

PROJECT NO. 22909

RULEMAKING RELATING TO § PUBLIC UTILITY COMMISSION
OUTSTANDING HB 1777 §
IMPLEMENTATION ISSUES § OF TEXAS

**PROPOSED AMENDMENT TO §26.465 AND PROPOSED NEW §26.469 AS APPROVED
FOR PUBLICATION AT THE MARCH 20, 2001 OPEN MEETING**

The Public Utility Commission of Texas (commission) proposes an amendment to §26.465 relating to Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers and proposes new §26.469 relating to Public Right-of-Way Fees and Penalties. The proposed amendment and new section will implement House Bill 1777, 76th Legislature, Regular Session (1999) (HB 1777) which authorizes the commission to determine a uniform method for calculating municipal franchise compensation paid by certificated telecommunications providers (CTPs). The proposed amendment and new rule clarify which access lines are subject to HB 1777, specifying its application to lines that pass through municipalities and set standards for fees and penalties assessed by municipalities with regard to use of public right-of-way (ROW) by CTPs. Nothing in this rule proposal is intended to expand the statutory definition of "CTP" or definition of "transmission path." Local Government Code, §283.003(2) defines a CTP to mean 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." A transmission path is defined in the commission's substantive rules at §26.465(c)(2) as "A path within the transmission media that allows the delivery of switched local exchange service. Each individual circuit-switched service shall constitute a single transmission path. Where services are offered as part of a bundled group of services,

each switched service in that bundled group of services shall constitute a single transmission path. Only those services that require the use of a circuit-switch shall constitute a switched service. Services that constitute vertical features of a switched service, such as call waiting, caller-ID, etc., that do not require a separate switched path, do not constitute a transmission path. Where a service or technology is channelized by the CTP and results in a separate switched path for each channel, each such channel shall constitute a single transmission path." Project Number 22909 has been assigned to this proceeding.

Alyssa Eacono, Network Analyst, Telecommunications Division and Michelle Lingo, Senior Attorney, Policy Development Division, have determined that for each year of the first five-year period the proposed amendment and proposed new section are in effect, there will be no fiscal implications for the state as a result of enforcing or administering the sections. Because there are at least 1100 diverse municipalities in Texas, fiscal implications may vary. However, because these proposed rules do not alter a municipality's option to exercise its police power-based regulations in accordance with Local Government Code, §283.056(c), there should be no fiscal impact on any given municipality. In addition, because Local Government Code, §283.051(b) provides that municipalities continue to have the right to initiate legal action against CTPs, there is no fiscal implication regarding remedies available to municipalities.

Ms. Eacono and Ms. Lingo have determined that for each year of the first five years the proposed amendment and proposed new section are in effect, the public benefit anticipated as a result of enforcing

the sections will be greater accessibility to telecommunications services and more efficient use of public ROW. Because HB 1777 decreases barriers to entry into the telecommunications market, small businesses and micro-businesses will incur no negative effect as a result of enforcing these sections. Persons who are required to comply with the proposed sections will experience some economic costs, but the economic benefits may outweigh the costs. Municipalities had various arrangements with CTPs prior to HB 1777. Because HB 1777 provides uniformity for CTPs to gain access to all public ROW, implementation of HB 1777 may have impacts that differ among municipalities. Some municipalities and CTPs may even experience an economic benefit due to the clarity, consistency, and uniformity imposed in the amended and new rules. As a result of these decreased barriers to entry into the telecommunications market, telecommunications competition is likely to increase, thereby providing greater choice for telecommunications consumers in Texas. The public also benefits through more efficient use of public ROW.

Ms. Eacono and Ms. Lingo have also determined that for each year of the first five years the proposed amendment and proposed new section are in effect, there should generally be no effect on a local economy; therefore, no local employment impact statement is required under Administrative Procedure Act, §2001.022. The commission acknowledges that infrastructure is constantly being built on an on-going basis. However, HB 1777 was designed to be revenue neutral; the effects of construction will neither increase nor decrease impacts to the local economy. In fact, the fiscal impact of pass through lines rests on the expectation of a municipality for a revenue amount rather than on a true impact to that amount. The proposed amendment and new rule does not alter a provider's choice as to where

infrastructure should be placed. With regard to fees and penalties, the net effect of the rule is an enhancement and clarification of a city's ROW management authority as it relates to compensation issues. The proposal does not modify, but rather clarifies, the amount of fees or penalties that are being correctly assessed. Therefore, this rulemaking poses no impact to the local economy.

The commission staff will conduct a public hearing on this rulemaking under Government Code, §2001.029 in the Commissioners' Hearing Room (7-100) at the commission's offices, located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701, on Thursday, June 21, 2001 at 10:00 a.m.

During the November 8, 2000 Workshop and in the briefs which followed, there was discussion regarding the creation of a standardized ordinance. The commission invites comments on whether the commission should promulgate rules or create guidelines for a uniform public ROW ordinance to be adopted by municipalities in Texas.

Written comments on the proposed amendment and new rule (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326, until 3:00 p.m. on Monday, June 4, 2001. Reply comments may be submitted until 3:00 p.m. on Monday, June 18, 2001. The commission invites comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed amendment and

new section. All comments and reply comments should refer to Project Number 22909 and must be filed in the Central Records Division.

The amendment and new rule are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated, §14.002 (Vernon 1998, Supplement 2001), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. The new rule and rule amendment are also proposed under Local Government Code, §283.058, which grants the commission jurisdiction over municipalities and CTPs necessary to enforce the provisions of Chapter 283.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and Local Government Code §283.058.

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

(a) - (c) (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), and (3) of this subsection, and shall be consistent with subsections (e), (f) and (g) of this section.

(1) **Switched transmission paths and services.**

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

(C) If the transmission path crosses more than one municipality, the line shall be counted in, and attributed to, the municipality where the end-use customer is located. Pursuant to Local Government Code, §283.056(f), the per-access-line franchise fee paid by CTPs constitutes full compensation to a municipality for all of a CTP's facilities located within a public right-of-way, including interoffice transport and other transmission media that do not terminate at an end-use customer's premises, even though those types of lines are not used in the calculation of the compensation.

(2) - (3) (No change.)

(e) (No change.)

(f) **Lines not to be counted.** A CTP shall not count the following lines:

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

(4) lines used by any other affiliate of a CTP for interoffice transport; ~~and~~

(5) lines that pass through a municipality but do not terminate at an end-use customer's premises within that municipality, including interoffice transport and other transmission media that do not terminate at an end-use customer's premises in accordance with Local Government Code, §283.056(f); and

(6)(5) any other lines that do not meet the definition of access line as set forth in §26.461 of this title.

(g) - (m) (No change.)

§26.469. Public Right-Of-Way Fees and Penalties.

(a) **Purpose.** The provisions of this section clarify the definitions and applicability of fees and penalties as these relate to municipal compensation and right-of-way (ROW) management.

(b) **Applicability.** The provisions of this section apply to certificated telecommunications providers (CTPs), as defined by §26.461(c) of this title (relating to Access Line Categories) and to incorporated municipalities within the State of Texas.

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

(1) **Fees** – Compensation to a municipality for the use of public ROW. Fees are uniformly applied to all similarly-situated ROW users.

(2) **Penalties** – Fines charged for noncompliance with a clear, nondiscriminatory, and competitively neutral standard.

(d) **Assessment of fees by municipalities.**

(1) A municipality may not require a CTP to pay any compensation other than the per-access-line franchise fee authorized by Local Government Code, §283.055, for the right to use a public right-of-way to provide telecommunications services in the municipality. In accordance with Local Government Code, §283.056, such prohibited

fees include, but are not limited to, application, franchise, license, permit, approval, excavation, inspection, or other similar fees or charges.

(2) Notwithstanding paragraph (1) of this subsection, a municipality may require a CTP to pay pole rental fees, special assessments, and taxes of any kind, including ad valorem or sales and use taxes, or other compensation not related to the use of a public right-of-way.

(e) **Assessment of penalties by a municipality.**

(1) To the extent elsewhere authorized by law, a municipality may assess penalties against a CTP for violations of a municipality's public right-of-way management ordinance or other written municipal policy.

(2) Any penalties for violation of a municipality's public right-of-way management ordinance or other written municipal policy shall be assessed on a non-discriminatory and competitively neutral basis, in accordance with a written policy made publicly available.

(3) As set forth in Local Government Code, §283.056, any penalties assessed by a municipality for non-compliance by a CTP are not included within the per-access-line franchise fee paid by CTPs under Local Government Code, §283.055.

(4) Any penalties assessed by a municipality for non-compliance by a CTP are not franchise fees or municipal fees within the meaning of the Utilities Code; therefore, penalties may not be passed through to customers as a municipal fee.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

**ISSUED IN AUSTIN, TEXAS ON THE 23rd DAY OF MARCH 2001 BY THE
PUBLIC UTILITY COMMISSION OF TEXAS
RHONDA G. DEMPSEY**