americans appears, at present, to be proceeding on a reasonable and timely schedule."[144] It reiterated that finding in its *Second 706 Report*.[145]

Certainly, the cable industry has advocated a policy of regulatory restraint, and it has lobbied to allow market forces to work and the FCC to work through the legal and regulatory issues of broadband Internet access. In various public pronouncements, the FCC and several of its commissioners and policy staff have expressed similar sentiments. Not surprisingly, the investment community also supports regulatory restraint.[146]

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[141]Federal Communications Commission, *Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398 (February 2, 1999)(*First 706 Report*) at ¶74.

[142]47 U.S.C. 706(b) specifically requires the FCC to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."

[143]See Oxman generally.

[144]*First 706 Report* at ¶101, ¶91.

[145]*Second 706 Report* at ¶1.

[146]First TCTA Paper at 31.

There is another view. Concerned with the growing influence of ever-larger telecommunications and media corporations, some analysts are concerned that the fundamental design principles that have fueled innovation on the Internet are endangered by the very "hands off" policies that allowed it to first flourish. At present, the end-to-end architecture of the Internet places the innovative functions at the ends of the network, while the communications protocols are kept simple and general.

This type of design "expands the competitive horizon by enabling a wider variety of applications to connect and use the network." No single entity can tilt the network to its own competitive advantage or favor particular applications over others. Anyone can design a better way to utilize the Internet, and anyone can take advantage of that application, because the network is open. This is beneficial, because no one is limited to relying on the creativity and innovation of a small group of entities that control the network and its uses. The Internet is truly competitive because anyone can bring their product to any online market.[147]

The Internet of today is somewhat analogous to interstate commerce. No state can close its borders to trade, or impose discriminatory tariffs on some goods and not others. It is far different from the old telephone network, which was not neutral to its uses. For most of its history, "it was a crime to use the network in ways not specified" by the companies that owned the wires. Innovation was controlled by the owners of the wire. The Carterfone decision in 1968 started a policy of opening the network to innovation. Today's telephone network has allowed for the Internet to grow and become the economic force that it is. Anyone can hook any device to the network, and any content or application may pass across the wires "so long as the toll is paid." Now there are more than 6,000 ISPs competing against each other in the U.S.[148]

The argument is not that cable operators *will* utilize their ownership of the wire to stifle innovation, as with the old telephone networks. Rather, the possibility of discrimination toward favored applications and affiliates "increases the risk an innovator faces" and should be "expected to reduce innovation."[149]

AOL, which has agreed to merge with Time Warner, operates a closed instant messaging platform that categorically prevents its subscribers from using that technology to communicate with non-subscribers, even though instant messaging applications are readily available on the

[147]Mark A. Lemley and Lawrence Lessig, comments ex parte, in the *Matter of Application for Consent to the Transfer of Control of Licenses of MediaOne Group, Inc. to AT&T Corp.* at ¶21.

[148]Ibid. at ¶25; ¶52, citing in the *Matter of Use of the Carterfone Device in Message Toll Telephone Service*, Docket No. 16942, 13 FCC 2d 420 (1968); and ¶20.

[149]Ibid. at ¶62.

Internet today.[150] In February 2000, AOL announced it was launching AOLTV, which amounts to a blending of the Internet and television, and it a large customer base in its online services and Time Warner's cable subscribers. Though bundling of services is often good for consumers, the requirement that consumers accept a bundle of services while shunning all others may be harmful to consumers and definitely harmful to innovation.

AOL and Time Warner, as well as AT&T, have expressed commitments to open their cable systems up to competitors. AT&T will initiate a six-month test on its cable system in Boulder, Colo., starting in November 2000. Time Warner will conduct a test on its system in Columbus, Ohio. In July, Time Warner announced that Juno, a non-affiliated ISP, would be available to Time Warner's subscribers along with Road Runner. While no date has been set for customers to elect Juno on Time Warner's system, the company has pledged that it will occur before the end of 2001, when Road Runner's contract as the exclusive ISP expires. Comcast, the nation's third largest cable company, has also pledged to give its broadband subscribers a choice among ISPs.

In February 2000, AOL and Time Warner released their MOU outlining their commitment to open access. By late September, ISPs were starting to accuse Time Warner of "speaking out of both sides of its mouth." Business Week reported that a proposed contract extended by Time Warner to its would-be ISP partners contained terms that ISPs claim would make it "difficult, if not impossible" to offer their service on Time Warner's systems. Specifically, the terms included requirements that ISPs provide Time Warner:

- 75 percent of an their subscription revenues, with a minimum monthly payment of $30 for each customer;
- Space on the top half of the ISP's home page to highlight links to Time Warner content and services;
- 25 percent of the revenues the ISP gets from cable-access advertising, e-commerce, and other services; and
- A $50,000 advance.

Time Warner's spokesmen reiterated the company's commitment to work with individual ISPs, and they added that the contractual terms were still under discussion and not final.[151]

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[150]"In an unusual twist, Microsoft Corp. is among a dozen or so smaller players in the IM market that decry what they consider to be AOL's market-dominating behavior in instant messaging, and they are demanding that it step up efforts to make its system interact with theirs." AOL says it is testing an IM standard that would increase connectivity, but it will take more than a year. AOL is also concerned with spam—unwanted, junk e-mail—and security. See "Rivals Demand Access to AOL Mail Service," *The New York Times* (August 7, 2000).

[151]"ISPs to AOL Time Warner: You Call This Open Access?" *Business Week* (September 29, 2000), available online at www.businessweek.com/bwdaily/dnflash/sep2000/nf20000929_701.htm, accessed October 3, 2000.

Broadband Today, a staff report prepared for FCC Chairman Kennard in October 1999, enumerated eight "preliminary findings" from its look at the broadband market. Clearly, the staff is of the opinion that open access will prevail in the marketplace, and some events suggest that it may. Some argue that the cable companies' efforts toward open access are merely being undertaken to gain regulatory approval of mergers or to avoid regulation at the federal, state, or local level. The government, through its examination of the issues and cable's business practices, is moving the cable companies to accept open access. Credit should not go to the market. Others would argue that cable companies are merely trying to give consumers what they want and are going about it in a manner that best protects the quality of their product. Cable modem service was the product of a co-venture among several companies, not all of which were cable companies. Those investors expect a return, and, like many new products, they were given a period of exclusivity to earn a return, in many ways analogous to a patent. If cable operators were to roll out a flawed product in a rush to meet a regulatory deadline, there will be serious consequences to the company's reputation, customer base, stock value, and profitability.

***Broadband Today's* "Preliminary Findings"**

1. The broadband industry is nascent.
2. Cable modem deployment spurs alternative broadband technologies.
3. Regulation or the threat of regulation ultimately slows deployment of broadband.
4. Market forces will compel cable companies to negotiate access agreements with unaffiliated ISPs, preventing cable companies from keeping systems closed and proprietary.
5. If market forces fail and cable becomes the dominant means of Internet access, regulation might then be necessary to promote competition.
6. There was no consensus on how to implement open access from a regulatory perspective.
7. There was no consensus on how to implement open access from a technical perspective.
8. Rapid nationwide broadband deployment depends on a national policy.

Source: Broadband Today *at 32-40.*

There is no disagreement with the FCC staff's first finding, that the broadband market is in an early stage of development. Clearly it is, but it is growing up quickly. Before 1996, the only true broadband customers were businesses that could afford T1 lines. In just five short years, there are nearly 5 million broadband customers, many of them residential and small business consumers.

There is some disagreement as to whether cable modem deployment spurs the rollout of other technologies. The cable industry contends that DSL rollout is largely the result of the initial success of cable modems.[152] The ILECs respond that DSL has only recently become technically feasible, and ILECs would never intentionally choose to enter a market in such a defensive position.[153] Either way, the Internet was hardly a way of life before 1996.

[152]First TCTA Paper at 15.

[153]Second GTE Paper at 3.

Lemley and Lessig take particular exception to preliminary findings three through five. They disagree with the "naïve assumption" that AT&T would voluntarily open its platform when their customers have little means to "vote with their wallets." Only by declining to purchase AT&T's bundled service offering could customers pressure AT&T toward openness, and even then, it is far from certain that AT&T would respond to that market threat, particularly in areas where it is the only viable high-speed provider. The FCC's report suggests that regulation could be used to force the market open if open access does not emerge as a market solution. It seems to be counterintuitive that the same threat of regulation that "ultimately slows deployment of broadband" could somehow provide the very spark that fosters open access as a market initiative.[154]

Broadband Today findings six and seven indicate that FCC staff were unable to find consensus about the technical aspects of implementing open access—the "devil is in the details," so to speak—on either a regulatory or engineering basis. The preceding discussions have detailed some of the reasons why consensus on the regulatory side was impossible to achieve, but the engineering questions are another debate entirely.

As noted, AT&T and Time Warner have plans for multiple-ISP trials on their cable systems in Boulder, Colo., and Columbus, Ohio, respectively, to work out the engineering problems with open access. GTE claims that the technological hurdles of open access are not great and that it successfully piloted open access on its Clearwater, Fla., cable system. GTE's trial "flatly discredits the claims that open access and consumer choice are technologically complicated and costly."[155] GTE's competitors and several outside observers were critical of the Clearwater experiment, saying that "it involved a very small number of ISPs, was never subject to peer review, and was ridiculed in the trade press as a public relations stunt."[156] Others defend the demonstration as confirmation that open access is technically feasible. Some cable operators, like Wide Open West, already have contracts in place to provide open access over systems they are constructing.

The cable industry argues that uncertainty over the technological and regulatory implications of open access will "inexorably chill investment and raise cable's cost of capital."[157] There is already considerably more risk to investors in cable than in other utilities. Cable operators cannot be granted exclusive franchises, cannot guarantee a rate-of-return on investment, and cannot even guarantee than any of its customers would purchase cable modem service if it were

[154]Lemley and Lessig at ¶87, et seq.

[155]Ed Shimizu, "Testimony of Ed Shimizu Before the House State Affairs Committee" (March 2, 2000) at 5.

[156]First TCTA Paper at 24.

[157]Ibid. at 32.

offered to them. Others, including GTE, argue that open access neither discourages cable operators from upgrading their networks nor increases the risks faced by investors. They claim that revenues from cable modem service represent only a tiny portion of the returns AT&T expects to make on its upgraded plant from telephony.[158] Their arguments aside, regulatory uncertainty remains.

"The way to reduce uncertainty, and promote broadband adoption, would be for the FCC to simply state a clear policy."[159] This is, in fact, one way to interpret the eighth preliminary finding: "rapid nationwide broadband deployment depends on a national policy." Many proponents of open access, including GTE, have declared that a national policy of open access is the desired outcome.[160] Certainly, a national policy could encompass all broadband platforms. States could enforce an open access requirement only on specific wireline providers.

However, open access proponents believe that it will take the FCC a long time, perhaps up to several years, to adopt such a policy. Because they see danger in waiting, GTE and other open access proponents are pressing for legislation at the state level to address cable modem service, the current leader in terms of broadband subscribers. That danger, says GTE, is the forming of a new "digital divide" between those consumers with a choice of ISPs and those without. A second danger is the potential for smaller, unaffiliated ISPs to be forced out of business as more consumers subscribe to closed broadband platforms. Once the government finally steps in to force the networks open, those businesses and their potential innovations may be lost.[161]

The cable industry responds that consumers are not being harmed, and the rapid increase in the number of cable modem subscribers indicates that they are choosing to use cable modem service regardless of whether the system makes multiple ISPs available. Simply put, subscribers are happy with their service, and impartial evaluations give cable modems high marks.[162] Cable modems provide customers with a new choice in high-speed service, and the result is a furious competition between cable modems, DSL, and the emerging wireless and satellite providers. Prices have come down, and consumers have more choices than before. Thus, the market is working.

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[158]Shimizu at 6.

[159]Lemley and Lessig at 87-91.

[160]GTE chastises the FCC for failing to consider the adoption of a national policy, "which would obviously be the most sensible approach." See Second GTE Paper at 3.

[161]Shimizu at 3.

[162]*Consumer Reports* said cable modems "were less troublesome to set up and maintain" and indicated that consumers were generally pleased with their cable broadband. See "Instant Internet," *Consumer Reports* (September 2000) at 24-27.

Exchange Between Chairman Wolens, Bill Carey from Time Warner, and Dale Bennett from AT&T

REP. WOLENS: Bill Carey, should we have open access in Texas, yes or no?

BILL CAREY (Time Warner): We have articulated a vision for open access. I think you will find that we will fulfill that vision in good faith, and I think you're going to be very satisfied with what you see us accomplish.

REP. WOLENS: As a matter of policy, should we have open access in the state of Texas?

MR. CAREY: We should not—not as a matter of regulation, no. I think that would be the most detrimental thing we could do to—

REP. WOLENS: We should have it if you give it to us, is that what you're saying?

MR. CAREY: Well, no. I think we're really talking about two issues here.

REP. WOLENS: I didn't say "force." I'm just saying, should we have open access here in the state of Texas?

MR. CAREY: I think open access is a good business policy. I think if it's imposed on operators as a matter of regulation, though, that it will—there will be a host of unintended consequences, and that will be harmful.

I think the history has shown that good things have been happening over the period in the last few years. There has been incredible investment made in infrastructure right here in Texas over the period of the last five or six years by cable operators. We were the first out, in most cases, with the broadband high-speed service.

That, in turn, stimulated the telephone companies to go out and start moving faster with DSL. If you want DSL service out there in those rural areas, turn the cable operators loose.

REP. WOLENS: Dale Bennett, should we have open access in the state of Texas or not?

DALE BENNETT (AT&T): Competitive open access is the preferred policy. We should have open access.

REP. WOLENS: Thank you.

Excerpt from March 2, 2000 hearing of the Committee on State Affairs.

Open access proponents counter that the market is not really working, and there is a growing threat to competition and consumer choice. The recent public skirmish between Time Warner and Walt Disney over the retransmission agreement for Disney's networks, including the broadcast network ABC, highlights what can happen when "one side has the power to pull the plug."[163] There are economic incentives in place for large media corporations to close the gates on their networks and strike deals with their affiliates at the expense of independent companies and, just as chillingly, their direct competitors. There is no guarantee that the promises made by AT&T, AOL Time Warner, and Comcast will ever lead to open access.

The preferential contracts they have with Excite@Home and Road Runner can be extended. On August 28, 2000, Excite@Home announced that it had extended its contract with AT&T until 2008 and with Comcast and Cox through 2006. The exclusive arrangement would continue through 2002, as previously known. Thereafter, Excite@Home will be the provider of platform and connectivity services used by its principal cable partners in delivering their high-speed Internet services. Excite@Home's portal, Excite.com, also will be featured on the cable partners' high-speed Internet service start pages."[164]

[163]Mark Cooper, "Statement of Mark Cooper" before the FCC In the *Matter of AOL and Time Warner Transfer of Control Application* (July 27, 2000) at 2.

[164]Excite@Home news release, "Excite@Home Announces New Board and Completion of Partner Distribution Agreements, AT&T Assumes 74 Percent Voting Stake" (August 28, 2000).

Streamed video, which could be viewed as a means for independent producers to compete with the cable companies, can currently be cut off by a cable operator after 10 minutes under terms of contracts already in place between the cable companies and Excite@Home. GTE and TCTA both stipulate that AT&T has not exercised its rights to do so. Though the cable companies have not exercised this level of control, some argue the dangers remain that they can discriminate against non-affiliated programming or providers, and that they might outright block access to competitors' content or services, and those contract terms are currently in force.[165]

TCTA replies that open access proponents are "left to predicting problems that aren't happening." What this discussion is really about is, one competitor is trying to tie up another competitor in a morass of regulation. The debate is not about consumer choice, because consumers have more choices now. The debate is about the incumbent telephone companies, which have much to gain by disabling or delaying the rollout of a competitive high-speed product, trying to impose a new set of regulation on their competitors. Any delays in upgrading cable plant because of uncertainties over open access regulation necessarily delay residential telephony competition.[166]

Proponents of open access laud cable operators' commitments to provide their consumers a choice of ISPs, but they are still critical that those commitments are vague, unenforceable, and only applicable to individual cable operators. Market forces ultimately will not work. The preservation of consumer choice, ISP competition, and possibly the Internet itself depend upon open access legislation. Opponents contend that the market is working. Consumers have more choices now that cable operators have solved the technological problems of providing Internet access over their cable systems. No cable modem customer is restricted from accessing the content of any Web site or choosing any start page. The FCC is beginning its proceeding to examine all of the complicated issues surrounding cable modem service, and it should be allowed to complete its inquiry.

[165]GTE indicates that "Section 7(a)(iii) of the Master Distribution Agreement ("Video Service prohibition") between Excite@Home and its cable company owners specifically requires Excite@Home to prohibit the downloading of all video programming and streaming video in excess of ten minutes to any subscribers." See Second GTE Paper at 13.

[166]First TCTA Paper at 34.

Findings of the Subcommittee on Cable & Broadband

The market is moving toward open access, but there are no guarantees it will get there.

There exists potential for telecommunications companies that control the wires to discriminate against the content of non-affiliated companies, including its competitors. That threat may be mitigated by vigorous competition between broadband providers.

Large telecommunications mergers, particularly those that combine content with the capability to control its delivery exclusively, have forced the FCC to look at open access, even as a potential condition of mergers. Its examination of the issue does not preclude the state from acting.

The PUC has at best limited authority to regulate cable modem service under PURA as it is currently written, even if it were determined that cable modem service is indeed a telecommunications service under the Act.

Some testimony reflected that the Legislature could give the PUC the specific authority to require open access. Others have argued that even the Legislature does not have this authority, and thus cannot grant it to the PUC, because it is preempted by the federal government.

The ultimate determination of the proper classification of cable modem service will be made by the FCC or the courts. The FCC has released a Notice of Inquiry as part of a proceeding to determine the proper classification of cable modem service. The FCC could, if petitioned, open a proceeding to forbear from regulating cable modem service. If it chose to forbear, it could invalidate Texas law.

Open access legislation could address regulatory disparities between cable modem service and DSL. The state lacks the authority to enact open access requirements for wireless and satellite broadband providers.

Any open access legislation passed by the Texas Legislature most likely would not take effect before September 1, 2001, and might be delayed by PUC rulemaking activities or litigation.

SUBCOMMITTEE ON PRIVACY

During the interim, the Committee on State Affairs was charged to review the current state of privacy laws in Texas as they relate to businesses' or government's ability to disseminate personal information without prior written permission.

A subcommittee was formed to examine privacy issues in Texas. The subcommittee held two public hearings in Austin and accepted testimony from invited witnesses representing various perspectives on the need for stronger state privacy protections. The subcommittee examined other states' privacy laws, as well as new federal laws affecting the health care, financial services, and online sectors of the economy. In addition, the Office of Attorney General (OAG) was asked to submit a report to the subcommittee that catalogued current state statutes related to personal information held by the government or the private sector. OAG presented its report ("the OAG Report") to the subcommittee prior to its July 21 hearing.[1]

Subcommittee on Privacy

Chairman:	Brian McCall
Members:	Debra Danburg Paul Hilbert Delwin Jones John Longoria Tommy Merritt
Hearings:	March 28 July 21

Recent opinion polls demonstrate that the public is concerned about privacy. An August survey found that 86 percent of Internet users were "very concerned" or "somewhat concerned" about businesses or strangers obtaining their personal information online.[2] These results are similar to a *Business Week*/Harris Interactive Poll conducted in March 2000 that found more than 92 percent of Internet users were concerned about Web sites sharing personal information with other Web sites. Nearly 95 percent were "not very comfortable" or "not at all comfortable" that an online profile could be created that merged a person's real name, address, income, driver's license, credit data, and medical status. The poll found that 57 percent of respondents believed the government should pass laws

[1]Office of Attorney General, *Information Held by Governmental Bodies Deemed Private or Confidential by the Texas Constitution and Statutes* (July 20, 2000)(OAG Report). The cover memorandum can be accessed on the OAG's Web site at www.oag.state.tx.us/notice/privacy_acts.pdf. For the survey of Texas privacy statutes, enter privacy_statutes.pdf in place of privacy_acts.pdf. A brief side-by-side comparison of other states' privacy acts has the filename privacy_table.pdf. The federal privacy act text has the filename privacy_code.pdf.

[2]Anick Jesdanun, "Study: Web users worry about privacy, do little for it," Associated Press news service (August 21, 2000), quoting a study by the Pew Internet and American Life Project.

to regulate how personal information is recorded and used, 21 percent believed the government should establish standards but not pass laws, and 15 percent believed the government should let industry develop voluntary standards.[3]

Public concern about Internet privacy has been fueled by revelations of some businesses' efforts to match anonymous online data and browsing habits with purchasing behavior and Web surfers' real identities. On January 27, 2000, Harriet Judnick, a Marin County (Calif.) administrative assistant, filed a lawsuit against DoubleClick alleging violations of privacy rights and deceptive trade practice laws. DoubleClick, the nation's top advertisement server on the Internet, serves banner ads and other promotional messages that are tailored individually to Web surfers. DoubleClick uses "cookies" and other online tools to track the Web sites and content that people look at, what they buy online, how often they hit a Web site, and how long they there.

By November 1999, DoubleClick had amassed online profiles of over 100 million individuals, but those profiles were still largely anonymous until DoubleClick "quietly reversed an earlier policy of providing only anonymous data about Web surfers to marketers and … began combining its online profiles with information from direct mailers and others that help determine the actual identity of the Web surfer." DoubleClick's executives predicted that the public would quickly come to accept that personal information would be used to tailor online advertising to their precise interests. They later admitted that they had erred, but only by "failing to communicate" to the public what DoubleClick's plans were. Ms. Judnick began receiving unsolicited e-mail from insurance companies, loan brokers, and medical firms after she had looked up medical insurance information online. Her lawsuit alleges that the marketing blitz resulted from her presumably anonymous online browsing habits.[4]

It was the start of a series of lawsuits filed around the company against DoubleClick, whose stock value tumbled in the wake of the publicity. It had been trading as high as $135.25 in January 2000 but was down to $27.56 in July, nearly an 80 percent decline.[5] The company has slogged through the public relations disaster and continues to provide targeted online advertising, though it now provides Internet users the opportunity to opt out of its targeting capabilities.[6] DoubleClick is one example of the public's backlash against a variety of companies, online and off, that collect, share, trade, or sell personal information without the consumer's permission.

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[3]Heather Green *et al.*, "It's Time for Rules in Wonderland," *Business Week* (March 20, 2000) at 83-96.

[4]Amy Borrus, "Privacy: Outrage on the Web," *Business Week* (February 14, 2000) at 38-40; Andrea Peterson, "Privacy Firestorm at DoubleClick," *The Wall Street Journal* (February 23, 2000).

[5]Stock quote information provided by Hoover's, available online at www.hooversonline.com.

[6]The opt out screen is one click from DoubleClick's home page, www.doubleclick.net. Clicking the "Opt Out" link takes visitors to www.doubleclick.net/company_info/about_doubleclick/privacy/privacy2.htm, accessed on September 8, 2000.

Methods of Tracking an Individual's Online Habits

Cookies are tiny data files that are created on a user's hard drive by a Web site, usually the first time the site is visited. It typically contains a unique tracking number that allows the site to identify the user, though not by real name unless the user provides that information to the Web site specifically. Cookies allow Web sites to tailor information specifically to the user, such as stock quotes, sports scores for favorite teams, or pages that have been updated since the user's last visit. They can also be used to create a dossier of pages viewed, links clicked, and items purchased. Most browsers allow the user to refuse or turn off cookies.

Advertisements can be used to track online usage because they can be served from a different computer than the one hosting the Web site. For example, DoubleClick stores advertisements with links to the advertisers' Web sites on its servers. It places those ads in the Web sites that a user visits. If the user clicks through to the advertiser's site, then the ad placement company can track that movement using cookies. In fact, the ad company can potentially track movement across all sites that it serves ads upon.

Clear GIFs (pronounced "jiffs") and **Web bugs** are invisible graphic files embedded in a Web site that allow a site other than the one being visited to track activities. These invisible graphics—each just one pixel by one pixel—allow a site to place a cookie on a user's hard drive potentially without the user's knowledge.

Histories are lists of recently visited Web pages that a user's browser stores to increase the functionality of "Back" and "Forward" buttons. Most Web site servers are capable of reading these histories and determining what sites a person has visited.

From various sources.

The public was similarly uneasy when bankrupt Toysmart, an Internet-only toy retailer, sought to sell its customer database at auction in apparent violation of its stated privacy policy. The Federal Trade Commission (FTC) sued Toysmart, which is majority owned by Walt Disney Company, to block the sale of the customer list as a stand-alone asset. The settlement between the company and the FTC stipulated that the customer database can only be sold to a successor-in-interest retailer, as part of the whole Web site, or else must be destroyed.[7]

Citizens' uneasiness with the collection and use of government information was not assuaged by public disclosure of the ominously named Carnivore, the electronic communications surveillance technology belonging to the Federal Bureau of Investigation (FBI). Because Carnivore attaches itself to an Internet service provider's (ISP) equipment to capture e-mail and other electronic communications, it has the capability of eavesdropping on practically unlimited numbers of individuals, regardless of whether they are suspected of wrongdoing. The FBI insists that it uses Carnivore lawfully, and it has asked the public to have confidence in the agency's judicious use of the technology.[8]

[7]CNNfn, "FTC, Toysmart settle," (July 21, 2000), available online at http://cnnfn.com/2000/07/21/companies/toysmart, accessed on July 21, 2000 (CNNfn is a subsidiary of Time Warner.).

[8]Federal Bureau of Investigation, "Statement for the Record of Donald M. Kerr to the Senate Committee on the Judiciary" (September 6, 2000), available online at www.fbi.gov/pressrm/congress/congress00/kerr090600.htm, accessed September 7, 2000.

Even more prevalent are the routine uses of government information for marketing or other business purposes. The public continues to be concerned about the amount of their personal information that is held by the government and its ability to collect, use, and share that information without their knowledge or consent.

Overview of Federal Privacy Laws

In his fiery dissent of *Olmstead v. United States,* Justice Louis Brandeis described a citizen's right to privacy as "the right to be left alone."[9] It was not the first time he had used that expression to define privacy. Thirty-eight years earlier, Brandeis and law partner Samuel Warren published an article in the *Harvard Law Review* in which he first described the need for laws to reflect the right to be left alone. Laws must be designed to protect citizens "whatsoever their position or station, from having matters which they may properly prefer to keep private, made public against their will. It is the unwarranted invasion of individual privacy which is reprehended, and to be, so far as possible, prevented."[10]

Though most people would agree that "the right to be left alone" is a reasonable definition of privacy, such a definition is difficult to implement legally. In general, legal skirmishes over privacy involve a balancing act between an individual's right to be left alone and a public's right to know. Most of these battles are fought over information that is collected and maintained by the government, as privacy protections clash with open government laws. Few laws apply the concept of being left alone to the private sector's collection, use, and distribution of information.

There is no enumerated right to privacy guaranteed by the U.S. Constitution. However, constitutional law recognizes two kinds of individual privacy interests. The first protects an individual's interest in making certain important personal decisions independently of and without interference from the government. Matters related to marriage, procreation, contraception, family, child rearing, and education are generally viewed by the U.S. Supreme Court to be within this zone of privacy. The second protects an individual's interest in avoiding the disclosure of personal matters to the government or the public. Courts typically apply this second protection only to the most intimate matters of human affairs as they weigh the individual's interest in privacy against the public's right to know.

Common law privacy encompasses information that contains highly intimate or embarrassing facts about a person's non-public affairs that are of no legitimate interest to the public and release

[9] *Olmstead v. United States*, 277 U.S. 438, 478 (1928). It was the first wiretapping case heard by the U.S. Supreme Court.

[10] Louis Brandeis, "The Right to Privacy," *Harvard Law Review*, 4 Harv.L.Rev. 193-220 (1890) at 193, 214-215.

of which would be considered highly objectionable to a reasonable person. Though it is broader than constitutional privacy standards, it nonetheless protects a fairly narrow range of personal information. As applied to information held by the government, the test of "no legitimate interest" becomes an especially high hurdle, as the public can be said to have a fairly legitimate interest in publicly held information that many reasonable people would consider to be private.

The bulk of citizens' privacy protections are provided by statute. The Privacy Act of 1974 is the primary federal law that governs information collected, maintained, and disclosed by the federal government. Several federal laws extend privacy protections to personal information collected by the financial industry, the health care industry, and the online world. In addition to the Privacy Act, important federal privacy legislation includes the Fair Credit Reporting Act, the Gramm Leach Bliley Act of 1999, the Health Insurance Portability and Accountability Act of 1996, and the Children's Online Privacy Protection Act of 1998.

No federal law completely governs use of Social Security numbers (SSNs), which are routinely collected by a variety of public and private entities in the course of ordinary transactions. A discussion of the widespread use of SSNs follows summaries of the aforementioned federal laws.

The Privacy Act of 1974

The Privacy Act is designed to provide U.S. citizens with more control over the collection, dissemination, and accuracy of information about them contained in government databases.[11] No federal agency can disclose information by any means to any person or other agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, subject to certain specific statutory exceptions. The Privacy Act specifies that information collected by an agency for one purpose cannot be used for another purpose without notice to or consent of the subject of the information ("the subject individual"). The Privacy Act applies to personal information maintained in a "system of records," which is a group of records from which information is actually retrieved by name, SSN, or other identifying symbol assigned to a subject individual.

The Privacy Act establishes general records management requirements for federal agencies. Each agency must publish notices describing all systems of records it maintains; there can be no secret record systems. Every two years, the Office of the Federal Register publishes a compilation of these notices in five volumes, although it is no longer available in print.[12] No

[11] 5 U.S.C. §552(a).

[12] The most recent edition of *Privacy Act Issuances* (1997) is available online (in searchable form) at http://www.access.gpo.gov/su_docs/aces/1997_pa.html. It is not available in paper form because of low demand and the high cost of printing.

agency can maintain records about how individuals exercise their First Amendment rights unless it is specifically authorized by law to do so.

Each agency must establish procedures allowing subject individuals to access records about themselves and to correct inaccurate information.[13] There are several exceptions, most notably those related to national security and law enforcement investigations. Systems of records used solely for the purpose of determining suitability for federal employment or for statistical research are also excluded. The Privacy Act provides a civil remedy whenever an agency denies access to a record or refuses to amend a record. It also provides criminal penalties for agency employees who violate its provisions.

Fair Credit Reporting Act

The Fair Credit Reporting Act (FCRA) limits the disclosure of consumers' private financial information contained in a consumer report.[14] Credit reporting agencies may disclose the information in a credit report to third parties if the third party seeks the report:

- In connection with a credit transaction involving the consumer, including the offering of credit;
- For purposes of determining suitability for employment;[15]
- For insurance underwriting activities;
- To determine eligibility for a government license or other benefit;
- For purposes of evaluating existing credit obligations; or,
- For a legitimate business need to complete a transaction initiated by the consumer.

A consumer report can also be requested by a state or local child support enforcement agency and by agencies administering various federal benefit programs. The FCRA provides criminal penalties for individuals who fraudulently obtain a consumer report or knowingly disclose consumer report information in violation of FCRA.

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[13]Individuals requesting information about themselves under the Privacy Act should send a written notice to the applicable agency. The request should indicate that it is a Privacy Act request; include the requestor's name, address, and signature, and describe the information requested as specifically as possible. For more information on using the Privacy Act, see U.S. Congress, *A Citizen's Guide on Using the Freedom of Information Act and the Privacy Act of 1974 to Request Government Records*, H. Rpt. 105-37 (1997).

[14]15 U.S.C. §§ 1681-1681t.

[15]In order to obtain a consumer report, the employer must make a clear and conspicuous disclosure to the subject individual before the report is procured, in a document consisting solely of the disclosure, that a consumer report may be obtained for employment purposes. The subject individual must give written authorization. If an employer takes adverse action based upon the consumer report, then the subject individual must be given the report and a written description of his or her rights.

FCRA allows information in a consumer report to be communicated to persons related by common ownership or affiliated by corporate control. Before the information can be shared, the subject individual must receive a clear and conspicuous disclosure that the information may be shared and must be given an opportunity to opt out. Subject individuals are also given the right to correct inaccurate or outdated information contained in their consumer reports.

Gramm Leach Bliley Act of 1999

The Gramm Leach Bliley Act (GLBA) created new federal laws regarding the disclosure of nonpublic personal information to unaffiliated third parties and fraudulent access to financial information.[16] It obligates any financial institution to protect the security and confidentiality of its customers' nonpublic personal information and respect the privacy of its customers. "Nonpublic personal information" is defined broadly by GLBA as personally identifiable information provided by a customer to a financial institution, resulting from any transaction with the customer, or information about a customer otherwise obtained by the financial institution.

Specifically, a financial institution is prohibited from disclosing nonpublic personal information to a *non*affiliated party, either directly or through an affiliate, unless the financial institution:

- Discloses to the customer, in a clear and conspicuous manner, that the information may be disclosed to a third party;
- Gives the customer an opportunity to direct that the information not be disclosed; and
- Describes the manner in which the customer can exercise the nondisclosure option.

In no event can a financial institution disclose a customer's account number, personal identification number (PIN), or other access code for a credit card, deposit, or transaction account to any nonaffiliated third party for use in telemarketing, direct mail marketing, or e-mail marketing. No nonaffiliated third party may disseminate nonpublic personal information to another nonaffiliated third party unless otherwise provided by law. There are a dozen narrow exceptions to the law to permit disclosure in specific circumstances, such as to comply with another law or provide information to a credit reporting agency.

Each financial institution is required to develop a privacy policy. It must detail the institution's practices and policies related to disclosure of nonpublic personal information to affiliates and nonaffiliated parties. It must address the categories of information that the institution collects

[16]P. L. 106-102 was signed into law on November 12, 1999, and is also known as the Financial Services Modernization Act of 1999. Congress did not intend for GLBA to supersede the FCRA, and, in fact, the two laws are complementary. The act is named for its sponsors, Sen. Phil Gramm (R-Texas), Rep. Jim Leach (R-Iowa), and Rep. Tom Bliley (R-Va.).

and the categories of persons to whom it may be disclosed. It must detail potential disclosure of information for people who cease to be customers of the institution. It must describe the institution's efforts to protect the confidentiality and security of nonpublic personal information. It must be provided to the customer at the time of establishing a relationship with the customer and at least once per year thereafter, so long as the person remains a customer. It may be provided in written or in electronic form.

GLBA prohibits an individual from obtaining or attempting to obtain someone else's nonpublic personal information fraudulently. It also prohibits an individual from disclosing or attempting to disclose nonpublic personal information in a fraudulent manner. Fraud violations are subject to fines and imprisonment of up to five years.

Authority to enforce GLBA's privacy provisions is split among seven federal regulatory agencies and at least one state agency, the Texas Department of Insurance (TDI).[17] Other Texas financial regulatory agencies may have authority to enforce GLBA-related provisions of state law that were either not directly preempted by GLBA or offer "greater" privacy protections than relevant sections of GLBA.[18] Final federal rules implementing GLBA's privacy provisions are effective as of November 13, 2000.

Health Insurance Portability and Accountability Act of 1996

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) establishes significant new federal standards for the maintenance and disclosure of health care information.[19] Final rules to implement its privacy protections have not yet been adopted. The U.S. Department of Health and Human Services (HHS) issued a proposed rule in October 1999. It has not announced a date for publication of its final rule.[20]

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[17]Depending on the type of financial institution, it will be under the authority of the Office of the Comptroller of the Currency (national banks, their agencies and subsidiaries, excluding investment companies, brokers, dealers, investment advisers, and insurance agents), Federal Reserve (state member banks), Federal Deposit Insurance Corporation (state nonmember banks), Office of Thrift Supervision (FDIC-insured savings associations), National Credit Union Administration (federally insured credit unions and their subsidiaries); Securities and Exchange Commission (investment companies, brokers, dealers, and investment advisers); or the Federal Trade Commission (other financial institutions not subject to the authority of the aforementioned federal agencies, excluding insurance agents covered by state laws).

[18]Please see the *Report to the 77th Legislature of the House Committee on Financial Institutions* for more information on the effects of GLBA on state law.

[19]P. L. 104-191 took effect on August 21, 1996. It was sponsored by Rep. Bill Archer (R-Texas).

[20]Congress failed to pass legislation establishing privacy standards for health care providers by the statutory deadline of August 21, 1999. Absent Congressional action, HHS was required to promulgate final rules by February 21, 2000.

The proposed rule would establish a set of information practices to inform consumers about how their health information is used and disclosed, ensure they have access to information about them, require their authorization before information can be disclosed (except under certain conditions), and mandate health care providers to maintain administrative and physical safeguards to ensure the confidentiality of health care information. The proposed rule would apply to health care providers, health plans, and health care clearinghouses, collectively referred to as "covered entities," that transmit health information electronically. The proposed rule would cover electronic information only. Any health provider that maintains solely a paper-based information system would not be subject to HIPAA's privacy regulations. The proposed rule would apply to electronic information for as long as it is in the possession of the covered entity.

The proposed rule would establish a concept of "minimum necessary use," meaning the amount of information that can be disclosed or used must be the minimum amount necessary to accomplish the purpose for which it is disclosed or used, taking into account practical or technological limitations. The proposed rule would not make disclosure mandatory, except that it must be disclosed to the subject individual at that individual's request. The subject individual would have the right to request correct inaccurate information.

Under the proposed rule, covered entities would be permitted to disclose health information for almost any conceivable purpose if the subject individual provides authorization, which would specify what information may be disclosed and to whom. An authorization would also have a definite expiration date. If a covered entity planned to sell or trade the information, then it would be required to inform the subject individual on the authorization form. Subject individuals would be able to revoke their authorization at any time. No covered entity would be permitted to require a subject individual's authorization as a condition to receiving treatment or paying a claim. A subject individual would be entitled to receive an accounting of instances where health information has been disclosed, with certain exceptions.

The proposed rule would allow covered entities to use and disclose information without authorization for treatment, payment, and health care operations, including quality assurance, utilization review, credentialing, and other activities that ensure proper treatment. A covered entity would be allowed to share information with persons it hires to perform functions on its behalf, such as attorneys, consultants, or billing firms. However, any contract between the covered entity and such business partners would be required to include terms to ensure that the information remains confidential.[21] The proposed rule would also permit use and disclosure for national priority activities, such as research, oversight, and law enforcement, without the subject individual's authorization. The proposed rule would encourage covered entities to strip

[21]HIPAA does not contain any authority for HHS to regulate information once it has been disclosed to the business partners. In its proposed rule, HHS has chosen to utilize contract language requirements to limit disclosure of information by business partners.

identifiers from health information when possible by permitting a covered entity to use and disclose anonymous information in any way, provided that it does not disclose the key to identifying the individual.

HIPAA preempts any state law or regulation that provides "less stringent privacy protections." State requirements that are more stringent than HIPAA will control. HIPAA provides civil and criminal penalties for violations but does not establish a private right of action for individuals to enforce their privacy rights.

Children's Online Privacy Protection Act of 1998

The Children's Online Privacy Protection Act of 1998 (COPPA) makes it unlawful for an operator of a Web site to collect personal information from a child under 13 years of age except pursuant to regulations issued by the FTC in October 1999.[22] In general, a Web site that is directed at children or that knowingly collects information from children must obtain "verifiable parental consent" for the collection, use, or disclosure of personal information.[23] The law's requirements are triggered at the time the data is collected, not disclosed.

Personal information means information collected online that can be used to identify a child individually including:

First or last name;
Home or other physical address, including just a street name or home town;
E-mail address;
Telephone number;
Social Security number;
Other identifiers the FTC determines would permit the operator to contact a specific individual, such as a user name or Internet Protocol (IP) address; and
Any other information about a child or the parents combined with one of the listed items.

No Web site operator may condition a child's participation in a game, awarding of a prize, or involvement in any other activity on the child's disclosing more personal information than is reasonably necessary to participate in the activity.

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[22] 15 U.S.C. §§ 6501-6506; 16 C.F.R. Part 312.

[23] 15 U.S.C. §6501(9) defines verifiable parental consent as "any reasonable effort (taking into consideration available technology), including a request for authorization for future collection, use, and disclosure described in the notice, to ensure that a parent of a child receives notice of the operator's personal information collection, use, and disclosure practices, and authorizes the collection, use, and disclosure, as applicable, of personal information and the subsequent use of that information before that information is collected from the child."

A Web site operator must provide, upon request of a parent whose child has given information, a description of the types of personal information collected, an opportunity to refuse to permit the operator's further use of that information, and a means for the parent to obtain any information collected from the child. The Web site must provide notice of what personal information is collected from children, how it is used, and how it may be disclosed. It must obtain consent if its information collection and disclosure practices change significantly. A violation of COPPA regulations is treated as a deceptive trade practice, and it carries a fine of $11,000 per violation.[24]

There are several exceptions to the consent requirement, provided that the operator does not use personal information to make further contact with a child or maintain the data in any retrievable form. For example, consent is not required when an operator responds on a one-time basis to a specific request from a child, to verify parental consent, to protect the safety or privacy of a child while visiting the Web site, to respond to judicial process, or to protect the integrity of the Web site.

COPPA allows operators to satisfy the requirements of the regulations by following a set of self-regulatory guidelines issued by industry representatives in accordance with FTC rules. As of the report's writing, four entities had submitted their self-regulation practices to the FTC for such "safe harbor" status.[25] A Web site operator would be considered in compliance with COPPA if it followed one of these safe harbor practices. The FTC has found that many Web sites are not in compliance. In July, it began sending e-mails to Web sites that "appeared to have substantial compliance problems."[26]

Social Security Numbers

The Social Security Administration created the SSN in 1936 as a means of maintaining records of wages paid to individual workers. Social Security cards were issued to workers as proof that their wage records were being maintained and to demonstrate their eligibility for benefits upon retirement. The SSN has become a national identifier because it has two unique properties. First, every American is issued one. Second, every SSN is unique.

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[24]15 U.S.C. §57a(a)(1)(B).

[25]The four entities are TRUSTe, the Entertainment Software Rating Board, the Children's Advertising Review Unit of the Council of Better Business Bureaus, and PrivacyBot.com. All of those applications were pending within the 180-day statutory deadline at the time of this report's writing. The FTC's safe harbor program Web site is www.ftc.gov/privacy/safeharbor/shp.htm. The FTC's consumer education Web site is www.ftc.gov/kidzprivacy.

[26]In part, these e-mails warned, "We recommend that you review your Web site with respect to information collection from children in light of the law's requirements. Be aware that the FTC will monitor Web sites to determine whether legal action is warranted." See Federal Trade Commission news release, "Web Sites Warned to Comply With Children's Online Privacy Law" (July 17, 2000).

A Brief History of Social Security Numbers

The Social Security Act (P. L. 74-271) did not specifically authorize a numbering system for the newly enacted old-age benefits program. Instead, Social Security numbers were born out of a 1936 regulation from the U.S. Department of the Treasury known as Decision 4704.

The Social Security Board, an agency within the Treasury Department, thought of several means of establishing proof that an individual had an account on file, including metal tags and pins, but it settled on paper cards. The Board paid Fred Happel, an Albany, N.Y., artist, $60 for his design of the original card.

Form SS-5, the first Social Security number application form, indicated that the assignment of a number was necessary "for an accurate recording of your social security rights under Federal and State laws." In the 1930s, there were no field offices of the Social Security Board. Instead, Social Security card applications were distributed and processed at more than 45,000 post offices around the U.S.

Little did the Social Security Board know that its invention would see such widespread, unintended use. In 1943, President Roosevelt issued Executive Order 9397 (3 C.F.R. (1943-48 Comp.) 283-284), which required all federal departments to use the SSN "exclusively" whenever a system of identifying individuals was "advisable." In 1961, the SSN became the employee identification number for all federal employees.

In that same year, the IRS required each taxpayer to furnish SSNs on tax forms. In the late 1960s, the SSN became the identifying number for Defense Department employees, Medicare and veterans benefits recipients, and tax records for people purchasing certain bonds and securities.

An internal Social Security Administration report warned of using the SSN as an identifier in 1971, but its applications continued to be broadened until the Privacy Act of 1974 was enacted by Congress. A host of laws enacted afterward has expanded the uses of SSNs at the federal and state levels.

Source: Social Security Administration. For more information, see its historical collection Web site at www.ssa.gov/history/history.html.

As computer technology evolved, the SSN became the primary means for government agencies to identify individual records in their databases and compare information about an individual across government databases. It also became the primary means for businesses to link credit, purchasing, and other information about their customers. Governments and businesses routinely ask for and use SSNs for purposes never required or even intended by federal law. SSNs are often required, or at least strongly encouraged, on applications for state benefits, driver's licenses, and education programs. Businesses utilize SSNs on applications for credit cards, checking accounts, insurance, apartment rentals, public utilities, wireless telephone service, and such ordinary things as videocassette rentals and grocery store discount cards.[27]

The SSN is the key not only to applying for these services but also for obtaining additional information about the individual. For example, an individual's SSN is needed to obtain a credit report, which lists practically every banking account, credit account, loan, previous address, and other information that normally is not disclosed. As such, the SSN is the key to identity theft.

[27]See General Accounting Office, *Social Security: Government and Commercial Use of the Social Security Number is Widespread*, GAO/HEHS-99-28 (February 1999).

No federal law specifically regulates the overall use of SSNs. The Social Security Act provides that SSNs obtained or maintained by authorized individuals—federal, state, or local government employees—after October 1, 1990, are confidential, and disclosure is prohibited except in certain circumstances.[28] Federal law requires that SSNs be used only for the purposes they are collected and provides penalties for unauthorized use or disclosure. As noted previously, the Privacy Act of 1974 also places some limits on the use of SSNs. Both laws apply only to SSNs collected or maintained by governmental bodies.

However, a number of federal laws require the use and disclosure of SSNs.[29] The Internal Revenue Service (IRS) uses the SSN as a taxpayer's identification number, which means that an SSN is required to report wages, interest payments, dividends, retirement benefits, purchases involving more than $10,000 in cash, automobile or boat purchases, mortgage interest payments exceeding $600, and student loan interest payments, among many other types of transactions. SSNs are required to establish eligibility for federal Supplemental Security Income (SSI), food stamps, Temporary Assistance for Needy Families (TANF), Medicaid, and veterans disability and health benefits. Federal agencies use the SSNs to match applicants' self-reported financial information with IRS, Social Security, and other agencies' records.

SSNs are used as the primary identifier for commercial driver's licenses, and states are required to use a driver's SSN in order to search records in the national Commercial Driver's License Information System. States may use a driver's SSN to search the National Driver's Registry to determine if an applicant's license has been suspended or revoked by another state. Federal law also requires the use of SSNs to aid child support programs through the Federal Parent Locator Service. Federal law requires states to make SSNs from professional licenses, marriage licenses, divorce decrees, paternity determinations, and death certificates available to child support enforcement agencies. Many other federal laws require, or at least allow, its use in specific circumstances, and many states utilize it for purposes of managing state and federal programs, administering taxes, and processing payments to employees, contractors, and vendors.

Recent Federal Actions

At the time of this report's writing, the 106th Congress had not adjourned. Several dozen bills related to privacy were in various—usually early—stages of the legislative process. Few had reached a point where they were likely to become law. The principle exception is GLBA, which was enacted during the First Session of the 106th Congress in 1999.

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[28] 42 U.S.C. §205(c)(2)(C)(viii).

[29] 42 U.S.C. §205(c)(2)(C)(i) states that "it is the policy of the United States that any State (or political subdivision thereof) may, in the administration of any tax, general public assistance, driver's license, or motor vehicle law within its jurisdiction, utilize the social security account numbers … for the purpose of establishing identification."

Privacy Laws of Texas

Texas has not enacted an all-encompassing privacy statute. However, the OAG Report identified 580 statutes that make certain information in the custody of governmental entities confidential. The overwhelming majority of these statutes apply to corporate persons rather than natural persons. Because privacy is ordinarily thought of as a personal right, not a corporate one, the actual number of Texas statutes promoting personal privacy is a much smaller subset of the statutes identified by OAG. The majority of laws applying to natural persons are related to information contained in applications, complaints, and investigations conducted by licensing agencies of their current or prospective licensees. Others protect health care information; names, addresses, and telephone numbers of certain individuals; information about children; financial records; and genetic information about individuals.[30]

In terms of information held by governmental entities in Texas, the state's Public Information Act (PIA) serves as citizens' primary privacy protection.[31] In general, government information is presumed to be public, and thus disclosed to any person, unless it is covered by a specific statutory exception. Some exceptions are mandatory, meaning that an agency cannot disclose the information, while others are discretionary and allow the agency to provide the information even though it may legally withhold it from the public.[32] Information considered to be confidential by law is a mandatory exception to the PIA. Its disclosure is a misdemeanor and constitutes official misconduct.[33] This exception covers information considered confidential by constitutional and common law privacy rights, judicial decisions, and specific statutes.

Only a few of the state's current statutes appear to cover information held by private companies, and the majority of those statutes protect health care information, including diagnosis, treatment, and prescriptions. Several statutes prohibit private financial institutions from disclosing confidential financial information, but a majority of these cover information provided to the institution by the state's regulatory agencies. A number of statutes protect information that is subpoenaed or otherwise involved in lawsuits or law enforcement activities. Some of the statutes governing public information may also apply to private companies that have contracts with state or local agencies. No state law appears to regulate information provided by consumers to private sector Web sites specifically.

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[30]Appendix E contains a list of selected provisions of current Texas law that relate to personal privacy.

[31]Chapter 552, Government Code.

[32]See Office of Attorney General, *Public Information Handbook* (2000) generally.

[33]§§ 552.101 and 552.352, Government Code, respectively.

Summary of Testimony

The subcommittee held two hearings on privacy issues to hear testimony and recommendations on whether, and in what manner, the state should enact new laws protecting personal privacy. These hearings drew a national panel of experts on privacy, including consumer groups and representatives of various industries. Included in the testimony was a discussion of the state's role in protecting privacy on the Internet.

March 28 Hearing

BILL POULOS of EDS said privacy deals with personally identifiable information, which is information that can be connected directly to an individual by name. Almost all information can be personally identifiable, but there are "various levels of sensitivity." For example, health care information is more sensitive than a home telephone number, but both are personally identifiable pieces of information. Privacy laws describe what can be done with personally identifiable information.

March 28, 2000
Subcommittee on Privacy
Witness List

Electronic Privacy
Bill Poulos, EDS

Privacy & Open Government Laws
Rebecca Payne, Office of Attorney General
Rob Wiley, Freedom of Information Foundation of Dallas

Internet & Consumer Databases
Rick Lane, U.S. Chamber of Commerce
Diane McDade, Microsoft
Rob Schneider, Consumers Union
Dave Steer, TRUSTe

The Online Privacy Alliance is an organization of more than 80 U.S. companies that are working together to develop "very definitive privacy guidelines that we want companies … to adopt for their online business."[34] These guidelines stipulate that a company should post a privacy policy on its Web site that notifies consumers whether private information is collected and what is done with the information. It must also provide consumers a choice to limit collection or use of that information and give them "reasonable access to the information" so they can correct any inaccurate information.

These guidelines were developed to respond both to market demand and to calls from European governments for better online privacy protection. Privacy has been considered a fundamental right in Europe for some time. "Privacy is to Europeans what free speech is to Americans." In

[34]The policy guidelines are available online at www.privacyalliance.org/resources/ppguidelines.shtml, accessed September 6, 2000.

1995, the European Union (E.U.) established its Privacy Directive, which took effect in 1998.[35] The directive establishes a minimum level of privacy protections for all E.U. citizens, and it requires each of the 15 member nations to pass national laws consistent with the directive's guidelines. Not all 15 have passed their laws yet. The European approach is built on law and enforced by governments. That approach is not as effective as the U.S. approach, which uses a mix of law and other "tools." Recently enacted federal laws apply strict privacy rules on the health care and financial services industries, but most other industries are working under market-driven mechanisms, voluntary practices, and self-policing regimes. These should be allowed to work.

The Texas Legislature should "avoid premature state privacy legislation." The state should continue to "exercise strong oversight" on privacy issues and monitor constituent concerns. It should continue to hold hearings and demand that industries demonstrate "exactly how these market-driven mechanisms are working." If market-driven mechanisms cannot improve consumer confidence in doing business on the Internet, then the Legislature should consider other alternatives. Wall Street's reaction to DoubleClick—cutting its market cap by 25 percent in one week—demonstrates that companies pay a price when they cross the line of consumers' expectations. No regulator "can move as swiftly and as harshly."

Existing state laws can be used to enforce some of these market-driven mechanisms. For example, if a company does not fulfill its promises contained in the privacy statement posted on its Web site, then it has violated the state's deceptive trade practice laws. New state privacy laws aimed at e-commerce do not "work very well in a global medium." They are effective only in states where they are passed, yet citizens will do business with people in other states and in other countries using the Internet. Privacy policies should not create "unnecessary barriers" to e-commerce. The law itself may not harm commerce, but the creation of a "patchwork of conflicting or inconsistent" laws across the country will cause damage, especially if they are passed before new federal rules affecting the health care and financial sectors become effective.[36] If the public decides those rules are not sufficient, and if industry cannot develop mechanisms that satisfy the public, then new laws may be needed.

[35]Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, took effect on October 25, 1998. Article I of the Directive requires member states to protect "the fundamental rights and freedoms of natural persons, and in particular their right to privacy." All E.U. member states, as well as nonmember states doing business in the E.U. are required to follow as yet unspecified "minimum standards" for safeguarding personal data. In June 2000, the U.S. and E.U. agreed on a "safe harbor" data accord by which U.S. businesses could comply with the Directive without disruption of trade. For more information on the Directive, see the Web site of the U.S. Department of Commerce, www.ecommerce.gov.

[36]Final rules implementing the privacy provisions of HIPAA have not been published, and there has been no indication from HHS when they would become effective. Rules implementing GLBA take effect in November 2000.

REBECCA PAYNE of OAG's Open Records Division said nine states—California, Hawaii, Idaho, Kentucky, Massachusetts, Minnesota, New York, Ohio, and Virginia—have enacted an "all-encompassing privacy statute" to protect personal information held by governmental bodies. In Texas, that protection is "piecemeal," based on judicial decisions, legal standards and practices, and statutes that address specific circumstances. In Texas, information held by governmental bodies is presumed to be disclosed unless it falls under specific statutory or legal exceptions. PIA contains 35 specific exceptions, but the majority of them are discretionary in nature, meaning that a governmental body may decide to release information even if it could be withheld under the law.

The state's common law privacy protections are derived from a two-prong test that was first enumerated by the Texas Supreme Court in 1976.[37] The first prong is, the information must contain "highly intimate or embarrassing facts" about a person's private affairs such that its disclosure would be highly objectionable to a reasonable person. The second prong is, the information must be of no legitimate interest to the public. "Very little information is protected under this standard."

There are two types of constitutional privacy, but they offer even less protection than the state's common law standard. The first protects information within zones of privacy that deal strictly with intimate decisions such as procreation, contraception, and marriage. The second involves a balancing test between a person's interests in not having intimate information disclosed and the public's right to know. Because common law and constitutional privacy protections are so limited, the Legislature has enacted specific statutes to protect private information that might not be covered by these other, more general protections.

ROB WILEY of the Freedom of Information Foundation said public access to information should not be restricted in the name of privacy if "there is a legitimate public interest" in the information. PIA does "a reasonably good job" of striking a balance, so there is not a good reason for "excessive amounts" of privacy protections. The fundamental principle, that information held by governmental bodies is presumed to be public information, should remain. Just because information is embarrassing does not mean that it should always be protected.

RICK LANE of the U.S. Chamber of Commerce said consumers have "never had more power in their hands in the business world than they do today." The Internet has created opportunities for businesses and consumers to communicate more efficiently. It has transformed the bricks-and-mortar marketplace into one that is more dynamic and robust, and it is open 24 hours a day. Some consumers fear their private information, like their credit card number, will be stolen

[37] *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 at 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The Texas Supreme Court held that §552.101, Government Code applies to information when its disclosure would constitute a common law tort of invasion of privacy.

online, and that results in $2.8 billion a year in lost e-commerce sales. Businesses are better off if they can come up with solutions that improve consumers' trust in e-commerce. If consumers are not happy with one company's privacy policies, then they can click over to another company instantly. Consumers "can go anywhere around the world until they are happy" with the service they are being provided.

Consumers are satisfied when a business can target its products to their specific interests and needs "instead of sending out a bunch of junk mail." Being able to target products to consumers also lowers cost, because money is not wasted sending mail or other promotional materials to consumers who are not interested in the product or service. Targeting also lowers the cost of entry for new small businesses marketing products that only certain types of consumers would be interested in.

Self-regulation of privacy works because consumers go "where they feel most comfortable." Consumers should be trusted to set their privacy preferences at levels they are comfortable with, not at levels required by government. If they do not feel confident that a Web site will not protect their information, then they will go to another one.

DIANE MCDADE of Microsoft said her company is incorporating technology into its Internet products and services to improve consumers' control of their privacy online. About 80 percent of Internet traffic today goes to Web sites that have privacy policies. Most of these privacy policies embody the principles of notice, choice, access, security, and enforcement (NCASE). Notice means a Web site fully discloses its information policies to consumers at the time they are entering their information. Choice means consumers are able to make informed decisions whether or not to share personal information with the Web site. Access means consumers have the chance to look at their information and update or correct it. Security means consumers' personal information is encrypted and other reasonable precautions have been taken to safeguard online transactions. Enforcement means Web sites abide by their stated policies. The FTC can hold them legally liable if they do not follow their stated policies and deceive consumers.

Some Web site privacy policies are written in plain English, but others are written in legalese such that even the most intelligent consumers cannot figure out exactly what they mean. Microsoft is developing an enhancement of its Internet Explorer browser called the Platform for Privacy Preferences (P3P) that will automate the privacy protection process. Once consumers sets their P3P-capable browsers for a chosen level of protection, then their browsers will be able to alert them when they are visiting a Web site that does not meet their desired level of privacy protection. Microsoft and TRUSTe developed a free "privacy wizard" to generate privacy statements that can be read automatically by P3P-capable browsers.[38]

[38]The wizard is available online at Microsoft's bCentral Web site, http://privacy.bcentral.com. Nearly 20,000 companies had used the wizard to generate P3P-compatible privacy statements as of September 1, 2000.

Microsoft has also developed the "Kids' Passport" program to help companies comply with COPPA. Kids' Passport automates the process of obtaining parental consent before a child can enter personal information on a Web site. When children indicate that they are under the age of 13 in an online form, parents are notified by e-mail to obtain their permission. The child provides the parent's e-mail address, and the parent is able to visit the site before granting permission to the child. It is not fool-proof, because "it is a self-reporting mechanism." In some cases, an offline permission, such as a fax confirmation or telephone call, may be needed.

Microsoft does not sell, rent, or lease its customer list to third parties. Microsoft will not advertise on Web sites that do not adopt privacy policies that are acceptable to the company. It has pulled advertisements from sites over concerns with their privacy policies. Microsoft is the Web's largest online advertiser. The "ultimate enforcement penalty is the loss of your customer's confidence," and if a company operates its online site in a manner that loses their customers, then the company pays for it in lost business. "Privacy legislation is still premature" because the self-regulatory model is working.

DAVE STEER of TRUSTe said his organization operates a non-profit Internet privacy seal program, essentially the "Good Housekeeping seal" of Internet privacy. The TRUSTe privacy seal is one of the most recognizable symbols on the Internet, and it immediately tells consumers that the Web site they are visiting adheres to good privacy practices. Begun in 1996, TRUSTe works with businesses to develop privacy policies, educates consumers about online privacy issues, and enforces its seal program with audits and advocacy.

All sites that display the TRUSTe seal must fully disclose their personal information gathering and sharing practices. They must write their policies in plain English, and they must be located no more than one click away from the home page. They must provide a meaningful choice for consumers to opt out of information sharing and allow correction of inaccurate or outdated information. They must provide reasonable security mechanisms to safeguard personal information. Finally, they must voluntarily subject themselves to TRUSTe's oversight process and enforcement mechanisms.

TRUSTe conducts quarterly audits to make sure that privacy policies have not changed in a way that runs counter to the seal program's goals. It plants unique data on Web sites to see if it comes back in any way, indicating a potential violation of the Web site's information sharing policy. It also manages a dispute resolution program called TRUSTe Watchdog, which allows consumers to report violations.

TRUSTe's authority to enforce its seal program arises from contract law. In order to display the TRUSTe logo, a Web site or company must sign an annual contract with TRUSTe. During some of its enforcement actions, TRUSTe has required companies to delete information it obtained in violation of its privacy policies. More drastic steps include revoking the use of the seal, pursuing

breach of contract proceedings in civil court, and referring the offender to the appropriate governmental body for investigation and prosecution. To date, none of these last steps have been taken against violators, because "they know all too well the fallout that would result in being kicked out of our program." More than 90 percent of Web users will visit a TRUSTe-approved site each month.

ROB SCHNEIDER of Consumers Union said about 90 percent of people polled were not comfortable that a Web site might merge their browsing habits and shopping patterns with their real-life identities. A similar number were uncomfortable that a Web site might sell or share personal information with other organizations so that their browsing habits could be tracked. This is exactly what DoubleClick was preparing to do before the negative public reaction forced the company to abandon those plans. Fifty-seven percent of people polled believed government should pass laws for how information could be collected and used on the Internet. Another 21 percent said government should recommend standards but not pass laws, and 15 percent believed industry should be left to develop voluntary standards.

Many of the privacy policies found on the Internet do not provide meaningful protection, and many policies are not being followed. Many sites routinely share information with affiliates and third parties, in violation of their stated policies. Some policies seem to offer consumers the opportunity to opt out of sharing altogether, but these policies actually do not allow consumers to opt out of the company sharing information with its affiliates. The protection such policies are "giving with one hand, they are taking away with another." It is important that privacy policies have an enforcement mechanism that is not self-policing.

There should be new protections for consumer privacy, but they cannot come at the price of less government oversight. Actions taken by the state to protect privacy can have the unintended consequence of hindering oversight. For example, laws intended to protect medical privacy must not prevent watchdog groups from uncovering complaints against Medicaid managed care providers.

July 21 Hearing

CAROLYN PURCELL, Executive Director of the Department of Information Resources (DIR), said the Internet and the practice of publishing information in electronic forms have "radically changed the character of public information." It has been a wonderful transformation for the purposes of exposing the operations of government and keeping it accountable. However, for personal information held by government, "the consequences are clearly less beneficial." Today, only about 10 percent of government information is available in an electronic format. The tools needed to make that information easily accessible are readily available.

There are several breaches of private information that are worth noting. In Maryland, state workers sold the names and SSNs of Medicaid recipients to insurance company recruiters. The medical records of more than 2 million senior citizens receiving public assistance in New England were turned over to a private consulting group studying government agencies. An employee of a Massachusetts health plan found, during a computer training class, that he could access the full medical records of any plan subscriber. He looked up his own record and found a complete psychiatric assessment, including the type and dosage of antidepressant drug he was taking. In another state, a psychiatrist was asked by an insurance company why he was prescribing a certain anti-anxiety drug for the insurance company's employees after it had apparently obtained a printout of its their drug purchases at a pharmacy affiliated with the company. The prevalence of personal information on the Internet is startling. Any state employee's SSN is "probably on the Internet today."

July 21, 2000
Subcommittee on Privacy
Witness List

Consumer Privacy
Jerry Cerasale, Direct Marketing Association
Gary Chapman
Gary Clayton, Privacy Council
Gloria Corey, SBC Communications
Catherine Martin, Office of Attorney General
Karen Neeley, Independent Bankers Association of Texas
Carolyn Purcell, Department of Information Resources

The privacy of Texas is potentially compromised "unless we can handle information about our citizens with much greater care." State agencies "overcollect data" by asking for information for which there is no "legitimate governmental need." Agencies have taken great liberties to collect information for which they have no need, and that information becomes public information once the agency has it. The Legislature should pass a law to give citizens the right to keep information private. Citizens should also have the right to review government information for accuracy and correct information that is not inaccurate or outdated. It would be a valuable exercise to review each state agency's data collection procedures in light of privacy concerns. Agencies must also be held accountable for following their privacy policies.

Because of its police power, the government has "an obligation to minimize our repository of personal information that could be misused by others, including a government not so benevolent as the one we enjoy today." In Europe, data gathered by government can be used only for the purpose it is collected. Once that purpose is fulfilled, it is destroyed. There are no downstream uses of government-collected data. Here, we are not "very deliberate in our decisions about keeping data or throwing it away," in part because the information is usually subject to open records laws, and thus must be kept.

GARY CHAPMAN, a professor with the LBJ School of Public Affairs, University of Texas, said "Texas should have a permanent ongoing state privacy commission," and the Legislature should pass a "privacy bill of rights" that would serve as a set of principles for the commission. A

privacy commission's primary role should be advisory. It should help state agencies protect citizens' privacy and adjust to emerging technologies. It should advise the Legislature on the need for state laws and regulations. It should produce clear information for citizens about their privacy rights and make it available online. If Texas were to create a privacy commission, it would be the first state to do so.

The state should not regulate privacy matters in the private sector, "at least not yet," because there is too much activity going on at the federal level and too much potential for any state law to conflict with federal laws and rules. It should also avoid having dozens of bills with conflicting agendas and poorly crafted regulations. It could do both by passing a single bill creating the commission and embodying the privacy bill of rights. A commission would cost taxpayers a "modest amount of money," but it would be far less expensive than implementing and then fixing privacy regulations that violate basic rights or contradict federal law.

JERRY CERASALE of the Direct Marketing Association (DMA) said remote sales, such as those involving a catalog or the Internet, require some amount of personal information to be completed, unlike simply paying cash at a retail store. In handling that personal information, businesses must have consumers' trust, or they will be lost as customers. In 1972, the DMA established its mail preference list, on which consumers may place their names and addresses in order to be left out of any direct mailings. It has about 3.6 million names, around 175,000 of which are in Texas. The service is free for consumers. In 1985, the DMA established its telephone list, which has about 3.2 million names, about 135,000 of which are in Texas. It is also free. The DMA started an e-mail list in January, and it has about 30,000 e-mail addresses on it.[39] All DMA members must use these lists.

DMA's "privacy promise" requires all of the association's 5,000 members to let people know what they do with the personal information they collect. They must notify customers at least once a year, and they must provide consumers the opportunity to prevent them from sharing that information with anyone else. The DMA has an antitrust exemption that allows it to require its members to comply with the privacy promise and to "kick them out of the association" if they do not. DMA has established an ethics review board to examine complaints related to the privacy promise, and it has established education programs for marketers and consumers. Deceptive practices are also punishable under existing federal and state law.

DMA's guidelines say that information is to be shared only with other marketers and that it should be used "only for marketing purposes." Though there are certainly ways around those

[39]Consumers can place their e-mail addresses on the list online at www.e-mps.org/en/ by filling out a form that asks only for e-mail addresses. No other personal information is required. The process requires a confirmation e-mail be replied to from the address or addresses entered. The registration is effective for one year. Consumers must send requests to be placed on the mail preference and telephone preference by mail. For more information, see www.the-dma.org/consumers/consumerassistance.html.

requirements, marketing information is tougher to obtain than information contained in the public record. Using the example of purchases made with a specific credit card, information about where a person shops and how much they spend is potentially available to "probably 90 percent" of DMA's members and non-member companies. They would have access to the customer's name, telephone number, and address. An unlisted telephone number supplied on a credit card application would be available to them. It is "likely" they would have an SSN, but they probably would not have the income level or other information on the original credit card application. Credit card balances and credit lines are covered by "permissible purposes" standards under FCRA.

Information sharing has helped the economy. One of its consequences is "lower cost credit cards and lower cost mortgages." Information sharing reduces fraud. The U.S. has half the rate of online credit card fraud than Europe because the U.S. allows information, such as credit card billing addresses, to be shared. When a credit card is used in an online transaction, a business can use shared information to verify that the billing address matches information provided by the customer. In Europe, no such information is available, and the business must assume that the customer is who he says he is. Internet fraud in the U.S. is "so low that Visa has eliminated that $50 liability" that consumers have for fraudulent purchases made on their account numbers.

KAREN NEELEY, representing the Independent Bankers Association of Texas, said the financial industry recognizes the significance of privacy policies because financial transactions depend on the trust and confidence of consumers. The FCRA was amended in 1996 to require companies to provide an opt-out notice to their customers before they could share information with affiliates. That requirement took effect in 1997. GLBA has taken a different approach. It allows information to be shared with affiliates but requires an opt-out before it can be shared with unaffiliated third parties. In tandem, these laws require financial companies to offer customers the opportunity to opt out before their information can be shared. All financial institutions are required to develop a privacy policy, and that language is standardized by federal rule. GLBA requires compliance by July 1, 2001.

GLORIA COREY of SBC Communications said Southwestern Bell's sales representatives are all trained on the company's privacy procedures. These include maintaining a corporate do-not-call list, and the company places a "flag" on the customer's account indicating that he or she does not want to receive sales calls. Southwestern Bell also subscribes to the DMA's lists. Customer information is "not sold or disclosed outside of SBC." The company requests permission to share information among SBC's affiliates. The company does not require customers to submit their SSNs in order to receive new service.

GARY CLAYTON of the Privacy Council said businesses need to understand that "privacy is a process," not a product that it can buy. Privacy issues are complex in the information age because very few individuals understand how information flows within a company or agency.

Information is being used in ways that were not contemplated. It has become a commodity, and firms with the largest databases win. When a dot-com company goes bankrupt, usually the first things the creditors go after is the customer database.

The U.S. has been left behind on privacy matters, and now it is starting to pay the price. Consumers are losing confidence in banks and businesses over privacy concerns. One U.S. bank discovered it could make money by selling its customer's financial information to a marketing company. It sold 49 categories of data, even though the bank's Web site had a policy statement that said it would keep all information confidential, for $4 million and 22 percent of sales.[40]

It has begun to show in e-commerce, where as much as 65 percent of online "shopping baskets" are dropped when consumers see how much personal information they have to enter in order to complete the transaction. A great deal of information can be found out on the Internet for free. In under 30 minutes, and at no cost, a person can look up another person's address, SSN, property ownership, voting history, children's names and SSNs, even a blueprint of his house.

Other States' Privacy Acts

Nine states have enacted privacy acts: California, Hawaii, Idaho, Kentucky, Massachusetts, Minnesota, New York, Ohio, and Virginia.[41] Most of these laws regulate the means by which political subdivisions within the states may collect and disclose information. Like the federal Privacy Act of 1974, their applicability to the private sector is quite limited.

In its 1999 survey of state privacy protections, *Privacy Journal* placed Texas at the very bottom of the list. Texas, along with Missouri, South Carolina, and Idaho—a state with a comprehensive privacy act—comprised *Privacy Journal's* fifth tier, which it described as being "not on the radar screen."[42] California's Information Practices Act of 1977 is considered by *Privacy Journal* to offer the best privacy protection in the U.S. Hawaii, Massachusetts, Minnesota, and New York

[40]Mr. Clayton listed name, address, phone number, account number, date of last purchase, date the account was opened, account balance, credit limit, credit insurance status, SSN, total finance charges paid, transaction account, type of card (gold, platinum, etc.), number of cards issued, birth date, cash advance limit, behavior score, bankruptcy score, date of last payment, amount of last payment, and date of last statement as categories sold by U.S. Bank Corp. to Memo Works.

[41]In the OAG Report, the states' privacy acts are cited as follows: California—Civil Code, §§ 1798-1799.78; Hawaii—Revised Statutes, §§ 92F-21 through 92F-28; Idaho—Idaho Statutes, §9-342; Kentucky—(no citation provided); Massachusetts—Mass. General Laws, Part I, Title X, Ch. 66A, §§ 1-3; Minnesota—Minn. Statutes, §13.04; New York—Public Officers Law, Ch. 47, art. 6-A, §§ 91-99; Ohio—Ohio Statutes, Title XIII, Ch. 1347; and Virginia—Code of Virginia, Title 2.1, Ch. 26.

[42]Robert Ellis Smith, "How Does Your State Rank in Protections?" *Privacy Journal* (October 1999) at 1, 6, available online at www.townonline.com/privacyjournal, accessed September 12, 2000.

join California in the group's first tier, comprised of the top 10 states. Ohio and Virginia are included in the second tier. Kentucky is in the fourth tier.[43]

Types of Information Covered

In California, no agency may disclose any personal information in a manner that would identify the subject individual without the written permission of the subject individual, except as provided by law. "Personal information" means any information that is maintained by an agency that identifies or describes an individual. It includes, but is not limited to, the name, SSN, physical description, home address, home telephone number, education, financial matters, medical history, and employment history. It includes statements made by or attributed to the individual.

Hawaii's privacy act covers personal records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. "Personal records" means any item, collection, or grouping of information about an individual that is maintained by an agency. It includes, but is not limited to, the individual's education; financial, medical, or employment history; and items that contain or make reference to the individual's name, identifying number, symbol, or other item assigned to the individual, such as a fingerprint, voiceprint, or photograph. These cannot be disclosed without the written permission of the subject individual, except as provided by law.

Idaho prohibits the disclosure of certain personnel records, health information, and records of a personal nature. The statutes do not define "records of a personal nature," but Idaho law sets forth a long list of information that is exempt from disclosure. However, as noted above, its privacy protection laws were ranked near the bottom in the U.S. in the *Privacy Journal* study.

Kentucky law prohibits the disclosure of public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy, except that a court may order its disclosure. "Information of a personal nature" is not defined by statute. Presumably, its scope is limited to items held confidential by other state law or common law. Kentucky's privacy protection laws were also ranked near the bottom in the U.S. according to *Privacy Journal*.

In Massachusetts, no agency may allow the disclosure of personal data unless access is authorized by statute or by the express approval of the subject individual. "Personal data" means any information concerning an individual which, because of name, identifying number, mark, or description, can be readily associated with a particular individual. Such data is not contained in a

[43]Selected provisions of California's Information Practices Act of 1977, Minnesota's Government Data Practices Act, and Virginia's Privacy Protection Act of 1976 are reprinted in Appendix F.

public record, by definition. Public records also exclude intelligence or evaluative information, as well as criminal offender report information.

Minnesota prohibits the disclosure of private and confidential data on individuals. Data is made "private and confidential" by federal or state law. "Data on individuals" means all government data in which any individual is or can be identified as the subject of that data, unless the appearance of the name of other identifying data can be clearly demonstrated to be only incidental to the data, and the data are not accessed by the name or other identifying data of any individual. No state agency or political subdivision may collect, store, use, or disseminate any private or confidential data for any purpose other than those stated to the individual at the time of collection, except as provided by law. The subject individual may give permission to disclose private data.

New York allows the disclosure of personal information only with the written consent of the subject individual. "Personal information" means any information concerning a data subject which, because of name, number, symbol, mark, or other identifier, can be used to identify that data subject. Similarly, Ohio prohibits the disclosure of personal information, except as provided by law. "Personal information" means any information that describes anything about a person, or that indicates actions done by or to a person, or that indicates that a person possesses certain personal characteristics, and that contains a name, identifying number, symbol, or other identifier assigned to a person.

Virginia takes a different approach. Its privacy law does not render personal information as confidential, and its privacy act generally does not prohibit dissemination of personal information. Rather, it requires procedural steps to be taken by state agencies in the collection, maintenance, use, and dissemination of such information. If personal information is determined to be confidential under the state's open records law, then it may not be disseminated. "Personal information" means all information that describes, locates, or indexes anything about an individual including his real or personal property holdings derived from tax returns, and his education, financial transactions, medical history, criminal or employment record, ancestry, religion, or political ideology. It includes information that affords a basis for inferring personal characteristics, such as fingerprints and voiceprints, photographs, things done by or to such individual, and the record of presence, registration, or membership in an organization or activity, or admission to an institution.

Exceptions to Disclosure and Notice Required

In almost every case, protected information can be disclosed to the subject individual. Minnesota is an exception, in that it does not allow the disclosure of "confidential" information to the subject individual. However, it appears that this restriction does not prohibit individuals in that

state from accessing information about themselves in a manner much different than other states or federal law.[44]

In general, protected information can be disclosed to individuals other than the subject individual with the written permission of that individual. In general, the state (or local unit of government) cannot disclose that information to others without permission unless the recipient is:

- An employee of the agency that has custody of the information, if the disclosure is relevant to that employee's performing official duties;
- An agency or employee of an agency performing statistical analyses or archival functions, though potentially only in a manner that does not disclose a person's identity;
- An agency specifically entitled to receive the information under law for the conduct of investigations, audits, or other statutory purposes;
- A court of competent jurisdiction or someone authorized by a court to receive the information;
- A law enforcement agency;
- A person with a search warrant or proper subpoena;
- A house of the legislature; and
- A family member or other third party, in emergency situations.

There are other exceptions provided by the states, many of which narrowly apply to the specific needs of particular individuals or agencies for specific records. In general, state privacy statutes provide for disclosure if it is authorized by another statute, federal law, or judicial decision.

The states vary on the type of notice that is required to subject individuals. California tends to follow federal law and requires agencies to provide written notice of the authority for collecting the information, the purpose for which it is being collected, and the routine uses for which it might be accessed. California also requires agencies to indicate whether the subject individual must provide information, and it must detail the effects of the subject individual's not providing the information. In general, California does not place restrictions on the information that may be collected, although the agency must have the authority to collect information. Minnesota, New York, Ohio, and Virginia have similar requirements on the use of information, but they restrict data gathering to information that is necessary to fulfill the intended purpose of collecting the information.

Massachusetts places stricter limitations on agencies' data-gathering abilities. Only data that is authorized by law may be gathered, and subject individuals must be given written notice that they

[44]In Minnesota, data is confidential if it is deemed by law to be inaccessible to the subject individual. In general, Minnesota law appears to apply the confidential label to information gathered by the government as part of law enforcement, civil action, or administrative proceeding.

are data subjects. In addition to being notified about the potential uses of personal data, subject individuals are also entitled to a list of all persons and organizations that gain access to their data. Minnesota and Virginia law also require state agencies to provide a similar list of people who have the authority to receive the data, but that list need not indicate whether any or all of those people have received it. Minnesota law also requires an agency to inform an individuals that they are subjects in a particular database on request of a subject individual.

Hawaii places no limits on an agency's ability to collect information, and it does not require an agency to provide notice to subject individuals. Instead, each agency is required to prepare annual reports on its information collection and usage policies. Idaho and Kentucky also place no limitation on types of information that can be collected but require no notification.

Corrective Procedures and Remedies

California, Hawaii, Idaho, Massachusetts, Minnesota, New York, Ohio, and Virginia provide procedures for subject individuals to access information about them and request that it be corrected. California, Hawaii, Minnesota, and New York also provide an avenue of administrative appeal if that request is denied by the agency. In most cases, the rules and procedures for corrections and appeals are promulgated at the agency level and thus vary from agency to agency within the state government. In cases where the request is denied and appeals are denied, the states of New York, Ohio, and Virginia require an agency to retain written complaints from subject individuals stating their disagreement with the accuracy of the information contained in their record. In Ohio and Virginia, this retention requirement replaces an appeals route. In other words, retention of the complaint letter serves as evidence that the individual disagrees with the agency. In New York, the individual may appeal to the relevant agency head. Kentucky is the only state of the nine that does not provide any statutory mechanism for information to be corrected.

California provides individuals civil and criminal remedies for wrongful disclosure of personal information. The aggrieved individual may bring civil action in state district court. The court may order the agency to amend an individual's record, enjoin release of the record, and require the agency to pay the individual's court costs and reasonable attorneys' fees. If the agency's action is deemed willful or intentional, then the court may award actual and mental suffering damages. An agency employee charged with willfully committing wrongful disclosure can be found guilty of a misdemeanor and fined $5,000.

Hawaii, Minnesota, and Ohio allow aggrieved individuals to bring civil action in a state circuit court seeking injunctive relief, actual damages, costs, and reasonable attorneys' fees. In Hawaii, the individual can also file an administrative complaint with the state's Office of Information Practices. An officer of employee of an agency who intentionally discloses confidential

information can be found guilty of a misdemeanor. Massachusetts and New York offer a similar civil remedy, but wrongful disclosure is not a criminal offense. The laws of Kentucky and Idaho provide no remedies for wrongful disclosure.

Recent State Actions

No state passed a comprehensive privacy act during 2000. Several states passed laws aimed at stopping identify theft, including Connecticut, Delaware, Kentucky, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, and Virginia.

Governor Don Siegelman (D-Ala.) signed a measure creating a Consumer Information Privacy Study Committee. The 18-member committee is required to conduct hearings on privacy issues, the interrelation of privacy and technology, and consumer privacy protections. It is required to issue a final report by December 2001. Governor Bill Owens (R-Colo.) signed a bill creating a task force on privacy. The 21-member task force is required to meet at least quarterly and issue a final report by December 2001. Governor Jeanne Shaheen (D-N. H.) signed legislation creating study committees to examine genetic testing issues and financial privacy protections. Both committees have six members and are required to issue final reports in November 2000.

Governor John Rowland (R-Ct.) signed a bill making it unlawful for state agencies to disclose a photograph or computerized image from a driver's license or other agency document without the individual's permission. Governor Tom Carper (D-Del.) signed a similar measure that also prohibits the sale or use of driver's license records to support bulk survey, marketing, or solicitation efforts. Governor Dirk Kempthorne (R-Idaho) signed legislation allowing a driver's license records to be disclosed for the purpose of marketing only if the subject individual had opted in to allowing disclosure. Governors Bob Taft (R-Ohio) and Mike Leavitt (R-Utah) signed similar measures in their states. Governor John Engler (R-Mich.) signed a bill closing *all* public records to marketers and another measure prohibiting the secretary of state from selling public information to marketing firms.

Governor Parris Glendening (D-Md.) signed a bill prohibiting public school or institute of higher education from utilizing SSNs as student identification numbers or printing SSNs on any identification cards. Governor Jim Geringer (R-Wy.) signed a bill providing that SSNs will no longer be collected on driver's license applications. Governor Mel Carnahan (D-Mo.) signed legislation prohibiting the combined sale of consumers' names with their credit card numbers without the express consent of the subject individuals.

Findings of the Subcommittee on Privacy

Other states afford their citizens more specific privacy protections and more control over their personal information than Texas.

Though there are nearly 600 statutes in Texas related to the confidentiality of information, there remains a strong sense that Texans' privacy is not sufficiently protected. Unlike several states that have a comprehensive privacy law, Texas privacy protections typically regulate how personal information may be disclosed in specific situations.

The U.S. Congress has passed three major pieces of legislation—HIPAA, COPPA, and GLBA—that create substantial new privacy protections and procedures at the federal level. Implementation of these Acts and the final rules dictating how the health care, online, and financial sectors of the economy must steward personal information is ongoing.

Though the final results of these federal laws are unclear, both HIPAA and GLBA enable a state to pass laws containing stricter privacy protections.

Very few statutes govern or place limits on the kinds of information that can be collected by state and local governments, and there are virtually no limits placed on the potential downstream uses of that information, whether obtained via the Public Information Act (PIA), purchased from the agency directly, or by another means.

A systematic review of state agencies' data collection, storage, and dissemination practices would greatly assist efforts to protect personal information held by government.

Enacting new privacy protections, either by limiting the collection of information by the state or its disclosure, necessarily reduces the amount of information currently available under the PIA.

The effectiveness of online privacy measures is limited by the interstate and global nature of the Internet. However, all state government Web sites could be covered by a law requiring privacy policies or determining the permissible uses of data collected online.

SUBCOMMITTEE ON LOBBY INFLUENCE

During the interim, the Committee on State Affairs was charged to study the nature and extent of lobby influence on the legislative process.

A subcommittee was formed to examine the state's laws regulating lobbyists and other statutes related to ethics in government, including "revolving door" laws and financial disclosure requirements. The subcommittee included a review of the state's ethics laws, including laws related to financial disclosure of state officials and post-employment activities of public employees in the various branches of government, within the scope of its inquiry. The subcommittee also examined campaign-related activities of lobbyists and, to a limited extent, campaign financing. The subcommittee held a public hearing in Austin and accepted testimony from invited witnesses presenting various perspectives on the lobby and public ethics. The Texas Ethics Commission (TEC), the agency responsible for interpreting and enforcing lobbying and ethics laws, was asked to provide its recommendations to the subcommittee.

Subcommittee on Lobby Influence

Chairman:	Paul Hilbert
Members:	Kevin Bailey Tom Craddick Debra Danburg Delwin Jones John Longoria Brian McCall Tommy Merritt
Hearing:	April 27

The First Amendment to the U.S. Constitution provides that Congress shall pass no law to abridge the right of the people "to petition the Government for a redress of grievances." Article I, Section 25 of the Texas Constitution also guarantees the right of citizens "to apply to those invested with the powers of government for redress of grievances or other purposes, by petition, address, or remonstrance."

State law establishes that a democratic government can be operated responsibly only by affording its citizens "the fullest opportunity to petition their government for the redress of grievances and to express freely their opinions on legislation, pending executive actions, and current issues." However, in order to maintain the integrity of the legislative and administrative processes, the identity, expenditures, and activities of individuals who are directed to persuade the legislative or executive branch to take specific actions must be "publicly and regularly" disclosed.[1]

[1] §305.001, Government Code.

During 1999, there were 1,678 individuals registered with the TEC as lobbyists, the highest number of registrants since current lobby laws took effect in 1991. According to TEC, registered lobbyists expended nearly $14 million during 1999, most of which was spent on mass media.[2] Lobbyists spent about $2 million—14 percent of their total expenditures—on activities that would normally be considered as lobbying: food and beverages, travel, entertainment, gifts, and awards. After netting mass media expenditures out of the total, TEC reported that the 1,678 registrants expended an average of $1,162 each to lobby for legislative or administrative actions in 1999, an increase of 28 percent over the 1997 average. In general, expenditures in non-session years are considerably less than in session years.

Lobbyist Expenditure Summary for 1999

Mass Media	$11,952,949
Food & Beverages	1,489,495
Entertainment	143,889
Gifts	132,549
Transportation	107,287
Charity	38,986
Awards	37,446
Total Expenditures	$13,902,602

Source: Texas Ethics Commission.

Because lobbyists report their compensation in ranges, the amount spent by individuals, businesses, associations, and others on lobbyists is more difficult to determine.[3] Utilizing the dollar values listed by lobbyists for each contract, Texans for Public Justice reported the total figure for 1999 was at least $77 million and could be as high as $180 million.[4] Even more money was spent at the federal level to lobby the U.S. Congress. During the first half of 1999—roughly the time the Texas Legislature was in session—nearly $700 million was spent to influence Congressional action. That figure represented a slight decrease from the $710 million spent in the comparable period for 1998. In 1999, the biggest spenders were the health care and high-tech industries, which each expended around $95 million during the six-month period. The financial services industry was third at $90 million.[5]

Public perception of lobbyists has never been very positive, especially since the Sharpstown scandal first became public in 1971. In the 1972 elections, nearly half of the Members of the

[2]§305.006(c), Government Code provides that lobbyists' expenditure reports must list the expenditures made for mass media communications if "the communications support or oppose or encourage another to support or oppose pending legislation or administrative action." This category does not cover political campaign advertising.

[3]Level of compensation is reported, for each client, by the following ranges: $0; less than $10,000; at least $10,000 but less than $25,000; at least $25,000 but less than $50,000; at least $50,000 but less than $100,000; at least $100,000 but less than $150,000; at least $150,000 but less than $200,000; and $200,000 or more.

[4]Texans for Public Justice news release, "Special-Interests Spend Up to $180 Million on Lobby Services in 1999 Legislative Session" (May 24, 2000).

[5]"Interest Groups Spent Nearly $700 Million Lobbying Washington," Associated Press news service (January 6, 2000), available online at www.cnn.com/2000/allpolitics/stories/01/06/lobbying.bill/index.html, accessed January 6, 2000.

House were either defeated or had chosen not to seek re-election. Ethics reform bills were passed in 1973 by the 63rd Legislature, in 1983 by the 68th Legislature, and in 1991 by the 72nd Legislature. These reforms—in many ways similar in purpose to open government laws enacted in the same time frame—have brought lobbying activities into the light of public scrutiny and have made abuses far easier to detect. Though most legislative observers would conclude that these reforms and the disclosure requirements they established have significantly decreased abuses of the system, some still occur.

Shortly after the end of the 76th Session, an *Austin American-Statesman* editorial described the lobby as a "two-ton elephant asleep in the statehouse parlor" that was in need of reform:

> The expansion of the Austin lobby corps, skyrocketing fees, and an escalating arms race in which lobbyists promote themselves as a defensive necessity have turned democracy's noble drama into a farce. Professional vote-wranglers accountable to no one but those who pay them have become a fourth branch of government, exerting as much power as legislators, the executive branch, or the judiciary. The inflated importance of lobbyists—many of them former legislators or state agency executives who have turned "hired gun" to cash in on connections and knowledge of the system—distorts democracy and disgusts the electorate. No wonder people don't vote. "Privatization" of lawmaking threatens to squeeze out voters altogether.[6]

Subsequent editorials urged citizens to "demand that legislators assert themselves to curb this expensive, unwholesome influence-peddling" and offered several proposed solutions: a lifetime ban on paid lobbying by ex-legislators and other officials, an increase in legislative salaries from $7,200 per year, an increase in funds available to hire and retain legislative staff, and limitations on campaign contributions.[7]

Other editorials have offered alternative viewpoints, particularly on the subject of whether former lawmakers should be banned from lobbying. The *El Paso Times* called lobbying "an acceptable means of connecting government with the people" and described a lifetime ban as "unnecessary punishment against people who have done no wrong." A *Valley Morning Star* article added that lobbyists provide information and research about issues that legislators do not have the resources—particularly time and staff—to gather independently.[8]

During its inquiry, the subcommittee explored potential reforms to current lobbying and revolving door laws, including an examination of the laws of other states.

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[6]"Hired-gun Control: Check Lobby Clout," *Austin American-Statesman* editorial (June 27, 1999).

[7]"Lobby Arms Race Hard to Avoid," *Austin American-Statesman* editorial (June 28, 1999); "Downsize Lobby," *Austin American-Statesman* editorial (June 29, 1999).

[8]"Lifetime Lobbying Ban Unfair," *El Paso Times* editorial (February 3, 1999); "Lobbyists Pros, Cons," *Valley Morning Star* (August 22, 1999).

Regulation of Lobbyists

The primary Texas law regulating lobbyists is Chapter 305, Government Code. The lobby law is administered by TEC.[9] In addition, Chapter 36, Penal Code covers bribery, honorariums, and gift prohibitions, which apply for lobbyists and non-lobbyists alike. Bribery is defined as the intentional offering, soliciting, or accepting of a benefit in exchange for a public official or public servant's vote, recommendation, opinion, decision, or other "exercise of official discretion." Bribery is a second-degree felony.[10] Title 15 of the Election Code covers campaign finances. In general, no legislator or statewide officeholder may accept a campaign contribution during the regular legislative session or the 30 days before it convenes.[11]

Summary of Testimony

KAREN LUNDQUIST, general counsel of the Texas Ethics Commission, said that registration of lobbyists was begun in 1973 as one of several ethics reforms following the Sharpstown Bank scandal. At first, people were required to register with the Secretary of State if they spent money lobbying the Legislature *and* were paid to lobby. That office did not have any real enforcement authority. Instead enforcement was left to the Attorney General or to local jurisdictions. In 1983, the Legislature amended the law to include the executive branch within the definition of lobbying.

April 27, 2000
Subcommittee on Lobby Influence
Witness List

Overview of Lobbying Laws
Tom Harrison, Texas Ethics Commission
Karen Lundquist, Texas Ethics Commission

Perspectives on the Lobby
Robert Floyd, Texas Society of Association Executives
Tom Harrison, Texas Ethics Commission
Craig McDonald, Texans for Public Justice
Tom "Smitty" Smith, Public Citizen

In the early 1990s, there was an incident in which blank campaign contribution checks were being passed out on the Senate floor. In addition, Members were going to exotic locations for what seemed to be pleasure vacations, all paid for by the lobby. Although these practices were legal at that time, they caught people's attention as being unseemly and renewed public outcry for ethics reform. In 1991, the 72nd Legislature passed Senate Bill 1, which overhauled state ethics laws, and a constitutional

[9]Rules adopted by TEC to administer the law are contained in Chapter 34 of Title 1, Texas Administrative Code (T.A.C.).

[10]§36.02, Penal Code.

[11]§253.034, Election Code.

amendment creating the TEC. The new commission was given enforcement authority over laws related to lobbyists, campaign finance, and financial disclosure. Among its reforms, the new law:

- Required individuals to register with the commission as lobbyists if, in a calendar quarter, they receive $1,000 to influence legislation (or administrative action) *or* spend more than $500 on lobbying expenses;
- Prohibited lobbyists from paying for pleasure trips for Members;
- Required the presence of the lobbyist at an event where the lobbyist was paying for a Member's meals, transportation, lodging, or entertainment;
- Placed a $500 annual limit on gifts per Member, a $500 annual limit on entertainment per Member, and a $500 limit on any award presented to a Member;
- Required lobbyists to report the name of a person on whom they spent more than $50 per day on food and beverages, or transportation, or entertainment; and
- Prohibited lobbyists from making loans or giving cash to Members.

Though the TEC has enforcement authority over lobby laws, as a practical matter it receives very few sworn complaints over alleged violations. TEC issued a number of opinions on the lobby laws early in its existence, which seemed to settle most of the outstanding issues related to interpreting the law. No opinions were issued last year.

TOM "SMITTY" SMITH of Public Citizen said lobbyists influence the Legislature primarily in three ways: campaign contributions, jobs and business dealings, and junkets. Contributions may not actually influence votes, but "what you see is the first, last, and longest word being given to those people who give campaign contributions." Such importance is understandable in Texas, given the costs of campaigning in the state and given the need to defray the living expenses and "lost business opportunities" of part-time legislators.

The Legislature should consider several reform proposals. First, campaign contributions from lobbyists and their principals or employers should be more fully disclosed, both by Member and by lobbyist. Campaign contributions should not be allowed from Election Day through the beginning of the next filing season. Second, former legislators and office-holders, once they become lobbyists, should not be able to give their unused campaign war chests to Members or legislative candidates. Third, former Members and their staff should not engage in lobbying for two years after leaving the Legislature.

With respect to financial disclosure forms, many kinds of business arrangements—such as retainers paid by lobbyists for a Member's professional services—are not presently disclosed, but should be. Lobbyists or their principals may have significant business dealings with Members through their normal occupations that should be included among the lobbyist's disclosure forms or the Members' personal financial disclosure forms, or both. In addition, campaign contributors should be required to list their occupation and employer, so that it would be easier to associate

campaign funds with particular interest groups. An opinion from the Attorney General currently restricts access to that information.[12]

Lobbyists should give prompt, specific notification to their clients about potential conflicts of interest between their clients, and that they should be required to sign in at Members' offices and disclose the interests they are representing while there. He also said that executive branch agencies should be able to designate someone as a special kind of lobbyist who can "advocate for the policy of that agency."

ROBERT FLOYD of the Texas Society of Association Executives said public and media perceptions of the "lobby clique" are false. He said current lobbying and disclosure laws have "really leveled the playing field" for competing interests to have their views represented in the legislative process. There have been abuses. However, the Legislature should not set disclosure and registration requirements at levels that would discourage public citizens from testifying or discussing issues of concern with their legislators, a right guaranteed by the First Amendment, in attempts to fix public perception problems.

Recent *Austin American-Statesman* editorials that described the lobby as "one big monolithic group of people" plying their trade at the expense of the public are incorrect.[13] In fact, the public's interest would likely lose out if lobbyists were restricted, because then only the wealthiest and most powerful individual citizens would have access to public officials. "Disclosure does equal accountability," and lobbyists should disclose potential conflicts of interest between their clients and should file their expenditure and activity reports electronically.

CRAIG MCDONALD of Texans for Public Justice said "too few people control too much political money." Lobbyists' clout does not stem from the power of persuasion but from "their power to marshal money" and to provide outside business income to legislators. The same interests who spend the most money to lobby also make the largest and most campaign contributions.

The lobby does not represent the public's interests. In terms of money spent on lobbying contracts in 1999, only 10 of the top 100 lobby clients represented something other than corporate or business interests, and most of those were cities. None of the top 100 represented environmental groups, consumers, housing advocates, or the poor.

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[12]Attorney General Opinion JC-0198 (2000) concludes that §254.0401(e), Election Code precludes TEC from making contributor address information—other than city, state, and zip code—available by any electronic means, including computer diskettes and on the Internet. Specific address information is required to be maintained at the TEC office, but the last sentence of §254.0401(e), Election Code provides that the specific street address "may not be available electronically at that office."

[13]See *supra* n. 6-7.

During the 1998 election cycle, all candidates for legislative and statewide offices in Texas raised $115 million. Nearly $60 million came from just 629 sources. More than $102 million came from donors who gave $1,000 or more, and more than half of the $115 million total came from donors who gave $25,000 or more. Governor Bush raised more than $10 million for his gubernatorial re-election campaign from 207 people, and 40 people gave him $70,000 or more.

More regulation is required on the campaign finance side of the equation than on lobbying itself. It is "way past time for the state to put reasonable limits" on campaign contributions made to candidates and to political action committees (PACs). Donor information should be made available in an electronic format that includes the donor's address.

Discussion

To place Texas lobby laws in perspective, the subcommittee examined the ways that other states regulate lobbying, particularly in the areas of registration, codes of conduct, campaign activities, and disclosure.

Registration

Like most states, Texas requires individuals who lobby the legislative or executive branches of state government to register with a state agency and regularly report expenditures and compensation on state prescribed forms. Many states, Texas included, makes these reports available in electronic formats and on the Internet. Since July 2000, TEC has made campaign contribution reports available on the Internet, pursuant to House Bill 2611, 76th Legislature.[14]

In Texas, individuals must register as lobbyists if they receive more than $1,000 of compensation or reimbursement in a calendar quarter for the purposes of lobbying, unless lobby activity constitutes no more than 5 percent of their compensated time during that calendar quarter. This includes compensation received to prepare for lobbying, such as strategy sessions, research and analysis, and communicating with a client concerning tactics.[15] Reimbursements for personal travel expenses and certain office expenses, such as long distance charges and courier fees, do not count toward determining whether the threshold is met.

Even if a person does not meet the $1,000 compensation threshold, registration is still required in Texas if lobbying expenditures exceed $500 in a calendar quarter. As noted, there are six

[14]See TEC's Web site, www.ethics.state.tx.us/whatsnew/elffiling.html, accessed October 10, 2000.

[15]1 T.A.C. §34.3.

categories of lobby expenditures: transportation and lodging; food and beverages; entertainment; gifts; awards and mementos; and the paid attendance of a state officer or employee at a political fundraiser or charity event. Expenditures for taxes and tips, the lobbyist's own expenses, certain expenses below $200 that are reimbursed by the state official or employee, and certain gifts to state agencies are not considered lobby expenditures.

In Texas, a person must pay a $300 annual fee to register, unless that person represents a non-profit organization that is exempt from federal income taxes.[16] In that case, the annual registration fee is $100. All registrations expire on December 31 of each year, regardless of the date that an individual first registered. Only three states—Maine, New Jersey, and Wisconsin—have higher initial registration fees than Texas. However, Texas does not charge additional fees for lobbyists who register multiple clients. At least 10 other states, including Florida, New Mexico, South Carolina, and Tennessee charge additional fees for each client registered; some are as much as the initial fee. Like Texas, several states offer reduced registration fees for lobbyists representing tax-exempt organizations. Some states require the clients of lobbyists to register as well. A few states allow one representative of each state agency to serve as the agency's designated lobbyist and register as such. Texas prohibits state agency staff from lobbying.

Lobbyist Annual Filing Fees

$5	Rhode Island
$10	Idaho, Louisiana, Missouri, Ohio
$20	Maryland, North Dakota, West Virginia
$25	California, Mississippi, New Mexico, South Dakota, Tennessee, Utah, Vermont
$50	Illinois, Massachusetts, Montana, New Hampshire, New York, Pennsylvania, South Carolina, Virginia
$60	Florida
$75	Colorado, North Carolina
$95	Nevada
$100	Alabama, Alaska, Indiana, Nebraska
$200	Georgia
$250	Kansas, Kentucky
$300	Texas
$325	New Jersey
$375	Wisconsin
$400	Maine

Fees shown are for a lobbyist registered with a single client or principal

Several states require their responsible agencies to print directories of lobbyists with their photographs and lists of their clients. Though Texas does not require that of TEC, its Web site lists lobbyists, clients, and their per-client compensation range by name, client, and subject matter.[17] To assist with identification, five states require lobbyists to wear identification badges while on state property.[18]

[16]The organization must have an exemption under either 26 U.S.C. §§ 501(c)(3) or 501(c)(4) to qualify.

[17]See TEC's Web site, www.ethics.state.tx.us/dfs/loblists.htm, accessed October 10, 2000.

[18]Those states are Georgia, Massachusetts, New Hampshire, North Dakota, and South Dakota. In the case of Georgia, the identification card consists of the name of the lobbyist and either the single client he or she represents or the word "LOBBYIST."

Codes of Conduct

Texas law establishes a "code of conduct" for lobbyists and provides TEC the authority to adopt rules to implement the code of conduct. Specifically, a registered lobbyist:

- Shall decline employment if the exercise of the registrant's "independent judgment on behalf of a client will be or is likely to be adversely affected by acceptance of employment";
- May not continue multiple employment if the exercise of independent judgment "will be or is likely to be adversely affected by his representation of another client"; and
- May represent multiple clients in the above situations only "with the consent of the clients after full disclosure of the possible effects of that representation."[19]

TEC rules require a lobbyist to resolve any conflict of interest caused by representing multiple clients no later than the third business day after the conflict becomes apparent. In the case of a conflict, a lobbyist must either obtain written consent from all relevant parties or withdraw from representation.[20] The code of conduct also provides that a partner or other person associated with the registrant may not step in and take over for a lobbyist who is forced to withdraw from representing a client under any of the above circumstances.

At least 24 states, including Texas, prohibit lobbyists from accepting "contingent compensation," which is a contractual arrangement, either written or otherwise understood, that a lobbyist's ultimate compensation is related to a specific outcome on a specific measure.[21] In other words, the lobbyist must receive the same compensation from a principal regardless of whether a particular bill passes or fails. In Texas, intentionally or knowingly accepting contingent compensation is a third-degree felony.

At least 13 states, including Texas, prohibit lobbyists from making false statements or otherwise falsely representing issues to legislators, their staff, or to executive branch employees.[22] At least 10 states prohibit lobbyists from influencing the introduction of legislation for the purpose of being thereafter employed to lobby for or against the measure. To help avoid conflicts, California requires lobbyists to attend biennial ethics training.

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[19] §305.0011, Government Code.

[20] 1 T.A.C. §34.19.

[21] §305.022, Government Code prohibits arrangements where compensation "is totally or partially contingent on the passage or defeat of any legislation, the governor's approval or veto of any legislation, or the outcome of any administrative action."

[22] §305.021, Government Code.

Campaign Activities

At least 17 states impose restrictions on political campaign activities that are specific to or apply only to lobbyists. At least six states prohibit a lobbyist from serving as a campaign manager, campaign treasurer, or similar position. South Carolina law prohibits a lobbyist from hosting a campaign fund-raising event.[23] Massachusetts law provides strict campaign contribution limits for lobbyists that are well below the state's campaign contribution limits for non-lobbyists. No lobbyist may give more than $200 to any one candidate in a year, and the total of all campaign contributions to all candidates cannot exceed $200 in any year. Non-lobbyists are allowed to contribute $500 to any one candidate and a total of $12,500 to all candidates per year.[24]

Kentucky law bans all political contributions from lobbyists.[25] Alaska permits lobbyists to make campaign contributions only to those candidates running for office in the districts in which the lobbyist actually resides.[26] In other words, lobbyists could contribute only to the single state representative and the single state senator representing them in the legislature and to any statewide elected official. This law, enacted in 1996, was challenged on constitutional grounds and unanimously upheld by the Alaska Supreme Court.

About a dozen states prohibit contributions from lobbyists during a legislative session. Texas law prohibits Members from accepting campaign contributions from anyone during the regular session and the month before it convenes. Texas laws prohibit lobbyists from making or offering to make campaign contributions based on the outcome of a vote or administrative action. The offer, solicitation, or acceptance of such a contribution would constitute bribery.

Reporting Requirements

Forty-nine states require lobbyists to submit a periodic report of expenditures, and those reports are made available to the public. Texas requires registrants to report their expenditures for lobbying and categories of persons who benefitted from the expenditures each month. In some cases, lobbyists must identify by name the individual who benefitted from those expenditures. For example, lobbyists must identify the individual on whom they spend more than $50 in one

[23]S. C. Code Ann. §2-17-110(F).

[24]Mass. Ann. Laws ch. 55, §7A(a)(1).

[25]Ky. Rev. Stat. Ann. §6.811(6) provides simply, "A legislative agent shall not make a campaign contribution to a legislator, a candidate, or his campaign committee."

[26]Alaska Stat. §15.13.074(g).

day for food and beverages, entertainment, transportation, or lodging for a state officer or employee; more than $50 for any single gift, award, or memento; or any amount for an officer or employee to attend a political fundraiser or charity event. Expenditures related to events to which all Members are invited are only reported in aggregate. Lobbyists are allowed to file reports with TEC electronically.[27]

Texas is one of 16 states that require lobbyists to submit expenditure and activity reports on a monthly basis. Other states' reporting requirements vary. Wyoming is the only state that has no reporting requirement. In general, states require lobbyists to report their expenditures—in states where such expenditures are legal—for food and beverages, entertainment, transportation, lodging, gifts, awards, and hospitality. The minimum limit for disclosing names of individuals benefitting from lobbyists' expenditures is as low as $5 in some states. In Texas, that threshold is $50. Several states have higher thresholds.

Lobbyist Reporting Requirements

Monthly:	Alaska, Colorado, Connecticut, Georgia, Idaho, Iowa, Kansas, Maine, Missouri, Montana, Nevada, New York, Rhode Island, Texas, Washington
Quarterly:	Alabama, Arkansas, California, Delaware, Nebraska, New Jersey, Ohio, Pennsylvania, Utah
Semiannually:	Florida, Hawaii, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Mexico, Oklahoma, Oregon, South Carolina, Tennessee, Vermont, West Virginia, Wisconsin
Annually:	Arizona, Kentucky, Mississippi, North Carolina, North Dakota, South Dakota, Virginia
None Required:	Wyoming

These reporting intervals apply during a regular legislative session. Several states require less frequent reporting during interims.

Wisconsin bans lobbyists from providing food, beverages, entertainment, gifts, awards, and travel altogether. Michigan bans food and beverage purchases and gifts from lobbyists to legislators and their families. A few states place strict limits on the amount that a lobbyist can spend on any one individual in a year. For example, Kentucky has an annual maximum of $100 per individual. In Texas, there is a $500 aggregate limit on food and beverages and a $500 aggregate limit on gifts that a lobbyist can provide an individual Member or employee. No lobbyist may give an award to a Member or employee that has a value of more than $500, but there is no limit on the number of awards that can be given.[28]

Some states additionally require lobbyists to indicate campaign contributions on their lobby activity reports. Texas has no comparable requirement. Several states require lobbyists to

[27] §305.006, Government Code.

[28] §305.024, Government Code.

disclose business and other financial relationships, including loans and lines of credit, with elected officials in their private-life occupations.[29] For example, Michigan law requires lobbyists to disclose any financial transaction of $875 or more with a business owned by a public official, the immediate family of the public official, or a business that a public official is associated with, must be disclosed. Texas has no comparable law for lobbyists. However, Texas law requires state office-holders and candidates for state partisan office to report interests in business in common with lobbyists and fees received for services rendered to a lobbyist or a lobbyist's employer.[30]

Like most states, Texas requires certain public officials and candidates for partisan office to file financial disclosure forms. Items that must be disclosed include all sources of occupational income, shares of stock and bonds owned by the filer, beneficial interests in real property, and all boards of directors on which the filer serves, among others.[31] The reporting requirements and personal financial statements have not been significantly revised since 1973.

TEC advises that the increasing complexity of financial arrangements have made a number of the reporting requirements unclear for certain types of transactions, such as mutual funds. Income from mutual funds is reported under the "interest, dividends, royalties, and rents" category, but it is unclear where to report the ownership of a mutual fund. It is likewise unclear whether a filer is required to report the ownership of a retirement account that makes investments which have not yet been distributed to the filer. Filers are uncertain whether credit account debts should be reported as personal notes (liabilities). It is unclear how much detail is required to report corporate or partnership assets and liabilities. Finally, filers are required to report financial activity of spouses and dependent children over which the filers have "actual control," a term that is not defined.[32]

Recent State Actions

The most significant state lobby legislation considered during the last two years was the Illinois State Gift Ban Act. Members of the Illinois General Assembly, state constitutional officers, employees, appointed and elected officials, directors of state governmental entities, and spouses

[29]Alabama, Alaska, Kentucky, Michigan, Missouri, Utah, and Washington have some form of requirement that lobbyists disclose non-legislative business dealings with members, their family, or their staff.

[30]§572.024, Government Code.

[31]§572.021, et seq., Government Code.

[32]Tom Harrison,"Suggestions for Changes in Financial Disclosure Law (Ch. 572, Government Code)," memorandum to the Honorable Steven Wolens (September 19, 2000).

and immediate families are prohibited from soliciting or accepting any gift from a prohibited source. Gifts include food, beverages, cash, honoraria, discounts, entertainment, hospitality, and any other tangible benefit. Prohibited sources include lobbyists, their business partners, regulated entities, or other individuals who have interests that may be substantially affected by a public official's or employee's actions.

It appears to be a sweeping ban on its face, but there are several notable exceptions. First, it does not include golf, tennis, food, or refreshments of nominal value consumed on the premises from which they were purchased, or items of nominal value such as T-shirts, baseball caps, and the like. Second, it excludes plaques, trophies, and other items that are substantially commemorative in value. Third, it excludes attendance, food and beverages, and other opportunities and benefits that are available to the public or a class of individuals. Finally, it excludes contributions to a political campaign or a legal defense fund.

A few other states have recently enacted minor amendments to their lobby laws. A new Maryland law requires lobbyists to disclose business transactions of $1,000 or more with business entities owned or affiliated with legislators and other state officials. A new Nebraska law prohibits lobbyists from expending more than $50 per month on any individual. A new Florida law mandates the suspension of lobbyists' registrations if they fail to pay administrative fines imposed by its ethics commission.[33]

Standards of the U.S. Congress

The U.S. House of Representatives permits its Members, officers, and employees to accept any gift (other than cash) valued at $50 or less, provided that the cumulative value in a calendar year is less than $100. However, gifts valued at less than $10 do not count toward that $100 limit. Gifts may be accepted up to a value of $250 if they are based on personal friendship, and gifts may be accepted above that level if approved by the Ethics Committee. Travel may be accepted for up to four days, but entertainment and recreational expenses generally cannot be accepted.

Members may not accept honoraria, except that the sponsor of an event may donate up to $2,000 to charity on the Member's behalf. However, honoraria can be accepted by "lower-paid staff" so long as the subject matter is not directly related to official duties.[34] The U.S. Senate has similar standards. Lobbyists must register and file quarterly reports with the Clerk of the House of Representatives or the Secretary of the Senate, as appropriate.

[33]The status of 25 bills filed in other state legislatures related to lobbying and revolving door laws appears in Appendix G.

[34]Congressional staff are considered "lower-paid" if they earn less than $93,137 per year.

Revolving Door Laws

State employees leave public service to work in the private sector, local or federal government, or the independent sector for many reasons. Most of these job changes elicit little notice. Occasionally they rise into public view, because it appears that an employee's public actions were undertaken to secure private gain in the form of outside employment. The subcommittee examined the state's revolving door law and specific statutes affecting post-employment activities of certain agencies' employees. It also looked at federal and other states' laws.

Summary of Testimony

KAREN LUNDQUIST of the TEC said the state's revolving door law has two main parts.[35] First, former executive directors and board members or commissioners of regulatory agencies may not make any contact with or appearance before their former agencies, with the intent to influence official action, for two years. Second, former state officers and former employees compensated above a certain level—currently about $33,000 per year—cannot represent a person or receive compensation regarding a "particular matter" on which they participated while they were employed.[36] Particular matter means a *specific* investigation, application, request for ruling or determination, rulemaking proceeding, contract, claim, accusation, or other *specific* proceeding.

The law does not prohibit employees from taking a new job to work on the same subject matter as they worked while at a state agency. However, other state laws that restrict representation before agencies by former employees, such as those applying to the Public Utility Commission of Texas (PUC) and the Texas Natural Resources Conservation Commission (TNRCC), prevail over the general "revolving door" law.

In addition, the General Appropriations Act prohibits the use of appropriated funds to contract for consulting or professional services with a former employee of the agency for one year after the employee leaves the agency. This prohibition, which applies to agencies, essentially restricts post-employment activities of state employees and thus serves as a revolving door law. Very serious violations of the law, where a clear "feathering of the nest" has taken place, could be prosecuted under the bribery provisions of the Penal Code. Beyond these existing provisions, laws that are more focused on the exact conduct of that agency "might be more effective to

[35] §572.054, Government Code.

[36] Compensation for former state employees must be at or above the level prescribed by the General Appropriations Act for step 1, salary group 17, of the position classification schedule. The prohibition also applies to employees who are exempt from the schedule but nonetheless compensated at or above that level.

address specific conflicts that could arise." No state law specifically restricts the post-employment activities of legislative or judicial branch employees.

A violation of the revolving door law is a class A misdemeanor, which carries a maximum fine of $4,000 or confinement in jail for a period not to exceed one year, or both. The employer is not subject to penalties. TEC does not have criminal enforcement jurisdiction, but it may refer a sworn complaint for criminal prosecution. However, it does have civil enforcement authority, and it could impose a civil penalty of up to $5,000 for a violation if a sworn complaint were filed with the commission. As a practical matter, TEC has never received a sworn complaint related to revolving door violations, and no criminal prosecutions have ever been undertaken to enforce the law. The law is nonetheless effective because it makes clear that certain types of conduct are prohibited. TEC has issued a number of advisory opinions that have been requested by state employees. These opinions have established the limits of post-employment activities that are permissible under the law.

April 27, 2000
Subcommittee on Lobby Influence
Witness List

Revolving Door Laws
Ron Hinkle, Public Utility Commission
Karen Lundquist, Texas Ethics Commission
Craig McDonald, Texans for Public Justice
Jim Phillips, Texas Natural Resources Conservation Commission
Tom "Smitty" Smith, Public Citizen

RON HINKLE of the PUC said the Public Utility Regulatory Act (PURA) places additional restrictions on commissioners and employees of the PUC.[37] Specifically, former commissioners may not be employed by a public utility that was under the scope of their official responsibilities for two years following the end of their service as commissioner. The same restriction applies for one year to all former PUC employees and to employees of the State Office of Administrative Hearings (SOAH) engaged in hearing utility cases.

In addition, PURA prohibits former commissioners and employees from ever representing a person or utility before the PUC or SOAH or a court of law on a matter in which they were "personally involved with" or that was "within [their] official responsibility." Similar restrictions are placed on the public counsel and employees of the Office of Public Utility Counsel (OPC).[38] PURA does not specify a penalty for violating these laws.

These current provisions may be too restrictive because they apply to all levels of employees, whether they have regulatory responsibility or not. It may be better for the PUC's revolving door provisions to capture only the "upper echelon"—the commissioners, executive director, and

[37] §12.155, Utilities Code.

[38] §13.043, Utilities Code.

higher paid employees—similar to those contained in the Government Code's general restrictions. Furthermore, current law is inconsistent in its treatment of utility companies, because it was established before deregulation of utilities had begun. For example, a PUC employee could not be employed by Southwestern Bell for one year after leaving the PUC employment but could immediately go to work for AT&T, Time Warner Telecom, or another entity that is not regulated by the PUC. In light of the blurring distinctions between regulated and unregulated utilities, the additional prohibitions in PURA may no longer be necessary.

JIM PHILLIPS of the TNRCC said various sections of state law related to water quality, solid waste, and air permitting activities restrict post-employment activities of former TNRCC employees.[39] However, unlike the Government Code's provisions, the penalties for violations of these sections are assessed on the new employer, not the former employee. Specifically, TNRCC must deny the permit application if a former employee "participates substantially" on that application and had been involved in the proceeding while at the TNRCC. There is no sanction against the employee.

TOM "SMITTY" SMITH of Public Citizen said current law has "two very significant loopholes." First, the post-employment prohibition is too limited because it has been applied only to a "particular matter." It should instead be applied to an overall policy or issue area, where employees may know where holes in the rules are or how to influence former supervisors on more general matters than the law currently covers. Second, the law lacks enforcement provisions. TEC should have enforcement authority, and the average citizen should have a right to initiate an enforcement action similar to the conflict-of-interest laws.[40]

The law's current salary threshold no longer reflects those people who are making decisions over contested cases, permits, and rules. Rather than base it on salary, it should instead be based on responsibility and include commissioners, executive directors, and agency staff "who are actually the effective decision makers." The post-employment restrictions should be effective for two years.

CRAIG MCDONALD of Texans for Public Justice said 110 individuals who were registered as lobbyists in 1999 passed through the revolving door. Ninety-three were former Members. Though the 110 accounted for 7 percent of the lobby workforce, they garnered nearly a quarter of all lobby compensation. There would be no harm in the state's enacting a lifetime ban on lobbying for former Members and a two-year "cooling off" period for key legislative staff.

[39] §26.0283, Water Code; and §§ 361.0885 and 382.0591, Health and Safety Code, respectively.

[40] §572.058, Government Code.

Discussion

The most egregious violations of the revolving door law would involve a public employee's using his or her official position for the purpose of securing future employment. Such an action would constitute bribery under current Texas law. At this time, the TEC does not recommend any changes to the state's revolving door laws.

Most states restrict a former public employee or official from engaging in post-employment activities related directly to matters they substantially participated in during their public employment. Many of these laws apply to individuals representing their new employers at proceedings before their old agencies. A number of states expand the restriction to cover the use of confidential information obtained during the employees' tenure with state agencies.

Five states have "cooling off" periods for former legislators. Arizona, South Carolina, and South Dakota restrict former legislators from lobbying their former colleagues for one year following their departure from their respective legislatures. Kentucky has a two-year prohibition. Michigan's restriction applies only to the remainder of a term if a member resigns early. For the most part, states do not restrict the post-employment activities of former members and staff.

The federal revolving door law for the executive branch does not bar any individual, regardless of rank or position, from accepting a position with any employer after government service. The basic prohibition bars a former employee from making any communication or appearing before a federal employee, with the intent to influence action, in connection with a particular matter in which the former employee personally and substantially participated, for life. For two years following government service, no former employee may make any communication or appear before a federal employee, with the intent to influence action, in connection with a particular matter which was within the former employee's official responsibility (during the last year of government service).[41] Several other restrictions apply to "senior" or "very senior" employees for one year following their government service and typically involve contacts and appearances before their former agencies.[42]

The U.S. Congress prohibits former members from lobbying their former colleagues for one year after they leave Congress. Very senior staff may not lobby their former bosses for one year following their departure from public service. The U.S. Senate has similar restrictions.

[41] 18 U.S.C. §207(a)(1) and §207(a)(2), respectively.

[42] 18 U.S.C. §§ 207(b), 207(c), 207(d), and 207(f).

Findings of the Subcommittee on Lobby Influence

The best means to maintain the integrity of the legislative and administrative processes is to ensure that lobbyists disclose their activities and their relationships with Members, their staff, state officials, and state agency staff.

Current law is generally adequate to provide for public scrutiny of lobbyists' activities, particularly as disclosure reports are made available on the Internet. Some clarifications and expansions of current law may be required, particularly with respect to proper disclosure of certain financial arrangements. Increasing the amount of information available on the Internet will increase the public's access to disclosure information.

The state's current policies related to post-employment activities make it clear that a state official or employee cannot "feather the nest" by taking official actions for the purpose of securing favor from a potential future employer.

SUBCOMMITTEE ON TELECOMMUNICATIONS

During the interim, the Committee on State Affairs was charged to monitor the implementation of Senate Bill 560, 76th Legislature, and changes in telecommunications markets resulting from the legislation.

A subcommittee was formed to examine issues related to telecommunications competition, particularly for residential local exchange service. It followed the efforts of the Public Utility Commission of Texas (PUC) to implement Senate Bill 560, Senate Bill 86, and House Bill 1777, 76th Legislature, and heard from industry and consumer representatives about the effects the legislation was having on consumer choice. The subcommittee studied issues that may have the potential to impede competition including operational aspects of interconnection, legislative and regulatory requirements, federal actions, and court decisions. The subcommittee examined the prospects of advanced services and local exchange competition in rural Texas and issues relating to the siting of wireless facilities. The subcommittee held two public hearings in Austin and accepted testimony from invited and public witnesses representing various perspectives on these issues.

Subcommittee on Telecommunications

Chairman:	Sylvester Turner
Members:	Leo Alvarado, Jr. Kim Brimer David Counts Debra Danburg Bob Hunter Delwin Jones John Longoria Tommy Merritt Steven Wolens
Hearings:	March 2 May 10

The Public Utility Regulatory Act (PURA) establishes the state's policy to provide "an orderly transition from the traditional regulation of return on invested capital to a fully competitive telecommunications marketplace in which all telecommunications providers compete on fair terms." The state shall "preserve and enhance universal telecommunications service at affordable rates," provide for the upgrading of the telecommunications infrastructure of the state, assure interconnectivity, and "promote diversity in the supply of telecommunications services and innovative products and services throughout the entire state, including urban and rural areas."[1]

Since the passage of the Telecommunications Act of 1996 ("the Act"), federal and state regulators have been asked to abandon the rate of return regime and instead implement sets of

[1]PURA §58.001.

policies that enable competition for services that have, even in the recent past, been provided by natural monopolies. Changes in technology and market structure "have increased the need for minimum standards of service quality, customer service, and fair business practices to ensure high-quality services to customers and a healthy marketplace where competition is permitted by law." Recognizing that the strength of competitive forces varies from market to market, it is the policy of the state to enable the PUC to "enhance competition by adjusting regulation to match the degree of competition in the marketplace." Further, recognizing that a truly competitive marketplace could leave some lower-income customers and rural parts of the state behind, it is the policy of the state to "ensure that customers in all regions of the state, including low-income customers and customers in rural and high cost areas" have access to basic and advanced telecommunications services at costs that are "reasonably comparable" to those offered in urban areas and to low cost customers.[2]

Senate Bill 560, Senate Bill 86, and House Bill 1777, 76th Legislature, further the policy goals enumerated above. The implementation of those laws is largely complete. Some rulemakings are still ongoing, but it is clear that these laws have already resulted in a more competitive telecommunications market.

Status of Telecommunications Competition

Congress has provided that a regional Bell operating company (RBOC) can be authorized to provide long distance services to customers in its territory on the condition that it first opens that territory to competitors. An RBOC satisfies that condition by demonstrating its compliance with a 14-point checklist contained in Section 271 of the Act. On June 30, 2000, Southwestern Bell of Texas (SBC Communications) became the second RBOC to gain authorization to provide long distance services to customers within its territory. It was the first Section 271 application to be endorsed by the relevant state regulatory body, the Federal Communications Commission (FCC), and the U.S. Department of Justice (DOJ).[3] In its order approving the application, the FCC certified "that SBC has opened its markets to competitors, and that other local telephone service companies have a meaningful opportunity to compete in Texas." FCC Chairman William Kennard commended the PUC for its "persistent, market-opening efforts" that had resulted in 90 competitors being able to serve one million customers in Texas.[4]

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[2]PURA §51.001.

[3]Bell Atlantic (now part of Verizon) obtained Section 271 approval for its New York service territory in December 1999, but its application was not endorsed by DOJ.

[4]Federal Communications Commission news release, "Statement of Chairman William E. Kennard on the SBC Texas Section 271 Application Approval" (June 30, 2000), available online at www.fcc.gov/Speeches/Kennard/Statements/2000/stwek056.txt, accessed September 18, 2000.

Summary of Testimony

The subcommittee heard testimony on the status of local telephone competition and the PUC's activities to implement Senate Bill 560, Senate Bill 86, and House Bill 1777, 76th Legislature, during its hearings on March 2 and May 10, 2000.

March 2 Hearing

CHAIRMAN WOOD said the PUC has completed its implementation of the Texas Universal Service Fund (TUSF), which subsidizes telephone service in high-cost areas, reduces the charges that lower income customers pay for telephone service, and supports hard-of-hearing relay programs. Prior to the implementation of TUSF, local telephone rates were partially supported by long distance access charges. As a result of Senate Bill 560, the local exchange companies reduced access charges that were paid by long distance companies. The bill required Southwestern Bell to lower its long distance access charges by one cent per minute in September 1999, and by another two cents per minute once its Section 271 application is approved, authorizing it provide long distance service. In January, the PUC certified that Southwestern Bell had met the 14-point federal checklist and endorsed its Section 271 application. Those changes will result in a total drop in access charges of $750-$800 million, and long distance companies are required to pass those savings on to their customers. The TUSF charge is now a little under 4 percent, and carriers pass some or all of that charge on to their customers. Those charges will provide about $550 million for the TUSF. The rest of the access charge reduction would be absorbed by Southwestern Bell.

March 2, 2000
Committee on State Affairs
Witness List

Telecommunications Competition
Janee Briesemeister, Consumers Union
Michael Jewell, AT&T
Neal Larsen, MCI WorldCom
Dave Lopez, Southwestern Bell
Kelsi Reeves, Time Warner Telecom
Pat Wood, Public Utility Commission of Texas

The PUC is following its timeline for implementing Senate Bill 560. The bill gave incumbent local exchange carriers (ILECs) the ability to package services together and flexibility to adapt their prices to competitors' offerings. One hundred or so such packages, mostly from Southwestern Bell and GTE, have been filed with the PUC. Most of these packages were taken straight to the market without the PUC having to approve it. The PUC also adopted rules related to cramming, customer protection, and bill simplification. It continues to work on the advanced services study and, with the Texas Department of Human Services (DHS), the automatic enrollment provisions for low-income customers.

Competition is coming more slowly to rural Texas. The PUC is monitoring the deployment of broadband and advanced telecommunications services to rural Texas. The latter is affected in part by a provision in Senate Bill 560 that requires wireline telephone companies to provide the same kinds of services in rural areas that they offer to their urban customers.[5] Though that provision will not be formally implemented before September 1, 2001, it "put everyone on notice" that the Legislature did not expect a digital divide to form that would leave rural Texas behind the cities.

JANEE BRIESEMEISTER of Consumers Union said competition remains an unfulfilled promise for most residential consumers. Outside of high-cost prepaid service, there are very few choices available for most consumers. Those who have attempted to exercise choice have had "tremendous service problems," some of which have gotten considerable media coverage. Consumers are faced with higher phone bills, new fees, new surcharges, increases in familiar fees and surcharges, and monthly minimums charges on their long distance bills.[6] "Customers are being charged for not making phone calls." Senate Bill 560 allows late fees for local bills, something that had not been allowed before, and increases reconnection fees. Nationally, between 50 and 70 million households are paying more for their telephone bills since the advent of competition. Mergers in the telecommunications industry have also reduced the potential for competition.

The good news for consumers is better customer protection rules. However, they are not always being applied to all competitors in the marketplace. "Customers deserve the same level of consumer protection" regardless of whether they purchase service from an ILEC or a competitive local exchange carrier (CLEC). Consumers are also becoming increasingly frustrated with items on their phone bill, and become even more upset when they learn that those fees are not taxes but are instead payments made directly to the telephone companies themselves.

Several things could be done by the Legislature to help consumers. As with electric deregulation, there should be a legislative mandate that CLECs serve residential customers. Many of the billboards advertising new phone companies are for business customers only. The PUC ought to impose customer service standards as part of any merger approval process. In addition, the same strong customer protection rules that are in effect for ILECs should also be applied to CLECs. Disconnection protection needs to be "rethought and expanded," given that telephone companies are likely to bundle regulated services with unregulated products and services. There also needs to be "some protection for low-volume callers," because they are the ones most likely to see net increases in their phone bills.

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[5] PURA §55.014.

[6] See Appendix H for a brief description of federal, state, and local fees, surcharges, and taxes found on local telephone bills.

NEAL LARSEN of MCI WorldCom said his company has been providing local service to businesses in Austin, Dallas, Fort Worth, Houston, and San Antonio with its own facilities since 1998.[7] Local residential service in Texas will begin in April 2000 in Southwestern Bell's territory. MCI WorldCom is also rolling out its wireless broadband using multichannel multipoint distribution service (MMDS) technology, an alternative to cable modems and digital subscriber lines (DSL).

MICHAEL JEWELL of AT&T said local competition in Texas is "promising." AT&T is using its cable and fixed wireless facilities to provide local exchange service. Because it cannot roll out its own facilities ubiquitously, utilizing unbundled network elements (UNEs) from Southwestern Bell "remains a very key component to AT&T competing on a broad scale" in Texas. Problems are still occurring. For example, AT&T had problems with its billing systems that resulted from bad data from an outside vendor and from operating system changes implemented by Southwestern Bell, which has worked with AT&T to clear up the problems.

AT&T's analysis of performance data shows that Southwestern Bell's performance is below the 90 percent compliance standard set by the PUC, and it is declining. Southwestern Bell has also had problems meeting the volume of AT&T's orders to switch customers, and the two companies are working together to fix them. Finally, AT&T's business customers are experiencing longer outages than the level deemed acceptable by the PUC and FCC when Southwestern Bell moves the copper loop from its switch to the AT&T switch.[8] All of these "bugs" can be worked out, but they demonstrate that effective local competition is still in the "development stage."

The PUC and the Legislature should exercise restraint in regulating CLECs. Customer protection rules that apply to ILECs should not be imposed on CLECs. Requiring CLECs to adhere to those rules would "mandate significant changes to the operation systems with essentially no customer benefit." There are ways of achieving customer protection goals without requiring CLECs to use the same procedures as ILECs. Southwestern Bell has had many years to develop its systems and procedures, while CLECs are typically adapting platforms developed for other purposes (such as a cable system) to provide the same kind of service to customers as the ILEC. As the market develops, then it makes sense to reduce the regulation of the ILECs, not add regulation to CLECs.

One issue the Legislature should consider is switched access reform. Access charges in Texas are still among the highest in the country, even following the adoption of a proposed federal

[7]In May 2000, WorldCom dropped "MCI" from its corporate name. It continues to market products and services under the MCI brand name.

[8]This process, which requires a coordinated effort between the CLEC and ILEC, is known as a "hot cut." Phone service is disconnected while the loop is being transferred.

Comparison of Intrastate Switched Access and Local Residential Service Rates

State	Intrastate Switched Access Rate Per Minute	U.S. Rank	Local Residential Service Rate Per Month	U.S. Rank
California	2.62¢	6th lowest	$11.25	8th lowest
Florida	4.84¢	22nd	$10.65	5th
Georgia	3.52¢	12th	$16.15	34th
Illinois	2.29¢	5th	measured	N/A
Michigan	2.12¢	2nd	$42.00	46th
Missouri	6.05¢	28th	$11.35	9th
New York	8.85¢	44th	$20.16	44th
Ohio	2.24¢	4th	$14.85	30th
Pennsylvania	5.33¢	24th	$9.00	2nd
Texas	5.99¢	27th	$11.05	7th

Source: Southwestern Bell. Four states use measured rates for local residential service. Michigan has the highest non-measured monthly rate for local residential service in the U.S. Intrastate switched access rate for Texas includes reductions in access charges resulting from Southwestern Bell's entry into long distance service.

reform and accounting for the reductions required by Senate Bill 560.[9] As part of the federal switched access reform, the long distance companies, including AT&T, agreed to eliminate their monthly minimum charge, so that customers who made no long-distance calls would not be charged a minimum usage fee.

DAVE LOPEZ of Southwestern Bell said a lot of progress has been made to bring competition to Texas. Reductions in access rates have yielded savings to consumers while residential telephone rates continue to be lower than the national average. Price flexibility has helped Southwestern Bell compete, but 70 percent of the company's services are still price-regulated by the PUC. Southwestern Bell's entry into the long distance market will be "the next springboard for competition on the residential side." The company will not impose a minimum charge on its long distance customers.

KELSI REEVES, representing Time Warner Telecom, said CLECs should not be required to operate under the same rules as ILECs. Doing so would force CLECs to divert investment from facilities to installing systems to match the procedures used by the ILECs. This would not give customers new choices in the marketplace. Time Warner Telecom is building out facilities in Texas and connecting them together so that it can offer point-to-point service along its network between customers in those cities.

[9]The FCC adopted a switched access reform package modeled on the "CALLS" proposal on May 31, 2000. The FCC estimates that the proposal reduced access charges by $3.2 billion, and long distance companies pledged to pass those savings on to their customers. The long distance carriers also pledged to eliminate minimum monthly charges for their low-volume customers. The Presubscribed Interexchange Carrier Charge (PICC) was combined with the federal Subscriber Line Charge, and the total amount of the two was reduced by an average of $1.15 per month for residences with a single telephone line.

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CHAIRMAN WOOD said reductions in long distance access rates charged by Southwestern Bell have provided Texas consumers between $700 and $800 million in savings. In general, prices for packages of services seem to be going down. However, prices for a la carte offerings, such as caller ID, have generally risen since Senate Bill 560 was passed. Call waiting service is capped, but ILECs have the flexibility to adjust prices for most other vertical services. Because those services tend to have a fair amount of margin built into them, the potential for competition is great. There have been very few—maybe four or five—protests lodged against the more than 200 pricing flexibility applications filed at the PUC. Residential consumers who are not buying any of the vertical services are still being helped by the residential rate freeze that has been in effect since 1989. However, there will not likely be competition for those consumers because competitors cannot "get underneath the rate that's already very low," and may be below cost.

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Subcommittee on Telecommunications
Witness List

Telecommunications Competition
Pat Wood, Public Utility Commission of Texas

PUC Implementation Activities

In order to implement Senate Bill 560, Senate Bill 86, and House Bill 1777, 76th Legislature, the PUC initiated more than 30 rulemaking proceedings and related projects. Most have been completed. In general, the final rules and orders reflect agreement between the various parties, including telecommunications providers and consumer groups, with certain exceptions noted below.

Senate Bill 560

Senate Bill 560 was signed into law by Governor Bush on June 19, 1999. It built on existing law, specifically House Bill 2128, 74th Legislature, and the federal Telecommunications Act of 1996, to open historically monopolized local telephone markets to competitors. Senate Bill 560 set the ground rules for local competition by addressing price flexibility, fair billing, access rates, advanced services, anticompetitive practices, cramming and slamming, and consumer protection. Senate Bill 560 capped basic local service rates for residential and business consumers through September 2005. The PUC's implementation of Senate Bill 560 is ongoing and will continue through 2000.

Pricing Flexibility. The PUC adopted seven new Substantive Rules (Subst. R.) to implement the pricing flexibility provisions of Senate Bill 560 and repealed two existing rules made obsolete by the new rules. Project No. 21155 was initiated to establish pricing flexibility requirements for Chapter 58 electing companies.[10] It was adopted in September 2000. It created new Subst. R. §26.226, which sets forth the substantive requirements related to pricing flexibility of Chapter 58 electing companies. Through the adoption of this rule, the PUC made its rules consistent with PURA and clarified the standards required of those companies for exercising pricing flexibility.

Project No. 21156 was initiated to establish basic network service requirements for Chapter 58 electing companies. It was adopted in September 2000. It created new Subst. R. §26.224, which sets forth the procedural and substantive requirements for changing the rates of basic network services offered by Chapter 58 electing companies. Through the adoption of this rule, the PUC made its rules consistent with PURA regarding the realignment from three baskets to two (basic and nonbasic) and clarified the standards and procedures required of those companies for offering basic network services to customers. The PUC repealed Subst. R. §§ 26.212 and 26.213 because they were no longer necessary.

Basic and Nonbasic Service Baskets

Basic services include flat rate residential local exchange service, primary directory listings, receipt of a directory, tone dialing service, service connection, direct inward dialing service, private pay telephone access service, call trap and trace service, access to 9-1-1 service, mandatory residential extended area service (EAS) and toll-free arrangements, residential call waiting service, and low-income programs. *PURA §58.051(a)*

Nonbasic services include business services similar to basic residential services, "1-plus" intraLATA message toll services, 0+ and 0- operator services, call forwarding, custom calling, caller ID, call return, PBX-type services, billing and collection services, ISDN, 800 numbers, private line service, public pay telephone service, paging and mobile services, speed dialing, three-way calling, and all other services not specifically designated as basic services. *PURA §58.151*

Project No. 21157 was initiated to establish nonbasic service requirements for Chapter 58 electing companies. It was adopted in September 2000. It created new Subst. R. §26.225, which establishes the substantive requirements relating to nonbasic services, including new services, offered by Chapter 58 electing companies. Through the adoption of this rule, the PUC made its rules consistent with PURA and clarified the standards required of those companies for offering nonbasic services to customers.

Project No. 21159 was initiated to establish requirements applicable to Chapter 52 and 59 companies.[11] It was adopted in September 2000. It created new Subst. R. §26.214, which sets

[10]Southwestern Bell and Verizon have elected to be subject to incentive regulation under PURA Chapter 58.

[11]Chapter 52 companies are either CLECs or ILECs, like Kerrville Telephone Company and Century Telephone of Lake Dallas, that have not elected to be under Chapter 58 or Chapter 59. ILECs such as Sprint/Centel and TXU are examples of companies that have elected to be regulated under the infrastructure commitments and their corresponding incentives of Chapter 59.

forth the substantive and procedural requirements for long-run incremental cost (LRIC) studies filed by Chapter 52 companies and Chapter 59 electing companies. It also created new Subst. R. §§ 26.228 and 26.229, which set forth the substantive and procedural requirements regarding new services, pricing and packaging flexibility, customer promotional offerings, and customer specific contracts of Chapter 52 and Chapter 59 companies, respectively.

Project No. 21160 was initiated to address PURA Chapter 59 withdrawal of election and switched access rates. It was merged with Project No. 21169 (See below).

Project No. 21161 was initiated to establish procedures applicable to nonbasic services and pricing flexibility for Chapter 58 electing companies. It was adopted in September 2000. It created new Subst. R. §26.227, which sets forth the procedural requirements for nonbasic services and pricing flexibility for basic and nonbasic services offered by Chapter 58 electing companies. Through adoption of this rule, the PUC implemented a procedure to allow for an efficient and timely review of service offerings and establish a complaint process contemplated by Senate Bill 560 in connection with information notice filings.

There are two issues that should be noted. First, the anticompetitive standard contained in the *proposed* Subst. R. §§ 26.225, 26.226, 26.227, and 26.229 would have placed the burden of proof upon an electing company to show that the price of a service or package of services is not anticompetitive. Specifically, this rebuttable presumption would state that the price of a service or package of services is anticompetitive if it is lower than the sum of the wholesale prices, based on total element long-run incremental cost (TELRIC), of components needed to provide the service or package.

The PUC concluded that an anticompetitive standard is more appropriately developed on a case-by-case basis because a single rebuttable presumption may not adequately address the range of anticompetitive behaviors. Therefore, the PUC deleted the rebuttable presumption from the adopted rules. However, it required ILECs to furnish information, in their informational filing package, about the list of relevant TELRIC-based wholesale and retail prices for the service or package of services being offered. An interested party may rely on this information to initiate a complaint regarding anticompetitive pricing.

Second, Subst. R. §§ 26.226, 26.227, 26.228 and 26.229 establish standards regarding the packaging and joint marketing of regulated services with unregulated products or services and/or with the products or services of an electing company's affiliate. Upon adoption, the provisions were expanded to obtain greater assurance regarding potential anticompetitive practices related to packaging and joint marketing.

Texas Universal Service Fund (TUSF). Project No. 21162 established interim procedures for the disbursement of TUSF funds to small and rural ILECs through an order issued in October 1999.

Small and rural ILECs are able to receive TUSF funds through a permanent mechanism implemented upon adoption of new Subst. R. §26.410 in Project No. 21163. The PUC also adopted amendments to Subst. R. §§ 26.401, 26.403, 26.404, 26.413, 26.414, 26.415, 26.417, and 26.418.

These revisions affect all telecommunications carriers who receive TUSF support. The revisions include adding the method used to determine support allocation when UNEs are used in the provision of service, clarify discounts that are applied to certain services, and establish the circumstances in which an eligible telecommunications provider (ETP) designation can be relinquished. The new rule and amendments were adopted in April 2000.

Affiliate issues. Project No. 21164 was initiated to address affiliate issues for telecommunications service providers (TSPs) pursuant to PURA §§ 54.102, 60.164, and 60.165. It was adopted in August 2000. This project addresses the structural and transactional requirements for a holder of a Certificate of Convenience and Necessity (CCN) and its affiliated TSPs applying for or holding a Certificate of Operating Authority (COA) or a Service Provider Certificate of Operating Authority (SPCOA).

Description of Certificates

A **CCN** is required for an ILEC to provide local exchange service, basic local telecommunications service, or switched access service in a territory. A CLEC must have either a COA or SPCOA. **COAs** typically apply to facilities-based carriers, although it is not a specific requirement. PURA §54.103 places financial and technical conditions on COA holders that do not apply to SPCOA holders. An ILEC affiliate may hold a COA and operate in the ILEC's CCN territory. CLECs that hold **SPCOAs** may provide resold service only. PURA §54.152 prohibits SPCOA holders from holding a CCN or COA for the same territory. A certificated telecommunications utility (CTU) holds at least one CCN, COA, or SPCOA for any territory that it operates in.

Reports. PURA §51.001 requires the PUC to submit a report to the Legislature evaluating the "availability and the pricing of telecommunications and information services, including interexchange services, cable services, wireless services, and advanced telecommunications and information services, in rural and high cost areas." The report is due January 1, 2001.

PURA §58.303 requires the PUC to submit a report to the Legislature evaluating, at a minimum, whether "alternative rate structures for recovery of switched access revenues are in the public interest and competitively neutral, and whether disparities in rates for switched access service between local exchange companies are in the public interest." The report is due January 1, 2001.

In addition, the PUC will submit its biennial report on the scope of competition in the telecommunications market, pursuant to PURA §52.006, in November 2000. The report will assess the effects of competition on the rates and availability of telecommunications services. It will also address the effects of competition on universal service. These reports are Project Nos. 21166, 21168, and 21167, respectively.

Review of Rules. The PUC was required to review its substantive rules and conform them as necessary with Senate Bill 560. Project No. 21169 was initiated to make minor conforming changes to the PUC's Subst. R. that did not require the initiation of separate rulemaking projects. This project consists of two sets of proposed rule changes. The first set, containing additions and modifications to Subst. R. §26.5, was published in May 2000 and adopted in September 2000. The second set, containing minor conforming changes to Subst. R. §26.274, was published in September 2000. Adoption is expected in November 2000.

Workforce Diversity. PURA §52.256 requires telecommunications utilities to file workforce diversity plans with the PUC. Project No. 21170 was initiated to establish a mechanism by which the utilities would file their plans. It was adopted in November 1999, and plans were filed by January 1, 2000. Project No. 22166 was initiated to establish permanent procedures for utilities' annual reports on workforce diversity. The final rule amends Subst. R. §§ 26.79 and 26.80. It was adopted in June 2000.

Dark Fiber. Project No. 21171 was initiated to address the leasing of excess capacity of fiber-optic cable facilities, known as "dark fiber." This project addressed PURA §54.2025, which provides that a municipality, or certain municipal electric systems, may lease dark fiber so long it is done on a nondiscriminatory, nonpreferential basis. The PUC determined that a rule was not necessary at this time. Instead, disputes would be handled on a case-by-case basis. The project was closed in July 2000.

CLEC Access Charges. Project No. 21174 was initiated to address COA/SPCOA switched access rates. It was adopted in June 2000. The project established procedures for the PUC's review of switched access rates under PURA §52.155 in excess of the rates charged by the territory's CCN holder. It creates a new Subst. R. §26.223 to prohibit excessive COA/SPCOA usage sensitive intrastate switched access rates.

Bill Simplification. Project No. 22130 was initiated to implement PURA §55.012, relating to telecommunications bill format. It was adopted in July 2000. This project revised Subst. R. §26.25, which calls for all local exchange companies (LECs) to issue simplified, easy-to-understand bills for local exchange telephone service. To the extent permitted by law, local telephone bills are to include aggregate charges for each of these categories: basic local service (including fees), optional services, and taxes.

The revised Subst. R. §26.25 requires holders of CCNs, COAs, or SPCOAs, collectively known as certificated telecommunications utilities (CTUs), to comply with minimum bill information and format guidelines, and to clarify information disseminated to residential customers in order to reduce complaints of slamming and cramming. The PUC found that the new rule was necessary to decrease the confusion associated with the proliferation of charges on residential

customers' telephone bills for separate services and products and of their related surcharges, fees, and taxes. The adopted rule requires compliance by February 15, 2001.

The various parties participating in this project's workshops had many disagreements, some of which are noted here. There was disagreement as to whether the rule should apply in its entirety to all CTUs, or just all LECs.[12] The adopted rule applies to all CTUs. Similarly, there was significant debate as to whether CTUs could issue bills solely over the Internet. The adopted rule requires that residential customers receive their bills via U.S. mail, "unless the customer agrees with the CTU to receive a bill through different means, such as electronically via the Internet." As explained in the rule preamble, this language allows the holder of an SPCOA, but not a holder of a CCN or a COA, to promote itself as a company that bills over the Internet only.

There was considerable discussion as to exactly what information should appear on the first page of a residential customer's bill. The adopted rule is considerably less prescriptive in this regard than the version published for comment. The adopted rule requires that the first page include only the grand total due for all services billed, the payment due date, and a notification of any change in service provider. CLECs argued that differentiation among providers is important in a competitive market, and customers may use formatting of bills as one standard for choosing a provider.

Parties disagreed as to whether CTUs should be required to enumerate a specific statement of the amount customers must pay to avoid having their basic local service disconnected. The adopted rule does not require such a statement. Instead, it requires the CTU to identify clearly and conspicuously those charges for which non-payment will either result or not result in disconnection of basic local service. A specific statement of the amount the customer must pay to avoid disconnection will suffice for this purpose. Such a statement is already required by Subst. R. §26.28 in any disconnection notice sent to a residential customer

Parties disagreed as to whether surcharges imposed on a percentage-of-revenue basis could be included only in the basic local service subtotal, or should the surcharges have to be prorated between basic local service and optional services. The adopted rule permits the CTU either to include the portion of such surcharges related to local service in the basic local subtotal or to allocate that portion between basic local service and optional local services on a proportionate basis.

Another contentious issue related to whether to require the itemization (in dollars and cents) of surcharges included in the subtotals for basic local service and optional services. The adopted rule allows the CTU discretion on this matter. However, if the specific amount of each assessment is not shown on the bill, the CTU must clearly indicate on the bill a toll-free method,

[12]PURA §51.002(4) defines a LEC as a holder of a CCN or COA. It does not include holders of SPCOAs.

including a toll-free number, by which the customer may obtain information regarding the amount and method of calculation of each surcharge.

Access Charges. Several projects were undertaken to implement provisions of Senate Bill 560 relating to access charges. Project No. 21172 was initiated to address filings by interexchange carriers (IXCs) to pass access charge reductions through to their customers. It was adopted in September 1999. In that project, the PUC established sworn affidavits of completion as the mechanism for IXCs to fulfill the requirements of PURA §52.112, which relates to reduction pass-through requirements for carriers that had at least a 6 percent share of total intrastate access minutes. The specific minute of use data submitted and sworn to in the affidavits is considered highly confidential information by the IXCs.

Project No. 21173 was initiated to address IXC compliance with access charge reduction pass-through filings. Initial access pass through filings were submitted by AT&T, MCI Worldcom, and Sprint in March 2000 covering access reductions for the period beginning September 1, 1999. Supplemental filings of additional information were submitted in April 2000. A review of information submitted indicates reductions to basic rate schedules were as high as 5 cents per minute for intrastate long distance calls. Additionally, the affidavits indicated that residential subscribers received their proportionate share of switched access reductions in compliance with the requirements of PURA. The project is complete.

Two projects were undertaken to approve applications from Southwestern Bell to implement access charge reductions pursuant to PURA §58.301. The first, Project No. 21184, was initiated to consider Southwestern Bell's application to implement the one-cent reduction mandated by PURA §58.301(1). Southwestern Bell proposed eliminating the one-cent Originating Residual Interconnection Charge (RIC). The PUC approved the application in September 1999.

Project No. 22302 was initiated to consider Southwestern Bell's application to implement the two-cent reduction in switched access rates mandated by PURA §58.301(2). Southwestern Bell proposed reducing the Terminating Carrier Common Line Charge (CCL) by two cents. The PUC approved the application in July 2000 after an analysis of prior access reductions and with no protest from the parties involved in the proceeding.

Senate Bill 86

Senate Bill 86 strengthened consumer protection laws for customers of telecommunications and electric utilities, particularly those related to cramming, slamming, and disconnection of local telephone service. It was signed into law by Governor Bush on June 20, 1999. The PUC's implementation of Senate Bill 86 is ongoing and will continue through 2000. Only those projects related to telecommunications projects are covered here.

Customer Protection. Project No. 21423 was initiated to adapt telephone customer service rules to the new competitive environment. Key issues being addressed are:

- # Applicability of rules to dominant certificated telecommunications utilities (DCTUs) and nondominant certificated telecommunications utilities (NCTUs);
- # Emerging issues such as failure of NCTUs to release lines;
- # Discrimination protections;
- # Prohibiting fraudulent, unfair, misleading, deceptive, and anticompetitive practices; and
- # Information disclosures.

Consumer groups and most dominant carriers have proposed that the customer service and protection rules apply equally to all CTUs. They argue that PURA in fact requires uniform standards for all CTUs. The perspective for the rules should be the customer, not the classification of the provider. Uniform rules would encourage more participation by giving some assurance to reluctant consumers that the market will operate fairly. Because nondominant carriers have indicated that they cannot survive unless they provide better service than the dominant carriers, adhering to the DCTU standards should not be a problem.

Nondominant carriers favored bifurcated rules with less restrictive requirements for them. They argue that PURA encourages competition by distinguishing between dominant and nondominant carriers in many areas, so it does not require uniform rules for all CTUs. Uniform regulation is appropriate only when competitors are equally situated. Equal application of the rules would create substantial burdens and costs for nondominant carriers and would inhibit competition. NCTUs argue that the PUC should apply regulatory mandates only when the market fails. The proposed rules, published in July 2000, provide some flexibility to NCTUs to encourage increased competition. The project has an anticipated adoption date of November 2000.

Project No. 21421 was initiated to establish procedures for customer proprietary network information. The PUC reviewed new statutory language concerning the privacy of customer consumption and credit information and concluded that no changes were needed to Subst. R. §26.122. Additional language to address these specific protections will be addressed in Project No. 21423, with which this project was merged. There are also ongoing federal proceedings on this subject.

Slamming and Cramming. The PUC undertook two rulemakings to implement the slamming and cramming provisions of Senate Bill 86. Project No. 21419 was initiated to amend rules relating to slamming, which is the unauthorized switching to another provider. It was adopted in June 2000. An amendment to Subst. R. §26.130 was adopted to implement PURA §§ 17.004(a)(5) and 55.301-55.308. The amendment eliminates the distinction between carrier-initiated and customer-initiated changes, and it eliminates the information package mailing, or "negative option," as a verification method. The amendment absolves the customer of any liability for

charges incurred during the first 30 days after an unauthorized telecommunications utility change. It prohibits deceptive or fraudulent practices, requires consistency with applicable federal laws and rules, and addresses the related issue of preferred telecommunications utility freezes. The rule applies to all CTUs.

Project No. 21006 was initiated to amend protections against unauthorized billing charges, or cramming. It was adopted in October 1999. Subst. R. §26.32 was adopted to implement PURA §§ 17.151-17.158. The rule applies to all billing agents and service providers. The 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. The rule seeks to minimize cost and administrative requirements and ensures consistency with FCC anti-cramming guidelines.

Disconnection. Project No. 21030 was initiated to implement new limitations on local telephone service disconnections. It was adopted in December 1999. Amendments to Subst. R. §§ 26.21, 26.23, 26.24, and 26.27 through 26.29 were adopted to implement PURA §55.012. These amendments prohibit discontinuance of residential basic local service for nonpayment of long distance charges and require that residential service payments first be applied to basic local service. They require a local service provider to offer and implement toll blocking to limit long distance charges after nonpayment for long distance service. Disconnection of local service is allowed for fraudulent activity. The rules establish a maximum price that a LEC may charge a long distance service provider for toll blocking. The amendments apply to all local telephone service providers.

Discrimination. Telecommunications discrimination issues will be handled in two projects. Project No. 22706 includes changes in language aimed at preventing discrimination based on geography or income. This project seeks to amend the PUC's policy language contained in Subst. R. §26.4 so that it is in compliance with PURA §17.004(a)(4). Specific mechanisms to implement and enforce the prohibitions on discrimination found in the proposed §26.4 are included in Project No. 21423. The rules will apply to all telecommunications providers. The date for adoption is November 2000.

Automatic Enrollment. Project No. 21329 was initiated to establish automatic enrollment for Lifeline participants pursuant to PURA §17.004(f).[13] It will result in an amendment to Subst. R. §26.412. PUC staff is continuing to work with the Department of Human Services (DHS) on an implementation plan. The target date for adoption is December 2000.

[13]The Lifeline program reduces monthly service charges for low-income individuals, specifically people whose income levels are at or below 125 percent of federal poverty guidelines or who receive benefits from Medicaid, food stamps, Supplemental Security Income (SSI), federal public housing assistance, or Low Income Home Energy Assistance Program (LIHEAP). Beneficiaries of these programs would be automatically enrolled in the Lifeline program.

Administrative Penalties. Project No. 21420 was initiated to amend the PUC's Procedural Rules (Proc. R.) related to administrative penalties. An amendment to Proc. R. §22.246 was adopted to implement PURA §15.024. The amendment eliminates the 30 day "cure period" for violations of PURA Chapters 17, 55, and 64, all relating to customer protection policies. It clarifies that a violator may not opt to pay a penalty without taking appropriate corrective action, and incorporates the term "continuing violation" into the rules. It was adopted in February 2000.

Registration. Project No. 21456 was initiated to amend certification, registration and reporting rules. It was adopted in June 2000. Amendments to Subst. R. §§ 26.107, 26.109, and 26.111 and new §26.114 were adopted to implement PURA §§ 17.051-17.053. The amendments and new section establish registration requirements for all nondominant carriers, require registration as a condition for doing business in Texas, establish customer service and protection standards, and address suspension or revocation of COAs and SPCOAs.

Automatic Devices. Project No. 21422 was initiated to amend the requirements for automatic dial announcing devices. It was adopted in January 2000. An amendment to Subst. R. §26.125 was adopted to implement PURA §55.126. The amendment shortens the amount of time an automatic device must disconnect from a called person to five seconds from 30 seconds. The rule applies to all operators of automatic dial announcing devices.

Prepaid Calling Services. Project No. 21424 was initiated to establish prepaid calling card disclosures. It was adopted in July 2000. Subst. R. §26.34 was adopted to implement PURA §55.253. The rule prescribes standards regarding the information a prepaid calling card company shall disclose to customers concerning rates and terms of service. The rule applies to all prepaid calling service providers. Project No. 22777 was initiated to amend Subst. R. §26.34 to consider bonding requirements for telephone prepaid calling service providers. The proposed rule has a scheduled publication date of October 2000 and a target adoption date of January 2001.

Payphones. Project No. 20787 was initiated to review payphone compliance with customer service provisions of PURA. It was adopted in March 2000. As a result of this review, the PUC repealed Subst. R. §23.54 and added new Subst. R. §§ 26.102 and 26.341-26.347.

House Bill 1777

House Bill 1777 sought to promote competition by providing a uniform means for compensating municipalities for the use of public rights of way by telecommunications utilities. It established procedures that were administratively simple, competitively neutral, nondiscriminatory, and consistent with federal law. It was signed into law by Governor Bush on June 19, 1999. Project No. 20935 was initiated to implement the provisions of the new Section 283, Local Government Code, as added by the bill. Several separate rules were adopted, and the project is completed.

Access Lines. House Bill 1777 required the PUC to establish no more than three categories of access lines. Subst. R. §26.461 establishes three competitively neutral, nondiscriminatory categories of access lines for statewide use in establishing a uniform method for compensating municipalities for the use of a public right of way by certificated telecommunications providers (CTPs).[14] CTPs urged the PUC to establish no more than one category for administrative simplicity. Municipalities, on the other hand, unanimously requested the establishment of three categories. The PUC adopted three categories—residential, non-residential, and point-to-point lines—to provide municipalities with the flexibility to design municipal rates for their citizens. The three categories would also allow municipalities to establish a lower rate for residential consumers compared to business customers. This rule was adopted in October 1999.

Subst. R. §26.465 establishes a uniform method for counting access lines within a municipality by category, as provided by §26.461, and sets forth certain reseller obligations. The provisions of this section apply to all CTPs and Texas municipalities. The PUC adopted rules to require CTPs to count one access line for every end-user in a manner consistent with the definition of access lines in House Bill 1777.[15] This rule was adopted in January 2000.

Subst. R. §26.467 establishes rates for categories of access lines, default allocation for municipalities, adjustments to the base amount and allocation, municipal compensation, and associated reporting requirements. Municipalities objected to a proposal that the default allocation of the costs of categories of access lines be set at a ratio of 1:1:1. The PUC revised its original proposal and adopted an allocation ratio that was an average of the cost ratios submitted by all CTPs, which was 1:2.3:3.5[16]. This rule was originally adopted in February 2000. After a minor date change to the rule, it was republished and adopted in May 2000.

Base Amount. Subst. R. §26.463 establishes a uniform method for determining a municipality's base amount and for calculating the value of in-kind services provided to a municipality under an effective franchise agreement or ordinance by CTPs. It sets forth reporting requirements. This section applies to all Texas municipalities. The cities and the CTPs were divided in their opinion over whether the accounting methodology used to calculate the 1998 base amount should be based on a calendar year or a fiscal year. There were also significant disagreements on whether to use cash- or revenue-based accounting methods to calculate that base amount. Several cities also argued that escalation provisions were perpetual, and that the base amount would have to be adjusted every year by the amount of escalation provisions in terminated contracts.

[14]CTP is a term used in the Local Government Code to mean entities holding a CCN, COA, or SPCOA. It is functionally equivalent to the term CTU, which is used throughout PURA.

[15]§283.002(1), Local Government Code.

[16]The ratio means that, on average, a non-residential line involves 2.3 times the cost of a residential line, and a point-to-point line involves 3.5 times the cost of a residential line.

Potential Impediments to Competition

Submitted by AT&T
Hot cuts
Glue charges imposed for combining UNEs
Access to multiple dwelling units
Proposals to increase regulation of CLECs

Submitted by CLEC Coalition
Affiliate issues; discriminatory access or conduct by ILEC
LRIC and TELRIC pricing; above-cost charges for switched access service
Access to compliance & performance data
ILEC bundling of regulated & unregulated charges
Fallout of directory listings

Submitted by Covad
ILEC performance in delivering copper loops
Operating systems & other database issues

Submitted by Teligent
Service outages & system performance issues

Submitted by Consumers Union
Billing problems, delays in getting service; customer confusion
"Make whole" provisions of PURA
Expanded local calling surcharges; rate group reclassification
Market issues; mergers; deregulation preceding competition

Submitted by Southwestern Bell
Pricing flexibility provisions; customer-specific pricing
Tariff filings vs. same-day price lists
Lack of parity in quality of service standards & reporting requirements
Prohibition against providing long distance; other federal issues
Selective entry into rural or under-served areas

Representatives from GTE, MCI WorldCom, and Sprint were invited but declined to submit items.

The adopted rule requires cities to use calendar year 1998 as the base year for calculating the 1998 base amount. It gives cities the flexibility to use revenues "due" for calendar year 1998 to calculate the base amount for that year. The PUC disagreed with the cities that the escalation provisions were perpetual. The adopted rule allowed escalation only until March 2000, the date by which rates must be established by the PUC. Escalation provisions in terminated contracts do not carry over beyond March 2000, as there is no mention in the statute about revising the base amount by escalation every year. This rule was adopted in October 1999.

Potential Impediments to Competition

The Texas market for local exchange services is still evolving from a regime of protected, regulated monopolies to a truly competitive marketplace populated with dozens of alternative, largely unregulated rivals. The subcommittee explored issues that could impede the development of competitive markets for local exchange services, particularly for residential consumers. Several representatives of the telecommunications industry and consumer groups were asked to submit a list of "potential impediments" that they believe could limit or delay competition for local exchange services. They were not limited to discussing items for which they had a particular legislative proposal. In fact, they were instructed to include matters outside the Legislature's jurisdiction and items that were specific compromises made in Senate Bill 560, so

long as they were viewed as potentially impeding local competition. Participants submitted a total of 37 items. Several parties submitted substantially similar or related topics that were grouped together. The final, condensed list of 21 items was provided to all interested parties.

Summary of Testimony

The subcommittee accepted invited testimony related to potential impediments to competition during its hearing on May 10, 2000. The party raising particular issues spoke first, followed by other interested commenters. Testimony was taken in the form of a panel discussion, with several commenters weighing in on individual issues. Testimony is summarized here by issue.

Issues Raised by Consumers Union

JANEE BRIESEMEISTER of Consumers Union said consumers who are interested in a "large bundled service package" are beginning to have choices among competitive providers. However, "there's not a lot of competitive activity" for consumers who want only basic service with one or two additional add-on services. If there is "no competition for those customers, then we'll see local rates going up" once the rate freeze expires. Some of the add-on items, such as caller ID, have increased in price for customers who purchase them a la carte. Some prices have decreased, but those are mostly for business customers.

May 10, 2000
Subcommittee on Telecommunications
Witness List

Potential Impediments to Competition
Janee Briesemeister, Consumers Union
Robin Casey, a coalition of CLECs
Eric Drummond, a coalition of CLECs
Carl Erhart, GTE
Chris Goodpastor, Covad Communications
Kathy Grant, a coalition of CLECs
Michael Jewell, AT&T
Charles Land, Southwest Competitive Telecommunications Association
Dave Lopez, Southwestern Bell
David Turetsky, Teligent
Pat Wood, Public Utility Commission of Texas

Customer Confusion. "Confusion has been around since day one with telephone competition." Customers who try to switch telephone companies have had problems such as not getting their bills, getting bills that are inaccurate, encountering long delays in having their service switched on, or being dropped from directory listings. "No one wants to venture out and try a new company if they're hearing these horror stories about not being able to get service." The message consumers are getting is, "it's better to stay where you are." These problems are being worked on. Once they are worked out, then "we need to tell consumers that it's okay" to switch. **MICHAEL JEWELL** of AT&T said "there's growing pains in the industry," and the different companies are working together to resolve problems, such as the highly publicized billing problems AT&T had in the Dallas/Fort Worth area.

MS. BRIESEMEISTER said customers are also confused when shopping for services, because the bundling of service packages and monthly fees makes it difficult for consumers to tell whether they are "getting a good price for this service." What is needed is for the PUC to "come up with ways to express price, terms, and conditions of service in a standardized way to allow consumers to compare offers." Shopping for long distance calling plans and wireless service is also confusing, and consumers are getting frustrated that they are "really paying for services that they're not using." **MR. JEWELL** replied that "different offers benefit different customers, and that's a good thing." There is balance between making it easier to compare services "apples to apples" and packaging services together to benefit different kinds of customers.

ROBIN CASEY, representing a coalition of CLECs, said "double billing occurs in a disturbing number of instances" when a CLEC wins a customer from Southwestern Bell. In some instances, a credit bureau has contacted the customer on behalf of Southwestern Bell. This problem, along with others identified by Consumers Union, makes it difficult for CLECs to attract customers. **MS. CASEY** was not able to determine what percentage of CLEC customers are double-billed. **DAVE LOPEZ** of Southwestern Bell pledged to work with the CLECs to resolve the problems.

CHARLES LAND of the Southwest Competitive Telecommunications Association said simplified billing for a bundle of resold integrated services digital network (ISDN) lines and basic telephone services "hasn't worked well." Customers want to compare bills and are "probably more confused and more standoffish" when they cannot compare between providers. When the bundle is rolled up into one price, it looks higher than Southwestern Bell's price, because the Southwestern Bell bill is broken out into more specific charges. Rolling up the non-optional surcharges into one number may provide simplification without sacrificing the consumer's ability to make price comparisons.

MS. BRIESEMEISTER said consumers need to be able to see all of those surcharges. Instead, it is the bundled rate for a package of services that requires simplification. Each service in a package should be separately priced, so the consumer does not pay for services included in the package that the consumer did not know about and does not want. Pricing individual components of a bundle would better enable consumers to compare offers "without hiding the ball on what these fees and surcharges are."

CHAIRMAN WOOD said consumers are confused by offers that do not include the fees and surcharges. For example, consumers may choose a new carrier because it advertised a plan at $29 a month. When the bill comes, they learn that it actually costs $43 a month once all of the taxes and surcharges are added. Then the consumers switch back, because they believe they have been misled, and to some extent they have been.

Delays in Getting Service. **MS. BRIESEMEISTER** said many consumers were experiencing long delays in getting service. Publicity over these delays is hurting competition and making it more

difficult for CLECs to win customers. **CHRIS GOODPASTOR** of Covad Communications said delays in delivering DSL loops are harming Covad's ability to compete with Southwestern Bell as an alterative broadband provider. Consumers will not choose Covad as a provider if they can obtain the service from Southwestern Bell faster. The PUC has set "very discrete deadlines for delivery of these services to competitors," but Covad is finding that Southwestern Bell is not complying with those deadlines.[17]

CHAIRMAN WOOD said the order process designed to make the switch work has come under fire from the CLECs during FCC proceedings on Southwestern Bell's 271 application. When a CLEC orders service, that order is split into three parts: disconnect, new connect, and change service. Splitting the orders has created opportunities for more problems. "Everything you do to fix a problem has a downstream impact" on other services.

"Make Whole" Provisions of PURA. **MS. BRIESEMEISTER** said there are several provisions of PURA that are "particularly incompatible with a competitive market." Rate group reclassification involves a "very old monopoly system" where basic phone rates are directly related to the size of the city. Under this scheme, Houston "has the highest local phone rates because it is the largest city." As cities increase in size, the rate is allowed to increase. However, it actually "costs less per line" to provide basic service in more densely populated areas.

PURA allows Southwestern Bell to increase the basic local rate, which is otherwise capped, under rate reclassification, even though the increase is "completely unrelated" to cost of service. All of these kinds of "make whole" provisions should be "put on the table," because they no longer make sense in a competitive market. Phone rates should continue to subsidize "what needs to be subsidized," specifically universal service, low-income programs, and affordable service in rural areas.

MR. LOPEZ said the Legislature and the PUC correctly looked to introduce competition as quickly as possible, but now it is time "to go back and relook and say, 'Are some of these historical things still appropriate in today's environment?'" Many of the "make whole" provisions cited by MS. BRIESEMEISTER are "part of the compromise that's developed each time … legislation has been passed."

CHAIRMAN WOOD said various subsidies allow residential retail rates to be "about half what the business rate is" even though it is essentially the same service. The state of Florida considered raising the residential rate as a means of jumpstarting competition, but here in Texas, "it's the

[17]In September 2000, SBC Communications announced that it was acquiring a 6 percent stake in Covad Communications for $150 million. Covad would become the principal DSL provider for SBC, giving Covad at least $600 million in new revenues over six years. The deal settled all of the legal, antitrust, and regulatory disputes, including interconnection arbitrations, between the companies. See Covad Communications news release, "Covad and SBC Form Marketing Agreement to Deliver Broadband Nationwide" (September 11, 2000).

third rail—we're not going there." The PUC agreed with Consumers Union on the rate group reclassification, and is in court with Southwestern Bell over that issue.[18] Southwestern Bell is treated differently under PURA because it is bigger and because it cannot replace lost revenues with TUSF funding as some of its competitors are allowed to do.

Issues Raised by Southwestern Bell

Pricing Flexibility. **MR. LOPEZ** said Senate Bill 560 prohibits Southwestern Bell from offering customer-specific pricing that includes basic telephone service.[19] Though it is able to provide customer-specific pricing on other services, consumers "may lose out on a potential bidder in Southwestern Bell that will be able to drive the price down." This prohibition was one of the many compromises that were part of Senate Bill 560, but it is something that should be monitored now. As the marketplace evolves and becomes more competitive, then it makes sense to address this prohibition as part of a global reduction in regulation for all telecommunications providers.

When it utilizes its pricing flexibility, Southwestern Bell is required to file "extensive information, some of which is proprietary, whereas competitors have a single page." This takes away administrative resources from the ILEC that a competitor is simply not having to invest. CLECs are able to offer their prices on the same day they file, but Southwestern Bell's pricing changes cannot take effect for 10 days.[20] This too was a compromise in Senate Bill 560.

MR. JEWELL said the PUC's "authority to stop a pricing flexibility when there's a competition problem" is an important component to Senate Bill 560. It is important to realize that the market is transitioning from a monopoly to a competitive environment. Many of these detailed reporting requirements "have been imposed for good reasons in order to avoid competitive problems." There will come a time when these requirements are no longer needed, but not yet. **MR. LAND** agreed that "the dominant incumbent companies and their customers need some greater depth of rules" until the market becomes fully competitive.

Customer Service Standards. **MR. LOPEZ** said customer service standards should apply to all providers, at least in the sense that there should be "basic requirements of service for any

[18] *Southwestern Bell v. PUC*, ___ S.W.2d ___ (Tex.App.—Austin 2000). The Third Court of Appeals has ruled that the PUC erred when it changed the rate group boundaries for Austin and Dallas, and it erred when it excluded access line growth in determining the rate freeze. Motions for rehearing are pending as of the writing of this report.

[19] PURA §58.003.

[20] PURA §52.0583.

customer regardless of who their provider is." Right now, most customer service standards apply to ILECs. At a minimum, companies that seek TUSF funding should be all subject to the same requirements. Customer service should not be diminished, and there should be "uniformity and protection for all customers, not just ours."

MR. JEWELL said the PUC does not have to impose the same rules on ILECs and CLECs "in order to maintain the same quality of service and customer protection." The systems of the incumbents have evolved over years under a rate-of-return regime. Competitors are developing their systems while trying to find the optimum, cost-effective way to provide services. "A flash cut requirement" that CLECs comply with the same rules applicable to ILECs would be a "show-stopper." Such a requirement would involve a "significant diversion of resources to overhaul systems that are not necessarily for the customers' benefit."

Issues Raised by CLECs

Affiliate Issues. **MS. CASEY** said the legal obligations imposed on an ILEC should not be "diminished or eliminated" if a service is transferred from the ILEC to its affiliate. The PUC must be able to examine relationships between ILECs and their affiliates, and it is proposing rules to do so. The FCC has no rules regarding affiliates of local exchange companies.

LRIC and TELRIC Pricing. **MS. CASEY** said Senate Bill 560 established a price floor for retail pricing flexibility based on LRIC. The standard adopted by the PUC "uses different parameters" than the TELRIC standards for wholesale prices to CLECs. Because they are different standards, a product can be priced above LRIC and still below TELRIC, which would mean that the retail price offered to the ILEC's customers is below the wholesale price offered to CLECs.

The PUC has proposed a pricing flexibility rule that presumes a price is anticompetitive if it is below TELRIC. Such an outcome is not inconsistent with Senate Bill 560 if it is considered "in context with the whole statute." Amending LRIC would be "an enormous undertaking," so the PUC's proposed rule will make sure that there is no anticompetitive pricing.

MR. LOPEZ said that there have been five complaints lodged against Southwestern Bell's more than 200 price flexibility filings. That, coupled with the number of customers the CLECs are taking away from Southwestern Bell, seems to indicate that the flexible prices being proposed by the company are "working well." The PUC is addressing the pricing issue and "already gone ahead and ruled on how unbundled network elements, for example, are priced appropriately."

CHAIRMAN WOOD said that price flexibility offerings cannot be discriminatory, preferential, prejudicial, anticompetitive, or predatory—the "five deadlies of price." Prices are presumed to be non-predatory if they are above LRIC. However, a price can be non-predatory but still have

"an anticompetitive tinge." The PUC published a draft rule that would presume a price that is set above TELRIC is not anticompetitive.

MR. JEWELL said switched access rates continue to be above cost, which is a competitive problem in areas where Southwestern Bell can offer intrastate long distance at rates that are below the access charges paid by competitors. The PUC is undertaking a study that will look at switched access rate reform. **MR. LOPEZ** replied that the balance is between lowering those rates and keeping "the bargain on basic local service," as it is the long distance customers who subsidize basic local service. About half the states have a switched access rate lower than Texas, but only six states have a basic local service rate below Texas.

CHAIRMAN WOOD said there are three potential options for reducing switched access rates further: the company absorbs it, price flexibility is used to make up the difference, or it is left on the long distance bill. The PUC is looking at the issue from the perspective that "everything is on the table."

Access to Performance Data. **MS. CASEY** said CLECs review Southwestern Bell's performance and compliance data, but they have had "problems with getting access to that data." At times, the PUC staff has intervened, but only after several months of delays. Allowing CLECs access to the data "should not have to rise to the level where the PUC has to order Bell to do it." CLECs are also participating in PUC workshops to develop performance standards. There is no need for new legislation.

MR. LOPEZ said the PUC has established over 120 different measures of Southwestern Bell's performance with respect to interfacing with CLECs, and those break down into "about 2,000 different submeasures." The PUC is looking at Southwestern Bell's performance "on a global basis," and it has remedies and penalties available to it if performance standards are not being met.

Fallout of Directory Listings. **MS. CASEY** said CLECs have had a number of complaints, some ongoing for months, about their customers disappearing from directory listing databases. In order to ensure that their customers are still listed, CLECs are having to make directory assistance calls for every customer. "We know the problem appears to be related to orders not being completed in Southwestern Bell's back end office systems." The CLECs want to work with Southwestern Bell to eliminate the problem.

Issues Raised by AT&T

Hot cuts. **MR. JEWELL** said long outages related to poorly coordinated hot cuts leave customers without telephone service and with a "bad taste in their mouth with regard to the whole idea of

changing providers." Hot cuts require the ILEC and the CLEC to coordinate work crews to move the loop, during which time a customer's telephone service is disconnected. The companies should have a goal of limiting the outage to no more than a few minutes, but currently the outages "last much longer." Being without phone service for several hours means lost business. The FCC and PUC have established performance measures that define "an acceptable level of outages," but that data indicates that problems are occurring.

ERIC DRUMMOND, representing a coalition of CLECs, said reviewing performance measures is not an adequate remedy for a CLEC that loses a customer over a hot cut, particularly if the cut is made prematurely by the ILEC. The companies involved agree on a time that the hot cut will occur. Disruption of service will be minimal if both companies' crews are there at the same time. However, if the ILEC's crew is early, then the disruption is longer. The PUC may assess a penalty when the performance measures are not met, but that penalty is not an adequate remedy if the CLEC "has spent a lot of time and energy gaining the confidence of that customer."

MR. LOPEZ said Southwestern Bell has complied with 58 of the 64 performance measures related to hot cuts. The other six require the company to perform at a 100 percent level, which it has not met. The data suggest that Southwestern Bell is "getting better on the process." It is collaborating with CLECs and the PUC to improve the process, not just measure it.

Glue charges. **MR. JEWELL** said the PUC established the "glue charge" during its efforts to get Southwestern Bell to unbundle its network elements, and that has turned out to be a mechanism by which CLECs "hemorrhage money to Southwestern Bell." These charges are paid to Southwestern Bell by CLECs when a customer switches to the CLEC. They are paid up front, which means that a customer must remain with the CLEC for at least several months before it recovers that cost. If the customer switches back, or to another CLEC, the CLEC is out the glue charge.

The charges apply only to customers switching from an ILEC, not another CLEC, so there is no glue charge going to a CLEC that loses a customer. However, Southwestern Bell had recently suspended assessing this glue charge while a petition from AT&T and MCI WorldCom are pending at the PUC.[21]

Access to Multiple Dwelling Units. **MR. JEWELL** said a disagreement has arisen between AT&T and Southwestern Bell when it comes to serving residential customers in apartments. The companies disagree as to whether the connection between AT&T and the end-users should occur at the single point of interconnection, where Southwestern Bell has facilities, or "all the way to

[21]As of September 20, 2000, Southwestern Bell was accruing the glue charges, pending the PUC's actions on those petitions. See *AT&T v. Southwestern Bell*, Docket No. 21622, and *MCI WorldCom v. Southwestern Bell*, Docket No. 22290.

the end-user's apartment." Southwestern Bell has taken the position "in many instances" that AT&T must go all the way to the end-user's apartment, which incurs additional costs to AT&T "if we can even get to the customer." Going all the way to the apartment also "delays the ability of a residential customer to take advantage of a competitive" AT&T offer.

The wires from the point of interconnection are owned either by the apartment complex or Southwestern Bell. The FCC has ruled that Southwestern Bell is obligated to make the wires it owns available to the CLEC, which in turn must pay Southwestern Bell for that portion of the loop. The two companies are working to reach an agreement. It has not been raised to the PUC.

DAVID TURETSKY of Teligent said his company can provide service only if it can gain access to the building to install its rooftop antenna and connect tenants' equipment to it. In 1995, the Legislature passed a law requiring building owners to provide access to CLECs on a nondiscriminatory basis.[22] The law is triggered by tenants' requesting the competitor to provide service in the building, and the competitor must pay just compensation for access to the building. Passage of this law inspired Teligent to launch its services in Texas.

Tenants do not have much leverage when it comes to telecommunications services. Without this law and the PUC's rules to implement it, tenants would not have meaningful choices among providers of telecommunications services. Building owners are concerned about the PUC's rules, but those rules represent a reasonable compromise in that "nobody is taking anything without paying for it." The landlord determines the compensation, and then it must be applied to every provider of telecommunications services on a nondiscriminatory basis.

CHAIRMAN WOOD said a single tenant may trigger the law. However, it does not follow that any building would be opened up to dozens of providers serving one or two tenants each. The provider may not be willing to make an investment to wire a building just for one tenant.

Issues Raised by Covad

Delays in Delivery of Copper Loops. **MR. GOODPASTOR** said all DSL competitors "get a bad name" when customers order service from a CLEC and "have to wait three months" to get it. When that happens, the customer is going to blame the CLEC, not the incumbent. No ILEC should discriminate against a CLEC's customers by supplying copper loops to its own customers faster than the CLEC's customers. No incumbent should use CLECs' orders for copper loops to market its DSL services, and no technician working for an ILEC should offer to install the

[22]PURA §§ 54.259-54.261. In October 2000, the FCC issued new rules barring commercial building landlords from making exclusive deals with local exchange companies. The rules also require those landlords to give competitors access to areas of their buildings where equipment must be installed.

incumbent's service instead of the competitor's when delivering the loop. **MR. LOPEZ** said such activities would violate Southwestern Bell's code of conduct. If the facts of the cases cited by Covad indicate "any sort of misconduct, they'll be dealt with very severely."

Issues Raised by Teligent

System Outages. **MR. TURETSKY** said there are no standards for system outages that include penalties or reparations when the outage is caused by an ILEC. On two recent occasions, all calls to Teligent's Austin customers were not completed, resulting in a "total outage" that lasted 12 hours. The next day, another outage affected Teligent's Austin customers, and Teligent lost some of those customers. For a CLEC, "our reputation and our customer base … are very much in a different level of security" than an established incumbent's.

In this case, everyone else in the building except for Teligent's customers had service. Psychologically, Teligent's customers conclude, "I made the decision to go with a CLEC, and now I'm out." All of the other rules are important, but they will not be worth much if ILECs can "knock the competitor off the air for 12 hours here and there." **MR. LOPEZ** said it was human error on the part of Southwestern Bell in both instances. The proper remedies are a "subject for discussion with the courts right now."

Iowa Utilities Board v. FCC

Several ILECs and their industry associations challenged various aspects of the FCC's First Report and Order to implement the Telecommunications Act of 1996.[23] Those challenges were consolidated into *Iowa Utilities Board v. FCC* ("*Iowa I*").[24] In that case, the Eighth Circuit Court of Appeals concluded, in relevant part, that the FCC exceeded its jurisdiction in promulgating various pricing rules and various unbundling rules. The U.S. Supreme Court affirmed in part, reversed in part, and remanded.[25]

On remand, the Eighth Circuit was required to review on the merits the FCC's forward-looking pricing methodology, proxy prices, and wholesale pricing provisions.[26] In addition, the court was

[23] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996).

[24] *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997)(*Iowa I*).

[25] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

[26] *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000)(*Iowa II*).

asked, in relevant part, to vacate the FCC's rules regarding the identification of additional UNEs and reaffirm its decision to vacate the superior-quality and the additional combination of network elements rule. In general, the court threw out the relevant FCC rules.

The most significant of these was the FCC rule that utilized a forward-looking economic cost methodology, based on TELRIC, to set rates for interconnection and UNEs.[27] These costs were based on an ILEC's existing wire center locations using the most efficient technology available in the industry, regardless of the technology actually used by the ILEC and furnished to the CLEC. State commissions were required to employ TELRIC to determine the price that an ILEC may charge for the right to interconnect and the use of UNEs. Petitioners contended that the TELRIC method violates the plain language of the Act and represents arbitrary and capricious decision-making. In particular, the FCC's use of a hypothetical network standard cannot be seen as consistent to the Act's language, which points "inescapably to the actual costs the ILEC incurs."[28] The Eighth Circuit agreed and consequently vacated and remanded the rule.

A number of other FCC pricing rules and methodologies used to identify and price UNEs were also vacated by the court and remanded to the FCC. However, their specifics are not necessary to understand the potential impacts of the decision, which, according to the PUC, are "minor."[29] None of the rules implementing Senate Bill 560 are impacted by the decision. The PUC did not use the hypothetical network standard thrown out by the Eighth Circuit. In fact, when the PUC set wholesale prices in its 1996-97 arbitrations, the FCC rules had been stayed on the jurisdictional issues raised in *Iowa I*.

Most, if not all, parties renewing interconnection contracts with Southwestern Bell are using the Texas 271 Agreement (T2A) prices, which were the 1996-97 arbitration rates.[30] However, the PUC assumed use of the most efficient currently available technology in the network, which may vary from actual technology used in the network. If *Iowa II* stands, Southwestern Bell may opt to have the PUC review wholesale prices contained in T2A for business customers after October 2001 and for residential customers after October 2002. At this time, it is unknown whether such a cost study review would result in higher or lower wholesale prices. Permanent rates for co-location of facilities will be established by the PUC by the end of 2000.

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[27]47 C.F.R. §51.505(b)(1).

[28]47 U.S.C. §252(d)(1) provides that the just and reasonable rates for interconnection or use of network elements shall be "based on the cost (determined without reference to a rate-of-return or other ratebased proceeding) of providing the interconnection or network element." The rate shall be nondiscriminatory and may include a reasonable profit.

[29]Public Utility Commission of Texas, "Impact of Recent Court Decision Regarding the FCC's TELRIC Pricing Methodology" (submitted August 17, 2000).

[30]Contracts with Verizon (formerly GTE) are currently being renegotiated.

On September 22, 2000, the Eighth Circuit granted the FCC's motion for partial stay of mandate pending the filing and ultimate disposition of a petition for *certiorari* with the U.S. Supreme Court. Specifically, the court stayed its decision to vacate the TELRIC pricing rule.

Bringing Competition to Rural Texas

In terms of the advent of local exchange competition and the rollout of advanced services, rural Texas lags behind urban areas of the state. The primary reason is economic. Because customers are more widely dispersed, the cost of serving them is higher than those who live in a more densely populated area. In addition, the economics of rural life result in lower demand for some services that can result in a lower penetration of these services than in urban areas.

The federal Universal Service Fund (USF) was created in part to promote the availability of quality telecommunications services at just, reasonable, and affordable rates, particularly for consumers with low incomes or who live in rural, insular, and other high cost areas. USF funding is provided to certain telecommunications providers that offer services to rural areas at rates that are reasonably comparable to those charged in urban areas.

In 1987, the Texas Legislature established the TUSF to subsidize local exchange service in high-cost rural areas, fund programs for the hearing-disabled, and support programs that reduce monthly bills for low-income Texans. It is financed by a 3.96 percent charge applied to all taxable telecommunications receipts, and the PUC expects the fund to collect $550 million in 2000. Of that, nearly $495 million will go to the Texas High Cost Universal Service Plan, which subsidizes telephone service in high-cost rural areas served by large phone companies, and to the Small and Rural Service Plan, which subsidizes smaller companies that provide affordable service in rural areas.

TUSF should not be confused with the Texas Infrastructure Fund (TIF), which provides grants and loans to fund the provision of equipment and training to enable public schools, hospitals, and libraries so that they can utilize advanced services.[31]

Summary of Testimony

The subcommittee invited testimony from representatives of several telecommunications providers to learn more about the prospects of residential competition and the availability of advanced services in the state's rural areas during its hearing on May 10, 2000.

[31]PURA §57.046.

DAVID RACKLEY of SBC Communications said Web merchants are still "addressing the low bandwidth users" because they understand that many people do not have broadband Internet access. They may offer alternative Web sites, such as those that are solely text-based, to reach the broadest market of e-commerce shoppers. Industry expects to serve low bandwidth users into the future, because applications for most cell phones, Palm Pilots, and paging devices rely on low bandwidth connections to the network. Large businesses may need fast servers and fast connections to put their Web sites up, and many are outsourcing their Web site hosting and credit card transacting to other e-businesses. Consumers and most smaller businesses do not need a broadband connection to transact business on a Web site. All that is needed is plain old telephone service (POTS).

May 10, 2000
Subcommittee on Telecommunications
Witness List

Bringing Competition to Rural Texas
Brook Brown, Valor Telecommunications
Jose Camacho, Valor Telecommunications
Dennis Conti, Hughes Network Systems
Carl Erhart, GTE
Dave Lopez, Southwestern Bell
David Rackley, SBC Communications
Suzie Rao, Western Wireless
Thomas Ratliff, Western Wireless
Mickey Sims, Valor Telecommunications
Pat Wood, Public Utility Commission of Texas

JOSE CAMACHO and **MICKEY SIMS** of Valor Telecommunications said their company is "exclusively a small rural community service provider." The company was formed in September 1999 to purchase some of GTE's rural exchanges in West Texas, East Texas, and the Texarkana area, plus rural exchanges in parts of New Mexico and Oklahoma. Provisions of Senate Bill 560 require certain telecommunications companies, including GTE, that provide advanced services in their urban territories to offer those services to rural exchanges as well.[32] Although Valor would not be required to do so under those provisions, it is nonetheless committed to "expanding the availability of advanced services."[33]

SUZIE RAO of Western Wireless said her company provides local exchange services using its wireless systems in 19 states west of the Mississippi River, including Texas. Its footprint covers 25 percent of the U.S. land area but only 2 percent of the population. The company provides service via a wireless local loop, which is an antenna and wireless access unit installed on the customer's residence. Any "regular $19.99 Wal-Mart phone" will plug into the unit and utilize the wireless connection. Advanced services would be provided as well, but the technology is limited to narrowband data transmission. The company uses its existing cellular towers and

[32]PURA §55.014.

[33]Under a PUC order signed June 15, 2000, Valor will upgrade central office facilities to provide custom local area signaling services (CLASS) such as caller ID, call waiting, and three-way calling; provide CLASS to all exchanges within 18 months; introduce high-speed Internet access or DSL service to at least 10 exchanges within 18 months; deploy DSL within 15 months to any exchange with at least 75 requests from Valor customers; and guarantee Internet service to every local exchange within 18 months.

other equipment to provide service, meaning that it can be rolled out very quickly. Before it can roll out its "universal service offering" in Texas, Western Wireless must first obtain eligible telecommunications carrier (ETC) status from the PUC. Within "a couple of weeks" after receiving ETC status for Minnesota, Western Wireless rolled out local exchange service in 40 communities.

DENNIS CONTI of Hughes Network Systems said his company, through its DirecTV subsidiary, is working to shrink the digital divide between rural and urban areas using satellites, which do not require an extensive ground-based infrastructure to deliver services to rural citizens. There is no need to coordinate the use of local radio spectrum, as is the case with wireless technologies. There is also no distance limitation as with ground-based DSL. By the end of 2000, the company will be offering equipment that is capable of two-way broadband transmission at retail stores throughout the U.S.. All DirecPC systems manufactured before the end of 2000 require a land-based telephone line to handle upstream data traffic from the customer. By 2003, speeds via satellite should exceed those currently available over a T1 connection, in both directions.

Discussion

In his presentation to the Select Committee on Rural Economic Development, PUC Commissioner Brett Perlman said advanced services capability and high-speed Internet connectivity will play an important role in the rural Texas economy.[34] Access to high-speed connectivity enables businesses to locate and thrive in rural areas, allows rural businesses to compete in the dynamic e-commerce marketplace, provides opportunities for rural doctors to utilize tele-medicine, and empowers rural residents to take advantage of distance learning.

Only about 14 of the state's roughly 1,550 telephone exchanges have no access to an ISP using a local telephone call. The availability of high-speed Internet access is substantially less. Technological and economic solutions are needed to reach Texans who live outside of urban areas and smaller rural cities. Commissioner Perlman suggests that policymakers may have a role to play in accelerating the rollout of advanced services and the development of competition to rural areas. Encouraging the deployment of new technology, aggregating demand for high-speed services, providing private and public grants, and developing tax incentives are options available to policymakers to decrease the digital divide between urban and rural Texans.

The PUC will issue its report to the 77th Legislature on the availability of advanced services in high-cost and rural areas by January 2001.

[34]Brett Perlman, "Interstates and Dirt Roads: High Speed Connectivity in Rural Texas," testimony before the Select Committee on Rural Economic Development (June 15, 2000).

Wireless Facility Siting

As the demand for wireless services and seamless coverage increases, wireless providers are constructing new towers at increasing rates. As of the end of 1999, there were 81,698 commercial cellular towers nationwide, representing an increase of 24 percent since 1998 and 260 percent since 1995.[35] Those figures do not include towers that service paging companies, broadcasters, and other types of telecommunications services.

Wireless towers vary in height from several dozen feet to nearly 500 feet, depending on their location, their coverage area, and the type of service they support. In general, towers must be taller as they become more dispersed. The type of service provided also dictates the tower's height. For example, Personal Communications Service (PCS) towers generally cannot be taller than 100 feet because of the limitations of those handheld devices. However, analog cellular and paging towers can be much taller. One wireless company operating in the Western U.S. reported that it operates more than 1,000 towers at an average height of 300 feet. Those towers, along with all of the towers belonging to other wireless carriers, support nationwide networks of services that are relied upon by more than 100 million U.S. subscribers.

Comparing Tower Heights

San Jacinto Monument	570 feet
Washington Monument	550 feet
GTE Tower in Bastrop Co.	480 feet
State Capitol	308 feet
UT Tower	307 feet
Mid-size Cellular Tower	260 feet
Moonlight Tower (Austin)	160 feet
PCS or Small Cellular Tower	130 feet

From various sources.

According to the cellular industry, "site selection is not a random process." Factors taken into account include the overall cellular grid pattern and service area, usage patterns, topography, and potential obstructions to line-of-sight signals. "In urban and other residential areas, care is taken to choose locations that are as unobtrusive as possible." Community interests, "including the views of nearby residents," are taken into account in locating antennas. "Extensive consultation before antennas are constructed generally involves a variety of groups and officials—local community zoning boards and county and municipal governments."[36]

Despite these pledges, a growing number of rural and suburban Texas residents are finding themselves living and working near a wireless tower. Residents who live in unincorporated portions of counties presently have no alternative outside of private negotiation to influence the

[35]Cellular Telecommunications Industry Association (CTIA), Semi-Annual Wireless Industry Survey, 1985-1999 (2000), available online at www.wow-com.com/wirelesssurvey, accessed September 18, 2000.

[36]Summarized from the CTIA Web site's "Frequently Asked Questions and Fast Facts," available online at www.wow-com.com/consumer/faqs/faq_antennas.cfm, accessed September 18, 2000.

siting of wireless facilities in their neighborhoods. With several limited exceptions, zoning authority in Texas ends at the city limit.

Summary of Testimony

CHAIRMAN WOOD said wireless towers must be taller as they get farther apart from each other to ensure adequate coverage. In urban areas, they are relatively short and relatively close together. Many urban towers are positioned on tops of buildings or other structures, which tends to mask their numbers. However, in rural areas, they are more widely spread out and there is a relative lack of other structures upon which they can be mounted. This results in very large towers, some in excess of 400 feet high, being sited in rural areas. Towers for paging services are the tallest. Co-location of different companies' equipment on the same tower is becoming more common. About 10 to 12 vertical feet is needed for each company, so four or five can share a fairly tall tower.

May 10, 2000
Subcommittee on Telecommunications
List of Witnesses

Wireless Facility Siting
Vivian Bauhof
Anne Beck
James Harris
Margaret Lambert, Bastrop County Audubon Society
Kimberly McCutcheon
John Prager, Bastrop County Environmental Network
Janet Roesler
Bette Stockbauer
Keith Surratt, GTE Wireless
Cindy Symington
Pat Wood, Public Utility Commission of Texas

Like cable, the regulation of wireless towers tends to be at the federal and local levels. There has been very little state involvement, except to say what local officials can and cannot do. Federal law does not preempt the states from regulating the siting of wireless facilities, except that no regulation may "unreasonably discriminate" against providers. No regulation can effectively eliminate the provision of wireless services, and decisions must be made in a "reasonable time." Federal law preempts regulations related to "health effects" of wireless facilities.[37]

One thing that seems to be clear is, "there are holes in Texas." Municipalities have zoning boards, but unincorporated areas in a county are not covered. Very few counties have any sort of zoning authority in Texas. Federal law would allow the state to grant zoning authority to counties to regulate the placement of wireless facilities. This could include regulations that encourage co-location of equipment or placement of the tower on existing structures, both of which would be useful in addressing "visual clutter" and landowner issues. Regulations could not ban a tower, but could "nudge a tower to a different location." Several states have created approval procedures that encourage towers to be placed on state land rather than in private

[37] 47 U.S.C. §332(c)(7).

neighborhoods. Others create incentives to place towers in areas that are zoned either commercial or industrial. For example, the state of Washington exempts towers that are less than 60 feet tall from regulation in an effort to encourage shorter towers.

JAMES HARRIS of Bastrop County said no public entity regulates the siting of wireless facilities in unincorporated rural areas. "All siting decisions are therefore made by the company building the tower with no formal process of input from local officials or citizens." At particular issue is a 480-foot GTE tower constructed in Bastrop County. MR. HARRIS said he learned of the tower when a construction truck "ran over" his water line. Perhaps something could have been done before the tower was already under construction, but the residents of the county were not informed of its planned construction and only learned of it once it had begun. There should have been a public hearing. There should be a comprehensive statewide plan for tower placement and co-location. "You need a permit to build a residential septic system, but in rural Texas, you don't need a permit to build a 480-foot cell phone tower."

BETTE STOCKBAUER of Bastrop County said the GTE tower in question is 1,200 feet from her house, where she has lived for 16 years, and 120 feet from power lines. When the magnetic fields in her house were measured, they were found to be "two to three times the maximum level advised as safe." In her garden area, "it is 15 times the limit." Because cancers related to high magnetic fields take 10 to 15 years to develop, she and her husband feel like they have "been living on a time bomb." Many studies are demonstrating hazardous health effects of higher frequency magnetic fields, such as those emitted by cellular towers. Other studies, including those funded by the industry, show little to no health effects. Funding should be set aside for "unbiased research into the many health issues" related to cellular equipment.

JANET ROESLER of Travis County said property values of neighborhoods are being reduced by the "visual garbage" of cellular towers that are sometimes placed without regard for the "neighbor who might be 50 feet away." A company contracted with a neighboring property owner to put a tower on her property so long as she did not tell anyone. Construction was noticed when another neighbor called to say someone was trying to steal firewood from the property. At that time, the property owner felt it was okay to tell her neighbor that she was letting the company build the tower. Now neighbors "started siding one against the other" in her neighborhood. Tower placement should be regulated, and deals made with landowners should not be secret.

KEITH SURRATT of GTE Wireless said the explosion in demand for wireless phones and the need to extend coverage into rural areas make the towers necessary. Marketing studies show that, alongside price, 45 percent of wireless customers said the most important feature of a wireless plan is "clear and reliable transmission." Another 37 percent said "a contiguous or an extended coverage area" was most important. People who use cell phones for security or who need to dial 9-1-1 for a roadside emergency depend on those calls going through.

"A significant amount of engineering effort goes into" tower placement to take into account customer usage and traffic patterns, topology, and reports of trouble spots. Once the best point for a tower is determined, a "small search area" is defined to look for a site. Most towers are placed on land leased from private landowners. GTE communicates with all federal and local government agencies concerning the placement of the tower and abides by all regulations. GTE registers all towers to the FCC and the Federal Aviation Administration (FAA). Because it is not always economical to build a tower, GTE looks for buildings upon which the antenna can be mounted or for an existing tower on which GTE can co-locate its equipment. When towers must be constructed, their emissions are monitored to ensure they meet federal standards, and they are built to withstand sustained hurricane-force winds.

ANNE BECK of Bastrop County said there must be a balance struck between the one landowner who receives money because of tower placement and other landowners whose property values decrease because of tower placement. Efforts currently being made by wireless companies to communicate with the community are not enough. Companies should be required to notify landowners "when they get ready to come into an area," via a notice in the newspaper and a registered letter sent to landowners within a mile of the proposed location. There should be a public hearing, "so questions can be answered." Companies should also be required to file a plat with the county that shows the tower location, the FAA and FCC permit numbers, and the telephone numbers and addresses for the companies who use the tower. There should also be requirements that a tower will be removed when it is no longer being used. **MR. SURRATT** said GTE's leases include provisions that call for removal of the tower and "the restoral of the land to as close to what it was before we came in."

JOHN PRAGER of Bastrop County said the towers are a substantial source of light pollution. **MARGARET LAMBERT**, representing the Bastrop County Audubon Society, said 4 million birds are killed each year in collisions with cellular towers and their associated wires. **CINDY SYMINGTON** of Bastrop County said her real estate agent told her that the market value of her house "can drop as much as 50 percent with a tower so close to your bedroom." A tower is located 50 feet from her son's bedroom window. **KIMBERLY MCCUTCHEON** of Bastrop County said she would "rather see a little regulation than a proliferation of lawsuits" arising from people trying to protect their property values from being reduced by a tower next door.

Discussion

Federal law permits state and local governments to regulate the placement, construction, and modification of wireless facilities, within certain limitations. No regulation may "unreasonably discriminate" among providers, and no regulation may have the effect of prohibiting wireless services in an area. A state or local government must act within a reasonable time on an application from a wireless provider. Any decision denying the application must be provided in

Preservation of Local Zoning Authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [FCC's] regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the [FCC] for relief.

47 U.S.C. §332(c)(7)

writing, with "substantial" written evidence. No permit may be denied because of health effects, so long as the tower complies with FCC standards. Adversely affected parties may commence an action in any court of jurisdiction within 30 days.

Federal law appears to permit states and local governments to establish procedures by which wireless operators obtain approval from the local government to site a wireless facility. Such procedures could involve specific requests for permission, or they could be limited to requirements for notification or a public hearing. State or local governments could not require co-location, but they could encourage companies to co-locate by expediting consideration of such requests. They could require that towers be constructed to accommodate multiple providers. A state or local government could limit the total number of towers in a given area and impose minimum distance requirements between the tower and other towers, schools, residences, or any other feature. It may be permissible for state and local governments to impose a moratorium on new tower construction for a limited period of time, so long as the ordinance does not have the effect of prohibiting wireless service or discriminating among providers.

In Texas, the power to exercise zoning regulation of "buildings and other structures" is conferred by the Legislature upon municipalities and, under very limited circumstances, certain counties.

Texas municipalities may by ordinance regulate the placement of wireless facilities under the general zoning authority they currently have.

Current law provides very limited zoning authority to counties that predominantly relates to "promoting the public health, safety, peace, morals, and general welfare and encouraging the recreational use of county parks." Cameron and Willacy Counties have authority over land located within two miles of a publicly owned park or recreational development, beach, wharf, or bathhouse used by at least 500 persons annually.[38] Several counties have limited authority to regulate areas around lakes.[39] El Paso County has limited authority to regulate development around the El Paso Mission Trail Historical Area. Several counties have very limited authority to regulate parking, speed limits, and photography in areas designated by the counties as "restricted military zones." This authority could be used to regulate tower placement in those areas.

There are several additional aspects of county zoning authority that demonstrate particular interests in preserving visual aesthetics. Counties may establish set-back lines from public roads and may prohibit the construction of buildings inside those lines. Counties may establish "visual aesthetic standards" for various kinds of outdoor businesses.[40] Certain counties may regulate outdoor lighting within 57 miles of McDonald Observatory if the lighting interferes with astronomical research. Certain coastal counties can order the demolition of bulkheads and other shoreline protection structures. Except as specified above, counties have no authority to regulate the placement of wireless facilities within their jurisdiction. Further, it does not appear that counties could require notification or public meetings under current state law.

Like Texas, most states regulate wireless facility siting using the zoning authority of municipal governments and counties, to the extent they are permitted to enact zoning ordinances.[41] In Congress, two bills have been introduced to remove restrictions placed on local governments' abilities to regulate tower placement, but they have not advanced in the legislative process.[42]

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[38]§231.011 et seq., Local Government Code allows the county commissioners of Cameron and Willacy Counties to regulate (1) the height, number of stories, and size of buildings and other structures; (2) the percentage of a lot that may be occupied; (3) the size of yards, courts, and other open spaces; (4) population density; (5) the location and use of buildings, other structures, and land for business, industrial, residential, or other purposes; and (6) the placement of water and sewage facilities, parks, and other public requirements.

[39]Lakes included are Amistad Reservoir, Cooper, Alan Henry, Ray Roberts, Somerville and Tawakoni.

[40]§238.002, Local Government Code applies to automotive wrecking and salvage yards, junkyards, recycling businesses, flea markets, demolition businesses, and outdoor resale businesses in unincorporated areas of the county.

[41]For example, Ohio grants to its county commissioners much of the same zoning authority in unincorporated areas as is given to cities within the city limits.

[42]HR 2834 by Rep. Sanders (I-Vt.) and S. 1538 by Sen. Leahy (D-Vt.) are substantially similar to bills they introduced in the 105th Congress.

Findings of the Subcommittee on Telecommunications

Competition among telecommunications providers is still at an early stage, but customers are seeing an increase in the number of competitors. Federal approval of Southwestern Bell's Section 271 application is indicative of that trend.

Implementation of Senate Bill 560, Senate Bill 86, and House Bill 1777, 76th Legislature, has been largely completed by the PUC. Most of the outstanding issues will be resolved by early 2001. Though there are differences of opinion about the outcomes of the PUC's rulemaking proceedings, it appears that the rules encourage new entrants into the market and effectively manage the transition from rate of return regulation to marketplace competition.

Until competition has fully evolved, strong minimum standards of service quality, customer service, and fair business practices will still be needed to ensure high-quality services to customers and a healthy marketplace. As competition and technology continue to evolve, it will become necessary to revisit state laws and regulations to ensure that they provide adequate protections while still fostering the market.

Competition is not as evident and may not be as robust for some Texas consumers, especially individuals who use few optional services, make few long distance calls, have low incomes, or live in high-cost or rural areas of the state.

New technological developments, particularly using wireless and satellite platforms, may lower the cost of providing advanced services in rural areas. New competitors seeking to serve rural customers may increase the options for local telephone service and spur new innovations to lower the cost of rural telephone service.

Additional regulation may be needed to address the siting of telecommunications facilities, particularly wireless towers, in areas of the state that are not covered by municipal zoning laws. Under federal law, the state may provide zoning authority or other forms of process-based relief to mitigate unregulated placement of facilities in unincorporated areas of counties.

OVERSIGHT OF AGENCIES UNDER THE COMMITTEE'S JURISDICTION

During the interim, the Committee on State Affairs was charged to conduct active oversight of the agencies under the committee's jurisdiction. No subcommittee was formed. Instead, the committee asked selected state agencies to respond briefly to the following:

1. Please indicate any difficulties you have encountered or issues that have arisen in implementing laws passed by the 76th Legislature that apply specifically to your agency.

2. Have any judicial decisions, federal rules or laws, or actions of other agencies forced, or have the potential to force, changes to be made in your agency's programs, administrative processes, or regulations? What options might be available to the Legislature to "fix" these changes if it chooses to?

3. What difficulties have you encountered in implementing Senate Bill 1851, 76th Legislature, which revised public information laws?

4. What other issues should the State Affairs Committee Members be advised of as we prepare for the upcoming session?

Responses were received from the Department of Information Resources (DIR), Texas Ethics Commission (TEC), General Services Commission (GSC), Texas Commission on Human Rights (TCHR), Texas Incentive and Productivity Commission (TIPC), Office of Public Utility Counsel (OPC), the State of Texas Aircraft Pooling Board (APB), and the Texas Veterans Commission (TVC). A response was not received from the Adjutant General's Department. Committee staff followed up with these agencies as needed.

Responses were not requested from the Public Utility Commission of Texas (PUC), the Office of the Governor, the Sunset Advisory Commission, or entities that operate primarily outside the state government.

Laws Passed by the 76th Legislature

None of the responding agencies reported difficulties in implementing laws passed by the 76th Legislature. However, the GSC reported that House Bill 3125, 76th Legislature, has placed additional requirements on the Office of Fleet Management without providing additional sources

of funding or full-time equivalent employees (FTE). The GSC said it is working with the Council on Competitive Government to develop a Fleet Management Plan that will identify funding and FTE needs to implement the plan effectively.

TEC reported that there were initial problems implementing House Bill 2611, 76th Legislature, which required the electronic reporting of campaign finance reports. Most of those problems were related to the initial setup and use of the software, and generally these problems have been resolved.

TIPC reported that it, as an agency with six full-time employees, is struggling to comply with mandates that are more appropriately directed at medium- and large-sized agencies. In particular, TIPC requested to be relieved of requirements to have its personnel policies reviewed by TCHR and to pay for that review. TIPC also advised that it is having difficulty complying with Section 9.623 of the General Appropriations Act, relating to disaster recovery services, and House Bill 1895, 76th Legislature, relating to software license management.

Judicial Decisions, Federal Rules and Other Actions

The APB reported that new regulations being promulgated by the Federal Aviation Administration (FAA) will lead to increased audits and reporting requirements, particularly as they apply to aircraft instrumentation and repair. The APB must implement new federal rules requiring several classes of turbine-powered aircraft be retrofitted with a "terrain awareness warning system" by 2004. This system has a projected cost of around $25,000 per plane. Accordingly, its strategic plan for 2001-05 will include a request for increased general revenue funding of about $250,000 to cover increased capital outlays mandated by federal rules.

Open Records

None of the responding agencies reported difficulties in implementing Senate Bill 1851, 76th Legislature, relating to public access to governmental information and decisions, including revisions to the Public Information Act.

Other Issues Requiring Attention

The APB reported that it must request an exception to travel cap language contained in the appropriations bill every year because of the unique nature of the board's operation. This language applies to the state's pilots each time that they fly state officials on overnight trips. Mandated training for pilots and aircraft maintenance personnel requires overnight trips to flight

facilities that are usually out of state. Though the board has received a waiver of this cap each time it has requested it, the board advised that providing an exception for pilots and aircraft maintenance personnel in the appropriations bill or in statute would be a more efficient means of addressing this problem.

DIR advised the committee of two issues that may require legislative attention during the 77th session. First, DIR is conducting a security assessment of the state government's systems, and it will present its results and recommendations prior to the 77th session. Second, DIR advised that legislation will likely be necessary to establish a governing board to operate the state business portal that the Electronic Government Task Force is building in conjunction with KPMG Consulting. This portal is being established pursuant to Senate Bill 974, 76th Legislature. The contract with KPMG expires in August 2001, which will not be sufficient time to fully implement the bill's requirements.

DIR does not have the authority to permit advertising on the Web portal, which it advises could be used to recover operating costs. Up to eight state agencies are expected to use the portal to accept forms and applications online for a small convenience fee. DIR recommends using those fees to improve the portal. DIR envisions the portal being used by local governments as well.

TVC reported that its enabling statute, Chapter 434, Government Code contains no authority for the commission to accept gifts or donations from public or private entities. The commission has been forced to decline gifts of "office equipment or funds to purchase office equipment" from various Veterans Service Organizations in the past.

TIPC recommended that the Legislature design and implement an "applicability note" that would be required for all oversight legislation and would determine which agencies should be required to comply with the bill, based on the size and appropriations of the agencies. Such a note would reduce the reporting requirements and unfunded strategies of smaller agencies. TIPC indicated that it supports eliminating travel cap limitations when they negatively affect performance measures. TIPC supports the removal of merit salary cap limitations when doing so positively affects staff turnover.

During the interim, the Sunset Advisory Commission conducted reviews of APB and GSC. The committee will continue to follow new developments affecting the agencies under its jurisdiction and consider legislation to address those, as necessary.

APPENDICES

APPENDIX A: LIST OF ABBREVIATIONS & ACRONYMS

ADSL	Asymmetric Digital Subscriber Line
Ala.	Alabama
ALJ	Administrative Law Judge
AOL	America Online
APB	Texas Aircraft Pooling Board
Br.	Brief
Calif.	California
CCL	Carrier Common Line Charge
CCN	Certificate of Convenience and Necessity
C.F.R.	Code of Federal Regulations
CLASS	Custom Local Area Signaling Services
CLEC	Competitive Local Exchange Carrier
CMTS	Cable Modem Termination System
COA	Certificate of Operating Authority
Colo.	Colorado
COPPA	Children's Online Privacy Protection Act of 1998
Ct.	Connecticut
CTIA	Cellular Telecommunications Industry Association
CTP	Certificated Telecommunications Provider
CTU	Certificated Telecommunications Utility
DBS	Direct Broadcast Satellite, like DirecTV or Dish Network
DCTU	Dominant Certificated Telecommunications Utility
Del.	Delaware
DEMS	Digital Electronic Messaging Service, an upperband spectrum area
DHS	Texas Department of Human Services
DIR	Texas Department of Information Resources
DMA	Direct Marketing Association
DOCSIS	Data Over Cable Service Interface Specifications
DOJ	U.S. Department of Justice
DSL	Digital Subscriber Line
DSLAM	Digital Subscriber Line Access Multiplexer

EAS	Extended Area Service Fee
EC	European Commission, the executive commission of the European Union
ELC	Expanded Local Calling Surcharge
ETC	Eligible Telecommunications Carrier
ETP	Eligible Telecommunications Provider
E.U.	European Union
FAA	Federal Aviation Administration
FBI	Federal Bureau of Investigation
FCC	Federal Communications Commission
FCRA	Fair Credit Reporting Act
FDIC	Federal Deposit Insurance Corporation
FTC	Federal Trade Commission
FTE	Full-time Equivalent employee
GAO	U.S. General Accounting Office
GHz	Gigahertz, a measure of frequency (spectrum)
GLBA	Gramm Leach Bliley Act of 1999
GSC	Texas General Services Commission
HFC	Hybrid Fiber-Coaxial, a type of coaxial cable used to upgrade cable systems
HHS	U.S. Department of Health and Human Services
HIPAA	Health Insurance Portability and Accountability Act of 1996
IBAT	Independent Bankers Association of Texas
ILEC	Incumbent Local Exchange Carrier
IM	Instant Messaging
IP	Internet Protocol, a standard for communications between computers
IRS	U.S. Internal Revenue Service
ISDN	Integrated Services Digital Network
ISP	Internet Service Provider
IXC	Interexchange Carrier, a provider of long distance calling services
kbps	Kilobits per second, a measure of the speed of data transmission
Ky.	Kentucky
La.	Louisiana
LEC	Local Exchange Carrier
LFA	Local Franchising Authority
LIHEAP	Low Income Home Energy Assistance Program
LMDS	Local Multipoint Distribution Service, an upperband area of spectrum

LNP	Local Number Portability Charge
LRIC	Long-run Incremental Cost
Mass.	Massachusetts
MB	Megabyte, or 1,024 kilobytes
Mbps	Megabits per second, a measure of the speed of data transmission
Md.	Maryland
MDS	Multipoint Distribution System
MHZ	Megahertz, a measure of frequency (spectrum)
Mich.	Michigan
Miss.	Mississippi
MMDS	Multichannel MultiPoint Distribution System
Mo.	Missouri
MOU	Memorandum of Understanding
MVPD	Multichannel Video Programming Distribution
NCASE	Notice Choice Access Security Enforcement, a privacy principle mnemonic
NCTU	Nondominant Certificated Telecommunications Authority
N. H.	New Hampshire
N. J.	New Jersey
NOI	Notice of Inquiry
OAG	Office of the Attorney General of Texas
OPC	Office of Public Utility Counsel
Ore.	Oregon
OVS	Open Video System, a generally unregulated alternative to cable television
P3P	Platform for Privacy Preferences
PAC	Political Action Committee
PCS	Personal Communications Services
PIA	Texas Public Information Act
PICC	Presubscribed Interexchange Carrier Charge
PIN	Personal Identification Number, used to access an account or services
P. L.	Public Law
POTS	Plain Old Telephone Service
Proc. R.	Procedural Rules
PUC	Public Utility Commission of Texas
PURA	Public Utility Regulatory Act, or Title II, Texas Utilities Code
RBOC	Regional Bell Operating Company
RIC	Originating Residual Interconnection Charge

S.C.	South Carolina
SDSL	Symmetric Digital Subscriber Line
SEC	U.S. Securities and Exchange Commission
SLC	Federal Subscriber Line Charge
SMATV	Satellite Master Antenna Television, often referred to as private cable
SOAH	State Office of Administrative Hearings
SPCOA	Service Provider Certificate of Operating Authority
SSI	Supplemental Security Income, a federal benefits program
SSN	Social Security number
Subst. R.	Substantive Rules
T2A	Texas 271 Application
T.A.C.	Texas Administrative Code
TANF	Temporary Assistance for Needy Families
TCHR	Texas Commission on Human Rights
TCP/IP	Transfer Control Protocol/Internet Protocol
TCTA	Texas Cable and Telecommunications Association
TDI	Texas Department of Insurance
TEC	Texas Ethics Commission
TELRIC	Total Element Long-run Incremental Cost
Tenn.	Tennessee
TIF	Texas Infrastructure Fund
TIPC	Texas Incentive and Productivity Commission
TNRCC	Texas Natural Resources Conservation Commission
TSP	Telecommunications Service Provider
TUSF	Texas Universal Service Fund
TVC	Texas Veterans Commission
UNE	Unbundled Network Element
U.S.	United States
U.S.C.	United States Code
USF	Federal Universal Service Fund
Va.	Virginia
Vt.	Vermont
W3C	World Wide Web Consortium
WCS	Wireless Communications Service
Wy.	Wyoming
xDSL	Digital Subscriber Line

APPENDIX B: TELECOMMUNICATIONS TIMELINE

The Telecommunications Act of 1996 ushered in an unprecedented wave of media mergers and acquisitions. This timeline follows some of the more significant events, mergers, and transactions in the telecommunications industry since the Act took effect.

Year	Month	Event, Merger or Transaction
2000	October	# European Union (E.U.) approves AOL-Time Warner merger # Warner Music Group terminates merger with EMI Group
	September	# FCC approves SBC-BellSouth wireless merger; new company to be named Cingular Wireless # News Corp acquires 21.5 percent of Gemstar from Liberty Media (AT&T) in exchange for 5 percent of Sky Global Networks # SBC agrees to acquire 6 percent of Covad Communications # WorldCom agrees to buy Intermedia and its controlling stake of Digex
	August	# Justice Department approves SBC-BellSouth wireless merger # AT&T increases its voting share of Excite@Home to 74 percent # Verizon agrees to merge its DSL operations with NorthPoint # News Corp buys Chris-Craft for $5.4 billion, now owns 13 TV stations in Top 10 U.S. markets # VoiceStream Wireless offers to buy PowerTel # Viacom agrees to buy portion of Infinity it does not already own # FCC approves Clear Channel's acquisition of AMFM; Clear Channel becomes nation's largest radio station operator
	July	# Deutsche Telekom offers to buy VoiceStream Wireless # WorldCom and Sprint terminate proposed merger # Time Warner agrees to give Juno access to its broadband facilities # Enron and Blockbuster (Viacom) agree to stream movies over DSL # AT&T and Charter Communications call off plans to swap cable systems, including Charter's Fort Worth system
	June	# FCC approves Southwestern Bell's (SBC) Section 271 application, making it the second Baby Bell authorized to offer long distance service # FCC approves Bell Atlantic-GTE merger, creating Verizon; Genuity (GTE Internetworking) to be spun off as separate company # FCC approves merger of AT&T and MediaOne # Vivendi announces plans to merge with Seagram and Canal+; new company would be called Vivendi Universal and would be the world's second largest media company

2000 (cont.)	June (cont.)	# America Online tops 23 million subscribers, launches AOLTV, announces AOL Mobile Service with Sprint PCS, acquires MapQuest # AT&T Wireless acquires wireless systems in Houston (PrimeCo), San Diego (GTE) and San Francisco (Vodafone) # News Corp consolidates satellite holdings into Sky Global Networks
	May	# VoiceStream completes merger with Aerial Corporation # NTT Communications, which is part of Japan's Nippon Telegraph & Telephone, agrees to buy Verio
	April	# FCC approves Bell Atlantic Wireless and Vodafone AirTouch merger; new company named Verizon Wireless # SBC and BellSouth agree to merge wireless operations # European Union approves Vodafone-Mannesmann deal
	March	# FCC approves Qwest-US West merger; combined company called Qwest # AT&T creates wireless tracking stock; agrees to purchase 39 percent of Net2Phone # Infinity Broadcasting (Viacom) agrees to purchase 18 radio stations from Clear Channel # Vodafone AirTouch announces plans to acquire Mannesmann # Tribune Co. announces plans to acquire Times Mirror
	February	# VoiceStream completes merger with Omnipoint # ALLTEL, Bell Atlantic, and GTE agree to swap wireless systems as part of merger approval
	January	# Time Warner and America Online announce merger plans # Warner Music Group and EMI Group announce merger plans # Cox purchases Multimedia Cablevision from Gannett
1999	December	# PUC endorses SBC's Section 271 application # FCC approves Bell Atlantic-New York's Section 271 application, making it the first Baby Bell allowed to provide long distance services
	November	# Cincinnati Bell completes merger with IXC Communications; new company is called Broadwing # SBC acquires 43 percent of Prodigy
	October	# WorldCom announces plan to merge with Sprint; acquires SkyTel # SBC completes merger with Ameritech; initiates Project Pronto # Clear Channel announces plans to acquire AMFM; deal would create nation's largest radio station operator
	September	# CBS agrees to merge with Viacom # Bell Atlantic, AirTouch, and PrimeCo agree to combine wireless operations into new company; GTE properties would be added following Bell Atlantic-GTE merger approval # Valor (then dba Communications Deal) agrees to purchase 400,000 access lines in Texas, N. M., and Okla. from GTE

1999 (cont.)	July	# AT&T agrees to swap of cable systems with Cox Communications # Cincinnati Bell agrees to merge with IXC Communications; new company to be called Broadwing # Qwest agrees to merge with US West; US West terminates merger agreement with Global Crossing # SBC enters strategic marketing alliance with DirecTV (Hughes)
	June	# UK-based Vodafone merges with US-based AirTouch # Western Wireless, SBC Wireless become management partners for CellularOne network
	May	# America Online acquires MovieFone, Nullsoft, and Spinner Networks # MediaOne agrees to merge with AT&T; cancels merger with Comcast # AT&T acquires Vanguard Cellular Systems; agrees to swap several cable systems with Comcast # US West agrees to merge with Global Crossing # VoiceStream Wireless is spun off from Western Wireless
	April	# AT&T acquires U.S. portion of IBM Global Network # News Corp acquires Liberty Media's interests in Fox Sports Net
	March	# AT&T completes its acquisition of TCI (and Liberty Media) # MediaOne agrees to merge with Comcast
	February	# AT&T and Time Warner announce strategic relationship to offer local telephony via cable
1998	December	# Seagram acquires PolyGram, forming world's largest music company
	November	# America Online acquires Netscape
	October	# SBC completes merger with Southern New England Telecommunications
	September	# WorldCom acquires MCI
	July	# AT&T completes merger with Teleport Communications Group # Bell Atlantic and GTE announce merger plans
	June	# Time Warner, MediaOne, Advance/Newhouse, Compaq, and Microsoft form Road Runner joint venture # (Old) US West splits into MediaOne and (new) US West # CBS acquires King World
	May	# SBC announces plans to merge with Ameritech
	April	# Bell Atlantic files Section 271 application with FCC for New York # AirTouch acquires MediaOne's wireless operations and its 25 percent stake in PrimeCo
	February	# Time Warner sells Six Flags amusement parks to Premier Parks

1998 (cont.)	January	# MCI acquires CompuServe from America Online in exchange for network support contracts; AOL retains CompuServe's online service # SBC announces plans to merge with Southern New England Telecommunications
1997	December	# GTE Internetworking (formed by acquisition of BBN) acquires Genuity # Covad launches DSL service in San Francisco
	November	# PrimeCo launches nationwide wireless network # SBC introduces DSL service in Austin, San Francisco
	September	# America Online and MCI acquire CompuServe from Bertelsmann
	August	# Bell Atlantic completes merger with NYNEX
	June	# News Corp, Fox/Liberty (TCI, now AT&T), and Rainbow Media create regional sports network alliance, Fox Sports Net
	April	# SBC completes merger with Pacific Telesis Group (Pacific Bell)
	February	# News Corp and EchoStar launch direct satellite service
1996	December	# AT&T divests National Cash Register # MCI merges with MFS
	November	# PrimeCo—a joint venture between AirTouch, Bell Atlantic, NYNEX, and US West—launches domestic wireless services in 16 markets.
	October	# Time Warner acquires Turner Broadcasting System
	September	# AT&T divests Lucent Technologies
	August	# MFS (now part of WorldCom) acquires UUNET
	July	# News Corp announces plans to purchase New World
	April	# Bell Atlantic agrees to merge with NYNEX # SBC agrees to merge with Pacific Telesis Group
	February	# Walt Disney acquires ABC # February 8: Telecommunications Act of 1996 takes effect

APPENDIX C: OWNERSHIP OF TELECOMMUNICATIONS & MEDIA CORPORATIONS

Many large telecommunications and media corporations have complex equity and management arrangements with affiliates, competitors, and seemingly unrelated enterprises. Untangling this web of relationships can be quite difficult, especially as the ever-evolving marketplace blurs distinctions between traditional media and digital media, as well as content and delivery.

Ownership summaries presented here are based primarily on the corporations' filings with the U.S. Securities and Exchange Commission (SEC) and financial news reported from a variety of sources. Mergers, transactions, stock offerings, and a host of other events will make this summary outdated very quickly, so it should not be relied upon as gospel. The summaries presented in this appendix are believed to be accurate as of September 30, 2000.

Summaries are presented for AOL Time Warner, AT&T, Broadwing, Walt Disney Company, News Corporation, Qwest, SBC Communications, Seagram, Sprint, Verizon, Viacom, and WorldCom.

AOL Time Warner

America Online (AOL) was founded in 1985 and is the nation's largest Internet service provider (ISP). Time Warner is the nation's second largest media company. The two companies announced plans to merge on January 10, 2000. The E.U. approved the merger with conditions on October 11, 2000. The deal was still being reviewed by U.S. regulators.

America Online

AOL's Interactive Services Group manages the AOL service, a worldwide Internet service and proprietary content provider with more than 24 million active subscribers, and the CompuServe service, with about 2.8 million subscribers. AOL merged with Netscape Communications Corporation in March 1999, giving it control over Netscape's Communicator software suite and Navigator browser, its Netcenter search directory, its Digital City property, and a pool of 17 million registered Netscape users. Digital City, which is also partially owned by Tribune Broadcasting, provides localized content to registered users in 60 cities who indicate a geographic preference in their "My Netscape" setup.

AOL Instant Messenger (AIM) is a Web-based communications service that enables online subscribers to exchange private electronic text massages in real time. AIM allows users to maintain "Buddy Lists" that alert its users when their buddies are online and thus capable of sending and receiving instant messages. AIM has over 25 million registered users. AOL owns ICQ Ltd., an Internet-based communications company that produces instant communications and chatroom technology. ICQ has nearly 38 million registered users in North America, and over 65 million worldwide. AOL operates AOL.COM, an Internet portal and search engine used by AOL members and outside users.

America Online Corporate Profile

Chief Executive:	Steve Case
Headquarters:	Dulles, Va.
Employees:	12,000
Sales:	$4.8 billion
Fortune 500 Rank:	337
Subsidiaries:	Netscape CompuServe MovieFone Spinner MapQuest

In May 1999, AOL acquired MovieFone, the largest movie guide and ticketing service in the U.S. It provides complete directories of movies, showtimes, and theater locations through interactive telephone and online services. People may purchase their movie tickets through the MovieFone service.

That same month, AOL acquired Spinner, Winamp, and SHOUTcast, three Internet music broadcast services. Spinner.com provides over a hundred "channels" of pre-programmed music from a library of more than 175,000 song titles. Winamp enables users to download and listen to MP3-format digital music. In the year since its acquisition by AOL, Winamp has gone from 5 million registered users to 25 million. SHOUTcast is similar to Spinner.com but allows registered users to program their own channels from lists of available songs. In June 2000, AOL acquired MapQuest, an online mapping and driving directions service.

AOL Plus delivers full-motion video, streaming audio, and AOL proprietary content to AOL subscribers who have broadband access to the Internet. AOL Mobile Services delivers e-mail, news, weather, stock quotes, and content from Digital City and AOL MovieFone to Sprint PCS Internet-enabled wireless phones. AOL is negotiating with other wireless providers, including AT&T, to offer similar services for those companies' customers.

AOL launched AOLTV in June 2000. The service allows viewers to watch television programs using existing signals and choose from a range of interactive features—AOL content, e-mail, AIM, chatrooms, and an interactive program guide—through a set-top box and wireless keyboard. Initially, AOLTV will be available through set-top boxes designed by Philips Electronics and will be sold exclusively through Circuit City retail stores. The service is being initially offered in Baltimore, Md.; Phoenix; and Sacramento, Calif. Eventually, Hughes will manufacture set-top boxes that work with that company's DirecTV and DirecPC services.

AOL is working with a variety of networks to create AOLTV content, including Starz Encore Group (owned by AT&T), E! Entertainment Television, Oxygen Media, QVC, The Weather Channel, Sesame Workshop (formerly the Children's Television Workshop, the makers of Sesame Street), Sony Pictures, CourtTV, and Odyssey. AOLTV's program guide allows users to sort through television programs in a variety of ways, to program their VCRs on screen, and to organize favorite shows or channels into a "Favorite Places" folder for easy access.

AOLnet is a transfer control protocol/Internet protocol (TCP/IP) network comprised of various third-party networks that AOL manages. Partners include WorldCom's Advanced Networks Inc., Sprint, and Genuity (recently spun off from GTE). AOLnet serves AOL's own online traffic and some of CompuServe's. AOLnet is available via dial-up connection in more than 1,000 U.S. cities. For most AOL users, the call is local and incurs no additional charge beyond a monthly access fee. Most CompuServe users still reach that system via CompuServe Incorporated, a subsidiary of WorldCom. CompuServe is available in about 500 U.S. cities.

The Netscape Enterprise Group provides software and services to businesses that help them to develop e-commerce markets. AOL has entered into a strategic electronic commerce alliance with Sun Microsystems to build and market end-to-end e-commerce solutions to businesses.

AOL offers customized advertising programs and e-commerce partnerships to a growing variety of merchants.

AOL User Statistics

America Online
- 24 million members worldwide
- 1.2 million peak simultaneous users
- 110 million e-mails each day
- 200 million stock quotes each day
- 5.2 billion Web sites served each day

CompuServe
- 2.8 million members worldwide

Digital City
- 6 million visitors each month
- 200 markets nationwide
- 85 percent of visitors shop online

ICQ
- 65 million registrants worldwide
- 1.4 million peak simultaneous users
- 8 million users access ICQ each day

MapQuest
- 8 million maps downloaded each day
- 5.7 million visitors each month

MovieFone
- 150 million user sessions each year
- 27,000 theater screens served

Netscape
- 32 million registrants
- 105 million copies of Navigator downloaded

Spinner
- 20 million songs listened to each week

Winamp
- 25 million registrants worldwide
- 10 million visitors each month
- 100,000 downloads each day

AOL has substantial presences internationally, including a 50 percent stake in AOL Europe, a joint venture with Bertelsmann, and operates AOL CompuServe France with Bertelsmann and Vivendi. AOL must sever all structural ties with Bertelsmann as a condition imposed by the E.U. on the AOL-Time Warner merger.

Time Warner

Time Warner Inc. is the parent company of several wholly and partially owned subsidiaries that are involved in the business of cable networks, cable television systems, publishing, music, filmed entertainment, and digital media. Time Warner Inc. has announced plans to merge with America Online to form AOL Time Warner and to combine its music assets with Britain's EMI Group to form Warner EMI Music.

Time Warner Entertainment (TWE) was formed in 1992 to own and operate substantially all of the businesses of the former Warner Brothers and Home Box Office. Time Warner owns 74.49 percent of TWE; the remaining 25.51 percent is held by AT&T through MediaOne.[1] TWE wholly owns Warner Bros. Pictures, which produces feature-length motion pictures, and Turner Broadcasting System (TBS), which operates the CNN, CNN Headline News, CNN/Sports Illustrated, CNNfn, CNN International, TBS Superstation, TNT, Cartoon Network, Turner Classic Movies, Turner South, and Boomerang cable networks. TBS also owns New Line Cinema, which produces feature-length motion pictures, including the *Austin Powers* films, and Castle Rock Television, which produces television series, including *Seinfeld*. TBS controls the libraries of Hanna-Barbera, MGM, and RKO.

Time Warner Corporate Profile

Chief Executive:	Gerald M. Levine
Headquarters:	New York City
Employees:	70,000
Sales:	$27.3 billion
Fortune 500 Rank:	45
Subsidiaries:	Time Warner Cable Time Warner Bros. Warner Music Group Home Box Office Turner Broadcasting

The Home Box Office division operates the multi-channel premium cable networks HBO (six channels) and Cinemax (four channels). HBO Independent Productions produces original programming and television series, including the CBS network show *Everybody Loves Raymond*. HBO holds 50 percent interests in the Comedy Central and CourtTV cable networks.[2] HBO and TBS produce original feature-length motion pictures that premiere on their cable networks.

Warner Bros. Television produces primetime dramatic and comedy programming, including *ER*, *Friends*, *The Drew Carey Show*, and *The West Wing*. Its Telepictures Productions unit produces reality-based and talk-show series, including *The Rosie O'Donnell Show*. Warner Bros. Animation (WBA) creates television series and feature-length animated productions. WBA has

[1]In August 1999, MediaOne terminated its covenant not to compete with TWE, immediately ending its right to participate in the management of TWE's businesses.

[2]Viacom is also an investor in Comedy Central. The other 50 percent of CourtTV is owned by Liberty Media, a wholly owned subsidiary of AT&T.

the creative use of Warner Bros., TBS, DC Comics, Looney Tunes, and Hanna-Barbera characters. WBA is also the U.S. distributor for *Pokémon*.

Time Warner owns 66.75 percent of the WB Television Network which airs 13 hours of primetime programming per week on affiliated television stations throughout the U.S. Shows include *Dawson's Creek*, *Buffy the Vampire Slayer*, and *7th Heaven*. Tribute Broadcasting owns another 22.25 percent of the WB, and its employees own the rest. Kids' WB! airs 19 hours of programming weekly, led by the previously mentioned *Pokémon*.

Warner Home Video (WHV) distributes pre-recorded videocassettes and DVDs containing the products of the company's various filmmaking divisions.

Time Warner Sports distributes pay-per-view boxing fights and other pay-per-view events. TBS also owns World Championship Wrestling, baseball's Atlanta Braves, basketball's Atlanta Hawks, and hockey's Atlanta Thrashers. TBS also has programming rights to televise live professional sporting events, including the National Basketball Association, certain NASCAR Winston Cup and Busch Series races, and the Atlanta Braves.

Time Warner Cable (TWC) generally manages the company's cable systems throughout the country, including those owned by TWI Cable, a wholly-owned subsidiary, and by a joint venture between TWE (64.8 percent ownership), TWI Cable (1.9 percent), and Advance/Newhouse (33.3 percent) known as TWE-A/N.[3] The company served nearly 12.6 million subscribers as of December 31, 1999. In the past two years, the company has swapped cable systems with AT&T, MediaOne, and Comcast to meet various regulatory conditions for those companies' various merger approvals, including several systems in the Dallas/Fort Worth area. TWC operates several 24-hour local news channels, including News 8 Austin. Time Warner is the largest cable operator in Texas.

In 1998, TWE (20 percent ownership), TWE-A/N (26.3 percent), TWI Cable (8.6 percent), MediaOne (25.1 percent), and subsidiaries of Compaq and Microsoft (10 percent each) formed the RoadRunner Joint Venture. RoadRunner service offers high-speed Internet access and online content optimized for broadband-capable networks. RoadRunner has been given certain rights of exclusivity by its affiliates, including TWC, to operate over their cable systems.

Time Warner Telecom (TWT) is a facilities-based competitive local exchange carrier (CLEC) in selected markets. Its customers are principally medium- to large-sized telecommunications-

[3]Advance Publications, the No. 2 U.S. publisher of magazines behind Time Warner, publishes *Allure*, *Conde Nast*, *Details*, *Glamour*, *Parade*, *Vogue*, and *W* magazines. It also owns 26 U.S. newspapers and more than 40 business weeklies. It owns 25 percent of Discovery Communications. Advance is owned by the Newhouse family.

intensive businesses and governmental entities. Its networks have been constructed largely through licensing the use of TWC's unused fiber capacity. In September 2000, TWT purchased substantially all of the assets of the bankrupt GST Telecommunications Inc., a local and regional fiber network operator in the Western U.S. TWT is a separately traded public company.

Time Warner's equity interest in TWT has thus been diluted to about 48 percent, although it retains a nearly 72 percent voting share. AT&T, through MediaOne, has about a 6 percent stake in TWT, and Advance/Newhouse owns about 15 percent.

Warner Music Group (WMG) conducts business through its Warner Bros. Records, Atlantic Recording Corporation, Elektra Entertainment Group, London-Sire Records recording labels, and their affiliated labels and subsidiaries. WMG recording artists include Kid Rock, Cher, Red Hot Chili Peppers, Sugar Ray, Everlast, GooGoo Dolls, Faith Hill, Metallica, Brandy, Jewel, and Busta Rhymes, among many others. WMG subsidiary Rhino Records specializes in compilations and reissues of previously released music. WMG has a number of joint venture arrangements with a variety of smaller labels, including Maverick and Tommy Boy, and other marketing arrangements to lend proprietary tracks to unaffiliated labels. WMG owns 50 percent of the Columbia House Company, a direct marketer of CDs and audio and videocassettes. The other half is owned by Sony Music Entertainment. Both companies also have substantial investments in CDnow, a music and video e-commerce company.

World's Largest Recording Companies

1. Universal Music Group (Geffen, MCA, Motown, Polydor, Universal)
2. Sony Music Group (Columbia, Epic)
3. Bertelsmann Music Group (Arista, RCA)
4. Warner Music Group (Warner Bros., Electra, Atlantic)
5. EMI Group (Capitol Records, Chrysalis, Virgin)

In January 2000, Time Warner announced plans to merge its music holdings with London-based EMI Group. The merger was terminated in October 2000. The combined company would have owned all of Time Warner's music assets plus Angel/Blue Note Records, Capitol Records, Priority Records, and Virgin Records, and all of their associated entities. These labels would have added The Beatles, Garth Brooks, Nat King Cole, Janet Jackson, The Rolling Stones, and Frank Sinatra, among many others, to Time Warner's roster of artists and recordings. The combined company would have surpassed Seagram's Universal Music Group as the world's largest recording company. The deal was met with considerable resistance from European regulators. In September 2000, the companies offered to divest UK-based Virgin Records and several other European labels to appease E.U. regulators. It was not sufficient to win approval, and the companies subsequently called off the merger. Days later, the E.U. approved Time Warner's merger with AOL.

WMG owns WEA Inc., which owns WEA Manufacturing Inc., which makes compact discs, audio and videocassettes, CD-ROMs, and DVDs for WMG's labels and Warner Home Video;

Ivy Hill Corporation, which produces printed matter and packaging for same; and Warner-Elektra-Atlantic Corporation (WEA Corp.), which markets and distributes same. WMG also owns a majority interest in Alternative Distribution Alliance, which specializes in alternative rock music with a focus on new artists. WMG's publishing arms own or control the rights to more than one million music compositions, including the works of Eric Clapton, George and Ira Gershwin, Michael Jackson, Madonna, and Cole Porter, among many others. Warner/Chappell administers the music of several motion picture and television companies, including Lucasfilm, and owns Warner Bros. Publications and CPP/Belwin, two of the world's largest publishers of printed music.

Time Inc. publishes *Time*, *People*, *Sports Illustrated*, *Fortune*, *Money*, *Life*, *Entertainment Weekly*, and *In Style*, among others. Its subsidiary Southern Progress publishes *Southern Living*, *Sunset*, *Cooking Light*, *Southern Accents*, *Coastal Living*, *Progressive Farmer*, and *Health*. Time Publishing Ventures manages the company's specialty periodicals, including *This Old House*, and Parenting Group publishes *Parenting*, *Baby Talk*, and *Family Life*. Time Inc. also manages American Express Publishing Corporations's operations, which include *Travel & Leisure*, *Food & Wine*, and *Departures*. Time Inc. owns 50 percent of American Family Enterprises, which sells magazine subscriptions via sweepstakes entries. Time Warner and its subsidiaries wholly own DC Comics, which publishes the comic book adventures of Batman, Superman, and Wonder Woman, among many others. Time Warner also wholly owns E.C. Publications, the publisher of *MAD* magazine.

Time Life Inc. is a direct marketer of series of books, music, and videos. Book-of-the-Month Club is a joint venture between Time Inc. and Bertelsmann's Doubleday book club and operates more than 10 separate book-of-the-month clubs and related businesses. Time Warner Trade Publishing operates two publishing houses, Warner Books and Little, Brown. It also distributes books published by outside houses. Time Warner Audiobooks develops and markets recorded versions of books published by Warner Books and Little, Brown. Oxmoore House Inc., a subsidiary of Southern Progress, markets how-to books under several brand names, including Leisure Arts and Sunset Books.

Warner Bros. Consumer Products licenses the rights to the names, photographs, logos, and other representations of characters and copyrighted material from the films and television series produced or distributed by Time Warner. The company licenses its animated and comic book characters to Premier's U.S. theme parks, including the Six Flags chain. It also owns the rights to the *Harry Potter* series. Warner Bros. Studio Stores operates 146 retail stores in the U.S. Time Warner, together with Viacom, have purchased a chain of motion picture theaters located in California and Colorado.

Time Warner Digital Media (TWDM) was created by the company in 1999 to develop a company-wide digital media strategy, fund initiatives, and seek investment opportunities

throughout the company. TWDM oversees the company's various Internet sites, including CNN.com, CNNfn.com, CNN/SI.com, Entertaindom.com, and a number of brand-name sites associated with the company's holdings, such as CartoonNetwork.com. TWDM has invested in such ventures as WebMD, Fortune City, OpenTV, and ARTISTDirect.

AT&T

AT&T, formerly known as American Telephone & Telegraph Corporation, was founded in 1885. It is the nation's largest long distance company and largest cable company. It is emerging as a facilities-based CLEC in deregulated markets around the U.S. via its cable systems and fixed wireless platforms. AT&T provides long distance service to more than 70 million residential and small business customers and offers basic cable service to more than 16 million residences.

AT&T Corporate Profile

Chief Executive:	C. Michael Armstrong
Headquarters:	Basking Ridge, N. J.
Employees:	151,000
Sales:	$62.4 billion
Fortune 500 Rank:	8
Subsidiaries:	AT&T Broadband AT&T Wireless AT&T WorldNet Liberty Media

The FCC approved AT&T's merger with MediaOne in June 2000, a little over a year after the deal was announced. MediaOne was the nation's third largest cable company prior to the merger. MediaOne owns 25.51 percent of Time Warner Entertainment. MediaOne also holds interests in a host of international cable and broadband companies. MediaOne was created when US West split into two separate corporations in June 1998. All of the old US West's multimedia and broadband enterprises, then known as the US West Media Group, became MediaOne. The rest of the old US West, comprised primarily by its local exchange and long distance units, has since merged with Qwest.

As a condition for merger approval, AT&T must by May 19, 2001:

- Divest its interests in Time Warner Entertainment;
- Terminate its involvement in Time Warner's video programming activities; or
- Divest ownership of cable systems such that AT&T would serve no more than 30 percent of multichannel video programming distribution (MVPD) subscribers nationwide.[4]

MediaOne owns 34.67 percent of Road Runner, a high-speed cable modem service ISP. MediaOne owns interest in the several networks, including Food Network, Sunshine Network,

[4]After the merger, and before any divestiture, AT&T would control cable systems serving 51 percent of multichannel video programming subscribers.

Music Choice, E! Entertainment Television, Speedvision, Outdoor Life, iNDEMAND, New England News Network, and Fox Sports New England. MediaOne owns a 5 percent passive interest in Vodafone AirTouch (now part of Verizon), and a 6 percent interest in Time Warner Telecom.

AT&T owns 25 percent (a 74 percent voting interest) of Excite@Home, a combination of the Excite Internet portal and @Home, the nation's largest cable modem service provider. Other companies with interest in @Home include Cox and Comcast. As part of complex stock arrangements between the companies, Cox and Comcast have options to sell their stakes in Excite@Home at a premium to AT&T.

In 1999, AT&T completed its merger with Tele-Communications, Inc. (TCI), by which AT&T acquired all of TCI's domestic cable and telecommunications operations, its interest in the @Home Corporation, and the Liberty Media Group. In 1999, AT&T acquired all U.S. assets of the former IBM Global Network and plans to acquire the rest of its worldwide holdings. In 1999, AT&T acquired Vanguard Cellular Systems, which served 26 markets in the eastern U.S. In 1998, AT&T acquired Teleport Communications Group (TCG), which at that time was the largest CLEC in the U.S., primarily through its provision of comprehensive telecommunications services to businesses in markets served by the Bell companies.

AT&T owns 29 percent of Cablevision, a cable system operator in New York. Cablevision owns 74 percent of Rainbow Media, which operates the American Movie Classics, Bravo, Romance Classics, MuchMusic, and Independent Film Channel networks.[5] Rainbow Media also has ownership interests in Radio City Music Hall, Madison Square Garden, basketball's New York Knicks, hockey's New York Rangers, and the MSG Network. In August 2000, Cablevision filed preliminary proxy materials with the SEC to create a Rainbow Media tracking stock.

AT&T Broadband offers digital and analog video, digital cable, and high-speed Internet access (through Excite@Home) over its cable broadband networks throughout the U.S. AT&T Broadband offers telephony to its cable subscribers in some markets, including the Dallas/Fort Worth area. In August 2000, the company began promoting free telephone service until early 2001 for customers who switched to AT&T local service provided over its cable systems.

AT&T WorldNet Services offers dial-up Internet access to its 1.5 million customers. AT&T WorldNet has entered into agreements with Yahoo!, Excite, and Lycos to offer co-branded access services. AT&T provides the network access, billing, and support while the portals provide personalizable content and search engine capability. AT&T WorldNet also provides Internet access to Sega's Dreamcast customers.

[5]NBC owns the remaining 26 percent of Rainbow Media. NBC is owned by General Electric.

AT&T Wireless operates one of the largest digital nationwide wireless networks, serving more than 12 million customers. It owns wireless licenses in 42 of the nation's top 50 markets. AT&T acquired the licenses held by PrimeCo in Houston and other wireless licenses in California in August 2000 as a result of the merger that created Verizon Wireless. Its fixed wireless service, Project Angel, provides customers with broadband Internet access coupled with telephony as an alternative to copper-wire broadband products. Its Aviation Communications Division provides air-to-ground communications services to commercial and private aircraft in the U.S.

In 1999, AT&T Canada merged with MetroNet Communications, Canada's largest CLEC. AT&T currently owns 31 percent of the merged entity and has agreed to purchase the remaining shares. In 2000, British Telecommunications (BT) purchased 30 percent of the combined entity a and may purchase up to an additional 30 percent. AT&T and BT jointly purchased 33.3 percent of Rogers Cantel Mobile Communications, Canada's largest wireless company.

Because of conditions imposed upon its mergers and acquisitions, and for other business reasons, AT&T has divested its interests in Lucent Technologies and NCR Corporation, both formerly wholly owned by AT&T, as well as its interests in AT&T Capital Corporation; AT&T SkyNet, Tridom, DirecTV, all satellite-based services; Universal Card Services, a credit card services company; American Transtech; LIN Television Corporation (locally, the broadcaster of Texas Rangers games) and Wood-TV, both programming providers; AT&T Language Line Services, an over-the-phone interpretation service; and its submarine systems business.

AT&T is reportedly considering several options to boost its stock price, including selling off its long distance operations, merging its wireless operations with Nextel Communications, spinning off some of its non-telecommunications businesses, and merging some of its assets with BT.

Liberty Media Group

Liberty Media Group, a wholly owned subsidiary of AT&T, owns interests in a broad range of video programming, communications, and Internet businesses in the U.S. and throughout the world. Liberty has a substantial degree of management autonomy, and it is financially and operationally separate of AT&T, as a condition of the AT&T-TCI merger in 1999. Nearly all of the networks affiliated with Liberty have entered into affiliation agreements with Satellite Services, Inc., a company within AT&T Broadband. These agreements allow AT&T's cable systems to broadcast cable networks that are supplied by Satellite Services to AT&T.

Liberty wholly owns the Starz Encore Group, which operates 13 domestic movie channels, including STARZ!, its four multiplex channels, and Encore and its six multiplex channels. Starz Encore has licensed the exclusive rights to first-run output from Walt Disney's Hollywood, Touchstone, and Miramax studios; Universal Studios (a Seagram company); New Line Cinema

(a Time Warner company); Fine Line; and Sony Pictures (formerly Columbia). It has non-exclusive affiliations with all other major motion picture studios.

Liberty owns 49 percent of Discovery Communications, Inc., which includes the Discovery Channel, The Learning Channel, Animal Planet, Discovery People, Travel Channel, and a variety of domestic digital and international networks.[6] Liberty owns 43% of QVC, one of the nation's largest home shopping companies and operator of the QVC cable network and iQVC Internet store.[7] Liberty and News Corporation each own 44 percent of TV Guide, Inc., publisher of the nation's most widely circulated weekly publication, *TV Guide*, and operator of the TV Guide and Prevue on-screen cable program guides. TV Guide owns 80 percent of Superstar/Netlink Group, a satellite entertainment programmer. In October 1999, TV Guide announced plans to merge with Gemstar International, the maker of the VCR Plus+ system and also operator of several on-screen cable program guides. TV Guide also provides satellite broadcast services, including the distribution of WGN-TV Chicago, KTLA-Los Angeles, and WPIX-New York superstations to various cable companies around the U.S.

Liberty Media Corporate Profile

Chief Executive:	John C. Malone
Headquarters:	Englewood, Colo.
Employees:	1,669
Sales:	$0.7 billion
Fortune 500 Rank:	N/A
Subsidiaries:	Starz Encore Group Gemstar-TV Guide BET Holdings USA Networks Discovery Communications DMX

In September 2000, Liberty Media and News Corporation agreed to a complicated stock swap that gave News Corporation a roughly 21.5 percent stake in Gemstar. Liberty Media obtained a 13 percent stake in News Corporation, and Liberty Media together with its CEO John Malone now own about 21 percent of News Corporation. Liberty Media obtained a 4.76 percent stake in Murdoch's Sky Global Networks, and Malone agreed to purchase an additional $500 million in Sky Global stock when it goes public, raising his overall interest in the company to about 6 percent.

Liberty owns approximately 21 percent of USA Networks, Inc.,[8] which operates the USA Network, Sci-Fi Channel, Home Shopping Network, and America's Store. USA Networks also owns Ticketmaster, CitySearch (including austin.citysearch.com), and the Hotel Reservations Network. USA Networks owns several motion picture production companies, including USA Films studio (formerly Savoy Pictures), and October Pictures, a former property of Universal.

[6]Cox Communications and Advance Publications each own 24 percent. Company founder and CEO John Hendricks owns the rest.

[7]The remaining 57 percent is owned by Comcast.

[8]Seagram, through Universal, owns approximately 45 percent. The rest is owned by outside investors.

Liberty's other domestic programming interests include 35 percent of BET Holdings; 50 percent of CourtTV; 10 percent of E! Entertainment Television; 50 percent of Golf Network; 67 percent of MacNeil/Lehrer Productions; 33 percent of Odyssey Network; and 50 percent of Telemundo. Liberty also has a substantial portfolio of international programming networks.

Liberty owns 9 percent of Time Warner Entertainment, and 8 percent of News Corporation. Liberty owns about 23 percent of Sprint PCS, the wireless operation of Sprint. Liberty owns 34 percent of Teligent, which offers business customers advanced telecommunications services over its SmartWave network systems, a mixture of fixed wireless and fiber-based broadband technologies. Teligent offers those services in about 40 major U.S. markets.

Liberty Digital, Inc. (formerly TCI Music) has significant investments in Internet content and interactive television, music services, and satellite systems. Liberty owns 100 percent of DMX, the maker of Digital Music Express, which has more than 29 million U.S. subscribers. It owns The Box Worldwide, a subscriber-selected music video programming service, and SonicNet, an Internet-based music programmer. Together with Viacom, Liberty owns MTV Online.

Liberty has extensive international holdings, including approximately 29 percent of Telewest, the United Kingdom's leading telecommunications and cable company, and 37 percent of Flextech, the distributor of the BBC internationally. Liberty also owns 2.5 percent of Motorola.

Broadwing

Broadwing was created in 1999 as a result of the merger of Cincinnati Bell, one of the original seven Baby Bells, and Austin-based IXC Communications, Inc. Broadwing is a diversified telecommunications holding company. Broadwing provides local telephone service, network access, and related communications products primarily through its Cincinnati Bell (CBT) and ZoomTown.com subsidiaries. CBT operates in the Cincinnati market area and has 1 million access lines. It owns 80 percent of Cincinnati Bell Wireless, which operates in several Ohio markets, as part of a joint venture with AT&T. Customers who use their handsets outside of those local markets have their calls terminated on AT&T's network.

Broadwing Corporate Profile

Chief Executive:	Richard G. Ellenberger
Headquarters:	Cincinnati, Ohio
Employees:	6,000
Sales:	$1.1 billion
Fortune 500 Rank:	N/A
Subsidiaries:	Cincinnati Bell IXC Communications ZoomTown.com

Broadwing controls a 16,000-mile fiber-optic network that reaches most major U.S. metropolitan areas. Currently, the bulk of Broadwing's revenues for this network are derived from private line services—the long-haul transmission of voice, data, and Internet over dedicated circuits—and

indefeasible right-to-use agreements by which companies lease bandwidth for fixed periods of time. Broadwing IT Consulting provides network integration and other services.

Cincinnati Bell Any Distance resells long distance services and products primarily in five states. It is licensed as a long distance provider in Texas. Cincinnati Bell Supply Company markets telecommunications and computer equipment. Cincinnati Bell Directory publishes several regional directories in the Ohio area.

Walt Disney Company

The Walt Disney Company owns 100 percent of Disney Enterprises, Inc. (DEI), which, together with its subsidiaries, operates media networks, studio entertainment productions, theme parks and resorts, consumer products and licensing, and Internet marketing segments.

Disney operates the American Broadcasting Company (ABC). The ABC Television Network had 225 primary affiliated television stations as of September 30, 1999, reaching 99.9 percent of all U.S. television households. ABC Radio Networks have over 8,900 program affiliations with 4,400 radio stations throughout the U.S. Radio Disney, which targets children aged 6 to 11, is carried by 45 stations and reaches 50 percent of the U.S. market. Nationwide, the company owns nine very high frequency (VHF) television stations, including KTRK-TV in Houston; 26 AM radio stations, including WBAP 820 and KMKI 620 in Dallas/Fort Worth, and KMIC 1590 in Houston; and 16 FM radio stations, including KSCS 96.3 and KMEO 96.7 in Dallas/Fort Worth. The company's television stations reach 24 percent of the nation's television households.

Walt Disney Corporate Profile

Chief Executive:	Michael D. Eisner
Headquarters:	Burbank, Calif.
Employees:	120,000
Sales:	$23.4 billion
Fortune 500 Rank:	66
Subsidiaries:	American Broadcasting Company
	ESPN Inc.
	Miramax Films
	Touchstone Pictures
	Buena Vista
	Infoseek
	Hollywood Records
	Walt Disney World Resort
	Anaheim Sports

Disney wholly owns the Disney Channel, Toon Disney, and SoapNet cable networks. It owns 80 percent of ESPN, Inc., which includes ESPN, ESPN2, ESPNEWS, ESPN Classic, ESPN Now, ESPN Extra, and ESPN Radio.[9] The company owns 50 percent of Lifetime Entertainment Services, which owns the Lifetime cable network; 39.6 percent of E! Entertainment Television, which operates the E! and style cable networks; and 37.5 percent of A&E Television Networks, which owns the A&E network and The History Channel.

[9]The Hearst Corporation owns the remaining 20 percent of ESPN.

Walt Disney Pictures and Television produces and acquires live-action motion pictures that are distributed under the banners Walt Disney Pictures, Touchstone Pictures, and Hollywood Pictures. Disney subsidiary Miramax Film Corp. releases films under the banners of Miramax and Dimension Films, including *Good Will Hunting* and the *Scream* series. Walt Disney Pictures also produces feature-length animated films. The company distributes and markets its films primarily through its own Buena Vista company. The company directly distributes home video releases from each of its banners and also acquires direct-to-video filmed products. The company develops and distributes television programming through its banners' television production companies. including *Live! with Regis and Kathie Lee*, *Roger Ebert at the Movies*, *Bill Nye the Science Guy*, and *Win Ben Stein's Money*. The company also produces original films for *it's the Wonderful World of Disney* television series, which airs on ABC. The company also produces live stage musicals around the world.

Broadcast Network Ownership

ABC	Walt Disney Company
CBS	Viacom
Fox	News Corporation
NBC	General Electric
UPN	Viacom
WB	Time Warner

Disney produces and distributes compact discs, audiocassettes, and records, most of which are soundtracks of its animated films and read-along products directed at the children's market. The company also owns Hollywood Records, which produces albums for new artists and soundtracks from the company's live-action films; Mammoth Records, which specializes in alternative music; and Lyric Street Records, a country label.

The company publishes books through its Buena Vista Publishing Group, and it publishes *FamilyFun*, *Disney Adventures*, and *Discover* magazines. In a joint venture with The Hearst Company, Disney publishes *ESPN The Magazine*. Disney Interactive licenses, develops, and markets entertainment and educational software and video games. It also produces audiovisual materials for classrooms, and licenses the manufacture and sale of educational posters and other teaching aids.

The Buena Vista Internet Group was formed in 1997 to consolidate the company's Internet activities. Disney owns 100 percent of Infoseek, an Internet search engine. Disney and Infoseek together control the GO Network (GO.com), an Internet portal and search engine. Disney's brand Web sites are hosted by GO.com, including Disney.com, Family.com, ESPN.com, and ABC.com.

ESPN's interactive divisions provide support and content for the official Web sites of several sports enterprises, including the National Hockey League, the National Football League, and the National Basketball Association. Disney Travel Online offers travel packages to Disney resorts, and DisneyStore.com offers Disney-themed merchandise. The company owns other brand-name store sites to sell merchandise, such as ESPNStore.com.

Walt Disney World Resort, located near Orlando, Fla., includes four theme parks—the Magic Kingdom, Epcot, Disney-MGM Studios, and Disney's Animal Kingdom—surrounded by hotels and villas; a retail, dining, and entertainment complex; a sports complex; conference centers; campgrounds; three water parks (Blizzard Beach, River Country, and Typhoon Lagoon); golf courses; and other recreational facilities designed to attract visitors for extended stays. The resort operates Disney Cruise Line from nearby Port Canaveral, Fla. Disneyland Resort, located in Anaheim, Calif., includes one theme park and several nearby hotels and recreational centers. The company is constructing a new theme park, Disney's California Adventure, which will be located adjacent to Disneyland.

The Disney Regional Entertainment Group develops entertainment complexes in metropolitan locations that are centered on sports and interactive entertainment related to Disney's brands and creative properties. These include the ESPN Zone, a series of sports-themed restaurants and sports entertainment complexes, and DisneyQuest, a series of multi-story interactive, virtual adventure centers.

The company licenses and merchandises its characters, other creations, and the name "Walt Disney." It owned and operated 728 The Disney Store facilities as of September 30, 1999. The company markets and distributes, through various outlets, animation cel art and other animation-related artwork and collectibles.

Anaheim Sports Inc., a wholly owned subsidiary, operates baseball's Anaheim Angels and hockey's Anaheim Mighty Ducks.

News Corporation

Rupert Murdoch's News Corporation is a global media company with substantial television, filmed entertainment, music, and news holdings in the U.S. News Corp owns 85 percent of Fox Entertainment Group, which operates the Fox Broadcasting Company. Fox owns 22 television stations, including KDFW-TV in Dallas, KRIV-TV in Houston, and KTBC-TV in Austin.

On August 14, 2000, News Corp. entered into an agreement to buy Chris-Craft Industries, Inc., for $5.4 billion. Chris-Craft owns 10 television stations in top markets, most of which are affiliated with the United Paramount Network (Viacom). Once acquired by News Corp, the stations will drop those affiliations, essentially ending the network's hopes for survival. The deal would give Murdoch control of stations in all of the top 10 U.S. markets, including two stations each in Los Angeles and New York. The deal includes BHC Communications, which was 80 percent owned by Chris-Craft, and United Television, both operators of broadcast television stations.

Fox owns and operates Twentieth Television, a filmed entertainment production and distribution company. Twentieth Television produces the television series *Dharma and Greg*, *The Practice*, *Judging Amy*, *The Simpsons*, *The X-Files*, *King of the Hill*, *Ally McBeal*, and *Buffy the Vampire Slayer*, among many others. Fox Television Studios also produces lower-cost series for network and independent broadcast, including *Malcolm in the Middle*, *The X-Show*, and reality-based shows such as *When Animals Attack*. The company owns the rights to more than 2,500 motion picture titles and syndication rights to dozens of television series, including *M*A*S*H* and *Hill Street Blues*.

News Corporation Corporate Profile

Chief Executive:	K. Rupert Murdoch
Headquarters:	Sydney, Australia
Employees:	50,000
Sales:	$14.2 billion
Fortune 500 Rank:	N/A
Subsidiaries:	20th Century Fox
	Fox Broadcasting Company
	HarperCollins
	Chris-Craft
	Sky Global Networks
	News America Marketing
	Los Angeles Dodgers

Fox owns and operates several networks, including the Fox News Channel, FX, and Fox Sports Net, a collection of 21 regional sports networks including Fox Sports Southwest. Fox owns 50 percent of the Health Network, 33 percent of the Golf Channel, 44 percent of TV Guide Networks, 34 percent of Outdoor Life, and 34 percent of Speedvision Networks. Fox and Saban Entertainment each own 49.5 percent of Fox Family Worldwide, which includes the Fox Family Channel and Fox Kids. Saban is a distributor of children's action-adventure programming, including the *Mighty Morphin' Power Rangers* franchise and *X-Men*.[10]

Fox also owns 40 percent of Regional Programming Partners, which has ownership interests in Radio City Music Hall, basketball's New York Knicks, hockey's New York Rangers, Madison Square Garden, and the MSG Network. It owns 50 percent of National Sports Partners and National Advertising Partners.

Fox Filmed Entertainment manages the company's production and distribution of full-length motion pictures and other filmed entertainment, headed by the Twentieth Century Fox studio. It also operates the Fox 2000 Pictures, Searchlight Pictures, and Fox Animation Studios. Recent Fox films include *There's Something About Mary*, *Star Wars Episode I: The Phantom Menace*, *Titanic* (together with Paramount), *The X-Files*, and *X-Men*. The company owns 20 percent of Monarchy Enterprises Holdings, which owns New Regency Entertainment. The two companies have formed a 50/50 joint venture, Regency Television, to produce television programs.

Twentieth Century Fox Home Entertainment distributes feature-length motion pictures, videos, DVDs, and other products through retail media outlets. Fox Interactive produces video games.

[10]Another 49.5 percent of Fox Family Worldwide is owned by Saban.

Fox Music produces, distributes, and licenses soundtracks from Fox movies and television shows.

News Corp subsidiary Sky Global Networks, a global satellite operator, is one of the world's leading distributors of pay-TV, serving roughly 85 million homes around the world, almost entirely outside the U.S. Sky Global owns 40 percent of BSkyB, one of the leading broadcasters in the United Kingdom.[11] BSkyB owns 50 percent of Nickelodeon, Nick Replay, Nick Jr., the History Channel, and the National Geographic Channel networks, 20 percent of the QVC home shopping network, and around 50 percent of several international networks. BSkyB owns a 49 percent stake in the Music Choice Europe joint venture, which has Warner Music Group and Sony Digital Radio Europe as partners. BSkyB also owns minority interests in the Manchester United, Chelsea, Leeds United, Manchester City, and Sunderland football clubs.

In September 2000, Liberty Media and News Corporation agreed to a complicated stock swap that gave News Corporation a roughly 21.5 percent stake in Gemstar International, maker of the VCR Plus+ system and operator several on-screen cable program guides, which has announced plans to merge with TV Guide. News Corp and Liberty Media each own 44 percent of TV Guide, Inc., publisher of the nation's most widely circulated weekly publication, *TV Guide*, and operator of the TV Guide and Prevue on-screen cable program guides. TV Guide owns 80 percent of Superstar/Netlink Group, a satellite entertainment programmer. TV Guide also provides satellite broadcast services, including the distribution of WGN-TV Chicago, KTLA-Los Angeles, and WPIX-New York superstations to various cable companies around the U.S.

As part of the stock swap, Liberty Media obtained a 13 percent stake in News Corporation, and Liberty Media together with its CEO John Malone now own about 21 percent of News Corp. Liberty Media obtained a 4.76 percent stake in Murdoch's Sky Global Networks, and Malone agreed to purchase an additional $500 million in Sky Global stock when it goes public, raising his overall interest in the company to about 6 percent. The deal positions Murdoch to make a serious effort to purchase Hughes DirecTV, assuming the company is put up for sale. That acquisition would fill the U.S. void in News Corp's satellite operations.

News Corp subsidiary HarperCollins Publishing is one of the world's largest publishing houses. It was formed in 1990 when News Corp acquired British publisher William Collins and added its holdings to the News America Publishing Group. Recent HarperCollins best-sellers include Sebastian Junger's *The Perfect Storm*, *Dr. Atkins' New Diet Revolution*, *The Rock Speaks* by wrestler The Rock, and the Jamie Lee Curtis children's book *Today I Feel Silly*. HarperCollins purchased Ecco Press, one of the world's leading literary publishers, in February 1999. It bought the Hearst Book Group, consisting of William Morrow & Company and Avon Books, in July 1999. That deal made HarperCollins the largest publisher in the U.S. In October 1999,

[11] BSkyB (British Sky Broadcasting) is controlled by Rupert Murdoch. Vivendi owns 20 percent of BSkyB.

HarperCollins purchased Amistad Press, of the nation's largest publishers of African-American writers. Zondervan Publishing House is one of the world's largest publishers of bibles and spiritual texts.

In the U.S., News Corp owns and operates the *New York Post*. It owns hundreds of newspapers around the world including the United Kingdom's *The Times*, *The Sunday Times*, and *The Sun*. News Corp publishes *See* and *The Weekly Standard* magazines, and it owns 44 percent of the TV Guide Magazine Group, publishers of *TV Guide*. The company also owns News America Marketing, one of the largest advertising insert producers in the U.S.

News America Digital Publishing operates the Fox Web sites, including Fox News and Fox Sports Online. Fox News Online is the primary news content provider for Excite@Home. It owns a minority stake in Juno Online Services, an ISP.

The company owns baseball's Los Angeles Dodgers. Fox Sports Ventures owns 40 percent of the Staples Center, home of basketball's Los Angeles Lakers and hockey's Los Angeles Kings.

Qwest

Qwest is the name of the company that formed by the merger of the old Qwest and US West, one of the original seven Baby Bells, consummated in March 2000. As a condition of the merger, Qwest was required to divest its long distance customers in US West's territory. Qwest is a broadband Internet communications and long distance company. Qwest owns and operates a nationwide digital network, and it is developing and acquiring the capacity to provide end-to-end connectivity nationwide. As of March 2000, Qwest's domestic network included over 25,500 miles of fiber, and an additional 1,400 miles was located in Mexico. In 1998, Qwest acquired Phenix Network, a long distance reseller. Qwest has investments in Covad Communications Group and Rhythms NetConnections, Inc.

Qwest Corporate Profile

Chief Executive:	Philip F. Anschutz
Headquarters:	Denver, Colo.
Employees:	71,000
Sales:	$17.1 billion
Fortune 500 Rank:	134
Subsidiaries:	US West Dex

The Anschutz Corporation owns about 38 percent of Qwest, which was founded by Denver billionaire Philip Anschutz. He also owns Vicorp, a leading provider of telecommunications switching equipment—Sprint and MCI WorldCom are customers—hockey's Los Angeles Kings, the United Artists theater chain, and, together with News Corporation, Fox Sports One, a sports marketing company. Ten percent of Qwest is owned by BellSouth. By far, Anschutz and BellSouth are the largest shareholders.

US West provides local exchange telephony and related services, including intraLATA long-distance and enhanced services, to 17 million access lines in a 14 western states. It provides wireless services throughout its service region. US West !nterprise offers high-speed Internet access, and US West.net offers standard dial-up access. Its subsidiary Dex publishes regional telephone directories. The current US West, before it became part of Qwest, was part of a larger corporation, also named US West, which split into two separate corporations in June 1998. The other, known as US West Media Group, controlled the multimedia aspects—including broadband—of the company. It became MediaOne and is now part of AT&T.

SBC Communications

SBC represents the recombining of four baby Bell companies. It was incorporated as a holding company in 1983 following the breakup of AT&T. When it began, SBC operated primarily in five southwestern states, including Texas. SBC merged with the Pacific Telesis Group in 1997, Southern New England Telecommunications Corporation in 1998, and Ameritech in 1999. SBC markets services under the brand names Ameritech, CellularOne, Nevada Bell, Pacific Bell, SBC Telecom, SNET, and Southwestern Bell.

SBC Corporate Profile

Chief Executive:	Edward E. Whitacre Jr.
Headquarters:	San Antonio
Employees:	204,000
Sales:	$49.5 billion
Fortune 500 Rank:	12
Subsidiaries:	Southwestern Bell Ameritech Pacific Bell SNET Prodigy CellularOne Cingular Wireless

SBC, through its subsidiaries, offers wireline telecommunications services in 13 states, including Texas. SBC provides services to approximately 37 million residential and 23 million business customers, making it the nation's second largest local exchange provider after Verizon. Wireline services provided SBC with 77 percent of its revenues in 1999. Wireline services provide local exchange, network and long-distance access service, interLATA long distance, messaging, Internet services, PBX equipment, and satellite television services. SBC also offers wholesale services to CLECs covering more than 1.6 million lines.

Project Pronto is a $6 billion investment initiative designed to provide broadband Internet access to at least 80 percent of SBC's wireline customers, primarily through xDSL. SBC, through SNET, operates a single cable system in Connecticut. SBC and Hughes are involved in a strategic marketing agreement by which SBC will market and distribute DirecTV to its wireline subscribers.

In September 2000, SBC agreed to invest $150 million in Covad Communications, a California-based DSL provider. The deal gives SBC a 6 percent stake in Covad and guarantees Covad

about $600 million over six years as SBC sells Covad's DSL service to its customers. In return, Covad agreed to drop its antitrust suit against SBC.

SBC owns 43 percent of Prodigy, which is SBC's exclusive retail consumer and business Internet access service. Prodigy has assumed the management of 650,000 current SBC Internet access subscribers through dial-up, ISDN, and DSL access, giving Prodigy more than 2 million subscribers nationwide. SBC has acquired Sterling Commerce, a provider of electronic business integration solutions. SBC has acquired 4 percent of Williams Communications, provider of a national fiber optic network.

SBC provides domestic wireless telecommunications services throughout the country, and its markets include 23 of the 35 largest U.S. metropolitan areas. SBC also provides local and nationwide paging services. In July 1999, SBC purchased Comcast Cellular Corporation, the wireless subsidiary of Comcast. In March 2000, SBC purchased Radiofone, Inc., a wireless and paging company. In April 2000, SBC and BellSouth agreed to merge their wireless operations into a new venture, called Cingular Wireless, of which SBC would own 60 percent. The merger would create the nation's second largest wireless company behind Verizon. The FCC approved the deal in September 2000. The companies will be required to divest systems in 16 markets where their service overlaps. Together with Western Wireless, SBC manages the CellularOne network.

Through its subsidiaries, SBC publishes 882 directories, which provided approximately 10 percent of the company's 1999 revenues. SBC Interactive offers SMARTpages and the Ameritech Internet Yellow Pages, both searchable national business directories. SBC owns cable systems operating in about 100 Midwestern communities, and it offers cable services in Chicago; Cleveland; Columbus, Ohio; and Detroit. SecurityLink offers electronic security products.

Internationally, SBC owns stakes in: Belgacon (Belgium), Algar Telecom Leste (Brazil), Bell Canada, Cegetel S.A. (France, together with Vivendi), Tele Danmark A/S (Denmark), Wer Liefert Was (Germany, a directory publishing company), MATAV (Hungary), AUREC (Israel), Telmex (Mexico), NetCom GSM (Norway), Telkom S.A. (South Africa), diAx A.G. (Switzerland), and TransAsia Telecommunications (Taiwan), among others.

Seagram

Seagram is a Canadian corporation that was founded in 1928, primarily as a distributor and distiller of spirits. Today, most of the company's earnings come from its entertainment businesses. In June 2000, Seagram agreed to be purchased by Vivendi, a French utilities company and the world's largest distributor of water. The combined company, which would be called Vivendi Universal, would be the world's second largest media company behind Time

Warner. Vivendi Universal would also include Canal+, one of Europe's largest distributors of pay-TV and cable networks. Vivendi already owns 49 percent of Canal+.

In September 2000, Vivendi officials promised that the combined company would not establish exclusive arrangements between its different operating units, specifically between Universal Music Group, Canal+, and Vizzavi.[12] Vivendi has also offered to sell its 20 percent stake in BSkyB. An August 2000 deadline for U.S. antitrust action passed without either the Federal Trade Commission or U.S. Department of Justice taking action. In October 2000, the EC extended its antitrust investigation of the proposed merger for another four months.

Seagram owns 92 percent of the Universal Music Group, the world's largest recorded music company. It was formed in December 1998 when Seagram acquired PolyGram and added its holdings to its own Universal company. Its recording labels include A&M, Blue Thumb, Decca/London, Def Jam, Geffen, Interscope, Island, MCA, MCA Nashville, Mercury, Mercury Nashville, Motown, Philips, Polydor, Universal, and Verve. Artists under contract include Bryan Adams, Beck, Sheryl Crow, Hanson, Dru Hill, Elton John, Reba McEntire, Metallica, Sting, George Strait, Shania Twain, U2, and Stevie Wonder. It owns the largest recorded music catalog in the world, including the works of ABBA, Jimmy Buffett, Patsy Cline, Marvin Gaye, Jimi Hendrix, Buddy Holly, Bob Marley, the Rolling Stones, and the Who. The company owns the rights to more than 600,000 songs in print.

Seagram Corporate Profile

Chief Executive:	Edgar M. Bronfman
Headquarters:	Montreal, Canada
Employees:	34,000
Sales:	$12.3 billion
Fortune 500 Rank:	N/A
Subsidiaries:	Universal Polygram Geffen USA Networks SEGA Dreamworks

Vivendi Corporate Profile

Chief Executive:	Jean-Marie Messier
Headquarters:	Paris, France
Employees:	275,000
Sales:	$41.9 billion
Fortune 500 Rank:	N/A
Subsidiaries:	Canal+ Cegetel Onyx North America

Universal Studios produces feature-length motion pictures, animated features, and children's shows for distribution in the U.S. and abroad. Universal owns 45 percent of USA Networks, which operates the USA Network, Sci-Fi Channel, Home Shopping Network, and America's Store.[13] USA Networks also owns Ticketmaster, CitySearch (including austin.citysearch.com), and the Hotel Reservations Network. USA Networks owns several motion picture production companies, including USA Films studio (formerly Savoy Pictures), and October Pictures, a former property of Universal.

[12]Vizzavi (pronounced as though it were *vis-a-vis*) is the high-speed Internet portal that is jointly owned by Vivendi and Vodafone.

[13]Liberty Media (AT&T) owns 21 percent. The rest is held by outside investors.

Universal owns 26 percent of Loews Cineplex Entertainment Corporation, which operates motion picture theaters across the U.S. and Canada, and 49 percent of United Cinemas International, which owns theaters abroad. The company has a 50 percent interest in Universal Studios Florida, a series of theme parks near Orlando, a 25 percent interest in hotel complexes near the parks, and 100 percent of Universal Studios Hollywood. Several international parks are under development. Universal owns 27 percent of SEGA GameWorks, a leading maker of video games systems and video games. Universal also owns the more than 570 Spencer Gifts, DAPY, and Glow retail stores. Universal also develops its own video games through various subsidiaries.

Seagram's spirits business distributes more than 235 brands of spirits, 180 brands of wine, and 40 brands of other alcoholic beverages. Its labels include Crown Royal, Seagram's 7, Chivas Regal, Glenlivet, Martell, Captain Morgan, and Absolut. Vivendi Universal plans to sell off the spirits business once the merger is approved. Potential buyers include Britain's Diageo PLC and Allied Domecq PLC, France's Pernod Ricard SA, and Switzerland's Spirit AB.

Sprint

Sprint, a holding company, was incorporated in 1938. Sprint's operations are split between its FON Group and its PCS Group, names that mirror its stock symbols. The FON Group includes the company's domestic and international long distance, local exchange, Internet, product distribution, and directory publishing businesses. The PCS Group includes the company's domestic wireless operations.

Sprint Corporate Profile

Chief Executive:	William T. Esrey
Headquarters:	Kansas City, Mo.
Employees:	78,000
Sales:	$19.9 billion
Fortune 500 Rank:	81
Subsidiaries:	Sprint PCS Sprint ION

Sprint is the nation's third largest long distance company. It operates a nationwide fiber-optic network that is capable of providing voice, video, and data communications services. The local telephone division controls a series of local exchange companies serving more than 8 million access lines in 18 states, predominantly in medium and small markets. Sprint ION is the company's advanced services offering, which extends the company's current infrastructure to the customer. Its last-mile offerings include xDSL and MMDS technologies. Sprint owns 19 percent of EarthLink, an ISP that recently merged with MindSpring, another ISP, and Call-Net, a Canadian long distance company.[14]

[14]EarthLink's principal investors include Sprint (19 percent), Sprint CEO William T. Esrey (19 percent), and Apple Computer (6 percent).

Sprint PCS operates a nationwide digital PCS wireless network in the U.S., with licenses to provide nationwide service using a single frequency range and a single technology. Sprint PCS operates in over 360 U.S. metropolitan areas, including the 50 largest. In areas where Sprint PCS does not operate its own digital network, it affiliates with other companies or arranges for roaming on other digital or analog networks. Sprint PCS was formed by an alliance between TCI, Comcast, Cox, and Sprint in 1994.[15]

In November 1999, MCI WorldCom and Sprint announced plans to merge. The deal ran into considerable regulatory resistance on both sides of the Atlantic Ocean. In the U.S., regulators were concerned about the competitive impacts of combining the nation's second and third largest long distance companies. European regulators, concerned about the combined company's control over Internet backbones, blocked the deal. In July 2000, WorldCom and Sprint announced termination of their proposed merger.

Verizon

Verizon Communications, Inc. came into existence on June 30, 2000, upon closure of the merger between GTE and Bell Atlantic. The merger received final approval from the FCC on June 16. Verizon is the nation's largest local exchange company, serving more than a third of the nation's local access lines. In terms of revenues, Verizon is the second largest U.S. telecommunications company behind AT&T. The company is also the largest domestic wireless carrier, the world's largest print and online directory company, and a leading provider of high-speed data services.

Verizon Corporate Profile

Chief Executives:	Charles R. Lee and Ivan Seidenberg
Headquarters:	New York City
Employees:	260,000
Sales:	$58.5 billion
Fortune 500 Rank:	33 (will move into Top 15 in 2001)
Subsidiaries:	Verizon Wireless NorthPoint

Bell Atlantic was one of the original seven Baby Bells created after the 1984 breakup of AT&T. It served 43 million access lines in 13 northeastern and mid-Atlantic states and the District of Columbia. In August 1997, Bell Atlantic completed its merger with NYNEX Corporation, the incumbent local exchange company of New York and most of New England. Bell Atlantic-New York was the first Baby Bell to receive FCC approval to offer long distance services to its local exchange customers in its territory.

[15]Today, principal investors in Sprint PCS are Liberty Media (23 percent), Cox (14 percent), Comcast (8 percent), and Deutsche Telekom (around 4 percent). Deutsche Telekom was rumored to be considering increasing its stake in Spring PCS when the Sprint-WorldCom deal fell apart. It chose to acquire VoiceStream Wireless instead.

Prior to the merger, GTE had been the nation's largest independent local exchange company, providing service to more than 28 million access lines in 28 states. GTE grew up outside of the Bell system. It was formed in 1918 from Richland Center Telephone Company and slowly added properties throughout the country. In 1935, it was reorganized as General Telephone Corporation. It added systems throughout the next several decades, including a number of exchanges in Texas. In 1990, GTE merged with Contel Corporation. In 1996, GTE entered the long-distance business as a reseller through an agreement with a forerunner of WorldCom.

Verizon has a domestic wireline presence in 31 states plus the District of Columbia, Puerto Rico, and Micronesia. The new company serves approximately 33 million households and has 63 million access lines, 95 million U.S. voice grade equivalents, 2.2 million wholesale lines (sold to competitors), 4 million long-distance customers, and has the capability to provide DSL service to 16.5 million households. Verizon's 100 percent digital network is comprised of 6,300 central offices and nearly 7 million fiber conductor miles.

In 1997, GTE acquired BBN, an Internet pioneer, and purchased fiber-optic capacity from Qwest. These enterprises became the company's Internet infrastructure company, called GTE Internetworking, and, later, Genuity. As part of the conditions attached by the FCC to approve the merger, Genuity was spun off in an initial public offering that divested 90.5 percent of the company from GTE. Verizon maintains a 9.5 percent equity interest in Genuity, and it has the option to increase its ownership up to 80 percent once Verizon has secured long-distance authorization from the FCC in the states formerly served by Bell Atlantic.

In August 2000, Verizon announced that it would merge its DSL business with NorthPoint Communications Group. The new NorthPoint company will include Verizon's existing DSL business, including its broadband network assets, and an $800 million cash investment from Verizon. Verizon would own 55 percent of NorthPoint after the merger, while NorthPoint's existing shareholders would own 45 percent. The merger is subject to various regulatory approvals, as well as approval from NorthPoint's shareholders, and the companies expect to complete the transaction in mid-2001.

Verizon Wireless was formed by the merger of the wireless assets of Bell Atlantic, Vodafone AirTouch, PrimeCo, and, ultimately, GTE. It serves 26 million wireless customers throughout the United States. In March 2000, the FCC approved the transfer of the wireless licenses of Bell Atlantic and the U.S. assets of Vodafone AirTouch to a new entity, Cellco Partnership. The Vodafone Group owns 45 percent of Verizon Wireless. Vodafone merged with AirTouch Cellular in June 1999, creating Vodafone AirTouch Plc. In 1998, AirTouch acquired the U.S. cellular operations of MediaOne and its 25 percent stake in PrimeCo Personal Communications. PrimeCo was formed in 1994 as a joint venture between AirTouch, Bell Atlantic, NYNEX, and US West. The combined company serves 96 of the nation's top markets and has the capability of serving 90 percent of the U.S. population. Verizon Wireless has 4 million paging customers.

Verizon is the world's largest provider of print and online directory information. Its information services company has a domestic circulation of 112 million printed directories, and an international circulation of 41 million directories. Its online directories receive 4.3 million page-views per month. The company has operations in 40 countries, with a variety of ownership and equity interests in wireline, wireless, and directory printing operations.

Viacom

In May 2000, regulators approved Viacom's merger with the Columbia Broadcasting System (CBS) Corporation. Founded in 1872, CBS is one of the largest radio and television broadcasters in the U.S., and it operates the nation's largest outdoor advertising business. CBS owns and operates 16 television stations, including KEYE-TV in Austin and KTVT-TV in Dallas/Fort Worth. The CBS television network produces, acquires, and broadcasts a comprehensive schedule of news, sports, and entertainment programming to more than 200 affiliated stations.

Viacom Corporate Profile

Chief Executive:	Sumner M. Redstone
Headquarters:	New York City
Employees:	126,000
Sales:	$12.9 billion
Fortune 500 Rank:	141
Subsidiaries:	Columbia Broadcasting System
	Paramount Pictures
	United Paramount Network
	Infinity Broadcasting
	Blockbuster
	Simon & Schuster
	MTV Networks
	Showtime Networks
	King World

CBS owns King World, a major television syndication distributor. CBS owns and operates The Nashville Network and Country Music Television networks. CBS is the majority owner of Midwest Sports Channel (Minneapolis) and Home Team Sports (Washington/Baltimore). CBS Internet has equity investments in a number of Internet sites, including Jobs.com and Rx.com.

Infinity Broadcasting owns and operates 162 radio stations in 34 markets. Infinity operates 16 radio stations in Texas.[16] On March 3, 2000, Infinity Broadcasting agreed to purchase 18 radio stations from Clear Channel Communications for about $1.4 billion. The deal is still pending regulatory approval. None of those stations are in Texas. Infinity owns 17 percent of Westwood One, a producer of syndicated radio content and manager of the CBS Radio Network. Infinity Outdoor Inc. is the nation's largest outdoor advertising business, utilizing various media including billboards, commuter rail and bus advertising, and phone kiosks. In August 2000, Viacom announced it would acquire the interests of Infinity that it did not already own.

[16]Infinity owns KAMX-FM, KJCE-AM, KKMJ-FM, and KQBT-FM in Austin; KHVN-AM, KLUV-AM, KLUV-FM, KOAI-FM, KRBV-FM, KRLD-AM, KVIL-FM, and KYNG-FM in Dallas/Fort Worth; and KIKK-AM, KIKK -FM, KILT-AM, and KILT-FM in Houston.

In 1994, Viacom merged with Paramount Pictures and, in a separate transaction, Blockbuster. Paramount Pictures produces, finances, and distributes feature-length motion pictures. Paramount Television, Viacom Productions, and Spelling produce, acquire, and distribute television series, miniseries, specials, and made-for-TV movies. The Paramount Stations Group owns and operates 17 television stations, including KTXA-TV in Dallas/Fort Worth. The company owns and operates the United Paramount Network (UPN), a nationwide broadcast network airing 24 hours of original programming weekly, including 10 hours of primetime broadcasts over five nights.[17]

Paramount Parks owns five theme parks in the U.S. and the Star Trek Experience attraction at the Las Vegas Hilton.

Viacom owns 82 percent[18] of Blockbuster, a nationwide chain of more than 7,000 stores, 515 of which are located in Texas, that rents videocassettes, DVD, and video games. The company rents more than 1 billion videos and games each year. Blockbuster's national distribution center is located in McKinney, which is near its Dallas headquarters. In July 2000, Blockbuster and Enron reached an agreement paving the way for the companies to stream motion pictures over DSL lines. In November 1999, Blockbuster and America Online entered into an online marketing alliance, and AOL acquired an equity interest in Blockbuster's interactive operations.

Viacom owns Simon & Schuster, one of America's largest publishing houses. It also owns the Pocket Books, Scribner, and The Free Press labels. Simon & Schuster publishes the works of Stephen King, Jackie Collins, and Mary Higgins Clark, among many others.

Viacom owns MTV Networks, which operates the MTV, MTV2, VH1, Nickelodeon, TV Land, and Noggin cable networks. MTV Films, in association with Paramount, produces feature-length motion pictures targeted for the 12 to 34 set. MTV Productions produces reality-based series and other television productions. With Liberty Media, MTV Networks own and operate The Box. Nickelodeon operates a variety of entertainment spinoffs, including the Nickelodeon Studios at Universal Studios Florida and several theme park/variety show units. Viacom owns Famous Music, which markets and distributes soundtracks from the company's motion picture and television offerings, and other recorded products.

Viacom owns Showtime Networks Inc., which owns and operates the premium subscription networks Showtime, The Movie Channel, and flix, and, through a partnership with SNI and Universal, the Sundance Channel. Showtime and The Movie Channel are offered as multi-

[17]The future of the UPN Network is in considerable doubt as of September 1, 2000. With News Corp's purchase of Chris-Craft, UPN will lose access to several of the nation's largest markets, including Los Angeles and New York. News Corp is the parent company of the Fox broadcast network.

[18]The remaining 18 percent of Blockbuster is publicly held.

channel subscriptions on digital cable and satellite systems throughout the U.S. Showtime Event Television is a pay-per-view distributor of sports events and concerts. Showtime Networks has an exclusive rights contract to first-run output from Paramount Pictures. Viacom has interest in Comedy Central, a joint venture with Time Warner's HBO.

WorldCom

Formed as a result of a September 1998 merger between MCI and WorldCom, the company operates a worldwide communications network such that customers can send data streams around the world without ever leaving the company's network. The merger gave WorldCom one of the nation's largest and most advanced digital networks and the second largest domestic long distance company. WorldCom operates the 1-800-COLLECT, 10-10-321, and 10-10-220 collect calling and dial-around services. In May 2000, WorldCom dropped MCI from its corporate name, but it continues to market its products under the MCI brand name.

WorldCom Corporate Profile

Chief Executive:	John Sidgmore
Headquarters:	Clinton, Miss.
Employees:	77,000
Sales:	$37.1 billion
Fortune 500 Rank:	25
Subsidiaries:	UUNet SkyTel 1-800-COLLECT

In September 2000, WorldCom agreed to buy Intermedia, one of the nation's leading CLECs. Intermedia provides voice and data services to over 90,000 business and government customers. Intermedia owns 54 percent of Digex, a website hosting company with more than 550 customers including automobile manufacturer Nissan and retailer J. Crew. The deal would give WorldCom a 55 percent stake and a 94 percent voting interest in Digex, which will take advantage of WorldCom's UUNet to manage ever-larger portions of Internet content and data traffic. The deal requires federal approval and is expected to close in early 2001.

In October 1999, WorldCom acquired SkyTel Communications, Inc., which provides nationwide messaging services. In September 1997, MCI acquired CompuServe from Bertelsmann, pending an arrangement with AOL to provide online content and manage network traffic. Shortly thereafter, MCI dealt CompuServe's Interactive Services division and cash to America Online in return for ANS Communications in 1998. Through this transaction, MCI secured management contracts making MCI and its network the primary provider of AOL's Internet access and network services. MCI retained CompuServe's Network Service's division.

Also in 1998, WorldCom acquired Brooks Fiber Properties, a facilities-based CLEC and builder of local fiber-optic networks. WorldCom also controls MFS Communications Company, another local fiber-optic network operator, and UUNET, a worldwide provider of a comprehensive series

of Internet connectivity services. WorldCom also owns the network services division of Williams Telecommunications, which it purchased in 1995. WorldCom owns substantial stock in Metricom, a provider of mobile data networking, which includes Ricochet, a service allowing mobile customers to access the Internet via their wireless handsets.

Through a strategic alliance, Bell Canada is MCI WorldCom's exclusive distributor in Canada. WorldCom owns 44.5 percent of Avantel S.A., the company that built Mexico's first all-digital fiber-optic network and was the first major competitor to Telmex. WorldCom also holds substantial interest in Embratel, Latin America's largest telecommunications provider. WorldCom owns trans-oceanic cables across the Atlantic and Pacific Oceans.

In November 1999, WorldCom and Sprint announced plans to merge. The deal ran into considerable regulatory resistance on both sides of the Atlantic Ocean, and the European Commission blocked the deal. In July 2000, the companies announced termination of their proposed merger. In September 2000, WorldCom appealed the EC's ruling.

APPENDIX D: SUMMARY OF STAFF BRIEFING ON OPEN ACCESS

The committee held a staff briefing on the open access issue on August 16, 2000, the day before the committee's final interim hearing. The briefing featured a moderated debate between representatives of GTE (now Verizon) supporting open access and representatives of the Texas Cable and Telecommunications Association (TCTA) opposing open access. The briefing was open to all Capitol staff and the public.

ED SHIMIZU of GTE said open access is "about consumer protection and competition." Because the telephone network was open by regulation, "the Internet has exploded." The high-speed Internet access product offered by the telephone companies, DSL, is open by regulation as well. Cable modem service is under no such regulation. It does not make sense that the competitor with the smaller market share is under more regulation than the competitor with the larger market share. Historically, it has been federal government regulation that has forced open communications networks, which their operators have wanted to keep closed. These proceedings can take years. "If you're concerned about the state of competition for Internet service providers in this state, you ought to move ahead with legislation at the state level." The danger in waiting is that "a new digital divide" will be created between those broadband consumers who have a choice in ISPs and those who do not. Open access legislation gives consumers choice without having to pay twice for their chosen ISP. Customers will not have to change e-mail addresses. Robust competition between ISPs will continue, and municipalities will be protected from litigation when they attempt to provide open access at the local level.

August 16, 2000
Staff Briefing on Open Access
Participants

Proponents of Open Access
Thomas Clarke, GTE
John Raposa, GTE
Ed Shimizu, GTE

Opponents of Open Access
Bill Arnold, Texas Cable & Telecommunications Association (TCTA)
Paul Glist, TCTA
Kathy Grant, TCTA

Resource
Darrell Guthrie, Public Utility Commission of Texas
Ron Hinkle, Public Utility Commission of Texas

PAUL GLIST, representing TCTA, said the development of cable modem service has given customers a new choice for high-speed Internet service and has "spurred the incumbent telephone companies to dust off DSL" and deploy it in their service areas. DSL is giving cable modems "a run for our money" and is growing faster than cable modem service. No industry analysts predict that cable modem service will dominate Internet access. Dial-up will remain the dominant means for some time, and other kinds of service, like wireless and satellite, are just now starting to be

rolled out. Contrary to GTE's outlook, cable is not a closed platform; its customers can connect to any ISP and visit any Web site they want. Different economic models exist on the Internet. Some offer content and access for free. Others charge for them. "The Internet did not come crashing to a halt" because different economic models were introduced.

Federal courts ruling on open access have "tossed the issue to the FCC, and the FCC caught it." The FCC has rejected open access every time it has considered it, because it believes the marketplace will maximize consumer choice. Open access will "hurt competition, hurt investment, and hurt customer choice." Government forbears from regulating new entrants in a market in order to bring investment to new technologies and give customers new choices. "Consumers aren't victims. They are winners in this horse race."

JOHN RAPOSA of GTE said there are two central tenets to communications policy. The first is openness, and the second is regulating like services in the same manner. The owner of the wire cannot be left to control what goes over the wire, who uses it, and what innovations can occur to make the experience better. ISPs provide access to the Internet and content. Being able to go to any Web site with a cable modem "answers only one piece," which is content. Closed platforms force consumers to use the cable company's affiliated ISP as their access point to the Internet.

MR. GLIST responded that Congress wanted "to inspire people to invest in facilities that would offer competing dial tones," so it created different rules for competitors than for incumbents. It is appropriate that same services are regulated differently, depending on who offers them, because the rules are set up to encourage competition. Regulators sought "to get the marketplace to do a lot of heavy lifting in bringing new technologies in." If consumers do not want to wait for AT&T to complete its multiple-ISP trials in Boulder, Colo., or wait for the FCC to act, they can have choice now. Cable modems do not stop anyone from accessing any content, from going to any Web site, from changing the opening screen when they get on the Internet, or from having any e-mail address they want.

DARRELL GUTHRIE of the PUC said the regulatory landscape over broadband can be divided up into pricing, access, content, and customer protection issues. In Texas, it is largely left up to local franchising authorities (LFAs) to regulate the cable companies that operate there. The FCC has asserted jurisdiction over DSL pricing, but it is unclear what role the state may have. LFAs can regulate the price for the basic service tier of video programming, but all other prices are unregulated. Franchise fees are also determined on a local level.[19] In terms of access, the state regulates unbundling and interconnection requirements for DSL. It is unclear what the state's role in access to cable is, considering that the *Portland* case has defined cable modem service as a telecommunications service. Content regulation is not applicable to DSL, and authority over

[19]Under federal law, franchise fees can be no more than 5 percent of cable service revenues. Franchise fees compensate cities for the cable operators' use of public rights of way.

cable content is very limited to an LFA's ability to require cable operators to set aside capacity for public, educational, and governmental channels. In terms of customer protection, the FCC has asserted authority over some aspects of DSL, and the extent of the state's authority remains unresolved. LFAs maintain authority over customer protection issues, and the city of Portland based its open access ordinance upon this authority.

KATHY GRANT of TCTA said that no cable operator has an exclusive franchise in any city in Texas, by law. Overbuilders are coming into the major cities such as Austin, Dallas, and Fort Worth.[20] **BILL ARNOLD** of TCTA added that overbuilders are also moving into some of the state's mid-size markets, such as Amarillo, Big Spring, Lubbock, Midland, Odessa, San Angelo, and Waco.

MR. RAPOSA said the Texas Legislature should pass legislation that would "require cable [operators] to provide nondiscriminatory access to any requesting Internet service provider." Cable operators should be prohibited from requiring their customers to purchase their affiliated ISP. **MR. SHIMIZU** said the requirement would apply to an individual customer who chooses an ISP and an ISP who wants to market and resell high-speed Internet access to a group of customers. **MR. GLIST** said the Legislature should "give the FCC the chance to do its job."

THOMAS CLARKE of GTE said the goal of open access legislation is not to create "some massive regulatory scheme like what we face on the telecom side." **MR. SHIMIZU** added that he envisioned a "pretty straightforward and clear cut" two-page bill, similar to House Bill 3393, 76th Legislature, filed by Rep. Brimer. **MR. GLIST** replied that "it is far more complicated to try to actually implement regulations defining what nondiscriminatory rates, terms, and conditions actually mean." **MR. RAPOSA** said open access legislation would not require "15 rulemakings or even a 15-page order."

MR. GLIST said there was not a guaranteed customer base for cable modem service when the cable companies and other high-tech companies invented cable modem technology. There is no separate price for transport, because cable modem access is "a co-venture between the founding innovators" of the product. By contrast, the phone companies already had DSL developed, and they were already under the regulatory regime that applied to incumbent phone companies as they began to deploy DSL. Consumers do not "feel trapped" in the marketplace that has since developed. **MR. RAPOSA** replied that investment in DSL was not incentivized by less regulation, so the cable companies should not receive regulatory incentives to provide an alternative product. **MR. GLIST** responded by saying that the FCC has "created a regulatory oasis" for broadband and has deregulated DSLAMs to encourage the phone companies to roll out DSL.

[20]An overbuilder is the equivalent of a facilities-based CLEC in the telephone world. It is a company that obtains a franchise to build a complete cable system to compete with an existing cable franchise.

MR. RAPOSA said the principle of nondiscrimination applies to all telecommunications providers, not just the incumbent phone companies operating under legacy regulation. Nondiscrimination was not a regulation created because of the incumbents' market dominance. **MR. SHIMIZU** said open access proponents are not seeking to place cable companies under legacy regulation but simply under the nondiscriminatory access requirement of Section 202 of the Act.[21] **MR. RAPOSA** added, open access legislation would ideally apply to all broadband providers. Because the state has authority only over wireline providers, state legislation would apply only to cable operators. **MR. GLIST** said open access does not result in regulatory parity, because the state does not have authority over all providers. In addition, if GTE feels that it has a Section 202 claim, then it should "go to the FCC with that claim." Ideally, GTE wants a national solution, "so let the commission do their job."

MR. RAPOSA said cable modem service is a telecommunications service, as the Ninth Circuit found in *Portland*. Existing state rules applicable to telecommunications service thus apply to cable modem service. **MR. GLIST** said there is a difference between telecommunications and telecommunications service, and either determination has "all sorts of regulatory consequences" that should be sorted out at the FCC. Three federal court decisions have come to three different conclusions. **MR. GUTHRIE** said cable modem service does not specifically fall under PURA, so "it's not clear" whether MR. RAPOSA'S assertion about the applicability of existing state law to cable modem service is correct.

MS. GRANT said it is a hard argument to make that the market is not working, even as GTE tries "to create a perception of market dominance." The government should not regulate a market where "competition is as fierce as it is." **MR. GLIST** said DSL had phenomenal growth in the first two quarters of 2000, and the market is a "horse race at work."[22]

MR. SHIMIZU responded that cable companies would not open their networks until "jurisdiction after jurisdiction across this country looked at this open access issue." The Legislature should step in before a market failure occurs that requires an 800-page order to fix. Because it is good policy to have an open network, legislation now will mean that the Legislature will "never have to worry about the problem happening on the back end."

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[21]47 U.S.C. §202(a) provides that, "it shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

[22]The parties debated market share figures at length. GTE, quoting the FCC's *Second 706 Report*, which was released in August 2000. Using year-end 1999 figures, that report said cable modems represented over 80 percent of the broadband market. TCTA responded that GTE's figures were no longer accurate and presented alternative figures from trade publications reflecting the first two quarters of 2000.

MR. GLIST replied that nearly every jurisdiction to consider forced access has rejected it. Cable operators are conducting multiple-ISP trials to give customers more choices, but they have to work through several technical hurdles. "Regulators don't make technology work. Engineers make technology work."

MR. SHIMIZU closed by saying open access is about consumers being able to choose who their ISP will be when they obtain a high-speed connection to the Internet. Cable operators might affect how people access the Internet if cable systems remain closed. Existing contracts with Excite@Home already allow cable operators to cut off streamed video after 10 minutes. The marketplace "isn't really working." The threat of regulation has forced cable companies to take steps toward opening their networks. Ultimately, this will come down to a legal resolution, but the legal issues will work themselves out, and the Texas Legislature does have the right to act. The debate comes down to a public policy question of whether it is good policy for consumers to have a choice of ISPs. "It's consumer protection. It's competition."

MR. GLIST closed by saying that "we're involved in a horse race among technologies, and we have one of the racing parties trying to handicap the other one." They are utilizing numbers that are not accurate and "predicting problems that aren't happening." Consumers are not being harmed, and there is no restriction on where they can go on the Internet. The FCC is the agency that has the authority to regulate, and forbear from regulating, and it should be given the chance to work out the "unclear regulatory issues lurking out there." The market is working, "and we aim to keep the market working."

APPENDIX E: SELECTED TEXAS STATUTES RELATED TO PRIVACY

Texas has not enacted an all-encompassing privacy statute. In its survey of the state's laws, the Office of Attorney General (OAG) identified 580 statutes that make certain information in the custody of governmental entities confidential. The majority of these statutes apply to corporate persons rather than natural persons. Because privacy is ordinarily thought of as a personal right, not a corporate one, the actual number of Texas statutes protecting personal privacy is a much smaller subset of those statutes. The majority of laws applying to natural persons are related to information contained in applications, complaints filed, and investigations conducted by licensing agencies of their current or prospective licensees.

The Public Information Act (PIA) presumes that information held by government is discloseable, except under certain conditions.[23] Some of these conditions apply specifically to personal privacy. Information is excepted from disclosure under the PIA if it is:

- "Considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Section 552.101, Government Code*;
- "Information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Section 552.102, Government Code*;
- "A student record at an educational institution funded wholly or partly by state revenue." *Section 552.114, Government Code*;
- "A birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official." *Section 552.115, Government Code*;
- Related to "the home address, home telephone number, or social security number, or that reveals whether" a current or former employee of a governmental body, a peace officer, an employee of the Texas Department of Criminal Justice, or any law enforcement officer killed in the line of duty. *Section 552.117, Government Code*;
- "A photograph that depicts a peace officer … the release of which would endanger the life or physical safety of the officer." *Section 552.119, Government Code*; or
- "A record created during a motor vehicle emissions inspection." *Section 552.129, Government Code*.

The first exception to the PIA is information that is "considered to be confidential by law." Based on the OAG report to the committee, 66 statutes were identified that protect personal

[23]Chapter 552, Government Code.

information from disclosure. This list is not intended to be exhaustive, but merely indicative of the scope of current privacy protections available to Texans under state law.

"Personal identifying information pertaining to an individual [employed by a correctional facility or related within one degree of sanguinity with same], including the individual's home address, home telephone number, and social security account number, is privileged from discovery by an individual who is imprisoned or confined in any correctional facility." *Section 30.010, Civil Practice and Remedies Code*.

"A document evaluating the performance of a teacher or administrator is confidential." *Section 21.355, Education Code.*

A teacher of a student who is expelled for serious offenses shall be notified of the conduct of that student and shall keep the information confidential. A teacher's certification may be revoked for violating this confidentiality. *Section 37.007(g), Education Code.*

"The results of individual student performance on academic skills assessment instruments … are confidential." *Section 39.030(b), Education Code.*

"Student loan borrower information collected, assembled, or maintained by the [Texas Guaranteed Student Loan Corporation] is confidential." *Section 57.11(d), Education Code*.

Original lists of delegates and alternates and the names and residence addresses of participants of a precinct convention are "not public information." *Section 174.027(f), Election Code*.

"The court proceedings shall be conducted in a manner that protects the anonymity of the minor. The application and all other court documents pertaining to the proceeding are confidential and privileged." *Section 33.003(k), Family Code*.

"Information contained in the juvenile justice information system is confidential information," subject to certain specific exceptions. *Section 58.106, Family Code*.

The address and telephone number of a person covered by a protective order, the place of employment, and child-care facility or school may be withheld from a protective order by request of the family member. *Section 85.007, Family Code.*

"Information contained in the [Paternity Registry] is confidential and may be released on request only to" certain specific individuals. *Section 160.255(b), Family Code*.

Adoption records that identify the birth parents or other names considered confidential are confidential. *Various sections of Chapter 162, Family Code.*

All records of the Child Support Enforcement Division of OAG are confidential and privileged. *Section 231.108, Family Code.*

In general, the identity of a person making a report of suspected abuse or neglect of a child, and much of the information related to the report, investigation, and management of the case. *Various sections of Chapter 261, Family Code (see especially Sections 261.101, 261.201, and 261.406).*

"The information contained in a completed [written jury summons] questionnaire is confidential." *Section 62.0132(f), Government Code.*

"Records of a member of the legislature or the lieutenant governor that are composed exclusively of memoranda of communications with residents of this state and of personal information concerning the person communicating with the member or lieutenant governor are confidential." *Section 306.003(a), Government Code.*

Communications of citizens to a member of the legislature or lieutenant governor are protected from public disclosure, with exceptions. *Section 306.004, Government Code.*

"Criminal history record information maintained by the [Department of Public Safety] is confidential information," but may be disclosed to specific individuals or entities under specific circumstances. Wrongful disclosure is a class B misdemeanor. If wrongful disclosure is done for remuneration, it is a second degree felony. *Section 411.083, Government Code.*

"A DNA record stored in the DNA database is confidential." *Section 411.153, Government Code.*

Information contained on an application for a license to carry a concealed handgun is confidential, except as otherwise provided. *Section 411.192, Government Code.*

Information revealing whether a state employee has authorized an automatic deduction from compensation for a charitable organization is confidential. *Section 659.135, Government Code.*

"Reports, records, and information furnished to a health authority of the [Texas Department of Health] that relate to cases or suspected cases of diseases or health conditions are confidential." *Section 81.046(a), Health and Safety Code.*

Results of HIV tests, communications requiring an HIV test be taken, and names of partners are confidential. *Section 81.050,* et seq., *Health and Safety Code*.

"Records of a health care facility that directly or indirectly identify a present, former, or proposed patient are confidential." *Section 81.203, Health and Safety Code*.

Information held by the Texas Department of Health regarding cases of birth defects is confidential. *Section 87.002, Health and Safety Code*.

Information held by the Texas Department of Health regarding cases or suspected cases of lead poisoning of children is confidential. *Section 88.002, Health and Safety Code*.

Information pertaining to injuries reported to the Texas Department of Health is confidential. *Section 92.006, Health and Safety Code*.

"Information in the possession of the [Texas Healthy Kids Corporation] that identifies an individual, including medical records and family financial information, is confidential." *Section 109.064(b), Health and Safety Code*.

"Information obtained by the [Texas Department of Health] for the immunization registry is confidential." *Section 161.007(h), Health and Safety Code*.

A person "may not disclose" the name or address or any other information concerning the identity of a person who was treated, or for whom treatment was sought, for overdose of a controlled substance. *Section 161.042(b), Health and Safety Code.*

"The medical and donor records of a blood bank are confidential." Violation is a class C misdemeanor and may involve civil liability for damages. *Section 162.003, Health and Safety Code, and additional sections of Chapter 162.*

"Copies of the [adopted] child's birth certificates or birth records may not disclose that the child is adopted." *Section 192.008(a), Health and Safety Code.*

"Except as authorized by Section 241.153, a hospital or an agent or employee of a hospital may not disclose health care information about a patient to any person other than the patient or the patient's legally authorized representative without the written authorization of the patient or the patient's legally authorized representative." An aggrieved person may pursue civil action for damages and injunctive relief. *Sections 241.152(a) and 241.156, Health and Safety Code.*

"A practitioner engaged in authorized medical practice or research may not be required to furnish the name or identity of a patient or research subject." *Section 481.068, Health and Safety Code*.

"Records of a mental health facility that directly or indirectly identify a present, former, or proposed patient are confidential." *Section 576.005, Health and Safety Code*.

"Records of the identity, diagnosis, evaluation, or treatment of a person that are maintained in connection with the performance of a program or activity relating to mental retardation are confidential." *Section 595.001, Health and Safety Code*.

Records of treatment by and communications between emergency medical services providers and patients are confidential. *Section 773.091, Health and Safety Code*.

"Information that is contained in a rabies vaccination certificate that identifies or tends to identify the owner or an address, telephone number, or other personally identifying information of the owner of the vaccinated animal is confidential." *Section 826.0211(a), Government Code*.

"Information that is contained in a municipal or county registry of dogs and cats under Section 826.031 or that identifies or tends to identify the owner or an address, telephone number, or other personally identifying information of the owner of the registered dog or cat is confidential." *Section 826.0311(a), Health and Safety Code*.

The Human Services Department shall keep any electronic fingerprint-imaging or photo-imaging of welfare recipients "strictly confidential" and shall use such information "only to prevent fraud." *Section 31.0325(b), Human Resources Code*.

The Department of Protective and Regulatory Services "shall prescribe safeguards to govern the use or disclosure of information relating to a recipient of a department service or to an investigation the department conducts." *Section 40.005(b), Human Resources Code*.

Qualified interpreters may not be required to disclose the contents of a conversation for which they were a "conduit for the conversation." Wrongful disclosure is a class C misdemeanor. *Section 82.002, Human Resources Code*.

"An elderly individual is entitled to privacy while attending to personal needs and a private place for receiving visitors or associating with other individuals." *Section 102.003(g), Human Resources Code*.

An elderly individual's personal and clinical records are confidential. *Section 102.003(j), Human Resources Code*.

"It is unlawful for a person to solicit, disclose, receive, or make use of, or authorize, knowingly permit, participate in, or acquiesce in the use of any list of, names of, or any information directly or indirectly derived from records concerning persons applying for or receiving health and human services." *Section 111.057(a), Human Resources Code.*

"Genetic information is confidential and privileged regardless of the source of the information," except as otherwise provided. *Section 21.403(a), Labor Code*.

The identity of an employee in a employer injury and occupational disease report is confidential. *Section 411.034(a), Labor Code*.

Communications between licensed physicians and patients, in connection with any professional services as a physician provided to the patient, and any records of identity, diagnosis, evaluation, or treatment of a patient, are "confidential and privileged." Aggrieved individual may seek civil damages and injunctive relief. *Section 159.002, Occupations Code.*

All communications between a licensed chiropractor and a patient, and all medical records disclosing identity, evaluation, diagnosis, and treatment are confidential. *Section 201.402, Occupations Code.*

All communications between a licensed podiatrist and a patient, and all medical records disclosing identity, evaluation, diagnosis, and treatment are confidential. *Section 202.402, Occupations Code.*

Prescription information is confidential. *Section 562.052, Occupations Code.*

"A polygraph examiner, trainee, or employee of a polygraph examiner … may not disclose information acquired from a polygraph examination," with certain exceptions. *Section 1703.306, Occupations Code*.

Accident reports filed by an operator of a water craft involved in an accident to the Texas Parks and Wildlife Department is "confidential and … inadmissible in court as evidence." *Section 31.105, Parks and Wildlife Code.*

"An application for agricultural designation filed with a chief appraiser is confidential and not open to public inspection." *Section 23.45(a), Tax Code*.

"Rendition statements, real and personal property reports, attachments to those statements and reports, and other information the owner of property provides to the appraisal office in connection with appraisal of the property, including income and expense information … voluntarily disclosed to an appraisal office or the comptroller … [are] confidential and not open to public inspection." *Section 22.27(a), Tax Code*.

Federal tax information and any information held by the comptroller or attorney general with respect to the review of a tax filing is confidential. *Section 111.006, Tax Code*.

Results of drug and alcohol testings of employees of a regional tollway authority are confidential. *Section 366.033(i), Transportation Code*.

The Department of Transportation "may not disclose class-type listings from the basic driver's license record file to any person." *Section 521.051, Transportation Code*.

The Department of Transportation may not disclose the changed license or certificate number or the name or former name of a person who receives a new driver's license because of a court order stating that the person has been a victim of domestic violence. *Section 521.275(c), Transportation Code*.

"A government-operated utility may not disclose personal information in a customer's account record if the customer requests that the government-operated utility keep the information confidential." *Section 182.052(a), Utilities Code.*

The Interacgency Council on Sex Offender Treatment "and the staff and consultants it employs shall keep confidential any record relating to the identity, examination, diagnosis, prognosis, or treatment of a sex offender." *Art. 4413(51), Sec. 10, V.T.C.S.*

"Any data or information pertaining to the diagnosis, treatment, or health of any enrollee or applicant obtained from such person or from any physician or provider by any health maintenance organization shall be held in confidence." *Art. 20A.25, Insurance Code*.

"A health benefit plan issuer, life insurer, or person employed by or under contact with a health benefit plan issuer or life insurer may not release information relating to the status as a victim of family violence of an individual who is clearly a victim of family violence." *Art. 21.21-5, Sec. 8(a), Insurance Code*.

"The result of an HIV-related test is confidential, and an insurer may not release or disclose the test result or allow the test result to become known." *Art. 21.21-4(e), Insurance Code.*

- # "Genetic information is confidential and privileged regardless of the source of the information." *Art. 21.73, Sec. 4(a), Insurance Code; Art. 9031, Sec. 3(a), V.T.C.S.*

- # Information furnished to governmental bodies or their agents regarding motor vehicle theft "is privileged and not part of any public record." *Art. 21.78, Sec. 2, Insurance Code.*

- # The Department of Transportation "may not disclose to any person the name, address, telephone number, social security account number, driver's license number, bank account number, credit or debit card number, or charge number of a person" who subscribes to Texas Highways or has purchased promotional items from the department. *Art. 6144e, Sec. 4(a), V.T.C.S.*

Additional provisions protect information obtained during investigations, audits, and licensure proceedings; related to participation in public-sponsored retirement systems or insurance; recorded during emergency communications; used in the process of determining eligibility for public employment; and disclosed during civil and criminal court proceedings.

APPENDIX F: SELECTED PROVISIONS FROM OTHER STATES' PRIVACY ACTS

In its 1999 survey of state privacy protections, the Providence, R. I.-based *Privacy Journal* ranked California and Minnesota as the top two states in terms of protecting their citizens' personal privacy. California's law is widely considered the most protective overall, while Minnesota is deemed to have the most comprehensive administrative procedures for collecting and safeguarding information. Virginia was included in *Privacy Journal's* top ten as well, and its laws incorporate several online privacy issues.[24]

Reprinted here are selected provisions of those states' privacy laws. Boldface type is used to help the reader find concepts of interest that may be located in several places throughout the text. Unless otherwise indicated, legislative references contained within the state's statutes refer to the laws, institutions, and officials of that particular state.

California Information Practices Act of 1977[25]

General Provisions and Legislative Findings

1798.1. The Legislature declares that the right to privacy is a **personal and fundamental right** protected by Section 1 of Article I of the Constitution of California and by the United States Constitution and that all individuals have a right of privacy in information pertaining to them. The Legislature further makes the following findings:

(a) The right to privacy is being threatened by the indiscriminate collection, maintenance, and dissemination of personal information and the lack of effective laws and legal remedies.

(b) The increasing use of computers and other sophisticated information technology has greatly magnified the potential risk to individual privacy that can occur from the maintenance of personal information.

(c) In order to protect the privacy of individuals, it is necessary that the maintenance and dissemination of personal information be subject to strict limits.

[24]Robert Ellis Smith,"How Does Your State Rank in Protections?" *Privacy Journal* (September 1999) at 1, 6.

[25]Cal. Civ. Code, §§ 1798-1798.78.

Definitions

1798.3. As used in this chapter:

(a) The term **"personal information"** means any information that is maintained by an agency that identifies or describes an individual, including, but not limited to, his or her name, social security number, physical description, home address, home telephone number, education, financial matters, and medical or employment history. It includes statements made by, or attributed to, the individual.

(b) The term "agency" means every state office, officer, department, division, bureau, board, commission, or other state agency.

(c) The term "disclose" means to disclose, release, transfer, disseminate, or otherwise communicate all or any part of any record orally, in writing, or by electronic or any other means to any person or entity.

(d) The term "individual" means a natural person.

(e) The term "maintain" includes maintain, acquire, use, or disclose.

(f) The term "person" means any natural person, corporation, partnership, limited liability company, firm, or association.

(g) The term **"record"** means any file or grouping of information about an individual that is maintained by an agency by reference to an identifying particular such as the individual's name, photograph, finger or voice print, or a number or symbol assigned to the individual.

(h) The term **"system of records"** means one or more records, which pertain to one or more individuals, which is maintained by any agency, from which information is retrieved by the name of an individual or by some identifying number, symbol or other identifying particular assigned to the individual.

(i) The term "governmental entity," except as used in Section 1798.26, means any branch of the federal government or of the local government.

(j) The term "commercial purpose" means any purpose which has financial gain as a major objective. It does not include the gathering or dissemination of newsworthy facts by a publisher or broadcaster.

Agency Requirements

1798.14. Each agency shall maintain in its records only personal information which is **relevant and necessary** to accomplish a purpose of the agency required or authorized by the California Constitution or statute or mandated by the federal government.

1798.15. Each agency shall collect personal information to the greatest extent practicable directly from the individual who is the subject of the information rather than from another source.

1798.16. (a) Whenever an agency collects personal information, the agency shall maintain the source or **sources of the information**, unless the source is the data subject or he or she has received a copy of the source document, including, but not limited to, the name of any source who is an individual acting in his or her own private or individual capacity. If the source is an agency, governmental entity or other organization, such as a corporation or association, this requirement can be met by maintaining the name of the agency, governmental entity, or organization, as long as the smallest reasonably identifiable unit of that agency, governmental entity, or organization is named.

(b) On or after July 1, 2001, unless otherwise authorized by the Department of Information Technology pursuant to Executive Order D-3-99, whenever an agency electronically collects personal information, as defined by Section 11015.5 of the Government Code, the agency shall retain the source or sources or any intermediate form of the information, if either are created or possessed by the agency, unless the source is the data subject that has requested that the information be discarded or the data subject has received a copy of the source document.

(c) The agency shall maintain the source or sources of the information in a readily accessible form so as to be able to provide it to the data subject when they inspect any record pursuant to Section 1798.34. This section shall not apply if the source or sources are exempt from disclosure under the provisions of this chapter.

1798.17. Each agency shall provide on or with any form used to collect personal information from individuals the **notice** specified in this section. When contact with the individual is of a regularly recurring nature, an initial notice followed by a periodic notice of not more than one-year intervals shall satisfy this requirement. This requirement is also satisfied by notification to individuals of the availability of the notice in annual tax-related pamphlets or booklets provided for them. The notice shall include all of the following:

(a) The name of the agency and the division within the agency that is requesting the information.

(b) The title, business address, and telephone number of the agency official who is responsible for the system of records and who shall, upon request, inform an individual regarding the location of his or her records and the categories of any persons who use the information in those records.

(c) The authority, whether granted by statute, regulation, or executive order which authorizes the maintenance of the information.

(d) With respect to each item of information, whether submission of such information is mandatory or voluntary.

(e) The consequences, if any, of not providing all or any part of the requested information.

(f) The principal purpose or purposes within the agency for which the information is to be used.

(g) Any known or foreseeable disclosures which may be made of the information pursuant to subdivision (e) or (f) of Section 1798.24.

(h) The individual's right of access to records containing personal information which are maintained by the agency.

This section does not apply to any enforcement document issued by an employee of a law enforcement agency in the performance of his or her duties wherein the violator is provided an exact copy of the document, or to accident reports …. The notice required by this section does not apply to agency requirements for an individual to provide his or her name, identifying number, photograph, address, or similar identifying information, if this information is used only for the purpose of identification and communication with the individual by the agency, except that requirements for an individual's social security number shall conform with the provisions of the Federal Privacy Act of 1974 (Public Law 93-579).

1798.18. Each agency shall maintain all records, to the maximum extent possible, with accuracy, relevance, timeliness, and completeness. Such standard need not be met except when such records are used to make any determination about the individual. When an agency transfers a record outside of state government, it shall correct, update, withhold, or delete any portion of the record that it knows or has reason to believe is inaccurate or untimely.

1798.19. Each agency when it provides by contract for the operation or maintenance of records containing personal information to accomplish an agency function, shall cause, consistent with its authority, the requirements of this chapter to be applied to those records. For purposes of Article 10 (commencing with Section 1798.55), any contractor and any employee of the contractor … shall be considered to be an employee of an agency. Local government functions mandated by the state are not deemed agency functions within the meaning of this section.

1798.20. Each agency shall **establish rules of conduct** for persons involved in the design, development, operation, disclosure, or maintenance of records containing personal information and instruct each such person with respect to such rules and the requirements of this chapter, including any other rules and procedures adopted pursuant to this chapter and the remedies and penalties for noncompliance.

1798.21. Each agency shall establish appropriate and reasonable administrative, technical, and physical safeguards to ensure compliance with the provisions of this chapter, to ensure the security and confidentiality of records, and to protect against anticipated threats or hazards to their security or integrity which could result in any injury.

1798.22. Each agency shall **designate an agency employee** to be responsible for ensuring that the agency complies with all of the provisions of this chapter.

1798.23. The Department of Justice shall review all personal information in its possession every five years commencing July 1, 1978, to determine whether it should continue to be exempt from access pursuant to Section 1798.40.

Conditions of Disclosure

1798.24. No agency may **disclose any personal information** in a manner that would link the information disclosed to the individual to whom it pertains unless the disclosure of the information is:

(a) To the individual to whom the information pertains.

(b) With the **prior written voluntary consent** of the individual to whom the record pertains, but only if such consent has been obtained not more than 30 days before the disclosure, or in the time limit agreed to by the individual in the written consent.

(c) To the duly appointed guardian or conservator of the individual or a person representing the individual provided that it can be proven with reasonable certainty through the possession of agency forms, documents or correspondence that such person is the authorized representative of the individual to whom the information pertains.

(d) To those officers, employees, attorneys, agents, or volunteers of the agency which has custody of the information if the disclosure is relevant and necessary in the ordinary course of the performance of their official duties and is related to the purpose for which the information was acquired.

(e) To a person, or to another agency where the transfer is necessary for the transferee agency to perform its constitutional or statutory duties, and the use is **compatible with a purpose** for which the information was collected and the use or transfer is accounted for in accordance with Section 1798.25. With respect to information transferred from a law enforcement or regulatory agency, or information transferred to another law enforcement or regulatory agency, a use is compatible if the use of the information requested is needed in an investigation of unlawful activity under the jurisdiction of the requesting agency or for licensing, certification, or regulatory purposes by that agency.

(f) To a governmental entity when required by state or federal law.

(g) Pursuant to the California Public Records Act, Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code.

(h) To a person who has provided the agency with advance adequate written assurance that the information will be used solely for **statistical research or reporting purposes**, but only if the information to be disclosed is in a form that will not identify any individual.

(i) Pursuant to a determination by the agency which maintains information that compelling circumstances exist which affect the **health or safety** of an individual, if upon the disclosure notification is transmitted to the individual to whom the information pertains at his or her last known address. Disclosure shall not be made if it is in conflict with other state or federal laws.

(j) To the State Archives of the State of California as a record which has sufficient historical or other value to warrant its continued preservation by the California state government, or for evaluation by the Director of General Services or his or her designee to determine whether the record has further administrative, legal, or fiscal value.

(k) To any person pursuant to a subpoena, court order, or other **compulsory legal process** if, before the disclosure, the agency reasonably attempts to notify the individual to whom the record pertains, and if the notification is not prohibited by law.

(l) To any person pursuant to a search warrant.

(m) Pursuant to Article 3 (commencing with Section 1800) of Chapter 1 of Division 2 of the Vehicle Code.

(n) For the sole purpose of verifying and paying government health care service claims made pursuant to Division 9 (commencing with Section 10000) of the Welfare and Institutions Code.

(o) To a **law enforcement or regulatory agency** when required for an investigation of unlawful activity or for licensing, certification, or regulatory purposes, unless the disclosure is otherwise prohibited by law.

(p) To another person or governmental organization to the extent necessary to obtain information from the person or governmental organization as necessary for an investigation by the agency of a failure to comply with a specific state law which the agency is responsible for enforcing.

(q) To an adopted person and is limited to general background information pertaining to the adopted person's natural parents, provided that the information does not include or reveal the identity of the natural parents.

(r) To a child or a grandchild of an adopted person and disclosure is limited to medically necessary information pertaining to the adopted person's natural parents. However, the information, or the process for obtaining the information, shall not include or reveal the identity of the natural parents. The State Department of Social Services shall adopt regulations governing the release of information pursuant to this subdivision by July 1, 1985. The regulations shall require licensed adoption agencies to provide the same services provided by the department as established by this subdivision.

(s) To a committee of the **Legislature** or to a Member of the Legislature, or his or her staff when authorized in writing by the member, where the member has permission to obtain the information from the individual to whom it pertains or where the member provides reasonable assurance that he or she is acting on behalf of the individual.

(t) To the University of California or a nonprofit educational institution conducting **scientific research**, provided the request for information includes assurances of the need for personal information, procedures for protecting the confidentiality of the information and assurances that the personal identity of the subject shall not be further disclosed in individually identifiable form.

(u) To an insurer if authorized by Chapter 5 (commencing with Section 10900) of Division 4 of the Vehicle Code. This article shall not be construed to require the disclosure of personal information to the individual to whom the information pertains when that information may otherwise be withheld as set forth in Section 1798.40.

(v) Pursuant to Section 1909, 8009, or 18396 of the Financial Code. 1798.24a. Notwithstanding Section 1798.24, information may be disclosed to any city, county, city and

county, or district, or any officer or official thereof, if a written request is made to a local law enforcement agency and the information is needed to assist in the screening of a prospective concessionaire, and any affiliate or associate thereof, as these terms are defined in subdivision (k) of Section 432.7 of the Labor Code for purposes of consenting to, or approving of, the prospective concessionaire's application for, or acquisition of, any beneficial interest in a concession, lease, or other property interest. However, any summary criminal history information that may be disclosed pursuant to this section shall be limited to information pertaining to criminal convictions.

1798.24b. (a) Notwithstanding Section 1798.24, except the last paragraph thereof, information may be disclosed to the protection and advocacy agency designated by the Governor in this state pursuant to federal law to protect and advocate the rights of persons with developmental disabilities and persons with mental illness, as described in Division 4.7 (commencing with Section 4900) of the Welfare and Institutions Code.

(b) Information that may be disclosed pursuant to this section includes all of the following information:

(1) Name.

(2) Address.

(3) Telephone number.

(4) Any other information necessary to identify that person whose consent is necessary for either of the following purposes:

(A) To enable the protection and advocacy agency to exercise its authority and investigate incidents of abuse or neglect of persons with developmental disabilities or persons with mental illness.

(B) To obtain access to records pursuant to Section 4903 of the Welfare and Institutions Code.

Accounting of Disclosures

1798.25. Each agency shall keep an **accurate accounting** of the date, nature, and purpose of each disclosure of a record made pursuant to subdivision (i), (k), (l), (o), or (p) of Section 1798.24. This accounting shall also be required for disclosures made pursuant to subdivision (e) or (f) of Section 1798.24 unless notice of the type of disclosure has been provided pursuant to Sections 1798.9 and 1798.10. The accounting shall also include the name, title, and business address of the person or agency to whom the disclosure was made. For the purpose of an accounting of a disclosure made under subdivision (o) of Section 1798.24, it shall be sufficient for a law enforcement or regulatory agency to record the date of disclosure, the law enforcement or regulatory agency requesting the disclosure, and whether the purpose of the disclosure is for an investigation of unlawful activity under the jurisdiction of the requesting agency, or for licensing, certification, or regulatory purposes by that agency. Routine disclosures of information pertaining

to crimes, offenders, and suspected offenders to law enforcement or regulatory agencies of federal, state, and local government shall be deemed to be disclosures pursuant to subdivision (e) of Section 1798.24 for the purpose of meeting this requirement.

1798.26. With respect to the **sale of information** concerning the registration of any vehicle or the sale of information from the files of drivers' licenses, the Department of Motor Vehicles shall, by regulation, establish administrative procedures under which any person making a request for information shall be required to identify himself or herself and state the reason for making the request. These procedures shall provide for the verification of the name and address of the person making a request for the information and the department may require the person to produce the information as it determines is necessary in order to ensure that the name and address of the person are his or her true name and address. These procedures may provide for a 10-day delay in the release of the requested information. These procedures shall also provide for notification to the person to whom the information primarily relates, as to what information was provided and to whom it was provided. The department shall, by regulation, establish a reasonable period of time for which a record of all the foregoing shall be maintained. The procedures required by this subdivision do not apply to any governmental entity, any person who has applied for and has been issued a requester code by the department, or any court of competent jurisdiction.

1798.27. Each agency shall retain the accounting made pursuant to Section 1798.25 for at least three years after the disclosure for which the accounting is made, or until the record is destroyed, whichever is shorter. Nothing in this section shall be construed to require retention of the original documents for a three-year period, providing that the agency can otherwise comply with the requirements of this section. 1798.28. Each agency, after July 1, 1978, shall **inform** any person or agency to whom a record containing personal information has been disclosed during the preceding three years of any correction of an error or notation of dispute made pursuant to Sections 1798.35 and 1798.36 if (1) an accounting of the disclosure is required by Section 1798.25 or 1798.26, and the accounting has not been destroyed pursuant to Section 1798.27, or (2) the information provides the name of the person or agency to whom the disclosure was made, or (3) the person who is the subject of the disclosed record provides the name of the person or agency to whom the information was disclosed.

Access to Records and Administrative Remedies

1798.30. Each agency shall either adopt regulations or publish guidelines specifying procedures to be followed in order fully to implement each of the rights of individuals set forth in this article.

1798.32. Each individual shall have **the right to inquire and be notified** as to whether the agency maintains a record about himself or herself. Agencies shall take reasonable steps to assist

individuals in making their requests sufficiently specific. Any notice sent to an individual which in any way indicates that the agency maintains any record concerning that individual shall include the title and business address of the agency official responsible for maintaining the records, the procedures to be followed to gain access to the records, and the procedures to be followed for an individual to **contest the contents** of these records unless the individual has received this notice from the agency during the past year. In implementing the right conferred by this section, an agency may specify in its rules or regulations reasonable times, places, and requirements for identifying an individual who requests access to a record, and for disclosing the contents of a record.

1798.33. Each agency may establish fees to be charged, if any, to an individual for making copies of a record. Such fees shall exclude the cost of any search for and review of the record, and shall not exceed ten cents ($0.10) per page, unless the agency fee for copying is established by statute.

1798.34. (a) Except as otherwise provided in this chapter, each agency shall permit any individual upon request and proper identification to **inspect all the personal information** in any record containing personal information and maintained by reference to an identifying particular assigned to the individual within 30 days of the agency's receipt of the request for active records, and within 60 days of the agency's receipt of the request for records that are geographically dispersed or which are inactive and in central storage. Failure to respond within these time limits shall be deemed denial. In addition, the individual shall be permitted to inspect any personal information about himself or herself where it is maintained by reference to an identifying particular other than that of the individual, if the agency knows or should know that the information exists. The individual also shall be permitted to inspect the accounting made pursuant to Article 7 (commencing with Section 1798.25).

(b) The agency shall permit the individual, and, upon the individual's request, another person of the individual's own choosing to inspect all the personal information in the record and have an exact copy made of all or any portion thereof within 15 days of the inspection. It may require the individual to furnish a written statement authorizing disclosure of the individual's record to another person of the individual's choosing.

(c) The agency shall present the information in the record in a form reasonably comprehensible to the general public.

(d) Whenever an agency is unable to access a record by reference to name only, … it may require the individual to submit such other identifying information as will facilitate access.

(e) When an individual is entitled under this chapter to gain access to the information in a record containing personal information, the information or a true copy thereof shall be made available to the individual at a location near the residence of the individual or by mail, whenever reasonable.

1798.35. Each agency shall permit an individual to request in writing an **amendment of a record** and, shall within 30 days of the date of receipt of such request:

(a) Make each correction in accordance with the individual's request of any portion of a record which the individual believes is not accurate, relevant, timely, or complete and inform the individual of the corrections made in accordance with their request; or

(b) Inform the individual of its refusal to amend the record in accordance with such individual's request, the reason for the refusal, the procedures established by the agency for the individual to request a review by the head of the agency or an official specifically designated by the head of the agency of the refusal to amend, and the name, title, and business address of the reviewing official.

1798.36. Each agency shall permit any individual who disagrees with the refusal of the agency to amend a record to request a **review of such refusal** by the head of the agency or an official specifically designated by the head of such agency, and, not later than 30 days from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such review period by 30 days. If, after such review, the reviewing official refuses to amend the record in accordance with the request, the agency shall permit the individual to file with the agency a statement of reasonable length setting forth the reasons for the individual's disagreement.

1798.37. The agency, with respect to any disclosure containing information about which the individual has filed a statement of disagreement, shall clearly note any portion of the record which is disputed and make available copies of such individual's statement and copies of a concise statement of the reasons of the agency for not making the amendment to any person or agency to whom the disputed record has been or is disclosed.

1798.38. If information, including letters of recommendation, compiled for the purpose of determining suitability, eligibility, or qualifications for employment, advancement, renewal of appointment or promotion, status as adoptive parents, or for the receipt of state contracts, or for licensing purposes, was received with the promise or, prior to July 1, 1978, with the understanding that the identity of the source of the information would be held in confidence and the source is not in a supervisory position with respect to the individual to whom the record pertains, the agency shall fully inform the individual of all personal information about that individual without identification of the source. This may be done by providing a copy of the text of the material with only such deletions as are necessary to protect the identity of the source or by providing a comprehensive summary of the substance of the material. Whichever method is used, the agency shall insure that full disclosure is made to the subject of any personal information that could reasonably in any way reflect or convey anything detrimental, disparaging, or threatening to an individual's reputation, rights, benefits, privileges, or qualifications, or be used by an agency to make a determination that would affect an individual's rights, benefits, privileges, or qualifications. In institutions of higher education, "supervisory positions" shall not be deemed to include chairpersons of academic departments.

1798.39. Sections 1798.35, 1798.36, and 1798.37 shall not apply to any record evidencing property rights.

1798.40. This chapter shall not be construed to require an agency to disclose personal information to the individual to whom the information pertains, if the information meets any of the following criteria:

(a) Is compiled for the purpose of identifying individual criminal offenders and alleged offenders and consists only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status.

(b) Is compiled for the purpose of a **criminal investigation** of suspected criminal activities, including reports of informants and investigators, and associated with an identifiable individual.

(c) Is contained in any record which could identify an individual and which is compiled at any stage of the process of enforcement of the criminal laws, from the arrest or indictment stage through release from supervision and including the process of extradition or the exercise of executive clemency.

(d) Is maintained for the purpose of an investigation of an individual's fitness for **licensure or public employment**, or of a grievance or complaint, or a suspected civil offense, so long as the information is withheld only so as not to compromise the investigation, or a related investigation. The identities of individuals who provided information for the investigation may be withheld pursuant to Section 1798.38.

(e) Would compromise the objectivity or fairness of a competitive examination for appointment or promotion in public service, or to determine fitness for licensure, or to determine scholastic aptitude.

(f) Pertains to the physical or psychological condition of the individual, if the agency determines that disclosure would be detrimental to the individual. The information shall, upon the individual's written authorization, be disclosed to a licensed medical practitioner or psychologist designated by the individual.

(g) Relates to the **settlement of claims** for work related illnesses or injuries and is maintained exclusively by the State Compensation Insurance Fund.

(h) Is required by statute to be withheld from the individual to whom it pertains. This section shall not be construed to deny an individual access to information relating to him or her if access is allowed by another statute or decisional law of this state.

1798.41. (a) Except as provided in subdivision (c), if the agency determines that information requested pursuant to Section 1798.34 is exempt from access, it shall inform the individual in writing of the agency's finding that disclosure is not required by law.

(b) Except as provided in subdivision (c), each agency shall conduct a review of its determination that particular information is exempt from access pursuant to Section 1798.40, within 30 days from the receipt of a request by an individual directly affected by the determination, and inform the individual in writing of the findings of the review. The review

shall be conducted by the head of the agency or an official specifically designated by the head of the agency.

(c) If the agency believes that compliance with subdivision (a) would seriously interfere with attempts to apprehend persons who are wanted for committing a crime or attempts to prevent the commission of a crime or would endanger the life of an informant or other person submitting information contained in the record, it may petition the presiding judge of the superior court of the county in which the record is maintained to issue an ex parte order authorizing the agency to respond to the individual that no record is maintained. All proceedings before the court shall be in camera. If the presiding judge finds that there are reasonable grounds to believe that compliance with subdivision (a) will seriously interfere with attempts to apprehend persons who are wanted for committing a crime or attempts to prevent the commission of a crime or will endanger the life of an informant or other person submitting information contained in the record, the judge shall issue an order authorizing the agency to respond to the individual that no record is maintained by the agency. The order shall not be issued for longer than 30 days but can be renewed at 30-day intervals. If a request pursuant to this section is received after the expiration of the order, the agency must either respond pursuant to subdivision (a) or seek a new order pursuant to this subdivision.

1798.42. In disclosing information contained in a record to an individual, an agency shall not disclose any personal information relating to another individual which may be contained in the record. To comply with this section, an agency shall, in disclosing information, delete from disclosure such information as may be necessary. This section shall not be construed to authorize withholding the identities of sources except as provided in Sections 1798.38 and 1798.40.

1798.43. In disclosing information contained in a record to an individual, an agency … [may] delete from the disclosure any exempt information.

1798.44. This article applies to the rights of an individual to whom personal information pertains and not to the authority or right of any other person, agency, other state governmental entity, or governmental entity to obtain this information.

Civil Remedies

1798.45. An individual may bring a **civil action** against an agency whenever such agency does any of the following:

(a) Refuses to comply with an individual's lawful request to inspect pursuant to subdivision (a) of Section 1798.34.

(b) Fails to maintain any record concerning any individual with such accuracy, relevancy, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, opportunities of, or benefits to the individual that may be

made on the basis of such record, if, as a proximate result of such failure, a determination is made which is adverse to the individual.

(c) Fails to comply with any other provision of this chapter, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual.

1798.46. In any suit brought under the provisions of subdivision (a) of Section 1798.45:

(a) The court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from the complainant. In such a suit the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld as being exempt from the individual's right of access and the burden is on the agency to sustain its action.

(b) The court shall assess against the agency reasonable attorney's fees and other litigation costs reasonably incurred in any suit under this section in which the complainant has prevailed. A party may be considered to have prevailed even though he or she does not prevail on all issues or against all parties.

1798.47. Any agency that fails to comply with any provision of this chapter may be enjoined by any court of competent jurisdiction. The court may make any order or judgment as may be necessary to prevent the use or employment by an agency of any practices which violate this chapter. Actions for injunction under this section may be prosecuted by the Attorney General, or any district attorney in this state, in the name of the people of the State of California whether upon his or her own complaint, or of a member of the general public, or by any individual acting in his or her own behalf.

1798.48. In any suit brought under the provisions of subdivision (b) or (c) of Section 1798.45, the **agency shall be liable** to the individual in an amount equal to the sum of:

(a) Actual damages sustained by the individual, including damages for mental suffering.

(b) The costs of the action together with reasonable attorney's fees as determined by the court.

1798.49. An action to enforce any liability created under Sections 1798.45 to 1798.48, inclusive, may be brought in any court of competent jurisdiction in the county in which the complainant resides, or has his principal place of business, or in which the defendant's records are situated, within two years from the date on which the cause of action arises, except that where a defendant has materially and willfully misrepresented any information required under this section to be disclosed to an individual who is the subject of the information and the information so misrepresented is material to the establishment of the defendant's liability to that individual under this section, the action may be brought at any time within two years after discovery by the complainant of the misrepresentation. Nothing in Sections 1798.45 to 1798.48, inclusive, shall be construed to authorize any civil action by reason of any injury sustained as the result of any

information practice covered by this chapter prior to July 1, 1978. The rights and remedies set forth in this chapter shall be deemed to be nonexclusive and are in addition to all those rights and remedies which are otherwise available under any other provision of law.

1798.50. A civil action shall not lie under this article based upon an allegation that an opinion which is subjective in nature, as distinguished from a factual assertion, about an individual's qualifications, in connection with a personnel action concerning such an individual, was not accurate, relevant, timely, or complete.

1798.51. Where a remedy other than those provided in Articles 8 and 9 is provided by law but is not available because of lapse of time an individual may obtain a correction to a record under this chapter but such correction shall not operate to revise or restore a right or remedy not provided by this chapter that has been barred because of lapse of time.

1798.53. Any person, other than an employee of the state or of a local government agency acting solely in his or her official capacity, who intentionally discloses information, not otherwise public, which they know or should reasonably know was obtained from personal information maintained by a state agency or from "records" within a "system of records" (as these terms are defined in the Federal Privacy Act of 1974 (P. L. 93-579; 5 U.S.C. 552a)) maintained by a federal government agency, shall be subject to a civil action, for invasion of privacy, by the individual to whom the information pertains. In any successful action brought under this section, the complainant, in addition to any special or general damages awarded, shall be awarded a minimum of two thousand five hundred dollars ($2,500) in exemplary damages as well as attorney's fees and other litigation costs reasonably incurred in the suit. The right, remedy, and cause of action set forth in this section shall be nonexclusive and is in addition to all other rights, remedies, and causes of action for invasion of privacy, inherent in Section 1 of Article I of the California Constitution.

Penalties

1798.55. The intentional violation of any provision of this chapter or of any rules or regulations adopted thereunder, by an officer or employee of any agency shall constitute a cause for discipline, including termination of employment.

1798.56. Any person who willfully requests or obtains any record containing personal information from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than five thousand dollars ($5,000), or imprisoned not more than one year, or both.

1798.57. Except for disclosures which are otherwise required or permitted by law, the intentional disclosure of medical, psychiatric, or psychological information in violation of the disclosure

provisions of this chapter is punishable as a **misdemeanor** if the wrongful disclosure results in economic loss or personal injury to the individual to whom the information pertains.

Miscellaneous Provisions

1798.60. An individual's name and address **may not be distributed for commercial purposes**, sold, or rented by an agency unless such action is specifically authorized by law.

1798.61. (a) Nothing in this chapter shall prohibit the release of only names and addresses of persons possessing licenses to engage in professional occupations or of persons who are registered with, or are holding licenses or permits issued by, the State Board of Equalization.

(b) Nothing in this chapter shall prohibit the release of only names and addresses of persons applying for licenses … for the sole purpose of providing those persons with informational materials relating to available professional educational materials or courses.

1798.62. Upon written request of any individual, any agency which maintains a **mailing list** shall remove the individual's name and address from such list ….

1798.63. The provisions of this chapter shall be liberally construed so as to protect the rights of privacy arising under this chapter or under the Federal or State Constitution.

Minnesota Government Data Practices Act[26]

Rights of Subjects of Data

13.04 Subdivision 1. Type of data. The rights of individuals on whom the data is stored or to be stored shall be as set forth in this section.

Subd. 2. Information required to be given individual. An individual asked to supply private or confidential data concerning the individual **shall be informed** of:

(a) the purpose and intended use of the requested data within the collecting state agency, political subdivision, or statewide system;

(b) whether the individual may refuse or is legally required to supply the requested data;

(c) any known consequence arising from supplying or refusing to supply private or confidential data; and

[26]Minn. Stat. Ann., Ch. 13.

(d) the identity of other persons or entities authorized by state or federal law to receive the data. This requirement shall not apply when an individual is asked to supply investigative data, pursuant to section 13.82, subdivision 5, to a law enforcement officer.

Subd. 3. Access to data by individual. Upon request to a responsible authority, an individual shall be informed whether the individual is the subject of stored data on individuals, and whether it is classified as public, private or confidential. Upon further request, an individual who is the subject of stored private or public data on individuals **shall be shown the data** without any charge and, if desired, shall be informed of the content and meaning of that data. After an individual has been shown the private data and informed of its meaning, the data need not be disclosed to that individual for six months thereafter unless a dispute or action pursuant to this section is pending or additional data on the individual has been collected or created. The responsible authority shall provide copies of the private or public data upon request by the individual subject of the data. The responsible authority may require the requesting person to pay the actual costs of making, certifying, and compiling the copies. The responsible authority shall comply immediately, if possible, with any request made pursuant to this subdivision, or **within ten days** of the date of the request, excluding Saturdays, Sundays and legal holidays, if immediate compliance is not possible.

Subd. 4. Procedure when data is not accurate or complete.

(a) An individual subject of the data may contest the accuracy or completeness of public or private data. To exercise this right, an individual shall notify in writing the responsible authority describing the nature of the disagreement. The responsible authority shall within 30 days either:

(1) correct the data found to be inaccurate or incomplete and attempt to notify past recipients of inaccurate or incomplete data, including recipients named by the individual; or

(2) notify the individual that the authority believes the data to be correct. Data in dispute shall be disclosed only if the individual's statement of disagreement is included with the disclosed data.

The determination of the responsible authority may be appealed pursuant to the provisions of the Administrative Procedure Act relating to contested cases. Upon receipt of an appeal by an individual, the commissioner shall, before issuing the order and notice of a contested case hearing required by chapter 14, try to resolve the dispute through education, conference, conciliation, or persuasion. If the parties consent, the commissioner may refer the matter to mediation. Following these efforts, the commissioner shall dismiss the appeal or issue the order and notice of hearing.

(b) Data on individuals that have been **successfully challenged** by an individual must be completed, corrected, or destroyed by a state agency, political subdivision, or statewide system without regard to the requirements of section 138.17.

After completing, correcting, or destroying successfully challenged data, a state agency, political subdivision, or statewide system may retain a copy of the commissioner of

administration's order issued under chapter 14 or, if no order were issued, a summary of the dispute between the parties that does not contain any particulars of the successfully challenged data.

Duties of Responsible Authority

13.05 Subdivision 1. Public document of data categories. The responsible authority shall prepare a public document containing the authority's name, title and address, and a description of each category of record, file, or process relating to private or confidential data on individuals maintained by the authority's state agency, statewide system, or political subdivision. Forms used to collect private and confidential data shall be included in the public document …. The responsible authority shall update the public document and make any changes necessary to maintain the accuracy of the document. The document shall be available from the responsible authority to the public in accordance with the provisions of sections 13.03 and 15.17.

Subd. 2. Copies to commissioner. The commissioner may require responsible authorities to submit copies of the public document required in subdivision 1, and may request additional information relevant to data collection practices, policies and procedures.

Subd. 3. General standards for collection and storage. **Collection and storage** of all data on individuals and the use and dissemination of private and confidential data on individuals shall be limited to that necessary for the administration and management of programs specifically authorized by the legislature or local governing body or mandated by the federal government.

Subd. 4. Limitations on collection and use of data. Private or confidential data on an individual shall not be collected, stored, used, or disseminated by political subdivisions, statewide systems, or state agencies for any **purposes** other than those stated to the individual at the time of collection in accordance with section 13.04, except as provided in this subdivision.

(a) Data collected prior to August 1, 1975, and which have not been treated as public data, may be used, stored, and disseminated for the purposes for which the data was originally collected or for purposes which are specifically approved by the commissioner as necessary to public health, safety, or welfare.

(b) Private or confidential data may be used and disseminated to individuals or agencies specifically authorized access to that data by state, local, or federal law enacted or promulgated after the collection of the data.

(c) Private or confidential data may be used and disseminated to individuals or agencies subsequent to the collection of the data when the responsible authority maintaining the data has requested approval for a new or different use or dissemination of the data and that request has been specifically approved by the commissioner as necessary to carry out a function assigned by law.

(d) Private data may be used by and disseminated to any person or agency if the individual subject or subjects of the data have given their **informed consent**. Whether a data subject has given informed consent shall be determined by rules of the commissioner. Informed consent shall not be deemed to have been given by an individual subject of the data by the signing of any statement authorizing any person or agency to disclose information about the individual to an insurer or its authorized representative, unless the statement is:

(1) in plain language;

(2) dated;

(3) specific in designating the particular persons or agencies the data subject is authorizing to disclose information about the data subject;

(4) specific as to the nature of the information the subject is authorizing to be disclosed;

(5) specific as to the persons or agencies to whom the subject is authorizing information to be disclosed;

(6) specific as to the purpose or purposes for which the information may be used by any of the parties named in clause (5), both at the time of the disclosure and at any time in the future;

(7) specific as to its expiration date which should be within a reasonable period of time, not to exceed one year except in the case of authorizations given in connection with applications for life insurance or noncancelable or guaranteed renewable health insurance and identified as such, two years after the date of the policy.

The responsible authority may require a person requesting copies of data under this paragraph to pay the actual costs of making, certifying, and compiling the copies.

(e) Private or confidential data on an individual may be discussed at a meeting open to the public to the extent provided in section 471.705, subdivision 1d.

Subd. 5. Data protection. The responsible authority shall (1) establish procedures to assure that all data on individuals is **accurate, complete, and current** for the purposes for which it was collected; and (2) establish appropriate security safeguards for all records containing data on individuals.

Subd. 6. Contracts. Except as provided in section 13.46, subdivision 5, in any contract between a governmental unit subject to this chapter and any person, when the contract requires that data on individuals be made available to the contracting parties by the governmental unit, that data shall be administered consistent with this chapter. A contracting party shall maintain the data on individuals which it received according to the statutory provisions applicable to the data.

Subd. 7. Preparation of summary data. The use of **summary data** derived from private or confidential data on individuals under the jurisdiction of one or more responsible authorities is permitted. Unless classified pursuant to section 13.06, another statute, or federal law, summary data is public. The responsible authority shall prepare summary data from private or confidential

data on individuals upon the request of any person if the request is in writing and the cost of preparing the summary data is borne by the requesting person. The responsible authority may delegate the power to prepare summary data (1) to the administrative officer responsible for any central repository of summary data; or (2) to a person outside of its agency if the person's purpose is set forth, in writing, and the person agrees not to disclose, and the agency reasonably determines that the access will not compromise private or confidential data on individuals.

Subd. 8. Publication of access procedures. The responsible authority shall prepare a public document setting forth in writing the **rights of the data subject** pursuant to section 13.04 and the specific procedures in effect in the state agency, statewide system or political subdivision for access by the data subject to public or private data on individuals.

Subd. 9. Intergovernmental access of data. A responsible authority shall allow another responsible authority access to data classified as not public only when the access is authorized or required by statute or federal law. An agency that supplies government data under this subdivision may require the requesting agency to pay the actual cost of supplying the data.

Subd. 10. International dissemination. No state agency or political subdivision shall transfer or disseminate any private or confidential data on individuals to the private international organization known as Interpol, except through the Interpol-United States National Central Bureau, United States Department of Justice.

Subd. 11. Privatization. (a) If a government entity enters into a **contract with a private person** to perform any of its functions, the government entity shall include in the contract terms that make it clear that all of the data created, collected, received, stored, used, maintained, or disseminated by the private person in performing those functions is subject to the requirements of this chapter and that the private person must comply with those requirements as if it were a government entity ….

(b) This subdivision does not create a duty on the part of the private person to provide access to public data to the public if the public data are available from the government entity, except as required by the terms of the contract.

Public Information Policy Training Program

13.073 Subdivision 1. Establishment. The commissioner may establish a **program for training** state and local government officials and employees on public information policy, including government data practices laws and official records and records management statutes. The program may provide for the development of broad-based expertise within state and local government entities. The program components may include basic training, specific training for specialized service sectors, and policy analysis and support.

Subd. 3. Basic training. The basic training component should be designed to meet the basic information policy needs of all government employees and public officials with a focus on key data practices laws and procedures that apply to all government entities ….

Subd. 4. Sector-specific training. (a) The sector-specific training component should be designed to provide for the development of specific expertise needed to deal with information policy issues within a particular service area. Service areas may include government entities such as state agencies, counties, cities, or school districts, or functional areas such as education, human services, child protection, or law enforcement. This component should focus on training individuals who implement or administer data practices and other information policy laws within their government entity.

(b) The commissioner may provide technical assistance and support and help coordinate efforts to develop sector-specific training within different sectors. Elements of sector-specific training should include:

(1) designation, training, and coordination of data practices specialists with responsibility for clarification and resolution of sector-specific information policy issues;

(2) development of telephone hot lines within different sectors for handling information policy inquiries;

(3) development of forums under which individuals with ongoing information policy administrative responsibilities may meet to discuss issues arising within their sectors;

(4) availability of expertise for coaching and consultation on specific issues; and

(5) preparation of publications, including reference guides to materials and resource persons.

Subd. 5. Policy analysis and support. The policy analysis and support component should be designed to address information policy issues at the policy level and to provide **ongoing consultation and support** regarding major areas of concern with a goal of developing a coherent and coordinated approach to information policy within the state. The commissioner may assist in the development and implementation of information policy and provide a clearinghouse for ideas, information, and resources. The commissioner may review public information policy and identify how that policy can be updated, simplified, and made consistent.

Subd. 6. Preparation of model policies and procedures. The commissioner shall, in consultation with affected government entities, prepare **model policies and procedures** to assist government entities in complying with the requirements of this chapter that relate to public access to government data and rights of subjects of data. Upon completion of a model for a governmental level, the commissioner shall offer that model for formal adoption by that level of government. Government entities may adopt or reject the model offered by the commissioner. A government entity that adopts the commissioner's model shall notify the commissioner in a form prescribed by the commissioner.

Virginia Privacy Protection Act of 1976[27]

Findings; Principles of Information Practice

2.1-3.78 A. The General Assembly finds:

1. That an individual's privacy is directly affected by the extensive collection, maintenance, use and dissemination of personal information;

2. That the increasing use of computers and sophisticated information technology has greatly magnified the harm that can occur from these practices;

3. That an individual's opportunities to secure employment, insurance, credit and his right to due process, and other legal protections are endangered by the misuse of certain of these personal information systems; and

4. That in order to preserve the rights guaranteed a citizen in a free society, legislation is necessary to establish procedures to govern information systems containing records on individuals.

B. Record-keeping agencies of the Commonwealth and political subdivisions shall adhere to the following **principles of information practice** to ensure safeguards for personal privacy:

1. There shall be no personal information system whose existence is secret.

2. Information shall not be collected unless the need for it has been clearly established in advance.

3. Information shall be **appropriate and relevant** to the purpose for which it has been collected.

4. Information shall not be obtained by fraudulent or unfair means.

5. Information shall not be used unless it is accurate and current.

6. There shall be a prescribed procedure for an individual to learn the purpose for which information has been recorded and particulars about its use and dissemination.

7. There shall be a **clearly prescribed and uncomplicated procedure** for an individual to correct, erase or amend inaccurate, obsolete or irrelevant information.

8. Any agency holding personal information shall assure its reliability and take precautions to prevent its misuse.

9. There shall be a clearly prescribed procedure to prevent personal information collected for one purpose from being used for another purpose.

10. The Commonwealth or any agency or political subdivision thereof shall not collect personal information except as explicitly or implicitly authorized by law.

[27]Va. Code Ann. §2.1-3.78, et seq.

Administration of Systems; Internet Privacy Policy

2.1-380 A. Any agency maintaining an information system that includes personal information shall:

1. Collect, maintain, use, and disseminate only that personal **information permitted or required by law** to be so collected, maintained, used, or disseminated, or necessary to accomplish a proper purpose of the agency;

2. Collect information to the greatest extent feasible from the data subject directly;

3. Establish categories for maintaining personal information to operate in conjunction with confidentiality requirements and access controls;

4. Maintain information in the system with accuracy, completeness, timeliness, and pertinence as necessary to assure fairness in determinations relating to a data subject;

5. Make no dissemination to another system without (i) specifying requirements for security and usage including **limitations on access** thereto and (ii) receiving reasonable assurances that those requirements and limitations will be observed, provided this subdivision shall not apply to a dissemination made by an agency to an agency in another state, district or territory of the United States where the personal information is requested by the agency of such other state, district or territory in connection with the application of the data subject therein for a service, privilege or right under the laws thereof ….

6. Maintain a list of all persons or organizations having regular access to personal information in the information system;

7. Maintain for a period of three years or until such time as the personal information is purged, whichever is shorter, a complete and accurate record, including identity and purpose, of **every access to any personal information** in a system, including the identity of any persons or organizations not having regular access authority but excluding access by the personnel of the agency wherein data is put to service for the purpose for which it is obtained;

8. Take affirmative action to establish rules of conduct and inform each person involved in the design, development, operation, or maintenance of the system, or the collection or use of any personal information contained therein, about all the requirements of this chapter, the rules and procedures, including penalties for noncompliance, of the agency designed to assure compliance with such requirements;

9. Establish appropriate **safeguards** to secure the system from any reasonably foreseeable threat to its security; and

10. Collect no personal information concerning the **political or religious beliefs**, affiliations, and activities of data subjects which is maintained, used or disseminated in or by any information system operated by any agency unless authorized explicitly by statute or ordinance.

B. By December 1, 2000, every public body, as defined in §§ 2.1-341, that has an **Internet** website associated with that public body shall develop an Internet privacy policy and an Internet privacy policy statement that explains the policy to the public. The policy shall be

consistent with the requirements of this chapter. By January 1, 2001, the statement shall be made available on the public body's website in a conspicuous manner. The Secretary of Technology or his designee shall provide guidelines for developing the policy and the statement, and each public body shall tailor the policy and the statement to reflect the information practices of the individual public body. At minimum, the policy and the statement shall address (i) what information, including personally identifiable information, will be collected, if any; (ii) whether any information will be automatically collected simply by accessing the website and, if so, what information; (iii) whether the website automatically places a computer file, commonly referred to as a "cookie," on the Internet user's computer and, if so, for what purpose; and (iv) how the collected information is being used or will be used.

Rights of Data Subjects

2.1-382 A. Any agency maintaining personal information shall:

1. Inform an individual who is asked to supply personal information about himself whether he is legally required, or may refuse, to supply the information requested, and also of any specific consequences which are known to the agency of providing or not providing such information.

2. Give **notice** to a data subject of the possible dissemination of part or all of this information to another agency, nongovernmental organization or system not having regular access authority, and indicate the use for which it is intended, and the specific consequences for the individual, which are known to the agency, of providing or not providing such information, however documented permission for dissemination in the hands of such other agency or organization will satisfy this requirement. Such notice may be given on applications or other data collection forms prepared by data subjects.

3. Upon request and proper identification of any data subject, or of his authorized agent, grant such subject or agent the **right to inspect**, in a form comprehensible to such individual or agent:

(a) All personal information about that data subject except as provided in §§ 2.1-342 B 3.

(b) The nature of the sources of the information.

(c) The names of recipients, other than those with regular access authority, of personal information about the data subject including the identity of all persons and organizations involved and their relationship to the system when not having regular access authority, except that if the recipient has obtained the information as part of an ongoing criminal investigation such that disclosure of the investigation would jeopardize law-enforcement action, then no disclosure of such access shall be made to the data subject.

4. Comply with the following **minimum conditions of disclosure** to data subjects:

(a) An agency shall make disclosures to data subjects required under this chapter, during normal business hours.

(b) The disclosures to data subjects required under this chapter shall be made (i) in person, if he appears in person and furnishes proper identification, or (ii) by mail, if he has made a written request, with proper identification. Copies of the documents containing the personal information sought by a data subject shall be furnished to him or his representative at reasonable standard charges for document search and duplication.

(c) The data subject shall be permitted to be accompanied by a person or persons of his choosing, who shall furnish reasonable identification. An agency may require the data subject to furnish a written statement granting permission to the organization to discuss the individual's file in such person's presence.

5. If the data subject gives notice that he wishes to **challenge**, correct, or explain information about him in the information system, the following minimum procedures shall be followed:

(a) The agency maintaining the information system shall investigate, and record the current status of that personal information.

(b) If, after such investigation, such information is found to be incomplete, inaccurate, not pertinent, not timely, or not necessary to be retained, it shall be promptly corrected or purged.

(c) If the investigation does not resolve the dispute, the data subject may file a **statement** of not more than 200 words setting forth his position.

(d) Whenever a statement of dispute is filed, the organization maintaining the information system shall supply any previous recipient with a copy of the statement and, in any subsequent dissemination or use of the information in question, clearly note that it is disputed and supply the statement of the data subject along with the information.

(e) The agency maintaining the information system shall clearly and conspicuously disclose to the data subject his rights to make such a request.

(f) Following any correction or purging of personal information the agency shall furnish to past recipients notification that the item has been purged or corrected whose receipt shall be acknowledged.

B. Nothing in this section or found elsewhere in this chapter shall be construed so as to require an agency to disseminate any recommendation or letter of reference from or to a third party which is a part of the personnel file of any data subject nor to disseminate any test or examination used, administered or prepared by any public body …. Nothing contained in this subsection shall prohibit the release of test scores or results as provided by law, or to limit access to individual records as is provided by law; however, the subject of such employment tests shall be entitled to review and inspect all documents relative to his performance on such employment tests ….

C. Neither any provision of this chapter nor any provision of Chapter 21 (§§ 2.1-340 et seq.) of this title shall be construed as denying public access to records of the position, job classification, official salary or rate of pay of, and to records of the allowances or reimbursements for expenses paid to any public officer, official or employee at any level of state, local or regional government

in this Commonwealth whatsoever. The provisions of this subsection shall not apply to records of the official salaries or rates of pay of public employees whose annual rate of pay is $10,000 or less.

D. Nothing in this section or in this chapter shall be construed to require an agency to disseminate information derived from tax returns in violation of §§ 2.1-342 and 58.1-3.

Disclosure of Social Security Number

2.1-385. On or after July 1, 1977, it shall be unlawful for any agency to require an individual to disclose or furnish his **social security account number** not previously disclosed or furnished, for any purpose in connection with any activity, or to refuse any service, privilege or right to an individual wholly or partly because such individual does not disclose or furnish such number, unless the disclosure or furnishing of such number is specifically required by federal or state law.

Injunctive Relief

2.1-386. Any aggrieved person may institute a **proceeding for injunction** or mandamus against any person or agency which has engaged, is engaged, or is about to engage in any acts or practices in violation of the provisions of this chapter. The proceeding shall be brought in the circuit court of any county or city wherein the person or agency made defendant resides or has a place of business. In the case of any successful proceeding by an aggrieved party, the person or agency enjoined or made subject to a writ of mandamus by the court shall be liable for the costs of the action together with reasonable attorney's fees as determined by the court.

APPENDIX G:
STATUS OF OTHER STATES' LEGISLATION RELATED TO LOBBYISTS

At least 25 bills were filed during the 1999-2000 legislative sessions to strengthen state lobbying laws, including several measures that would have imposed mandatory "cooling off" periods on legislators, legislative staff, or executive branch employees. Seven were signed into law.

State	Bill	Major Provisions	Status
California	SB 1025	State commission must publish lobby directory; online version updated weekly	Signed by Gov. Davis
Colorado	HB 1192	Imposes one-year "cooling off" period for former legislators, agency heads	Defeated on House floor
Connecticut	SB 5600	Imposes one-year "cooling off" period for legislative branch employees; prohibits legislators from taking official action that directly affects associated business	Died in committee
Delaware	SB 205	Reduces the reporting threshold for individual gifts/meals to $15 from $50	Died in committee
Florida	SB 718	Decreases expenditure reporting period to 2 months from quarterly; requires lobbyist registration to be suspended for failing to pay fines	Signed by Gov. Bush
Hawaii	HB 49	Bans gifts to legislators and legislative employees from lobbyists	Died in committee
Illinois	HB 672	"The State Gift Ban Act"	Signed by Gov. Ryan
Kansas	SB 462	Prohibits lobbyists from giving anything of value to legislators and staff; prohibits campaign contributions during session	Died in conference
Kentucky	HB 511	Reduces reporting requirement to annual from semiannual	Signed by Gov. Patton
Maryland	SB 428	Requires legislators & state officials to disclose gifts/meals received from lobbyists	Reported unfavorably by committee
Maryland	HB 973	Prohibits legislators and their families from certain business transactions with lobbyists	Reported unfavorably by committee

State	Bill	Major Provisions	Status
Maryland	HB 974	Requires lobbyists to disclose business transactions of $1,000 or more with business entities owned/affiliated with legislators and other public officials	Signed by Gov. Glendening
Michigan	HB 4056	Prohibits lobbyists from delivering a campaign contribution from a PAC; prohibits lobbyists from delivering their own contribution at various state buildings	Died in committee
Michigan	HB 5320	Imposes one-year "cooling off" period for former legislators	Died in committee
Minnesota	HF 9	Imposes one-year "cooling off" period for former legislators	Passed house; died in Senate committee
Nebraska	LB 156	Imposes one-year "cooling off" period for former legislators, statewide officials	Postponed indefinitely
Nebraska	LB 1021	Increases reporting requirements; limits monthly gifts to $50	Signed by Gov. Johanns
New Jersey	S 292	Imposes two- and one-year "cooling off" periods for former legislators, state employees	Died in committee
New York	A 1164	Requires lobbyists to report specific subjects, bill numbers on reports	Died in committee
New York	A 9710	Limits campaign contributions from lobbyists to $250; prohibits lobbyists from soliciting, making, or delivering contributions from or to any officeholder, candidate or PAC	Died in committee
New York	A 9711	Limits gifts from lobbyists to $75 annually	Died in committee
North Carolina	SB 767	Clarifies existing ban on contributions from lobbyists during Assembly[28]	Signed by Gov. Hunt
Texas	HB 845	Prohibits lobbyists from representing clients with conflicting interests; provides penalties	Passed House; died in Senate committee
Vermont	H 297	Imposes three-year "cooling off" period for former legislators, legislative employees, and statewide officials; imposes limited one-year "cooling off" period for agency employees	Died in committee
Wisconsin	AB 138	Imposes one-year "cooling off" period for former legislators	Failed to pass House

[28]Original version would have imposed one-year "cooling off" period for former legislators. That provision passed the Senate, but it was stripped out by the House committee.

APPENDIX H: SUMMARY OF TELEPHONE BILL TAXES, SURCHARGES & FEES

The Federal Subscriber Line Charge (SLC) was begun in 1983 as part of the settlement reached for the divestiture of AT&T. The FCC increased the primary line SLC to $4.35 from $3.50, effective July 1, 2000. The maximum charge will increase again, to $5, on July 1, 2001. The FCC has capped the SLC for non-primary lines at $7 through mid-2005, but a company may charge only as much as is necessary to cover interstate costs not recovered elsewhere.

The Presubscribed Interexchange Carrier Charge (PICC) was eliminated by the FCC effective July 1, 2000. It had been $1.04 per month, and it was used by long distance companies to recover flat-rate fees that they were being charged by local telephone companies to recover the costs of providing local loops.

The Federal Universal Service Charge (USF) helps assure affordable access to telecommunications services for low income customers, high-cost service areas, schools, libraries, and rural health care providers. Fees vary among long distance companies but are typically between 4 and 5 percent of a customer's monthly charges.

The Texas Universal Service Charge (TUSF) subsidizes local telephone service in high-cost rural areas, funds programs for the hearing-disabled, and supports programs to reduce bills for low-income Texans. The PUC set the TUSF charge at 3.96 percent of taxable communications receipts, effective March 1, 2000.

The Texas Infrastructure Fund (TIF) provides grants and loans to public schools, hospitals, and libraries to help them obtain advanced telecommunications services. All telecommunications utilities and wireless providers must pay 1.25 percent of their taxable receipts into the TIF.

The Local Number Portability Charge (LNP) funds the configuration of local networks so that customers may keep their phone numbers when they switch to another provider. The FCC allows local companies to assess a monthly charge for up to 5 years. Southwestern Bell charges $0.33 per month per line.

Several fees fund emergency services in Texas. The 9-1-1 Emergency Service Fee is based on the cost of providing 9-1-1 services in a region and cannot exceed $0.50 per month for each line. The 9-1-1 Equalization Surcharge provides additional funding for regions that cannot collect

sufficient funds through the regular fee. It cannot exceed 0.3 percent of charges for intrastate long distance service. The PUC reviews this charge. The Poison Control Surcharge funds six regional poison control centers that operate 24-hour emergency centers and toll-free information lines. It cannot exceed 0.3 percent of intrastate long distance charges.

The federal government applies a 3 percent Federal Excise Tax on all local and long distance service. The money goes to the U.S. Treasury. It was established as a luxury tax in 1898 to pay for the Spanish-American War.[29]

The State Sales Tax is 6.25 percent, and it is imposed on telecommunications companies, which pass it on to customers. Local Sales Taxes cannot exceed 2 percent.

The Public Utility Gross Receipts Tax funds certain activities of the PUC and Office of Public Utility Counsel (OPC). All utilities are assessed one-sixth of 1 percent of their gross receipts.

Municipal Franchise Fees compensate municipalities for a telecommunications company's use of public rights-of-way. The fee varies based on location.

Expanded Local Calling (ELC) and Extended Area Service (EAS) fees and surcharges expand customers' local calling areas by allowing them to call additional exchanges by paying a flat fee, rather than incur long distance charges on a per-minute basis. For the first five exchanges, the maximum ELC fee is $3.50 per month. The maximum EAS fee is $3.50 per month.

[29]At the time the tax was established, just 1,376 U.S. households had telephhones. The war ended in 1898. A bill to eliminate the tax, H. R. 3916 by Rep. Rob Portman (R-Ohio), passed the U.S. House of Representatives this spring, 420-2. The U.S. Senate voted to repeal the tax in an amendment to a massive spending bill in October 2000. Repealing the tax would save consumers more than $5 billion annually.

APPENDIX I: INDEX OF WITNESSES

Sixty-five individuals testified during the interim before the Committee on State Affairs and its subcommittees. Individuals who signed up as resource witnesses and did not actually provide testimony, or whose testimony was solely in written form, are not included in the list below. If a summary of testimony is provided in this report, the corresponding page number(s) will follow the hearing date.

Witness Name	Representing	Testimony Provided (Page)
Monte Akers	Texas Municipal League	Cable & Broadband: March 2 (21)
Bill Arnold	Texas Cable & Telecommunications Association	Cable & Broadband: March 2, May 2, August 17 (27-28); *Staff Briefing: August 16 (197)*
Dave Baker	EarthLink; OpenNet Coalition	Cable & Broadband: August 17 (29-30)
Vivian Bauhof	Self	Telecommunications: May 10
Anne Beck	Self	Telecommunications: May 10 (149)
Dale Bennett	AT&T	Cable & Broadband: March 2 (19-20, 64)
Janee Briesemeister	Consumers Union	Telecommunications: March 2 (118), May 10 (133-135)
Brook Brown	Valor Telecommunications	Telecommunications: May 10
Jose Camacho	Valor Telecommunications	Telecommunications: May 10 (144)
Bill Carey	Time Warner Cable	Cable & Broadband: March 2 (20, 64)
Robin Casey	CLEC Coalition	Telecommunications: May 10 (134, 137-138)
Jerry Cerasale	Direct Marketing Association	Privacy: July 21 (88-89)
Gary Chapman	Self	Privacy: July 21 (87-88)
Thomas Clarke	GTE	*Staff Briefing: August 16 (197)*
Gary Clayton	Privacy Council	Privacy: July 21 (89-90)
Dennis Conti	Hughes Network Systems	Telecommunications: May 10 (145)
Mark Cooper	Consumer Federation of America	Cable & Broadband: August 17 (28-29)
Gloria Corey	SBC Communications	Privacy: July 21 (89)
Eric Drummond	CLEC Coalition	Telecommunications: May 10 (139)
Carl Erhart	GTE	Telecommunications: May 10

Witness Name	Representing	Testimony Provided (Page)
Henry Florsheim	KTRK-TV, Houston	Cable & Broadband: May 2 (24)
Robert Floyd	Texas Society of Association Executives	Lobby Influence: April 27 (102)
Paul Glist	Texas Cable & Telecommunications Association	Cable & Broadband: March 2 (21-22), May 2 (23-25), August 17 (31-32); *Staff Briefing: August 16 (195-199)*
Chris Goodpastor	Covad Communications	Telecommunications: May 10 (135, 140)
Kathy Grant	CLEC Coalition Texas Cable & Telecommunications Association	Telecommunications: May 10 *Staff Briefing: August 16 (197-198)*
Darrell Guthrie	Public Utility Commission of Texas	Cable & Broadband: March 2, May 2, August 17 (33); *Staff Briefing: August 16 (196, 198)*
James Harris	Self	Telecommunications: May 10 (148)
Tom Harrison	Texas Ethics Commission	Lobby Influence: April 27
Jim Higgins	Wide Open West	Cable & Broadband: August 17 (29)
Ron Hinkle	Public Utility Commission of Texas	Lobby Influence: April 27 (111-112); *Staff Briefing: August 16*
Michael Jewell	AT&T	Telecommunications: March 2 (119-120), May 10 (133-134, 136-140)
Margaret Lambert	Bastrop County Audubon Society	Telecommunications: May 10 (149)
Charles Land	Southwest Competitive Telecommunications Association	Telecommunications: May 10 (134, 136)
Rick Lane	U.S. Chamber of Commerce	Privacy: March 28 (83-84)
Neal Larsen	MCI WorldCom	Telecommunications: March 2 (119)
Dave Lopez	Southwestern Bell	Cable & Broadband: May 2; Telecommunications: March 2 (120), May 10 (134-139, 141)
Karen Lundquist	Texas Ethics Commission	Lobby Influence: April 27 (100-101, 110-111)
Catherine Martin	Office of Attorney General	Privacy: July 21
Kimberly McCutcheon	Self	Telecommunications: May 10 (149)
Diane McDade	Microsoft	Privacy: March 28 (84-85)
Craig McDonald	Texans for Public Justice	Lobby Influence: April 27 (102-103, 112)
Karen Neeley	Independent Bankers Association of Texas	Privacy: July 21 (89)

Witness Name	Representing	Testimony Provided (Page)
Rebecca Payne	Office of Attorney General	Privacy: March 28 (83)
Jim Phillips	Texas Natural Resource Conservation Commission	Lobby Influence: April 27 (112)
Bill Poulos	EDS	Privacy: March 28 (81-82)
John Prager	Bastrop County Environmental Network	Telecommunications: May 10 (149)
Carolyn Purcell	Department of Information Resources	Privacy: July 21 (86-87)
David Rackley	SBC Communications	Telecommunications: May 10 (144)
Suzie Rao	Western Wireless	Telecommunications: May 10 (144-145)
John Raposa	GTE	Cable & Broadband: May 2 (24), August 17 (31-32); *Staff Briefing: August 16 (196-198)*
Thomas Ratliff	Western Wireless	Telecommunications: May 10
Kelsi Reeves	Time Warner Telecom	Telecommunications: March 2 (120)
Janet Roesler	Self	Telecommunications: May 10 (148)
Edwin Rutan	AT&T	Cable & Broadband: May 2
Rob Schneider	Consumers Union	Privacy: March 28 (86)
Ed Shimizu	GTE	Cable & Broadband: March 2 (20-21); *Staff Briefing: August 16 (195, 197-199)*
Mickey Sims	Valor Telecommunications	Telecommunications: May 10 (144)
Tom “Smitty” Smith	Public Citizen	Lobby Influence: April 27 (101-102, 112)
Dave Steer	TRUSTe	Privacy: March 28 (85-86)
Bette Stockbauer	Self	Telecommunications: May 10 (148)
Keith Surratt	GTE Wireless	Telecommunications: May 10 (148-149)
Cindy Symington	Self	Telecommunications: May 10 (149)
David Turetsky	Teligent	Telecommunications: May 10 (140-141)
Rob Wiley	Freedom on Information Foundation of Dallas	Privacy: March 28 (83)
Pat Wood	Public Utility Commission of Texas	Cable & Broadband: March 2 (18-19), May 2 (22-23), August 17 (25-27); Telecommunications: March 2 (117-118), May 10 (121, 134, 135-136, 137-138, 140, 147-148)
Christopher Wysocki	Net Compete Now	Cable & Broadband: August 17 (30-31)

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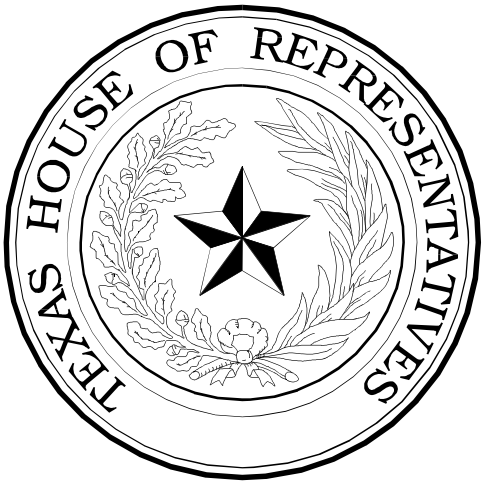

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