

**PROJECT NO. 24597**

<b>PETITION OF THE SOUTHWEST</b>	<b>§</b>	
<b>COMPETITIVE TELEPHONE</b>	<b>§</b>	
<b>ASSOCIATION , IP COMMUNICATIONS</b>	<b>§</b>	
<b>CORPORATION, XO TEXAS, INC.,</b>	<b>§</b>	
<b>ASSOCIATION OF COMMUNICATIONS</b>	<b>§</b>	<b>PUBLIC UTILITY COMMISSION</b>
<b>ENTERPRISES, COMPETITIVE</b>	<b>§</b>	
<b>TELECOMMUNICATIONS</b>	<b>§</b>	<b>OF TEXAS</b>
<b>ASSOCIATION, SAGE TELECOM, INC.,</b>	<b>§</b>	
<b>Z-TEL COMMUNICATIONS, AND</b>	<b>§</b>	
<b>BIRCH TELECOM OF TEXAS, LLP TO</b>	<b>§</b>	
<b>AMEND PUC SUBSTANTIVE</b>	<b>§</b>	
<b>RULE 26.226</b>	<b>§</b>	

**ORDER DENYING PETITION FOR RULEMAKING  
AND INITIATING INVESTIGATION**

This Order denies the petition for rulemaking and directs Staff to hold a workshop to further investigate the issues raised by the petition.

On September 4, 2001, the Commission received a petition to amend P.U.C. SUBST. R. 26.226 relating to Requirements Applicable to Pricing Flexibility for Chapter 58 Electing Companies. The Petitioners are the Southwest Competitive Telephone Association, IP Communications Corporation, XO Texas, Inc., Association of Communications Enterprises, Competitive Telecommunications Association, Sage Telecom, Inc., Z-Tel Communications, Inc, and Birch Telecom of Texas, LLP. Under the Administrative Procedure Act, TEX. GOV'T CODE § 2001.021, the Commission must either deny the petition in writing, stating its reasons for denial, or initiate a rulemaking proceeding not later than the 60<sup>th</sup> day after the date the petition is filed (in this instance, not later than November 3).

Petitioners propose amendments to P.U.C. SUBST. R. 26.226 to curtail what they believe is anticompetitive and discriminatory behavior. Petitioners allege that marketing practices by ILECs (Incumbent Local Exchange Companies) related to special “winback” and “retention” promotions constitute price discrimination by former monopolists intended to squelch developing competition and withhold the benefits of competition from all but a few customers. Petitioners state that by limiting the eligibility of a promotion to the narrow segment of

competitive local exchange (CLEC) customers or prospective CLEC customers, the ILEC is able to maintain high rates for a certain group of customers while limiting price reductions to only those customers that have sought competitive choice.

The proposed amendment to P.U.C. SUBST. R. 26.226(c)(2) seeks to clarify that Chapter 58 electing ILECs may not offer reduced rates or other inducements that are available only to a customer that: (1) is currently served by a competitor of the electing ILEC or of an affiliate of the electing ILEC; (2) is a former customer of the electing ILEC or of an affiliate of the electing ILEC; (3) has been contacted by a competitor of the electing ILEC or of an affiliate of the electing ILEC regarding the possibility of switching service providers; (4) is considering changing some or all of their services to a competitor of the electing ILEC or of an affiliate of the electing ILEC; and/or (5) is a member of any other limited customer base if the effect of such limitation is to target only those customers that would constitute a winback or a retention on behalf of the electing ILEC, of an affiliate of the electing ILEC, or of the electing ILEC and its affiliate collectively.

The proposed addition of P.U.C. SUBST. R. 26.226(e)(4) would clarify that an electing ILEC may not implement a customer-specific contracting program that has the effect of circumventing the prohibitions in subsection (c)(2).

On October 12, 2001, supporting comments were filed by Time Warner Telecom of Texas, L.P., ionex Communications, Inc., KMC Telecom, Inc., and Talk America, Inc. Opposing comments were filed by Southwestern Bell Telephone Company and Verizon Southwest.

Having considered the petition and the comments, and for the reasons set out below, the Commission denies the petition for rulemaking and directs Staff to hold a workshop for further investigation of possible effects on competition of various ILEC winback and retention programs.

Codifying a blanket prohibition of winback and retention program in the rule could have the potential undesirable effect of depriving certain customers of some benefits of competition – price reduction as an outcome of the bidding process where competitive offers and counter-offers are made in the marketplace. Wholly insulating CLECs from such price competition by ILECs might deny customers price reductions that would otherwise occur when ILECs and CLECs engage in wooing customers back from each other. The intent of the Federal Telecommunication Act of 1996 is to protect customers and foster competition, not to shield particular competitors from the competitive process.

Nevertheless, ILECs still possess significant market power and serve the vast majority of customers; winback/retention activities may afford ILECs the opportunity to abuse that market power. Winback and retention offers can take many forms. Some of these offers may arguably be benign or even beneficial to competition (such as certain waivers of nonrecurring or installation charges), while others may indeed be anti-competitive (such as certain offers combined with minimum term contracts, reductions of recurring charge over an extended period of time, and other measures designed to bind the customers to ILECs over time.) A Staff-conducted workshop for further investigation can help determine the appropriate course of action: for example, whether market power abuse prevention can best be accomplished on a case by case basis in the tariff review process, whether a set of administrative guidelines for reviewing tariff filings would be helpful, or whether it is better to amend the rule to prohibit or limit winback/retention offers.

**Ordering Paragraph**

The Commission denies the petition for rulemaking and directs Staff to hold a workshop to further investigate the issues raised by the petition. Upon completion of its investigation, Staff shall present its findings and recommendation to the Commission.

**SIGNED AT AUSTIN, TEXAS the 8th day of November, 2001.**

**PUBLIC UTILITY COMMISSION OF TEXAS**

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**MAX YZAGUIRRE, CHAIRMAN**

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**BRETT A. PERLMAN, COMMISSIONER**

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**REBECCA KLEIN, COMMISSIONER**