PROJECT NO. 33004

PUC RULEMAKING PROCEEDING TO IMPLEMENT SENATE BILL 5 AMENDMENTS TO LOCAL GOVERNMENT CODE CHAPTER 283 AND TO ADDRESS THE REDEFINITION OF ACCESS LINE PURSUANT TO LOCAL GOVERNMENT CODE CHAPTER 283.003	**§**	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER ADOPTING AMENDMENTS TO §26.461, §26.463 and §26.465 AS APPROVED AT THE DECEMBER 14, 2006, OPEN MEETING

The Public Utility Commission of Texas (commission) adopts amendments to §26.461, relating to Access Line Categories, §26.463, relating to Calculation and Reporting of a Municipality's Base Amount, and §26.465, relating to Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers with changes to the proposed text as published in the August 25, 2006 issue of the *Texas Register* (31 TexReg 6612). These amendments are necessary to address the impact of Senate Bill 5 (SB 5) on the commission's telecommunications right-of-way (ROW) rules under Subchapter R, Provisions Relating to Municipal Regulation and Rights-of-Way Management. The commission also redefines the term "access line" and the categories of access line in §26.461 of this title pursuant to Texas Local Government Code §283.003 and §26.465(m) of this title. Local Government Code §283.003 permits the commission to "modify the definition of "access line" and the categories of access lines as necessary to ensure competitive neutrality and nondiscriminatory application and to maintain consistent levels of compensation, as annually increased by growth in access lines and consumer price index, as applicable, to the municipalities."

Senate Bill 5 amended §283.002 of the Local Government Code by amending subsection (2) which expanded the definition of the term "certificated telecommunications provider" to include providers of voice service and adding subsection (7) which is a definition of the term "Voice service." Local Government Code §283.003 permits the commission to periodically modify the definition of access line to ensure competitive neutrality and nondiscriminatory application and to maintain consistent levels of compensation to the municipalities under the provisions of Subchapter R of this title. The commission is amending §26.461, §26.463 and §26.465 to implement the changes to Local Government Code Chapter 283 and pursuant to the authority granted the commission in Local Government Code §283.003. Senate Bill 5 also amended the Public Utility Regulatory Act (PURA) by adding §55.1735, relating to Charge for Pay Phone Access Line. The commission is also amending §26.465, relating to Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers, to clarify that payphones lines are classified as access lines.

On September 14, 2006, the commission received written comments on §26.461, §26.463 and §26.465 from Southwestern Bell Telephone, L.P., d/b/a AT&T Texas (AT&T Texas), Verizon Southwest, Bell Atlantic Communications, Inc., MCI Communications Services, Inc., d/b/a Verizon Business Services, and MCImetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services (collectively Verizon), the Coalition of Cities and the City of Houston (the Coalition), and Grande Communications Networks, Inc. (Grande). On October 6, 2006, reply comments were received from AT&T Texas, Verizon, the Coalition, Grande, and Worldcall Internet Inc. (Worldcall). On September 29, 2006, the commission held a public hearing attended by representatives from AT&T Texas, Verizon, the Coalition, Grande, and XO

Communications (XO) and Time Warner Communications (Time Warner). Notice of the public hearing and the questions presented were published in the *Texas Register* on September 22, 2006. At the public hearing, the commenters discussed, among other issues, whether the language in §26.461(c)(1)(A)(iv) should be less restrictive so that software application-based providers, such as Vonage and Skype, would also be subject to municipal ROW access line fees. In this preamble the terms "software application-based," "application-based," "non-facilities based," "application voice-over-internet-protocol (VoIP)" and "over-the-top" VoIP providers have the same meaning: a service provider that provides VoIP service via a broadband connection that uses means other than owned facilities, unbundled network elements or leased facilities, or resale. Relevant comments at the public hearing are summarized herein to the extent they differed from the written comments. Parties' comments addressed specific subsections of the amended rule and are summarized below.

Comments on §26.461

§26.461(c)(1)

The definition of access line in proposed §26.461(c)(1) has been amended to incorporate the statutory language of §283.002(1) of the Local Government Code into subsection (c)(1)(A)(i)-(iii) and to add a new clause (iv) which reads "any other line not described in clauses (i), (ii) or (iii) of this subparagraph that provides voice service delivered by means of owned facilities, unbundled network elements or leased facilities, or resale."

1. Scope of SB 5 amendments

Some commenters suggested that the commission-proposed definition of access line is more restrictive than that contemplated by the SB 5 amendments to Local Government Code Chapter 283. The Coalition argued that prior to the SB 5 amendment, wireline Certificated Telecommunications Providers (CTPs) that provide VoIP service were already counting and filing access line reports. According to the Coalition, the intent of the "voice service" definition included in SB 5 could only have been to capture "over-the-top" providers if the voice service traveled through the public ROW. The Coalition pointed out that broadband services are not currently assessed a ROW fee and that adding VoIP service to the access line definition would not result in double counting of municipal access line fees.

The Coalition, commenting on proposed §26.461(c)(1)(A)(iv), suggested substituting the phrase "to end-use customers that allow such end-use customers to receive calls that originate through or on the public switched telephone network and/or that allow such end-use customers to send calls that terminate on the public switched telephone network" in place of the proposed language "delivered by means of owned facilities, unbundled network elements or leased facilities, or resale." The Coalition asserted that the proposed language is restrictive and would exclude "over-the-top" voice service providers, including those that use internet protocol technology such as Vonage, because they do not "provide service by means of owned facilities, unbundled network elements or leased facilities, or resale."

AT&T Texas, on the other hand, stated that the proposed definition of "access line" in §26.461(c)(1) captures the language and intent of §283.002(1) of the Local Government Code.

AT&T Texas commented that the Coalition's and Grande's proposed language would clearly modify the definition of "access line" to include "interconnected VoIP providers" and that that definition is not contained in the relevant SB 5 amendment.

Furthermore, AT&T Texas noted that it would be imprudent for the commission to implement a definition of access lines that included VoIP providers because of the difficulty of determining if a provider is actually using the ROW, how to locate providers and how to determine the correct location for the service. Similarly, Time Warner/XO in its comments at the public hearing, expressed concern about including "over-the-top" providers in the definition of access line and the legal challenges that would almost certainly arise if such a definition were implemented by the commission. The legal challenges that Time Warner/XO was referring to was in essence a challenge of the commission's authority to adopt a rule that requires "over-the-top" VoIP providers to pay municipal ROW fees if such providers could demonstrate that their end-users are not in fact burdening a municipality's ROW.

Verizon argued that the proposed amendments appeared to implement SB 5, because municipal access line fees should only be assessed if a provider offers voice services that pass "through wireline facilities located at least in part in the public right-of way" *and* "the voice service is transmitted over an access line" that is owned, leased, or resold. Verizon also stated that the intent of the legislature with the passage of SB 5 was not to resolve all ROW issues, and the study of ROW access and fees, required by PURA §66.017 was intended to address all ROW issues in a comprehensive manner including the imposition of ROW fees on non-facilities based

interconnected VoIP providers. At the public hearing, Time Warner concurred with Verizon on this point.

The commission held a public hearing on, among other issues, the question of whether the definition of "access line" should be expanded beyond that proposed to include voice service delivered to end-users by providers using other means, specifically software application-based providers over a broadband connection, also known as "over-the-top" providers. The commenters that participated in the hearing did not agree on whether "over-the-top" VoIP providers should be subject to Subchapter R of the commission's substantive rules. The Coalition and Grande contended that the plain language of Local Government Code §283.002 (2) and (7) mandate that "over-the-top" VoIP providers must pay compensation to the municipalities, and that the commission is obligated to adopt rule language implementing the SB 5 changes to accomplish that end. Verizon, AT&T Texas, Time Warner/XO argued that §26.461(c)(a) as proposed appropriately implements the SB 5 changes to Local Government Code Chapter 283.

The Coalition and Grande commented that the proposed definition of "access line" does not implement the broadly-worded definition of "voice service" the legislature enacted, but rather negates its effect. The Coalition contended that the legislature must have intended that all VoIP service providers be required to pay ROW fees since they provide "voice service" as defined in Chapter 283.

Commission response

The commission believes that the changes made by SB 5 to Local Government Code Chapter 283 empower the commission to require VoIP service providers that provide services by "means of owned facilities, unbundled network elements or leased facilities, or resale…" to pay municipal ROW access fees as proposed in §26.461(c)(1)(A)(iv). The commission agrees with the Coalition and Grande that the proposed definition of "access line" in §26.461(c)(1)(A)(iv) will prevent application of the rule to "over-the-top" VoIP service providers. The commission also agrees that the changes to Local Government Code Chapter 283 may empower the commission in some circumstances to require "over-the-top" VoIP service providers to assess and pay municipal ROW fees, particularly in the case where the geographic location of the end-user can be determined with a sufficient degree of certainty and the service is inherently non-nomadic. However, the commission disagrees with the contention that the legislative changes to Local Government Code Chapter 283 mandate that any "over-the-top" VoIP service provider currently serving end-users in Texas must be presently required to pay municipal ROW fees. Accordingly, for reasons discussed below, the commission adopts §26.461(c)(1) as proposed.

The commission recognizes that VoIP service is increasingly being adopted by end-users as a replacement for traditional telephone service. The amendment to §26.461(c)(1), as adopted, requires facilities-based VoIP providers that burden the rights-of-way to pay compensation to the municipalities, but does not require "over-the-top" VoIP providers to pay compensation to the municipalities at this time. However, in accordance with §283.003 of the Local Government Code, the commission plans to revisit the definition of "access

line" again in the future, as appropriate, to determine whether technological changes, market conditions, level of consistent compensation to the municipalities, and other factors indicate that the service provided by "over-the-top" VoIP providers should be included in the definition of "access line." The commission notes that it is obligated under §283.003 of the Local Government Code and P.U.C. Substantive Rule §26.465(m) to review the need for modifying the definition of an access line at least once every three years.

The commission believes it has authority under the provisions of Local Government Code Chapter 283 to require any person that provides voice service utilizing access lines, as defined by the commission, to pay municipal ROW fees. Local Government Code §283.003 gives the commission the power to redefine the term "access line" periodically and the discretion to adopt a definition that is consistent with the elements listed in Local Government Code §283.003 and with legislative intent as expressed in the language of the entire statute. However, it is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. The commission must consider the provisions of any statute as a whole and not in isolation.

Under Local Government Code Chapter 283 and under §§26.461 through 26.469 of this title, Provisions Relating to Municipal Regulations and Rights-of-Way Management, an "access line" is the unit of measurement employed to calculate the amount that must be paid by a CTP to a municipality for use of that municipality's rights-of-way. Local Government Code §283.002 contains a definition of "access line," but Local Government

Code §283.003 permits the commission to "modify the definition of 'access line' and the categories of access lines as necessary to ensure competitive neutrality and nondiscriminatory application and to maintain consistent levels of compensation, as annually increased by growth in access lines and consumer price index, as applicable, to the municipalities." The commission recognizes that changes in Local Government Code Chapter 283 resulting from SB 5, and changes in technology, facilities, and competitive and market conditions warrant a redefinition of "access line" at the present time. The commission in this rulemaking proposed a new definition of "access line" that mirrored the definition in Local Government Code §283.002, but that also clarified that voice services provided by means of owned facilities, unbundled network elements or leased facilities, or resale, would now be counted as an "access line." Voice services provided by other means (*e.g.*, via satellite, via facilities neither owned, leased, by UNEs, nor resold) would not be counted as an "access line."

However, the criteria listed in Local Government Code §283.003 are not the beginning and end of the inquiry; they must be read in the context of the overall statutory scheme. The commission notes that Local Government Code §283.001, State Policy; Purpose, indicates in part that the "purpose of this chapter is to establish a uniform method for compensating municipalities for the use of a public ROW by certificated telecommunications providers that "is administratively simple for municipalities and telecommunications providers…" and that is "consistent with the burdens on municipalities created by the incursion of certificated telecommunications providers into a public right-of-way…." Section 283.001 also indicates that other purposes of the statute include establishing a uniform method that

is consistent with state and federal law, is competitively neutral, and is nondiscriminatory in its application. In reaching its decision to, for the time being, exclude the service provided by "over-the-top" providers from the definition of "access line," the commission considered all factors enumerated in the statute, as explained more fully in the following paragraphs.

The commission agrees with the Coalition and Grande that "over-the-top" VoIP service providers are providing "voice service" per the statutory definition. The commission does not agree that it is required in this rulemaking to adopt a definition of "access line" that ensures that all voice service providers must be required at present to pay municipal ROW fees, regardless of the other important, statutorily-mandated considerations mentioned above, *e.g.*, administrative simplicity.

As noted by AT&T Texas in its reply comments, if the commission were to adopt a definition of "access line" that included "over-the-top" VoIP service as a line to be counted, the commission would have to be sure that those types of providers were actually burdening the rights-of-way. The commission notes that many, if not all, "over-the-top" VoIP services are fully portable or "nomadic." That is, the end-users may use the service anywhere they can connect to a broadband connection. Even though an end-user's billing address may be inside the boundary of a particular municipality, the user may never, or rarely, make a voice call from or to that municipality. At present even the service provider is not able to ascertain with certainty the physical location of an end-user using "over-the-top" VoIP service.

The commission does not believe the state of technology today permits easy identification of the geographic location of the end-users of "over-the-top" VoIP services, and therefore declines to adopt a definition of "access line" that would compel such an end-user, even though she may live in a different state or country, to pay municipal ROW fees to a particular municipality. Again, the commission notes that technology is advancing, as always, and there may come a time in the near future when easy identification of such end-users is more practicable and administrable from the perspective of Subchapter R of the commission's substantive rules.

The commission does note that under current federal and state regulations end-users of "interconnected VoIP services" are required, or at least encouraged, to provide geographic location information to their service provider to facilitate 9-1-1 services. "Interconnected VoIP service" is defined at 47 C.F.R. §9.3 as a service that (1) enables real-time, two-way communications; (2) requires a broadband connection from the user's location; (3) requires Internet protocol-compatible customer premises equipment (CPE); and (4) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network. The commission plans to study the implementation and facilitation of the federal and state 9-1-1 regulations, and other pertinent state and federal regulations, rules and laws in anticipation of its review of the definition of "access line" within the next three years. However, the commission notes that presently no administratively practical methodology exists to

correlate 9-1-1 geographic location information of "over-the-top" VoIP end-users with the provisions of Subchapter R of the commission's substantive rules.

The commission notes that neither Local Government Code Chapter 283 nor the commission's rules includes any definition of "interconnected VoIP services" but, as mentioned above, there is a definition of the term in the Code of Federal Regulations at 47 C.F.R §9.3. The term "interconnected VoIP services" distinguishes between those VoIP service providers that, among other things, enable the end-user to make and receive calls to and from the public switched telephone network (PSTN) from those that do not. Local Government Code Chapter 283 and the commission's rules distinguish, for the purposes of this rulemaking, VoIP service providers that provide service by means of owned, leased, unbundled network elements or resale and those that provide service by other means. The FCC employs the term "interconnected VoIP service" to identify, among other things, those service providers that are subject to the FCC's 9-1-1 rules and those that are not. Whether a service provider permits its end-user to make calls to and from the PSTN is not determinative under Local Government Code Chapter 283 as to which service providers are required to pay municipal ROW fees. Thus, the use of the term "interconnected VoIP services" is informative to a degree, but not particularly relevant to this rulemaking proceeding.

Furthermore, the commission notes that the important public safety concerns that underlie federal and state regulations pertaining to 9-1-1 service are not a concern in this rulemaking. Obviously 9-1-1 service is critical to the nation's ability to respond to a host of

crises, and the FCC's decision to extend 9-1-1 obligations to virtually all kinds of providers of voice communications is based on Congress's recognition of the need to protect and preserve life and property in a time of emergency. This rulemaking and the legislation behind it concern whether or not certain types of voice service providers must pay a fee to municipalities for the privilege of using the public ROW. Administration of the use of public ROWs has not yet been determined to be a matter of national importance such that Congress has recognized the need to establish a national methodology for assessing and collecting municipal ROW fees. The commission notes that if its concerns about identification of the geographic location of the end-user of "over-the-top" VoIP services can be adequately addressed by, for example, changes in technology or changes in federal regulations regarding such services, such changes will inform the commission's decision on whether the term "access line" should be redefined.

For the reasons discussed above, the commission declines to adopt the changes to §26.461(c)(1) suggested by the Coalition and Grande and adopts §26.461(c)(1) as proposed, which excludes "over-the-top" VoIP service providers.

2. ***Considerations of competitive neutrality, nondiscriminatory application, and revenue impact on municipalities***

The Coalition expressed concern that as the number of non-certificated VoIP providers increases, the revenue to municipalities in the form of ROW fees will continue to decrease if these providers are not captured in this rule. The Coalition contended that an interconnected VoIP provider is essentially the same as a traditional telephone provider and that such providers should

be paying access line fees because they cannot complete their calls without using the public ROW. To achieve competitive neutrality, the Coalition argued that "non-certificated VoIP providers," including "over-the-top" providers, should be required to pay municipal ROW fees. The Coalition contended that by continuing to exclude these providers from payment of municipal access line fees, the commission will be permitting such VoIP providers to maintain a "competitive regulatory advantage." In its reply comments, Grande supported the Coalition's arguments regarding "over-the-top" providers. In its reply comments, AT&T Texas opposed the Coalition's position and stated that the intent of Local Government Code Chapter 283 was to establish a mechanism for assessing access line fees for the use of the public ROW, and this intent should not be overshadowed by issues related to competitive neutrality. AT&T Texas also advised the commission to "take a cautionary approach" with regard to deciding who should pay access line fees to make certain that only those providers that "burden the rights-of-way" are the ones required to pay access line fees.

Grande recommended that references to owned facilities, unbundled network elements or leased facilities, or resale in the proposed rule be deleted to ensure that voice service providers that use the public ROW are included in the definition and are deemed subject to applicable municipal access fees. In its reply comments, Grande suggested that the phrase "and that is provided by means of owned facilities, unbundled network elements, or resale" should be deleted in §26.461(c)(1)(A)(i)**,** §26.461(c)(1)(A)(iv), and §26.465(e)(10) to avoid creating an incentive for telecommunications providers to "separate organizational responsibility for physical facilities from organizational responsibility for customers with an eye toward avoidance of the fee in question." Grande stated that to achieve competitive neutrality the access line definition should

capture all entities, including interconnected VoIP providers that provide voice services to end-use customers. The Coalition concurred with Grande.

Worldcall in its reply comments generally objected to the suggestion from Coalition and Grande to include VoIP service provided by "over-the-top" VoIP providers in the definition of access lines. Worldcall, an enhanced service provider, asserted that it does not provide "over-the-top" services like Vonage and that the current rules impose multiple access line fees on facilities (facility to Worldcall; facility to Worldcall's wholesale customer; facility to ultimate customer) and the proposal by Coalition and Grande only exacerbate the situation by adding yet another access line fee on the VoIP service that rides on these dedicated circuits.

Commission response

The commission notes that while "over-the-top" VoIP services seem to be growing in popularity, the level of public use of the service is presently small relative to all other types of voice service provisioning. The commission believes that the economic impact on Texas municipalities that results from its decision to exclude "over-the-top" VoIP providers at the present time is relatively insignificant. The commission has considered the foregoing as part of a broad review of the issue of the impact of the proposed rule on competitive neutrality. The commission believes any impact on competitiveness between CTPs will be minimal for the same reason. As noted by AT&T Texas in its reply comments, "concerns over how municipal access line fees are applied vis-à-vis competitors should not override the purpose of Chapter 283—establishing an access line fee regime for the municipalities' management of the public rights-of-way." The commission agrees and has determined that

adopting the proposed changes to §26.461(c) results in a competitively neutral access line fee regime to the extent possible in light of the state of telecommunications technology today. The commission recognizes that technology will likely change over time and that if the use of "over-the-top" VoIP service continues to grow in popularity, the commission may need to revisit the definition of "access line" in the future.

Grande's suggestion that the definition of "access line" should be modified to exclude any reference to owned, leased, unbundled network elements, or resale is unwarranted. The commission points out that prior to the SB 5 amendments, Local Government Code Chapter 283 and Subchapter R of the commission's substantive rules imposed ROW fees on CTPs for access lines that enabled the provision of local exchange telephone service that are provided by means of owned or leased facilities, unbundled network elements or resale. SB 5 amendments did not alter this obligation on CTPs, it merely recognized a new class of providers, namely uncertificated providers of voice services who would now be subject to ROW fees under Local Government Code Chapter 283 if they provided voice communications through wireline facilities located at least in part in the public ROW. To delete the latter portion of the existing definition of "access line" contained in Local Government Code §283.002(1) and embodied in §26.461(c)(1)(A)(i), that reads "that is provided by means of owned facilities, unbundled network elements or leased facilities, or resale" as Grande suggests is unnecessary to accomplish what Grande recommends, namely that all voice service providers should be subject to provisions of Subchapter R of the commission's substantive rules. The commission believes that Grande's suggested language goes beyond the scope of the SB 5 amendments. As to Grande's concern about

the creation of an incentive for companies that provide voice service that fall under the rule to change their business structure to take advantage of the exception, the commission believes that its decision to revisit its definition of "access line" within the next three years should alleviate such concerns. For these reasons, the commission declines to adopt the changes recommended by Grande.

The commission carefully considered the issue of whether limiting the application of ROW fees to providers that provide voice service by means of owned, leased, unbundled network elements gives "over-the-top" VoIP providers a competitive advantage over those entities that are required to pay ROW fees. The commission believes that given the *de minimus* usage of "over-the-top" VoIP at present, any concern that such providers will obtain any significant competitive advantage is unwarranted, particularly in light of the fact that the commission has stated that it has the statutory authority to require "over-the-top" VoIP providers to pay ROW fees and that it has the statutory obligation to review the definition of access line at least once every three years. On balance, issues of competitive neutrality do not outweigh other concerns such as feasibility of administration and adequacy of certainty that the end-user is actually burdening the public ROW. The commission will address the issue of competitive neutrality again if and when usage of "over-the-top" VoIP service grows to a significant level.

3. Relevance of recent FCC decisions regarding interconnected VoIP providers

Grande and the Coalition contended that the recent Federal Communications Commission (FCC) decisions imposing responsibility on "interconnected VoIP providers" with respect to E9-1-1, Communications Assistance for Law Enforcement Act (CALEA), and the Universal Service Fund (USF) are informative, if not dispositive, of whether interconnected VoIP providers are included in the list of providers that use "a transmission path through the wireline communications system to provide service." Further, both Grande and the Coalition cited the FCC's definition of "interconnected VoIP providers" as services that must connect with the public switched telecommunications network (PSTN). Grande argued that payment of ROW fees is analogous to the other requirements recently extended to interconnected VoIP providers by the FCC.

Verizon, however, argued that ROW fees are *not* analogous to the fees assessed for E9-1-1 and USF purposes. Rather, Verizon suggested that ROW fees are best described as a property tax. Under this scenario, only telecommunications providers that own or lease facilities in the state should pay ROW fees. In support of this argument, Verizon cited portions of a letter filed by Representative Phil King, Chairman of the House Regulated Industries Committee in the predecessor rulemaking project, Project Number 31973. In its reply comments, AT&T Texas offered comments similar to those of Verizon.

Commission response

The commission agrees with Grande in its reply comments in this proceeding on the topic: "[i]t is important to remember that this is not a question of classifying VoIP as a

telecommunications service or as an information service which debate has engendered such consternation in the telecommunications industry. This is purely a state government question revolving around fees for use of the public ROW." At this time, it is not clear whether the FCC will decide to occupy the entire field regarding all types of VoIP services. It has not done so as yet. As such, the commission believes it has the statutory authority to subject providers of voice services, as defined in Local Government Code §283.002, to the provisions of Subchapter R of the commission's substantive rules. For reasons previously discussed, the commission also believes that it has the discretion under Local Government Code §283.003 to exclude certain classes of voice service providers from the provisions of Subchapter R of the commission's substantive rules.

The commission disagrees with the Coalition and Grande that requiring service providers in Texas that use VoIP to deliver voice service to pay municipal ROW fees is analogous to the other requirements recently extended to interconnected VoIP providers by the FCC. First, as noted previously, Local Government Code Chapter 283 does not contain a definition of "interconnected VoIP service." Second, the FCC's decisions in E9-1-1, CALEA, USF orders were based in large part on the desirability of creating a national framework to ensure the provisions of each would be uniformly applied. This rulemaking concerns a state statute that addresses the practical administration of telecommunications service providers' use of municipal rights-of-way. The commission therefore declines to adopt the changes to the rule suggested by the Coalition and Grande.

§26.461(d)(1) and (2)

The proposed amendment to §26.461(d)(1) adds the phrase "any other line that provides residential voice service" under Category 1 lines. Likewise, the proposed amendment to §26.461(d)(2) would include any other line that provides non-residential voice service under Category 2 lines. Verizon offered language to clarify the proposed amendments to §26.461(d)(1) and (2) and suggested that the new phrases should read "any other *access* line …" [emphasis added]. The Coalition's reply comments supported this suggested change.

Commission response

The commission finds that Verizon's suggested revisions helps clarify the type of lines included in categories 1 and 2 and therefore adopts Verizon's suggested revisions in §26.461(d)(1) and (2).

Comments on §26.463

No comments were filed by the parties on the proposed amendments to §26.463.

Comments on §26.465

§26.465(c)(2)(E)

Proposed §26.465(c)(2)(E) adds a definition for voice service, which states that "[v]oice service, without regard to the delivery technology, switched or not, and including Internet protocol technology, shall constitute a single transmission path." Verizon suggested that the definition of a transmission path in §26.465(c)(2)(E) should be revised to include the phrase "provided

through wireline facilities located at least in part in the public right-of-way." The Coalition's reply comments supported this change.

Commission response

The commission finds that Verizon's suggested revisions helps clarify the definition of voice service and is consistent with the definition of voice service in Local Government Code Chapter 283. The commission therefore adopts Verizon's suggested revisions to §26.465(c)(2)(E).

§26.465(d)(4)(A)

Under the proposed rule, §26.465(d)(4)(A) modifies the method in which access lines are counted, particularly with regard to voice service. Verizon stated that more clarification is needed in §26.465(d)(4)(A) to explain adequately how a facility of a CTP will be counted. Verizon proposed that this subsection be amended to read, "[t]he CTP shall count as one access line each separate physical facility or logical 56 kbps channel in the public ROW used to serve an end-use customer." In its reply comments, Verizon recognized some opposition to its suggested rule language and stated that it was not opposed to changing the phrase, "or logical 56 kbps channel," as this phrase may not be technologically neutral so long as the rule language ensures that CTPs are not assessed separate fees for the same physical facility. The Coalition cautioned that Verizon's suggested revisions would represent a departure from the commission's current rules. The Coalition posited that the commission has traditionally treated services as a 'proxy' for an access line. Therefore, multiple services can be provided over a single physical line and would be counted whether they are provided over one physical facility or not. The

Coalition offered the following example: "[i]f a resident has multiple dial tone switched service, there are then multiple access lines to be counted-perhaps one access line is for a home office, another one for a fax machine, and yet a third is for a separate student line." Under the current rule, each of these lines would incur an access line fee. Grande, in its reply comments, supported the Coalition's position and stated that the commission's proposed amendment to §26.465(d)(4)(A) is consistent with the current rule language, which "treats each service as a separate transmission path."

Commission response

The commission declines to adopt Verizon's suggestion because proposed §26.465(d)(4)(A) is consistent with the commission's current rules on counting access lines and adequately explains the counting of voice service lines. Currently each individual switched service constitutes a single transmission path under §26.465(c)(2)(A) regardless of the number of switched services provided over the same physical facility. As the example offered by the Coalition demonstrates, a residential customer could subscribe to three different lines for his or her residence and each line would be counted as a separate access line for ROW purposes even though they are provided over the same physical facility. Similarly, proposed §26.465(d)(4)(A) counts each end-use customer provided voice service as one access line with the caveat that vertical features of a voice service or services bundled with the voice service would not be counted as a separate access line.

§26.465(d)(4(B)

The proposed amendment to §26.465(d)(4)(B) would require the CTP to use an end-use customer's billing address, if the physical address could not be determined, to decide whether or not municipal access line fees should be assessed. Verizon proposed the deletion of §26.465(d)(4)(B) if the intent of the commission is to include non-nomadic VoIP providers who must own or lease a physical facility in the public right-of-way and who would always know the physical location of an end-use customer. Verizon contended that the proposed language would capture CTPs that "own or lease a physical facility in the public ROW;" and would therefore exclude nomadic "over-the-top" VoIP providers such as Vonage. In contrast to Verizon's comments, Grande suggested that using the billing address for purposes of counting access lines is appropriate and should be retained in the proposed rule. In its reply comments, Verizon changed its position and did not object to §26.465(d)(4)(B), as proposed. The Coalition suggested that "billing addresses are susceptible to being manipulated at will by end-users by choosing where a billing is to be received." To avoid potential billing address manipulation, the Coalition suggested either deleting the billing address provision as proposed by Verizon or adding language that would permit carriers to use the billing address only in instances where the physical location could not be determined and when the registered location of the customer that is used for E9-1-1 purposes could not be determined. The Coalition expressed a preference for the latter suggestion.

Commission response

The commission declines to adopt the language proposed by the Coalition in light of the fact that Verizon has withdrawn its initial objection to proposed §26.465(d)(4)(B). Also, the

proposed language is similar to the method already in use and embodied in §26.465(d)(2)(D), which attributes non-switched telecommunications services or private lines to the municipality identified by the CTP's billing systems when the physical location of the non-switched telecommunications service or private line cannot be identified. The commission concludes that reliance on a carrier's existing billing system to identify the location of end-use customer's voice service in the absence of a physical location would also minimize the administrative costs of implementing the SB 5 amendments.

§26.465(e)(10)

Proposed §26.465(e)(10) adds language that would include all lines that provide voice service delivered by means of owned facilities, unbundled network elements or leased facilities or resale that are not otherwise counted under §26.465(e). The Coalition believed that substantive changes to §26.465(e)(10) should be made to capture the intent of SB 5 more fully and to reduce the possibility of federal preemption. For the same reasons offered by the Coalition for its suggested changes to §26.465(c)(1)(A)(iv), the Coalition proposed that §26.465(e)(10) be rewritten to include "all lines that provide voice service to end-use customers that allow such end-use customers to receive calls that originate through or on the public switched telephone network and/or that allow such end-use customers to send calls that terminate on the public switched telephone network" instead of the phrase "delivered by means of owned facilities, unbundled network elements or leased facilities, or resale." Grande's reply comments supported the Coalition's suggested changes to this subsection.

Commission response

The commission has addressed the matter in its response to comments on the proposed changes to §26.461(c)(1) above. The changes to §26.465(e)(10) make clear that only voice service that is provided by means of owned facilities, unbundled network elements or leased facilities or resale is to be counted as an access line at the present time, consistent with the commission's response pertaining to §26.461(c)(1) above. Therefore the commission declines to make the changes suggested by Grande and the Coalition.

Registration of VoIP providers

The Coalition suggested that non-certificated telecommunications providers, including interconnected VoIP providers, should be required to register with the commission. The Coalition argued that this would not function as a barrier to entry, but rather, would assist the commission in enforcing access line reporting and payment to municipalities. The Coalition cited current procedures used by the State Comptroller and the Commission on State Emergency Communications (CSEC), which require an initial registration process. The State Comptroller uses this process for state sales tax purposes, whereas CSEC uses this process for E9-1-1 purposes. The Coalition suggested that its proposed registration process for ROW purposes could be based initially on E9-1-1 and other state required reports filed by "interconnected VoIP providers."

Commission response

The commission acknowledges that a CTP registration process for non-certificated voice providers might aid the commission and the municipalities in tracking non-certificated

voice providers that are subject to SB 5. However, the commission notes that the SB 5 amendments to Local Government Code Chapter 283 are silent on the issue of registration of non-certificated providers and clearly do not require certification of VoIP providers. Moreover, establishing a registration process for non-certificated voice providers would contravene the policy in PURA §51.001(e) which requires the commission to take action to enhance competition in telecommunications markets by reducing the cost and burden of regulation and protecting markets that are not competitive. In any event, the commission determines that the registration issue is beyond the scope of this rulemaking project. Interested municipalities may rely on the E9-1-1 and other state required reports filed by most VoIP providers in Texas to track non-certificated voice providers subject to this section.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting these sections, the commission makes other minor modifications for the purpose of clarifying its intent.

These amendments are adopted under the PURA §14.002, which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. These amended sections are also adopted under the Texas Local Government Code §283.003, which permits the commission to periodically modify the definition of access line to ensure competitive neutrality and nondiscriminatory application and to maintain consistent levels of compensation to the municipalities. These amended sections are also adopted under Local Government Code §283.056(c)(3) and §283.058, which grant the

commission the jurisdiction over municipalities, certificated telecommunications providers, and voice service providers, necessary to enforce Local Government Code Chapter 283 and to ensure that all other legal requirements are enforced in a competitively neutral, non-discriminatory, and reasonable manner. The amendments are necessary to implement Texas Local Government Code §283.002(2) and (7) and are also made pursuant to Local Government Code §283.003.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and Texas Local Government Code §§283.002(2) and (7), 283.003, 283.056, and 283.058.

§26.461. Access Line Categories.

(a)-(b) (No change.)

(c) **Definitions**. The following words and terms when used in this subchapter, shall have the following meaning, unless the context clearly indicates otherwise.

(1) **Access lines** –

(A) means a unit of measurement representing

(i) each switched transmission path of the transmission media that is physically within a public right-of-way extended to the end-use customer's premises within the municipality, that allows the delivery of local exchange telephone services within a municipality, and that is provided by means of owned facilities, unbundled network elements or leased facilities, or resale; or

(ii) each termination point or points of a nonswitched telephone or other circuit consisting of transmission media located within a public right-of-way connecting specific locations identified by, and provided to, the end-use customer for delivery of nonswitched telecommunications services within the municipality; or

(iii) each switched transmission path within a public right-of-way used to provide central office-based PBX-type services for systems of any number of stations within the municipality, and in that instance, one path shall be counted for every 10 stations served; or

(iv) any other line not described in clauses (i), (ii) or (iii) of this subparagraph that provides voice service delivered by means of owned facilities, unbundled network elements or leased facilities, or resale.

(B) The definition of "access line" may not be construed to include interoffice transport or other transmission media that do not terminate at an end-use customer's premises or to permit duplicate or multiple assessment of access line rates on the provision of a single service.

(2) **Certificated telecommunications provider (CTP)** – A person who has been issued a certificate of convenience and necessity, certificate of operating authority, or service provider certificate of operating authority by the commission to offer local exchange telephone service or a person who provides voice service.

(3)-(5) (No change.)

(6) **Voice service** – Voice communications services provided through wireline facilities located at least in part in the public right-of-way, without regard to the delivery technology, including Internet protocol technology. The term does not include voice service provided by a commercial mobile service provider as defined by 47 U.S.C. Section 332(d).

(d) **Access line categories**. There shall be three categories of access lines. The three categories shall be as follows:

(1) Category 1 shall include both analog and digital residential switched access lines and any other access line that provides residential voice service. It shall also

include point-to-point private lines, whether residential or non-residential, only to the extent such lines provide burglar alarm or other similar security services.

(2) Category 2 shall include all analog and digital non-residential switched access lines and any other access line that provides non-residential voice service.

(3) (No change.)

§26.463. Calculation and Reporting of a Municipality's Base Amount.

(a)-(b) (No change.)

(c) **Definitions**. The following words and terms when used in this subchapter, shall have the following meaning, unless the context clearly indicates otherwise.

(1) **Base amount** – The total amount of revenue received by the municipality from CTPs in franchise, license, permit, application, excavation, inspection, and other fees related to the use of a public right-of-way in calendar year 1998 within the boundaries of the municipality. The base amount may include revenue from newly annexed areas, the value of in-kind services or facilities, or municipal fee rate escalation provisions for certain municipalities as prescribed in subsection (d) of this section.

(A) (No change.)

(B) The base amount does not include compensation received from interexchange carriers, cable providers or wireless providers, who may be CTPs, but whose lines do not meet the definition of access line under §26.461 of this title (relating to Access Line Categories).

(2)-(7) (No change.)

(d)-(m) (No change.)

§26.465. Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers.

(a)-(b) (No change.)

(c) **Definitions**. The following words and terms when used in this section, shall have the following meaning, unless the context clearly indicates otherwise.

(1) (No change.)

(2) **Transmission path** — A path within the transmission media that allows the delivery of switched local exchange service or provides voice service.

(A)-(B) (No change.)

(C) Services that constitute vertical features of a switched service, *e.g.*, call waiting, caller-ID, do not constitute a transmission path.

(D) (No change.)

(E) Voice service provided through wireline facilities located at least in part in the public right-of-way, without regard to the delivery technology, switched or not, and including Internet protocol technology, shall constitute a single transmission path.

(3) (No change.)

(d) **Methodology for counting access lines.** A CTP's access line count shall be the sum of all lines counted pursuant to paragraphs (1), (2), (3), and (4) of this subsection, and shall be consistent with subsections (e), (f) and (g) of this section.

(1)-(3) (No change.)

(4) **Voice service.**

(A) The CTP shall count each end-use customer provided voice service as one access line. Services that constitute vertical features of a voice service, or are bundled with the voice service shall not be counted as a separate access line.

(B) In the event a CTP is unable to identify the physical location of an end-use customer utilizing voice service, but that end-use customer's billing address, as identified in the CTP's billing system, is located inside the boundaries of a municipality, the end-use customer's access line shall be attributed to the municipality where such billing address is located.

(e) **Lines to be counted.** A CTP shall count the following access lines:

(1)-(6) (No change.)

(7) any other lines meeting the definition of access line as set forth in §26.461 of this title;

(8) Lifeline lines;

(9) all retail pay telephone access lines; and

(10) all lines that provide voice service delivered by means of owned facilities, unbundled network elements or leased facilities, or resale that are not otherwise counted under paragraphs (1)-(9) of this subsection.

(f)-(l) (No change.)

(m) **Commission review of the definition of access line.**

(1) Pursuant to the Local Government Code §283.003, not later than September 1, 2002, the commission shall determine whether changes in technology, facilities, or competitive or market conditions justify a modification of the adoption of the definition of "access line" provided by §26.461 of this title. The commission may not begin a review authorized by this subsection before March 1, 2002.

(2) As part of the proceeding described by paragraph (1) of this subsection, and as necessary after that proceeding, the commission by rule may modify the definition of "access line" as necessary to ensure competitive neutrality and nondiscriminatory application and to maintain consistent levels of compensation, as annually increased by growth in access lines and consumer price index, as applicable, to the municipalities.

(3) After September 1, 2002, the commission, on its own motion, shall make the determination required by this subsection at least once every three years.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority. It is therefore ordered by the Public Utility Commission of Texas that §26.461, relating to Access Line Categories, §26.463, relating to Calculation and Reporting of a Municipality's Base Amount, and §26.465, relating to Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers are hereby adopted with changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE 21st DAY OF DECEMBER 2006.

PUBLIC UTILITY COMMISSION OF TEXAS

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PAUL HUDSON, CHAIRMAN

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JULIE PARSLEY, COMMISSIONER

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BARRY T. SMITHERMAN, COMMISSIONER

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