

## I. INTRODUCTION

This article discusses developments in Texas law concerning contractors' liability for damage to underground utilities. Principally, it analyzes the Railroad Commission of Texas' (the "Commission") new rules found in Chapter 18 of Title 16 of the Texas Administrative Code, effective September 1, 2007, entitled *Underground Pipeline Damage Prevention* (the "New Rules")<sup>2</sup>. The New Rules apply generally by their terms to all persons engaged or preparing to engage in the movement of earth in the vicinity of an intrastate underground pipeline containing flammable, toxic or corrosive gas, a hazardous liquid or carbon dioxide.<sup>3</sup> This article briefly reviews the historical development of the Texas law of liability for damage to underground utilities, summarizes some of the New Rules as they apply to contractors and utility operators, and notes where the New Rules differ from the terms of the Texas Utilities Code, Chapter 251, *The Underground Facility Damage and Prevention Act*<sup>4</sup> (the "Texas One Call Law"). A Supreme Court of Texas opinion, *Qwest International Communications, Inc. v. AT&T Corp.*, addressing the appropriateness of imposing exemplary damages on a contractor engaged in excavation that damages underground telecommunications facilities, is briefly noted.<sup>5</sup> This article also reviews a recent Corpus Christi Court of Appeals opinion, *Southwestern Bell Telephone, L.P. v. Ballenger Construction Co.*<sup>6</sup>, which dismisses a contractor's declaratory judgment counterclaim seeking to construe a Texas Department of Transportation ("TxDOT") permit on the ground that TxDOT was not joined as a party.<sup>7</sup>

## II. TEXAS UTILITIES CODE CHAPTER 251

# CONTRACTOR'S LIABILITY FOR DAMAGE TO UNDERGROUND UTILITIES: NEW RULES AND SIGNIFICANT CASES

## A. THE LEGAL AND HISTORICAL CONTEXT OF THE TEXAS ONE CALL LAW

To put the New Rules in historical context, it is helpful to point out some of the most significant provisions of the Texas One Call Law.<sup>8</sup> The Texas One Call Law applies generally to the duties of excavators and utility operators in excavation, which includes excavation in the area of telecommunications and electrical underground facilities, as well as in the vicinity of gas pipelines and other types of underground utilities.<sup>9</sup> The Texas One Call Law is, still in force, and its relationship to the New Rules remains unsettled where they contradict each other.

The Texas One Call Law became effective September 1, 1999 and loosely follows a federal statute establishing minimum standards for the several States' one-call notification programs in order for the States to qualify for federal grants.<sup>10</sup> In fact, one of the Texas statutes relied upon by the Commission for its enabling authority to promulgate the New Rules directs the Commission to "adopt and enforce standards and best practices, including those described in 49 U.S.C. Section 6105 et seq..."<sup>11</sup> According to its legislative history, the Texas One Call Law provides the underground facility operator with an opportunity to mark his underground facilities, which allows the excavation to be made without damage to underground facilities.<sup>12</sup> Generally, the Texas One Call Law provides for the formation of the Texas Underground Facility Notification Corporation<sup>13</sup>, establishes notification centers and their duties<sup>14</sup>, and most importantly for the contractor, sets forth requirements relating to the

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<sup>2</sup> TEX. ADMIN. CODE title 16, §§ 18.1-.12 (e) (Supp. 2007).

<sup>3</sup> TEX. ADMIN. CODE title 16, § 18.1 (a) (Supp. 2007).

<sup>4</sup> TEX. UTIL. CODE ANN. §§ 251.001-.203 (b) (Vernon 2007).

<sup>5</sup> 167 S.W.3d 324, 327 (Tex. 2005) (applying TEX. CIV. PRAC. & REM. CODE ANN. § 41.001 (11) (Vernon Supp. 2006)).

<sup>6</sup> 230 S.W.3d 489 (Tex. App.—Corpus Christi 2007, no pet.).

<sup>7</sup> *Id.*

<sup>8</sup> TEX. UTIL. CODE ANN. §§ 251.001-.203 (b) (Vernon 2007).

<sup>9</sup> TEX. UTIL. CODE ANN. § 251.002 (5) (Vernon 2007) (defines "excavate" as the use of explosives, or motor, engine, hydraulic or pneumatically powered tool, or other mechanized equipment of any kind and includes ... trenching and tunneling to remove or otherwise disturb soil to a depth of 16 or more inches).

<sup>10</sup> See 49 U.S.C.A. § 6104 (West 2007).

<sup>11</sup> TEX. HEALTH & SAFETY CODE ANN. § 756.126 (Vernon Supp. 2007); see also TEX. ADMIN. CODE title 16, § 18.1 (a) (Supp. 2007).

<sup>12</sup> HOUSE COMM. ON PUBLIC SAFETY, BILL ANALYSIS, TEX. COMM. SUBSTITUTE H.B. 2295, 75<sup>th</sup> Leg., R.S. (1997).

<sup>13</sup> TEX. UTIL. CODE ANN. § 251.051 (Vernon 2007) ("The Texas Underground Facility Notification Corporation provides statewide notification services under this chapter").

<sup>14</sup> *Id.* §§ 251.101, .102.

excavation duties of an excavator<sup>15</sup>, and the marking duties of a utility operator.<sup>16</sup>

The Texas One Call Law replaces the common law where it specifically provides rights, duties and exemptions, and provides in relevant part:

**EFFECT ON CIVIL REMEDIES.** Except as otherwise specifically provided by this chapter, this chapter ... does not affect any civil remedy for personal injury or for property damage, including any damage to an underground facility.<sup>17</sup>

One of several provisions in the Texas One Call Law that specifically affects a civil remedy is the provision that states, generally, that an excavator who fully complies with the Texas One Call Law may not be liable for damage to an underground facility that was not marked by the utility operator in accordance with that chapter.<sup>18</sup> Another important Texas One Call Law provision states that TxDOT contractors are exempt from the Texas One Call Law in certain situations.<sup>19</sup> This exemption is not carried forward in the New Rules, and this is a very significant difference between the two.<sup>20</sup> Prior to the effective date of the Texas One Call Law in 1999, the Texas common law had evolved from a few early cases which generally treated damage to underground utilities in terms of strict liability for trespass, to a more flexible approach which also placed a duty on the utility owner to take reasonable care to protect its underground facilities once it had notice of plans for construction.<sup>21</sup> This approach replaced a strict liability analysis with a rule generally requiring negligence for the contractor to be liable. Under the new approach once the utility owner had notice of the contractor's work, and if the contractor did not intend to intrude into the space where the utility was located, the contractor is only liable with a showing of negligence.<sup>22</sup> For an excellent analysis of the development of the common law in this area written in 1974 (prior to the Texas One Call Law) by the Dallas Court of

Appeals, see *General Telephone Co. of the Southwest v. Bi-Co Pavers, Inc.*<sup>23</sup>

## B. SOME DUTIES OF THE EXCAVATOR UNDER THE TEXAS ONE CALL LAW

Generally, the Texas One Call Law states that a person who intends to excavate shall notify a notification center not earlier than the 14<sup>th</sup> day before excavation is to begin or later than the 48<sup>th</sup> hour before the time excavation is to begin, excluding Saturdays, Sundays, and legal holidays.<sup>24</sup> Specific information is required to be in the notice.<sup>25</sup> It is unstated and also unsettled under the terms of TEX. UTIL. CODE ANN. § 251.151 whether an excavator should notify the notification center so that there are fourteen days of notice before each day of excavation, or whether this notice may be given only at the beginning of a continuing excavation.<sup>26</sup> There is no published Texas case addressing this issue. However, in 1992 the Texas Attorney General issued an opinion which states that the excavator must notify the notification center if the excavation is delayed beyond fourteen days of the original notice.<sup>27</sup> Unfortunately this opinion does not clearly address the circumstance of an excavator's work that commences within the fourteen-day period and continues unabated. As noted by the Texas One Call Center web site, "no mention is made [in this Attorney General Opinion] of a ticket expiring once excavation has begun."<sup>28</sup> Note, however, that the New Rules generally provide that the life of a line locate ticket shall be fourteen days.<sup>29</sup> This is a significant difference between the Texas One Call Law and the New Rules; additional differences will be discussed below.<sup>30</sup>

## C. SOME DUTIES OF THE UTILITY OPERATOR UNDER THE TEXAS ONE CALL LAW

The Texas One Call Law generally requires the underground facility operator to mark the approximate location of its underground facilities not later than forty-eight hours after the excavator gives notice, excluding Saturdays, Sundays, and legal holidays.<sup>31</sup> An excavator who fully complies with his duties under the Texas One

<sup>15</sup> *Id.* §§ 251.151(a) (b) and (c).

<sup>16</sup> *Id.* § 251.157.

<sup>17</sup> *Id.* § 251.008.

<sup>18</sup> *Id.* § 251.157 (c).

<sup>19</sup> *Id.* § 251.004 (a).

<sup>20</sup> TEX. ADMIN. CODE title 16, § 18.1 (c) (Supp. 2007) ("Persons that are exempt from the provisions of Texas Utilities Code, Chapter 251, are required to comply with this chapter, unless the person is exempt under subsection (d) of this section.")

<sup>21</sup> See *Gen. Tel. Co. of Southwest v. Bi-Co Pavers, Inc.*, 514 S.W.2d 168, 174 (Tex.Civ.App.—Dallas 1974, no writ).

<sup>22</sup> *Id.* at 170.

<sup>23</sup> *Id.* at 170-74.

<sup>24</sup> TEX. UTIL. CODE ANN. § 251.151 (a).

<sup>25</sup> *Id.* § 251.152 (1)-(7).

<sup>26</sup> *Id.* § 251.151 (a).

<sup>27</sup> Tex. Att'y Gen. Op. No. JC-0234 (2000).

<sup>28</sup> Texas One Call System Website, <http://www.texasonecall.com/Default.aspx?tabid=359>

<sup>29</sup> TEX. ADMIN. CODE title 16, § 18.1 (h) (Supp. 2007).

<sup>30</sup> See Section IV, *infra*.

<sup>31</sup> TEX. UTIL. CODE ANN. § 251.157 (a) (1).

Call Law may not be liable for damage to an underground facility that was not marked by the utility operator in accordance with that chapter.<sup>32</sup> The underground facilities operator shall refer to the American Public Works Association color coding standards when marking.<sup>33</sup> The underground facilities operator shall notify the excavator of its plans to not mark the approximate location of an underground facility at or near the site of the proposed excavation - presumably because the operator has no facilities in the intended area of excavation.<sup>34</sup>

### III. THE NEW COMMISSION RULES

#### A. SOME DUTIES OF THE EXCAVATOR UNDER THE NEW RULES

The New Rules add several new responsibilities for contractors, including: requiring they have a copy of a valid locate ticket available for inspection on one-hour notice<sup>35</sup>; defining the life of a locate notice as generally lasting fourteen days<sup>36</sup>; mandating on-line reports in case of an underground pipeline damage and in other circumstances<sup>37</sup>; defining the tolerance zone<sup>38</sup>; adding reporting requirements when positive responses are not received from the operator as required by the New Rules<sup>39</sup>; and requiring white-lining the area of intended excavation under certain circumstances.<sup>40</sup>

The New Rules are based on the assumption that the excavator will notify a notification center as required by the Texas One Call Law.<sup>41</sup> The New Rules apply, by their terms, to all persons preparing to move earth in the vicinity of underground pipelines containing flammable, toxic or corrosive gas, a hazardous liquid, or carbon dioxide.<sup>42</sup> The New Rules do not exempt TxDOT contractors, as does the Texas One Call Law.<sup>43</sup> The New Rules require notice to the notification center as stated by Texas Utilities Code, Chapter 251.<sup>44</sup> The New Rules require an

excavator to include in the notice to excavate the method or methods by which the excavator will receive a positive response - as defined in the New Rules.<sup>45</sup> The New Rules require white-lining the excavation area prior to giving notice of intent to excavate when the excavation site cannot be clearly identified and described on a line locate ticket.<sup>46</sup> When an excavation project is too large to mark using white-lining or is so expansive that a full description cannot be provided on a locate ticket, the excavator and utility operator shall conduct a face-to-face meeting to discuss excavation activities and establish protocols for specifically identified topics.<sup>47</sup>

The New Rules state that if an excavation project is not completed at the time a locate ticket expires then a new refresh notice is required, limited to the area yet to be excavated.<sup>48</sup> The New Rules state generally that the life of a locate ticket shall be fourteen days.<sup>49</sup> The New Rules state that an excavator is to comply with the requirements of the TEXAS HEALTH & SAFETY CODE, subchapter H, relating to Construction Affecting Pipeline Easements and Rights-of-Way, and the excavator shall plan excavation to avoid damage and to minimize interference with all underground pipelines and shall take all reasonable steps to protect underground pipelines from damage.<sup>50</sup> The New Rules define the "tolerance zone" as half the nominal diameter of the underground pipeline plus a minimum of eighteen inches on either side of the outside edge of the underground pipeline on a horizontal plane.<sup>51</sup>

The New Rules also require the excavator confirm a valid locate ticket is in the possession of the excavator's designated representative and can be obtained from this representative or provided within one hour of a request from the operator or the Commission.<sup>52</sup> Prior to excavation, excavators shall verify the location as stated in the locate ticket, verify white-lining, and shall make a visual

<sup>32</sup> *Id.* § 251.157 (c).

<sup>33</sup> *Id.* § 251.157 (b).

<sup>34</sup> *Id.* § 251.157 (d).

<sup>35</sup> TEX. ADMIN. CODE title 16, § 18.4 (c) (Supp. 2007).

<sup>36</sup> *Id.* title 16, § 18.1 (h).

<sup>37</sup> *Id.* title 16, § 18.11 (b).

<sup>38</sup> *Id.* title 16, § 18.2 (21).

<sup>39</sup> *Id.* title 16, § 18.11 (c).

<sup>40</sup> *Id.* title 16, § 18.3 (c).

<sup>41</sup> *Id.* title 16, § 18.1 (b).

<sup>42</sup> *Id.* title 16, §§ 18.1 (a) & (c), 18.2 (11).

<sup>43</sup> *Id.* title 16, § 18.1 (c).

<sup>44</sup> *Id.* title 16, § 18.3 (a).

<sup>45</sup> *Id.* title 16, § 18.3 (b).

<sup>46</sup> *Id.* title 16, § 18.3 (c).

<sup>47</sup> *Id.* title 16, § 18.3 (d).

<sup>48</sup> *Id.* title 16, § 18.3 (e).

<sup>49</sup> *Id.* title 16, § 18.1 (h) ("Unless an excavator and an operator otherwise expressly agree in accordance with the requirements set forth in § 18.3 of this title, relating to Excavator Notice to Notification Center, the life of a line locate ticket shall be 14 days.")

<sup>50</sup> *Id.* title 16, § 18.4 (a).

<sup>51</sup> *Id.* title 16, § 18.2 (21).

<sup>52</sup> *Id.* title 16, § 18.4 (c).

check for any unmarked underground pipelines.<sup>53</sup> The New Rules require a second notice prior to excavation in some circumstances including knowledge or evidence of utilities when he receives an "all clear" or "no conflict" or when there is no positive response or the positive response is either unclear or obviously erroneous.<sup>54</sup>

The New rules provide that the excavator shall protect and preserve locate marks.<sup>55</sup> Each excavator that damages an underground pipeline shall notify the utility operator as stated in the New Rules.<sup>56</sup> The excavator and operator shall make a record of each positive response regarding each line locate ticket received as more fully described in the New Rules.<sup>57</sup> The excavator shall also report to the Commission through the on-line reporting system called The Texas Damage Reporting Form or TDRF [which may be accessed via the internet using the excavator sign-in at the Commission web site] when an excavator gives a second notice pursuant to section 18.4 (e) because of the failure of an operator to give a positive response.<sup>58</sup> The excavator must report the failure to provide positive response to a second notice call.<sup>59</sup> The excavator shall exercise reasonable care to prevent damage when excavating within the specified tolerance zone and may consider hand digging or other methods based on climate or geographical conditions.<sup>60</sup> The excavator shall notify the operator of any damage and shall submit a report of the damage incident to the Commission using the on-line TDRF within 10 days of the incident.<sup>61</sup> The New Rules also provide penalty guidelines, which may be deviated from, but only up to the statutory penalty.<sup>62</sup>

#### B. SOME DUTIES OF THE EXCAVATOR UNDER THE NEW RULES

The New Rules provide that upon being contacted by the notification system, the utility operator shall provide

a positive response within the deadlines imposed by the Texas One Call Law by either marking the pipelines or notifying the excavator that the operator has no underground pipelines in the excavation area by an "all clear" or "no conflict" notice to the excavator.<sup>63</sup> The Texas One Call Law generally provides that the line should be marked by the utility operator not later than 48 hours after the notice.<sup>64</sup> The New Rules require that both the utility operator and the excavator make a record of the positive response regarding each line locate ticket received.<sup>65</sup>

All markings shall conform to the American Public Works Association's uniform color code, a requirement also found in the Texas One Call Law.<sup>66</sup> Markings are valid for fourteen days from the time a positive response is given and if a locate ticket has been refreshed, then the operator shall re-mark or ensure that the marks are still visible and valid.<sup>67</sup> The New Rules state that the operator shall mark the approximate center of the pipeline.<sup>68</sup> Markings of a pipeline greater than six inches in nominal outside dimension shall include the size in inches at every other mark.<sup>69</sup> The operator is required to report damage to its pipelines.<sup>70</sup>

#### IV. SOME IMPORTANT DIFFERENCES BETWEEN EXCAVATOR'S DUTIES UNDER THE TEXAS UTILITIES CODE AND THE NEW RULES

There are significant differences between the duties of the excavator under the New Rules from those provided by the Texas One Call Law, and this article will highlight some of the important differences, but not all such differences. The New Rules state compliance with the Texas

<sup>53</sup> *Id.* title 16, § 18.4 (d).

<sup>54</sup> *Id.* title 16, § 18.4 (e).

<sup>55</sup> *Id.* title 16, § 18.4 (g).

<sup>56</sup> *Id.* title 16, § 18.4 (h).

<sup>57</sup> *Id.* title 16, § 18.5 (b).

<sup>58</sup> *Id.* title 16, § 18.5 (c).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* title 16, § 18.10 (b).

<sup>61</sup> *Id.* title 16, § 18.11 (b).

<sup>62</sup> *Id.* title 16, § 18.12.

<sup>63</sup> *Id.* title 16, § 18.5 (a).

<sup>64</sup> TEX. UTIL. CODE ANN § 251.157 (a) (1) provides in relevant part:

(a) Each Class A underground facility operator contacted by the notification system shall mark the approximate location of its underground facilities at or near the site of the proposed excavation if the operator believes that marking is necessary. The operator shall mark the location not later than:

(1) the 48<sup>th</sup> hour after the time the excavator gives to the notification system notice of intent to excavate, excluding Saturdays, Sundays, and legal holidays....

<sup>65</sup> TEX. ADMIN. CODE, title 16, § 18.5 (b) (Supp. 2007).

<sup>66</sup> *Id.* § 18.6 (a); TEX. UTIL. CODE ANN. § 251.157 (b).

<sup>67</sup> TEX. ADMIN. CODE, title 16, § 18.6 (b) (Supp. 2007).

<sup>68</sup> *Id.* title 16, § 18.8 (b).

<sup>69</sup> *Id.* title 16, § 18.8 (g).

<sup>70</sup> *Id.* title 16, § 18.11 (a).

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One Call Law "does not necessarily constitute compliance" with the requirements of the New Rules.<sup>71</sup> Texas Department of Transportation contractors are not exempt from the New Rules as they are from the Texas One Call Law.<sup>72</sup> Where the Texas One Call Law is not clear as to the duration of a locate ticket<sup>73</sup> or when a new notice must be made on an ongoing project, the New Rules provide generally that the life of a line locate ticket shall be fourteen days.<sup>74</sup> Where the Texas One Call Law has no definition of the tolerance zone for hand-digging, the New Rules define the tolerance zone as:

Half the nominal diameter of the underground pipeline plus a minimum of 18 inches on either side of the outside edge of the underground pipeline on a horizontal plane.<sup>75</sup>

The New Rules add reporting requirements through the TDRF for the excavator. The excavator should report through that system when the excavator must give a second notice to the notice center because there was no initial positive response, as well as when there is no positive response to this second notice.<sup>76</sup> The excavator shall also submit a report using the TDRF within 10 days of the incident if he damages an underground pipeline.<sup>77</sup> Also, the New Rules add that the excavator must have a copy of a valid locate ticket for the location in his possession or provide one to the Commission or the utility operator on one hour's notice.<sup>78</sup> Another new requirement for the excavator is that he must not begin excavation until a second notice is given in certain circumstances including if he has knowledge of the existence of an underground pipeline, or if he observes clear evidence of the presence of an unmarked underground pipeline.<sup>79</sup>

White-lining of the area of an excavation site is required prior to giving notice of excavation if the excavation site cannot be clearly identified and described on

a locate ticket.<sup>80</sup> If the excavation area is too large for white-lining or is so expansive that a full description cannot be provided on a locate ticket, then a face-to-face meeting with the operator should be conducted to establish protocols.<sup>81</sup> The New Rules state, unlike the Texas One Call Law, that the excavator shall comply with the requirements of TEXAS HEALTH AND SAFETY CODE, Subchapter H, relating to Construction Affecting Pipeline Easements and Rights-of-Way, and shall plan an excavation to avoid damage and minimize interference with underground pipelines.<sup>82</sup>

V. QWEST INTERNATIONAL COMMUNICATIONS, INC. V. AT&T CORP.

In *Qwest International Communications, Inc. v. AT&T Corp.*<sup>83</sup> the Texas high court overturned an award of punitive damages imposed against Qwest in the trial court and upheld by the court of appeals below.<sup>84</sup> The facts disclosed that on three occasions cable-laying crews for Qwest or its subcontractors cut AT&T's fiber-optic cable. The jury awarded punitive damages based on a finding of Qwest's malice in two of the three cable cuts. The jury considered whether the conduct of Qwest, when viewed objectively from the standpoint of Qwest, involved an extreme degree of risk.<sup>85</sup> The Texas Supreme Court in a *per curiam* opinion applied this test and held that there was insufficient evidence of senior management fostering a corporate environment of rapid cable-laying operations in close proximity to AT&T's cables.<sup>86</sup> The Texas Supreme Court reasoned that there was no evidence that Qwest authorized its agent's malice, maliciously hired an unfit agent, or acted with malice through a vice-principal.<sup>87</sup> The *Qwest* opinion reasoned that when haste risks waste to life and limb, it may justify exemplary damages, but in the same breath it also recognized that in a competitive global economy, time is often of the essence for business.<sup>88</sup> The Supreme Court stated

<sup>71</sup> *Id.* title 16, § 18.1 (b).

<sup>72</sup> *Id.* title 16, § 18.1 (c); TEX. UTIL. CODE ANN. § 251.004 (a).

<sup>73</sup> TEX. UTIL. CODE ANN. § 251.151 (a) (Vernon 2007) generally provides in pertinent part, "[A] person who intends to excavate shall notify a notification center not earlier than the 14<sup>th</sup> day before the date the excavation is to begin or later than the 48<sup>th</sup> hour before the time the excavation is to begin, excluding Saturdays, Sundays and legal holidays."

<sup>74</sup> TEX. ADMIN. CODE title 16, § 18.1 (h) (Supp. 2007).

<sup>75</sup> *Id.* title 16, § 18.2 (21).

<sup>76</sup> *Id.* title 16, § 18.5 (c).

<sup>77</sup> *Id.* title 16, § 18.11 (b).

<sup>78</sup> *Id.* title 16, § 18.4 (c).

<sup>79</sup> *Id.* title 16, §§ 18.4 (e) (1), (2).

<sup>80</sup> *Id.* title 16, § 18.3 (c).

<sup>81</sup> *Id.* title 16, § 18.3 (d).

<sup>82</sup> *Id.* title 16, § 18.4 (a).

<sup>83</sup> 167 S.W.3d 324, 327 (Tex. 2005)

<sup>84</sup> *Id.* at 326.

<sup>85</sup> *Id.* (applying TEX. CIV. PRAC. & REM. CODE ANN. § 41.001 (11) (Vernon Supp. 2006)).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 327.

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that the Legislature's balance of these competing interests "requires courts to adhere to the standard that exemplary damages are available only if a corporation ignores an extreme degree of risk of harm."<sup>89</sup> The Texas Supreme Court reversed the lower court decision.<sup>90</sup> The Court reasoned there was a lack of clear and convincing evidence that Qwest's upper management had actual knowledge that its activities posed an extreme degree of risk.<sup>91</sup>

## VI. SOUTHWESTERN BELL TELEPHONE V. BALLENGER CONSTRUCTION COMPANY

*Southwestern Bell Telephone, L.P. v. Ballenger Construction Co.*,<sup>92</sup> involved a claim against Ballenger for cutting or damaging Southwestern Bell's cables. The contractor, Ballenger, brought a counterclaim seeking in part a declaration that a permit issued by TxDOT to Southwestern Bell required Southwestern Bell to relocate its lines within a certain response time from notice by TxDOT.<sup>93</sup> In the trial court, Ballenger obtained a summary judgment construing TEX. UTIL. CODE ANN. § 181.082 (Vernon 2007)<sup>94</sup> to require that Southwestern Bell must relocate its lines, that are the subject of a standard TxDOT permit, within one hundred days of written notice by TxDOT.<sup>95</sup> The trial court held that the TxDOT permit, which required Southwestern Bell to relocate the line, controlled over a statute, TEX. TRANS. CODE ANN. § 203.0935 (Vernon Supp. 2006), which Southwestern Bell urged controlled over the permit in the trial court and in its briefing on appeal.<sup>96</sup>

The case was dismissed on jurisdictional grounds. The court of appeals reasoned TxDOT had an interest that would be affected by the declaratory judgment action and as such should have been made a party.<sup>97</sup> Additionally, the court of appeals reasoned, because TxDOT was not made a party, the declaration would not prejudice TxDOT's rights.<sup>98</sup> The declaratory judgment would, therefore, be purely advisory, so the court of appeals vacated the trial court's summary judgment, and dismissed the appeal.<sup>99</sup>

The merits of Southwestern Bell's appeal was left undecided by the court of appeals. Southwestern Bell argued that TEX. TRANS. CODE ANN. § 203.0935 (Vernon Supp. 2006) — which establishes a means for the utilities and TxDOT to come to an agreement concerning relocation of utilities in conflict with a TxDOT project — controlled over the terms of the permit which it had signed. Ballenger cited cases in its brief which generally hold that the public's right to use roads and the public's convenience mandate that utilities relocate their facilities when made necessary by road construction. This principle was noted in a recent Houston First Court of Appeals opinion in which Southwestern Bell was also a party, *Harris County Toll Road Authority v. Southwestern Bell Telephone, L.P.*<sup>100</sup> The *Ballenger* opinion counsels joining TxDOT as a party when the contractor is asserting an affirmative defense based on the failure of the utility operator to move its lines in advance of a TxDOT project.

The practitioner evaluating a claim of liability for damage to an underground utility should be familiar with the common law as it existed prior to the enactment of the Texas One Call Law.<sup>101</sup> The Texas One Call Law and the New Rules also provide the source of much of the substantive law in the area of liability for damage to underground utilities and knowledge of their terms is essential for the evaluation, preparation, and defense of these claims.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 326-27.

<sup>92</sup> 230 S.W.3d 489, 490 (Tex.App.—Corpus Christi 2007, no pet.).

<sup>93</sup> *Id.*

<sup>94</sup> TEX. UTIL. CODE ANN. § 181.082 ("A telephone ... corporation may install a facility of the corporation along, on, or across a public road, a public street, or public water in a manner that does not inconvenience the public use of the road, street, or water.").

<sup>95</sup> 230 S.W.3d 489, 490 (Tex.App.—Corpus Christi 2007, no pet.).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at \*3.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> No. 01-05-00668-CV, 2006 WL 2641204, at \*14 (Tex.App.—Houston [1st Dist] September 14, 2006, pet. granted Nov. 2, 2007) (citing *State of Texas v. City of Austin*, 160 Tex. 348, 353, 331 S.W.2d 737, 741 (Tex. 1960) and , 653 S.W.2d 320, 323 (Tex.App.—Fort Worth 1983, no writ)).

<sup>101</sup> See *Gen. Tel. Co. of Southwest v. Bi-Co Pavers Inc.*, 514 S.W.2d 168, 174 (Tex. Civ.App.—Dallas 1974, no writ).