

**MUNICIPAL AUTHORITY TO MANAGE THE
PUBLIC RIGHTS-OF-WAY UNDER
FEDERAL AND STATE LAW AS TO
TELECOMMUNICATION PROVIDERS**

(Revised to May 16, 2002)

"The streets being the property of the public, whoever represents the public not only has a right, but it is their duty, to see that these streets shall subserve the interests of those who wish to use them for their designated purposes."

City of Waco v. Powell, 33 Tex. 258, 272 (1869) - Texas Supreme Court upholding an ordinance regulating hogs running in the streets.

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MUNICIPAL AUTHORITY TO MANAGE THE PUBLIC RIGHTS-OF-WAY UNDER FEDERAL AND STATE LAW

"A municipal corporation is considered an arm of the State, and has the police power to protect the safety of the public, and in the exercise of its police power to protect the public from traffic hazards, a city has broad and comprehensive power to enact ordinances for such purposes and so long as the ordinances do not violate the Constitution or laws of this State, and are not unreasonable and arbitrary, they will be held valid A city has the power to consider many factors in order to determine the reasonableness and necessity of regulatory restrictions contained in an ordinance adopted under the police power." Town of Ascarate, 223 S.W.2d 945 (Tex. 1949) - Texas Supreme Court upholding Police Power Ordinance.

General Overview:

Historically, cities have had the authority to grant franchises to telecommunications utilities allowing them to use the public rights-of-way. A franchise in Texas has *three principal components*: (1) *grant of a special privilege* to use the public rights-of-way for private purposes; (2) *compensation* that is value based paid to the City for use of the public rights-of-way; and (3) *construction standards* to manage the public rights-of-way. ("Management of public rights-of-way" means any municipal regulations or ordinances regarding the construction and placement of facilities in the public rights-of-way in coordination with other users of the public rights-of-way, i.e., construction permit standards, relocation requirements, post-construction repair requirements, indemnity, insurance, tree trimming, providing "as-built" construction drawings, and time allowed for construction, just to name a few examples. The basis of authority for the construction standards are the police powers of a municipality. As will be discussed below, since September of 1999, Chapter 283 of the Local Government Code (sometimes referred to as HB 1777) addresses the first two components as to certificated telecommunications providers ("CTPs" - certificated to provide local exchange service). The third

principal component of a franchise, on construction standards for right-of-way management, will be the focus of this paper.

The discussion of a municipality's authority to promulgate these "management of the public rights-of-way" regulations arises now principally due to federal telecommunication law changes in February of 1996 and to state telecommunication law changes in September of 1999.

FEDERAL LAW:

1996 Federal Telecommunication Law Changes:

In February of 1996, Congress adopted significant telecommunications legislation. As part of that legislation to "deregulate" the telecommunications industry, it adopted a section concerning State and local regulatory authority over telecommunications providers. This section is codified as 47 U.S.C. § 253. It provides, in part, as follows:

"Section 253. Removal of Barriers to Entry.

- (a) In General - No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.*
- (b) State Regulatory Authority - Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with Section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.*
- (c) State and Local Government Authority - Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on*

a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) *Preemption - If, after notice and an opportunity for public comment, the [Federal Communications] Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency."*

Subsection (a), termed the "barrier to entry" subsection, is frequently cited by those in the telecommunication industry when objections are made as to right-of-way standards. Subsection (c), termed the "safe harbor" subsection, is relied on by cities as a preservation of their rights. Subsection (d) allows preemption by the FCC as to subsection (a) and (b), but not as to subsection (c). While both State and Federal courts have generally upheld cities' historic authority in this area, the courts have outlined the "parameters of reasonableness" of right-of-way regulations.

SIGNIFICANT FEDERAL CASE LAW ON SECTION 253 AND ON MUNICIPAL RIGHT-OF-WAY REGULATION:

AT&T Communications of the Southwest, Inc. v. City of Dallas, 8 F.Supp.2d 582 (N.D. Tex. 1998). [On appeal this matter was deemed moot due to the 1999 passage of HB 1777 (and Dallas' repeal of the challenged Ordinance) and the judgment was vacated (242 F.3d 928; rehearing in part 249 F.3d 336 (5th Cir. 2001.))]

While the *City of Dallas Opinion* addressed a number of issues, the Court commented specifically on the city's authority to manage its rights-of-way in light of the then recently enacted

federal law [47 U.S.C. § 253(c)], and under (pre HB 1777) State law the Court provided that management of the rights-of-way is based upon the police powers delegated to a City by the state, or in the case of a home-rule City, powers which the State could exercise, except to the extent the City is preempted by state law (at pages 591-592).

The *Dallas* Court notes that under 47 U.S.C. § 253(c), cities retain the authority to manage the public rights-of-way. The court does state however that "[a]bsent explicit delegation by the state legislature, cities do not have the more general authority to regulate and to protect public safety and welfare - this is a function reserved to the states by § 253(b), not to local governments."

The Court (as Page 592) also comments how, under Texas law, the legislature has delegated authority to cities to manage the public rights-of-way on several occasions. This authority being preserved in both the Texas Civil Statutes in Article 1175, as applicable to home rule cities, and in the original Texas Public Utility Regulatory Act of 1976 (now Codified in the Utility Code § 14.008). [This preservation of authority occurred at least twice more-in 1995, with the initial deregulation of the telecommunications industry in Texas (now Codified as Utility Code § 54.205), and again in 1999 in HB 1777, in Tex. Loc. Gov't Code ANN. § 283.001(b)(1) and § 283.005(c)(1)].

The *Dallas* Court details several examples of how the City may "manage its rights-of-way" consistent with the 1996 federal law, i.e.:

1. "[P]reserve the physical integrity of the streets and highways"
2. "[C]ontrol the orderly flow of vehicles and pedestrians"
3. "[M]anage gas, water, cable (both electric and cable television) and telephone facilities that crisscross the streets and public rights-of-way"
4. "[C]oordination of construction schedules"
5. "[D]etermination of insurance, bonding and indemnity requirements"
6. "[E]stablishment and enforcement of building codes"

7. "[K]eeping track of the various systems used in the rights-of-way to prevent interference between them" (at page 591, - quoting the 1997 Federal Communications Commission case involving the City of Troy, Michigan).

***Cablevision of Boston v. Public Improvement Commission of Boston*, 184 F.3d 88, 103-106 (1st Cir. 1999).**

This Court uses the "safe harbor" analogy in construing 47 U.S.C. § 253(c) as retaining cities' broad authority to manage the public rights-of-way. Section 253(c) allows reasonable management of rights-of-way requirements as a "safe harbor" from being construed to be "barriers to entry", in violation of 47 U.S.C. § 253(a)). The Court specifically upholds a City requirement which provides that additional "shadow" conduit must be installed by new telecommunication providers, but not by incumbents providers (except as to totally new installations) as not being an "unreasonable" discrimination. The concurrence very strongly supports a city's authority to manage the rights-of-way, and emphasizes that Sec. 253(c) does not restrict cities, but is an exception to the restrictions of Sec. 253(a).

***City of Auburn, Washington, et al. v. Qwest*, 247 F.3d 966 (9th Cir. Wash., April, 2001), revised, 260 F.3d 1160 (9th Cir. Wash. July 10, 2001).**

Several cities in Washington State had challenged a tariff filed by Qwest that specified that any right-of-way facility relocation cost would be paid by the requesting City. Then the incumbent telecommunications provider (Qwest) challenged under federal law (47 U.S.C. § 253) each city's management of the rights-of-way and franchise ordinance as being unlawful. The Trial Court granted summary judgment on behalf of the cities, agreeing that facility relocation cost was controlled by statute - not a tariff - and that cost should be borne by the utilities. The Court dismissed the federal law claims as "unripe." On appeal, the 9th Circuit Court of Appeals reviewed three issues - (1) who bears relocation cost under Washington State law, (2) whether the federal issues were "ripe" for review, and if they were, did the right-of-way management and franchise ordinances violate federal law. The Court held that

under Washington State law, as in most states, the utility pays the cost of relocation for City construction projects - not the City.

The Court further held that a Washington State law enacted in 2000 (while the case was pending) preempted the franchise requirements of the contested ordinances. (The state statute also exempted any telecommunications providers that were asserting a pre-existing state legislative grant of authority to use the rights-of-way from the new type of franchise - a "master permit". Qwest was asserting such a "pre-existing" state grant of authority, therefore it did not need a "master permit".)

As to the application of the right-of-way standards under state law, the Court did not address them, but stated it would defer to a State Court. However, the Court held that the federal law issues were "ripe" to be considered. The Court concluded that Cities' franchise application process was so burdensome that it effectively prohibited entry into the market, and thus, was preempted by 47 U.S.C. § 253(a). The Court also held that, as a number of ordinance provisions had nothing to do with management of the rights-of-way, but were regulating either the providers' business or its services, those provisions were also preempted.

Lastly, the Court noted that several sections of the ordinances were overly broad with vague standards and, as such, allowed too much discretion to the City. Those sections were also preempted. The Court concluded that, as substantial parts of the various City ordinances were preempted, the Court held that the remaining portions could not be severed from the preempted parts of the ordinance, and thus preempted the entire ordinances.

Some examples of the prohibited provisions were: open ended authority to request information, favored city rates and services, required reports of stock sales, and request for information as to the financial, technical and legal ability to provide services.

The Court also suggested that any "non-tax fees" for use of the right-of-way must be cost-based under federal law. The Court does not cite any authority on this point and it is contrary to the *TCG v. Dearborne*, [206 F.3d 618, (6th Cir. 1999)] and the *City of White Plains*, (125 F.Supp.2d 81, S.D. NY 2000, appeal pending) opinions discussed later in this paper. It should be noted that under Washington State law while a City is statutorily prohibited from charging a franchise fee, in lieu of a "traditional" franchise fee, cities may impose a statutory 6% gross receipts tax on telecommunications providers. This authority was *not* challenged, but was commented on in a footnote by the Court as being authorized by state law.

***Bellsouth Telecommunications v. Town of Palm Beach*, 252 F.3rd 1169 (11th Cir. 2001).**

The Eleventh Circuit Court of Appeals held in a remand to District Court that 47 U.S.C. § 253(c) was indeed a "safe harbor" provision for cities and not a limitation on cities. This was the same reasoning as in *Cablevision of Boston* in the 1st Circuit. The 11th Court provides very detailed account of the legislative history of Section 253 that led them to the conclusion that it was a "safe harbor" provision.

***TCG New York, Inc. v. City of White Plains*, 125 F.Supp.2d 81, at 89-95 (S.D. NY 2000, pending appeal at 2nd Circuit).**

The Court reviews several recent Federal Court opinions on the management of right-of-way issues in reaching its conclusions that "253(c) preserves the authority of local governments to manage the public rights-of-way" (at pp. 89-90). *White Plains* held that while requesting detailed information as to the description of telecommunications service to be provided and as to financial information concerning the operation and construction of the facilities was not permitted, as these were not "management of the rights-of-way" matters (at page 91), the City may conduct an inspection of facilities and review records if narrowly limited to right-of-way enforcement issues. The Court also listed a

number of management of the rights-of-way regulations or terms in an agreement as permissible under federal law (at pages 91, 92 and 94):

- termination provisions
- performance bonds
- security provisions
- insurance and indemnity requirements
- workmanship quality and construction methods
- obligations to supply an engineering site plan
- provisions to "minimize the extent to which public use of the streets are disrupted"
- the requiring of an "annual map"

White Plains supports city required consents on transfers (page 92) [which in Texas is limited to notice, Tex. Loc. Gov. Code ANN. § 283.056(c)(4)].

White Plains also endorsed the concept, approved by the FCC, that a city could require "a company to pay fees to recover an appropriate share of the increased street repair and paving cost that result from repeated excavations," [at p. 90, quoting the FCC, *In Re: Classic Telephone*, FCC 1996].

The *White Plains* Court (at page 98) also discusses the issue of whether all providers must be treated identically under federal law. The Court concludes that they need not be treated identically and that this is still consistent with the federal requirements of Section 253(c) (that the city must treat all providers in a "competitively neutral and nondiscriminatory" manner.) The Court relied on and quoted three prior federal cases on that point: (1) *Cablevision of Boston v. Public Improvement Commission of Boston*, 184 F.3d 88, 103, (D. Mass. 1999) ("As long as the city makes distinctions based on valid considerations, it cannot be said to have discriminated against [the entrant] in favor of [the incumbent carrier];" (2) *TCG Detroit v. City of Dearborn*, 16 F.Supp.2d 785, 792 (E.D. Mich. 1998) ("the explicit language of the statute does not require such strict equality."); and (3) *City of Dallas*, 8 F.Supp.2d 582,

593 (N.D. Tex. 1998) ("being competitively neutral does not require cities to treat all providers identically and to ignore the significant distinctions among them.").

The *White Plains* Court emphasizes, consistent with *Cablevision*, that there can be different standards for new construction by new providers.

***BellSouth Telecommunications v. City of Mobile*, 171 F.Supp. 2d 1261, 2001 WL 394909 (S.D. Ala. 2001).**

BellSouth made a broad challenge to the City of Mobile's Right-of-Way Management Ordinance under both state and federal law. The Ordinance was upheld in a Summary Judgment proceeding. The Court specifically reviewed several right-of-way management provisions including filing of "engineering drawings," locations of facilities and indemnity provisions. It analyzed and distinguished prior Federal court opinion, such as *Dallas* and *City of Austin* (cited below). The Court noted that local control was appropriate in management of the right-of-way, and that to regulate locally would always impose "some burden and inconvenience" to those regulated but that in and of itself did not make such regulations unlawful under federal laws a "barrier to entry".

***Qwest Communications v. Berkeley*, 146 F.Supp. 2d 1081 (N.D. Cal., May 2001).**

In a pending federal district court case out of Berkeley, California, the court followed the 9th Circuit *Qwest Communications v. City of Auburn* case and enjoined the City's right-of-way ordinance as being overly broad and as it allowed too much discretion to the City Council. However, on commenting on the fees, the court held that the fees violated federal law (47 U.S.C. § 253), as they were not cost-based. (Citing the *Prince George's County* District Court case, 49 F.Supp. 2d 805 (D. Md. 1999), even though the case was vacated and remanded back by the Court of Appeals in 2000 [212 F.3d 863 (4th Cir. 2000)], which on remand held that under State law there was no county authority as to charging the fee, 155 F.Supp. 2d 465 (2001)). While the *Berkeley* opinion appears to be an aberration on the fee issue, as

a majority of the federal district court cases and the Federal 6th circuit court have upheld value based fees, it will likely be mentioned and cited by those in the telecom industry.

[See also: *Omnipoint Communications, Inc. v. the Port Authority of New York and New Jersey*, 1999 W.L. 494120, at 10-12 N. 5 (S.D. NY July 13, 1999) ("only unreasonable discrimination [among providers] violates the Act"), and *AT&T of the Southwest v. City of Austin*, 975 F.Supp. 928, 939 (W.D. Texas 1997), Judgment vacated as moot by the 5th Circuit in Dec. 2000 (235 F.3d 241) (threat of criminal sanctions for failure to have a franchise is a prohibited type of regulations); *Quest Corp. v. Portland*, ___ F.Supp. 2d ___, 2002 WL 834051 (D. Or., March 2002) - Upholding a 7% Gross Receipts Fee, and providing detailed analysis as to *Question v. Auburn*, cited above) and *Cox Communication PCS, LP v. City of San Marcos* [Cal.], ___ F.Supp. 2d ___, [April] 2002 WL 856702 (S.D. Cal.)].

Conclusion as to Federal Case Law and Municipal Right-of-Way Management Authority:

In general the federal courts have held that Section 253(c) is not a limitation on cities, but rather it is a protective "safe harbor" from the restrictions of Section 253(a), i.e., cities may not have regulations or laws that are effectively prohibiting telecommunications providers (which is broadly defined) from entry into the telecommunications market – however, "reasonable" regulations do not constitute a barrier. Where right-of-way management ordinances have been preempted by federal law it is usually because of one of four transgressions – (1) the regulation is unreasonable on its face (i.e. excessive insurance or other patently unreasonable term), (2) the regulation is overly vague and general, (3) the regulation allows too much unbridled discretion to local officials, or (4) the regulation is unrelated to use of the rights-of-way (it unlawfully either attempts to regulate the telecommunications service, or requires extensive information unrelated to right-of-way use or requires a discounted or free service).

Municipal Authority Under State Law

"municipalities . . . retain the authority to manage a public right-of-way within the municipality to ensure the health, safety and welfare of the public . . . " From Preamble to HB 1777 on State Policy (1999), codified as Loc. Gov't Code § 283.001 (b)(1).

House Bill 1777 and Management of Right-of-Way Issues:

House Bill 1777 ("HB 1777") adopted in 1999, as codified in the Local Government Code, Chapter 283, now controls as to two components of the traditional telecommunications franchise, i.e., it granted by statute to all "certificated telecommunications providers"¹ the right to use the City's public rights-of-way without a Franchise and provides for Access Line fee compensation to cities. However, the statute expressly allowed municipalities to retain their municipal authority to manage the public rights-of-way, with a few express restrictions.

Right to Terminate Franchise Raises the Issue :

House Bill 1777 granted incumbent telecommunications providers [such as GTE Southwest, Inc. ("GTE") and Southwestern Bell Telephone Company ("SWB")] the right to terminate their existing city franchises. Notice of termination was to be given by December 1, 1999, with the effective date of the termination (for most providers) being when the new access line rates took effect on June 1, 2000.

With the termination of those existing franchises in June of 2000, a question arose as to which and what management of rights-of-way regulations (construction standards) would apply to the incumbent or to other providers who may want to place facilities in the public rights-of-way. While perhaps the construction standards under the prior franchise would continue to control as to the former franchisees (as arguably only the compensation portion of the franchise was terminated under HB 1777),

¹ Authorized by the Public Utility Commission to provide Local Exchange Telephone Service.

that matter was not clear. Some providers suggested that other statutes provided the needed construction standards (i.e., the Utility Code) and that cities did not need a separate right-of-way Ordinance for such construction standards. However, just a cursory review of the existing statutes would reveal that they do not provide the same level of construction standards, either in breath or in detail, as did the former franchises (for instance, there is no statutory requirement to repair a defective excavation). Therefore, in late 1999 and thereafter, many cities adopted new management of the public rights-of-way ordinances ("ROW Ordinance"). These ROW Ordinances, to a substantial degree, simply readopt the construction standards that were in the former franchise.

In adopting those ROW Ordinances, there have been challenges as to municipal authority to adopt them by some telecommunications providers at City Halls, at the Public Utility Commission and in threatened litigation. A few telecommunication entities take the position that with the passage of House Bill 1777, the ability of cities to adopt the construction standards was severely limited unless the construction standard was expressly provided for in House Bill 1777. This paper will discuss the primary areas of disagreement between providers and cities on the management of the rights-of-way issue and provide the legal basis for cities to continue to adopt broad police power regulations that are reasonable to protect the public and to control the public rights-of-way.

Police Powers both Broadly Retained and in Certain Areas Limited by House Bill 1777:

The Preamble of HB 1777 provides that it is the policy of the State, "that *municipalities . . . retain the authority to manage a public right-of-way within the municipality to ensure the health, safety and welfare of the public . . .*" § 283.001 (b)(1). It further provides that a city may still require a construction permit, but the "terms of the permit shall be consistent with construction permits issued to other persons excavating in a public right-of-way." [§ 283.056(b)].

In § 283.056(c) it provides, in part, that:

"A municipality may exercise those police power-based regulations in the management of the public right-of-way that apply to all persons within the municipality. A municipality may exercise police power-based regulations in the management of the activities of certificated telecommunications providers within a public right-of-way only to the extent that they are reasonably necessary to protect the health, safety and welfare of the public. Police power based regulation of certificated telecommunications providers may not include activities that are governed by this chapter or are within the sole business discretion of a certificated telecommunications provider. . . any regulation must be competitively neutral and may not be unreasonable or discriminating . . . [and] may not impose regulations on [CTPs] that are not authorized by this Chapter."

House Bill 1777 does not further clarify what "governed by this chapter" means nor what kind of activities "are within the sole business discretion" of a provider. Chapter 283 does provide four (4) examples of regulations that are "governed by this Chapter" in § 283.056 (c)(1) - (4). - A city may not require a local office; it can only request statutory reports as they relate to the use of the rights-of-way; and cities' CTP business records review is limited to access line reporting validation, with a 90 day request limitation and no city approval can be required of transfers, only notice may be required, with a contact person. Other examples in House Bill 1777 of activities "governed by this chapter" are - emergency repairs may now be made without notice to the city and without a city permit until circumstances allow per § 283.056(e); and Chapter 283 has a statutory indemnity provision (§ 283.057). (There are Houston exceptions as to the indemnity provision).

Provisions of House Bill 1777 as to Preemption of Police Power Matters:

Section 3 of House Bill 1777, [Uncodified].

"Notwithstanding any provision of Chapter 283, Local Government Code, as added by this Act, to the extent a municipal regulation, ordinance, resolution, or charter provision is applicable to certificated telecommunications providers, the municipal regulation, ordinance, resolution, or charter provision is preempted to the extent it (1) conflicts with Chapter 283, Local Government Code, as added by this Act or (2) is not specifically authorized by Section 283.056, Local Government Code, as added by this Act."

Jurisdiction of PUC Over Municipalities to Enforce House Bill 1777:

Section 282.058. Additional Commission Jurisdiction.

"The Commission shall have the jurisdiction over municipalities and certificated telecommunications providers necessary to enforce this chapter and to ensure that all other legal requirements are enforced in a competitively neutral, non-discriminatory, and reasonable manner."

Attorney General Opinion No. J.C. - 0331 (2001) and Right-of-Way Regulations - Supports Cities'

Use of Police Powers:

This Attorney General Opinion was requested in 2000 to determine whether Chapter 283 required a municipality to apply right-of-way construction permit standards to both certificated telecommunications providers ("CTPs") and to other "persons" using the rights-of-way in the same manner, such as electric utilities, but also including a city's water and sewer operation. The Attorney General concluded that Chapter 283 did not *require* that such an ordinance be applied to the city. The Attorney General reached this conclusion by referring to clear language in Chapter 283, which provides by its own terms, that it only applies to certificated telecommunications providers, citing § 283.004.

The Attorney General determined that only the municipal requirement of Section 283.056(b) is that a CTP excavation permit's terms must be "*consistent*" with the construction permit terms applied to other persons excavating in a public right-of-way. The Attorney General opined that the term

"consistent" means "[a]greeing or according in substance or form; congruous, compatible." In summary, the Attorney General states that the "permit terms [of a CTP] must be congruent or compatible with those in other municipal right-of-way excavation permits; they do not have to be identical."

Additionally, the Attorney General seems to broadly read the police powers of cities under Chapter 283 as to generally "allow municipalities to exercise their police powers as reasonably necessary for the protection of the public in the management of public rights-of-way use by CTPs." While the Attorney General agrees that CTPs must have municipal regulations that are nondiscriminatory and competitively neutral, the A.G. Opinion specifically refers to the preamble to Chapter 283, Section 283.001(b)(1), which provides that it is *the policy of the state that cities "retain the authority to manage public right-of-way to . . . ensure health, safety, and welfare of the public."* (Italics added)

The Attorney General's Opinion clearly supports cities in exercising their police power based regulations on behalf of the public welfare in a manner consistent with what they have done historically.

HB 1777 and the Public Utility Commission ("PUC"):

There have been no less than thirteen (13) PUC Projects Involving HB 1777 - the initial HB 1777 project, and twelve (12) different PUC docketed matters, several of which are still pending.

1. PUC Project Number 20935 – *"Initial Implementation Project for House Bill 1777 and Rulemaking"* (July, 1999.)

This initial project promulgated four (4) PUC Rules on Municipal Access Line Fees:

- (a) PUC Rule 26.461 - Access Line Categories

Established three categories of Access Lines:

Category 1 - residential lines and non-switched burglar alarm / security services lines

Category 2 - switched nonresidential / business lines

Category 3 - point-to-point data / private lines, unless included in Category 1

(b) PUC Rule 26.462 - Calculation and Reporting of Municipalities' Base Amounts

The Base Amount was generally based upon 1998 telecommunication franchise fees and permit fees received by the City, except for certain cities in litigation, newly incorporated cities, cities without a franchise fee, and smaller cities in small counties (by population).

The Base Amount rule took into consideration certain franchise escalation provisions and receipt of in-kind services. The base excluded fees paid by long distance providers.

Each City's documentation for the Base Amount was filed in December of 1999.

(c) PUC Rule 26.465 - Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers

This rule established the type of lines that would be counted as Access Lines and, more importantly perhaps, what type of lines would not be included as Access Lines. For example, while not in the text of the rule, it was determined (over city objections) that DSL service over a "counted" voice line would not be included as a separate Access Line. This was discussed in the preamble to the Commission's Order adopting this Rule.

It was also determined that when high capacity Category 3 lines that were channelized by the telecommunications provider, each channel would count as a separate Access Line but when the lines were channelized by the customer, it would only count as one Category 3 line. City compensation consequences by who channelized the line are significant, as some high capacity lines (for instance, an OC-48) may be channelized to over 20,000 plus lines. Therefore, rather than being compensation for 20,000 Category 2 a (switched business) lines at \$3.00 per line, the City may be paid on a dozen or so Category 3 termination points, at less than \$15.00 per point.

While the issue of a high capacity line categories being counted only as one line and at a low rate was objected to by city representatives in the initial PUC Project Number 20935 proceeding, it was

rejected, as is reflected in the present rule. However, under the statute and under the current rule, the PUC has some latitude to revisit this issue by modifying the definition of Access Line between March 1st and September 1st of 2002. (See PUC Project Number 25450 below for proposed amendments to this Rule on the definition of access line and categories.)

(d) PUC Rule 26.467 - Rates, Allocation, Compensation, Adjustments and Reporting

This rule established the formula for computing the Access Line rates for each city, taking into consideration each municipality's Base Amount and each provider's line count. The Rule also provides for an annual increase to the Access Line rates after the first 24 months of one-half of any Consumer Price Index increase. It also allows each municipality to change the allocation among the Access Line categories in September of each year, but no more than once in twenty-four (24) months.

It also establishes that all providers are to either pay each City or directly pay the underlying carrier, who then pays the City. All providers are to report to the PUC on Access Lines on a quarterly basis, 45 days after each quarter, which is identical to the payment schedule.

Cities may, under both the Statute and Rule, make a written request to the PUC for copies of the CTP filed Access Line Reports in order to verify correct payments.

**SUBSEQUENT PUBLIC UTILITY COMMISSION PROCEEDINGS
INVOLVING HOUSE BILL 1777**

2. PUC Project Number 22909 - *"Outstanding HB 1777 Implementation Issues"* - Right-of-Way Ordinance; Pass-through Lines; Penalties.

As there were several "right-of-way management" issues raised by providers and a "data-only" and "pass-through" provider issue raised by cities during the initial HB 1777 project in 1999 and 2000 which were not resolved, this PUC project was established by the Commission in mid-2000. Industry representatives requested that the PUC adopt a rule that would require cities to adapt a standard right-of-way ordinance, with the standards for those ordinances being set by the PUC. The request was

predicated on an assertion that some city's right-of-way ordinances was either unreasonable and/or out of compliance with limitations of HB 1777. It was also asserted that some fees that were being charged by cities were "unreasonably" and/or prohibited by the new state law.

City representatives raised the issue that when certificated telecommunications providers did not provide or intend to provide local exchange telephone services but only provided data services, they were not governed by the new statute and thus could be charged a different fee. Additionally, the city sought to clarify that providers, who did not have any end-users in a City, but had lines that were "passing through" a city in the public rights-of-way could also be charged a different fee by a city for use of that public right-of-way (typically a linear foot fee).

Several workshops were conducted and on March 20, 2001, the Staff published a proposed amendment to PUC Rule § 26.465 and a new proposed Rule § 26.469, with a request for written comments on the ROW ordinance issues. The proposed amended Rule § 26.465 provided that a "pass-through" line of a CTP would not count as an Access Line. The proposed new Rule § 26.469 repeats the statutory language that application and permit fees cannot be charged for "use" of the public rights-of-way. It also added language that a city may charge a "penalty" for violating a right-of-way ordinance. Cities opposed both the amendment to § 26.465, as it did not clarify what a City can do and implicitly grants a "pass-through" right, and opposed the new rule § 26.469, as the Cities do not need PUC authority to impose penalties. (While the PUC preamble stated that there would be a separate Rulemaking on the non-local exchange "data-only" question, that issues has now been raised in the *MFN vs. City of Carrollton* PUC Project Number 24480, discussed below.)

On September 5, 2001, the Commission adopted the amendment to § 26.465. The staff determined that a "pass-through" line was not an "access line" that required additional compensation. In the preamble to the PUC Order it stated that access lines are those that *allow* local delivery of exchange

telephone service or non-switched service (citing the statutory definition of Category 3 non-switched access lines). *Significantly, the Commission rejected both the new proposed rule (§ 26.469) on penalties, and rejected promulgating any ROW ordinance or standards.*

3. PUC Project Number 23379 - *"Review of CTP Reporting and Counting of Access Line Issues"*

This PUC project was established in late 2000 due to the large number of certificated telecommunications providers (well over 50%) that had either not filed the statutory quarterly Access Line reports with the PUC at all or had incorrectly reported Access Lines. By late 2000 and early 2001, the Commission had sent out at least two letters citing possible sanctions to CTPs for improper reporting, and has strengthened its reporting tracking process.

This project has also taken up whether newly incorporated or newly participating cities can request retroactive compensation for right-of-way use from the date of incorporation or PUC request for access line rates. This issue also concerns whether the PUC will allow a surcharge via a pass-through to collect the amounts to be paid the city before the effective date of the rates. The PUC agreed that a new city did not accrue access line fees when incorporated, but only 90 days after a completed request to be paid the fee was made to the PUC. This would allow time for the providers to obtain a map of the incorporated area and calculate lines, the city to establish a base amount, the PUC to calculate the rate and for the line rate to be implemented.

The PUC issued an order on this in May, 2001, and it expressly states that the PUC did not have the authority under law to authorize a surcharge to recoup Access Line Fees that had not been collected.

4. PUC Project Number 23557 - *"Forum to resolve Complaints Between Municipalities and Certificated Providers"* - Verizon, Long Distance Rev.

This PUC project was established after a requested Rulemaking by TCCFUI to have a separate complaint procedure for cities was denied. Rather than adopting a separate process, the PUC chose to

establish a standing "project" forum to resolve outstanding right-of-way/police power issues, as they arise.

Verizon:

The initial issue in this project was a review of an erroneous Access Line filings by Verizon (formerly GTE) involving over 300 cities (although less than a dozen are affected significantly), and 11 other CTPs. The principal issues in the Verizon matter were: (1) how to collect the data to correctly calculate the Access Lines by each provider (not just Verizon) in order to properly establish the correct Access Line rates per category; (2) when cities are to be paid at the corrected rate; and (3) if there is any authority for a Verizon requested "surcharge" to recoup the underpayments to the city. City representatives urged prompt payment and opposed any City or PUC sanctioned surcharge. (While the PUC Staff requested a briefing on the legal authority from Verizon to justify such a surcharge it was never filed.) Under the Public Utility Regulation Act (Utility Code § 51.009) ("PURA") a provider may pass-through pro-rata, the "municipal fee" - but the PUC, in its Rules § 26.467(m)(1), "caps" the pass-through to the amount of the Access Line fee by category. (See Project Number 23379 above, on the May 2001 Order as to the lack of PUC "surcharge" authority.) At the March 20, 2001 PUC meeting, the Commission also "suggested" that after the PUC sets the correct Access Line rates, that Verizon calculate the amounts due each city by the utilization of an outside accounting firm. This was never fully followed up by the PUC. The PUC issued an Order as to the corrected Access Line rates in May, effective July 1, 2001. (See PUC Project Number 23956 on "Corrected Rate" below).

Ft. Worth/MCI in Long Distance Revenue:

This project also reviewed a dispute between the City of Fort Worth and MCI metro over whether a franchise agreement for lines originally designated for long distance and currently operated by a CTP should have been included in the municipal base amount. This issue is a sub-issue of the pass-

through line issue, but involves long distance providers, like AT&T and MCI. At the April 6, 2001 PUC meeting, the Staff was authorized to give an informal, non-binding letter opinion to the city and MCI. The PUC Staff took the position that as long distance lines revenue was not a part of a cities' base amount under HB 1777 (which they could not be) those long distance lines were not covered by HB 1777 (PUC Staff letter to MCI April 20, 2001), therefore, MCI was to continue paying under the license agreement. After the PUC staff letter, MCI paid the City the disputed amount. (It should be noted that AT&T had taken a contrary position to MCI at the earlier PUC workshops on the base amount issue in 2000, which was cited in the April 20th PUC letter).

Carrollton/SW Bell – Ins.:

In late May, SWB filed a "formal" complaint at the PUC against the City of Carrollton regarding its right-of-way ordinance. The complaint objected to the self insurance provisions (City required self insurance to be comparable in defense of claims as regular insurance) and as to how confidential documents would be handled. The issue was "resolved" by the parties without further action by the PUC.

5. PUC Project Number 23956 - *"Access Line Rates for Texas Cities to Correct Line Counts of DMJ, Winstar and Verizon, et al."* This was opened April 12, 2001 as the Project for the "Corrected Rates." (See PUC Project Number 23557 above on Verizon issues). The new rates were adopted by the Commission in May with an effective date of July 1, 2001. While the final PUC Order indicates that each City should "work" with the providers to pursue collection of under payments, they have informally "encouraged" such payments by the providers. If providers do not provide an accounting, cities may both initiate legal action in District Court and/or deny construction permits for failure to compensate, in accordance with Chapter 283 (HB 1777). The final Order also expressly concludes that a surcharge is not authorized by HB 1777. Unfortunately the final Order also characterizes certain

access line charges over \$2, \$4, and \$10 for each category respectively, as "high" and essentially asks cities to review the allocation among categories to "reduce" rates that are "high." The effect of such a reallocation would usually be to raise residential access line rates. The PUC does not (and could not) mandate this reallocation.

6. PUC Project Number 24480 – *"MFN vs. City of Carrollton"* - Data Only Issue

Complaint in 2001 of Metromedia Fiber Network (MFN) against the City of Carrollton. This was a Complaint filed by MFN concerning issues that were raised by the City of Carrollton as to whether MFN was a qualified CTP. MFN requested the Public Utility Commission to require the City of Carrollton to process the construction permit submitted by them. The City of Carrollton took the position that as MFN was not providing local exchange service it did not qualify as a Certificated Telecommunication Provider for purposes of HB 1777. This matter was submitted to the Public Utility Commission on a certified question whether a "data only" CTP was a qualified CTP for purposes of HB 1777. The PUC determined that MFN was a CTP for purposes of Chapter 283, as all that was required to qualify was to be "authorized" by the PUC to provide local exchange service - not whether a Provider actually provided local exchange service. In October 2001, MFN noted it no longer had a customer in Carrollton, and the PUC dismissed the matter.

7. PUC Project Number 24639 - *"Enforcement Procedures Relating to Quarterly Access Line Reports Under Chapter 283"*

Because there has been significant non-compliance with Chapter 283 reporting requirements and payment requirements, the P.U.C. staff requested and has established a separate rulemaking to examine those enforcement issues in April 2002. The staff requested comments on a proposed new rule, PUC Rule 26.468, on "Standardized Procedures for Access Line Reports and Enforcement Relating to Quarterly Reporting." The rule establishes MARS – an acronym for Municipal Access Line Reporting

System on the Internet. The rule also has criteria that are to be reviewed for enforcement (i.e., late, incorrect or no report, history of reporting, impact of the non-compliance). The rule may be adopted in late spring, early fall. (Contemporaneous with the establishment of this rulemaking there were Notice of Intent to Assess Administrative Penalties against Certificated Telecommunication Providers for Failure to Report and to Pay Cities being sent out by the PUC enforcement section - See PUC Project No. 25707 on Enforcement below.)

8. PUC Project Number 24640 – *"Issues related to Annual Revisions to Access Line Rates"*

In the initial proceeding on this matter in 2001, the PUC delegated authority to the PUC staff to adjust, correct or revise Access Line rates below maximum. In April 2002, the PUC allowed a 1.15% Consumer Price Index ("CPI") adjustments to access line rates, effective July 1, 2002. (See PUC Project Number 24683, below).

9. PUC Project Number 24683 – *"CPI Adjustment to Access Lines"*

Per Tex. Loc. Gov't Code ANN. § 283.055(g) the PUC is to annually adjust access lines rates by 1/2 the annual change in the CPI, this proceeding amended Rule 26.467 to allow that process after March 2002. (See PUC Project Number 24640, above).

10. PUC Project Number 24703 - *"Plano v. Southwestern Bell"*

In August, the City of Plano filed a complaint against S.W. Bell as to it's calculation of access line payments. S.W. Bell was using it's own "internal" system to count access lines, rather than in accordance with the actual filed access line reports. Bell filed a response indicating it would resolve the issue in the near future. The City and Bell resolved the matter without further PUC action.

11. PUC Project Number 25433 - *"Rulemaking to Address Municipal Authorized Review of Access Line Reporting."*

This project was initiated on January of 2002, largely due to a failure to have a good audit trail to verify access line counts, particularly as to CTP resellers and rebundlers. This rulemaking is pursuant to

Tex. Local Gov't Code ANN. § 283.056(c)(3), which references a municipality's right "to conduct an authorized review of the provider to ensure compliance with the access line reporting requirements of this chapter"

Comments were filed in mid-March as to the questions posed by the PUC staff, with a workshop being held on April 10, 2002. At this all day workshop, there was some agreement between city representatives and the industry representatives that business records need to be provided to cities to verify compliance with the reporting and payment requirements of Chapter 283. After that broad agreement, the disagreements arose as to what kind of documents, how quickly those documents would be produced, how long the review would take, how far back the review period could go and there were some issues raised as to customer proprietary information. (Cities took the position there was no statute of limitation on any underpayments, per *City of Port Arthur v. Tillman*, 398 S.W.2d 750 (Tex. 1965)). The P.U.C. staff discussed and then recommended that there would be another workshop on or about May 9, 2002 to review specifically the current procedures of certificated telecommunication providers as to how they are counting access lines, the kind of documents each certificated telecommunication provider has to verify the count and to review lists of services provided and whether they are characterized as access lines or not. The principal certificated telecommunication providers that were present at the meeting, including Verizon and Southwestern Bell, agreed to produce these documents a week before that meeting.

A second workshop was held May 9, 2002. After an all day workshop, cities were asked to file with the PUC comments as to specific kinds of information and documents needed for an audit and why they were needed. The CTPs are to respond and provide details on what kind of "adequate proof" can be provided as to resellers and rebundlers.

12. PUC Project Number 25450 - *"PUC review and possible revision to definition of 'Access Lines' and 'Categories' of Access Lines."*

This is a new project pursuant to Local Gov. Code § 283.003, initiated in March 2002.

Tex. Loc. Gov. Code ANN. § 283.003 (a) requires that no earlier than March 1, 2002 and not later than September 1, 2002 the PUC:

*"...shall determine whether **changes** in [1.] **technology**, [2.] **facilities**, or [3.] **competitive** or [4.] **market conditions** justify a modification in the commission-established categories of access lines or, if necessary, the adoption of a definition of 'access line' provided by this section [283.003]."*

(Emphasis added)

Subsection (b) provides that:

*"...the commission by rule **may modify the definition of 'access line' and the categories of access lines as necessary to ensure [1.] competitive neutrality and [2.] nondiscriminatory application and [3.] to maintain consistent levels of compensation, as annually increased by growth in access lines and consumer price index, as applicable, to the municipalities."***

(Emphasis added)

Comment on Types of "Modification":

A modification as to the definition of what constitutes an "access line" should focus on "services" as a proxy for each line, otherwise as more and more "services" are provided via one copper or fiber optic line, revenues will be eroded, and municipalities will not "maintain consistent levels of compensation."

As to a modification of "categories" of access lines, cities reasserted that only high capacity activated private lines (perhaps those over T-1) should constitute a revised Category 3, with lower capacity lines (T-1 and below?) being included in Category 2. Such a change would allow a more

equitable recovery from users of the more expensive high capacity lines, rather than by "standard" business lines. Secondly, DSL service should be counted as a separate Category 2 "Access Line".

There was an all day workshop on April 9, 2002 in which industry representatives and City representatives presented their respective views to the P.U.C. staff concerning the redefinition of "access lines" and categories of lines. Cities recommended making the definition of what constitutes an access line broader and to clarify the categories in order to ensure that cities could "maintain a consistent level of compensation" from access line fees. Cities as a whole presented a unified presentation on broadening access line definition and clarifying the categories.

The principal focus of the discussion at the workshop was whether, through technological changes, where more services are provided through the same physical delivery path, (i.e. dsl), whether those new services should constitute independent and separate access lines or not. It was the cities positions, for the most part, that all of those new services should constitute an access line, otherwise over time as new services evolve and are provided over the same physical transmission paths, revenues would decrease. There was also a discussion concerning Category 3 lines (high capacity data/private line connections) and how those should be counted. Currently Category 3 access line rates are effectively capped by the lowest and cheapest Category 3-type service. One of the requests that cities made was either to base the fee upon the number of "switched" access lines that are activated and transmitted over the Category 3 line or to charge on actual activated capacity. An example of a particular problem was mentioned by the City of Dallas. The City of Dallas has approximately 10,000 Category 2 switched voice-grade lines. They have recently changed or are changing to use an internet protocol (Voice over Internet Protocols) VoIP system. When they do that, those voice calls will end up being transmitted by a Category 3 high capacity line. If that is the case, then the access line fee will drop from approximately \$30,000 per month to \$150 per month. (If Dallas had a \$3.00 fee per each

Category 2 lines, they were receiving \$30,000 in access line fees for those 10,000 lines. If after the conversion they have ten Category 3 termination points, at \$15.00 a point, they will be receiving \$150.00 per month). That dramatic example was helpful in demonstrating to the P.U.C. staff the consequences of not looking at the type of services being provided as opposed to the physical line.

Unfortunately, the industry representatives consistently opposed any proposal for broadening of the access line fee base and opposed any revisions in categories except to perhaps reduce it to one or two categories. While it was not clear what the next step will be in this proceeding, one P.U.C. staff member indicated that they would draft a proposed rule for formal comments in the next month or so. After the comments on that proposed rule, it would then be presented to the Commission for adoption.

13. PUC Project Number 25707 - *"Investigation of Certificated Telecommunications Utilities Failing to File Municipal Access Line Counts During the Year 2001."*

To review enforcement action against CTPs for calendar year 2001 filings.

Overview on Current HB 1777 Proceedings:

That these four proceedings on HB 1777 matters - PUC Project Nos. 25433 (Review of Records), No. 25450 (Redefinition of Access Line) and Nos. 24639 and 25707 (Enforcement of Chapter 283) are occurring contemporaneously, is helpful. If the cities are successful in broadening of the access line definition or a clarification in the categories in Project No. 25450, that will ensure that revenues going forward will be consistent and will grow, as they have in the past. However, cities will need to verify that those changes in access line definitions are being complied with. Without verification, the changes are worthless. So therefore, the proceeding concerning the review of access line reports (Project No. 25433) and the documentation for verification is critical. The P.U.C. staff seems to fully appreciate the fact that if the access line reports cannot be verified, then the whole Chapter 283 compensation mechanism is a failure. Additionally, with the enforcement proceedings (Project No.

24639 and No. 25707) going on at the same time, it will reemphasize, even prior to a new enforcement rule coming into place, that the P.U.C. is taking the CTPs' failure to report seriously. In the next few months, the P.U.C. will begin enforcement actions against certificated telecommunication providers who do not report or pay properly. I would note that most of those who are not reporting are resellers and rebundlers, as opposed to the facility-based providers. However, all certificated telecommunication providers seem to have some problem on reporting and the accuracy of their reporting.

Other PUC Proceedings involving Right-of-Way Issues:

14. PUC Project Number 25429 - *"Oncor (formerly TXU) challenge of City of Allen Right-of-Way Ordinance."*

This Docket Matter involves an "appeal" by Oncor Electric Delivery Company (the former TXU electric utility), the wireline electric utility in the area, of a lawfully adopted City Right-of-Way Management Ordinance involving: (1) construction/location requirements for the undergrounding of all new electric distribution facilities of an electric utility that are placed in the City's public rights-of-way, excepting transmission lines; (2) upgrades in some instances from wooden poles to concrete or metal poles; and (3) landscape or other screening of certain facilities in the public rights-of-way. The "appeal" challenges the City of Allen's authority to promulgate such an ordinance, asserting that the ordinance constitutes a regulation of services or operations of an electric utility, and as such, Oncor asserts, the City is preempted from doing so, as that is exclusively in the province of the Commission's jurisdiction. The City asserts that Ordinance does not regulate the services or operations of an electric utility, and to the extent it may, it is by express statutory authority.

In March, 2002, the Commission deemed it had the jurisdiction under PURA § 32.001(b) to review the ordinance as to whether the Right-of-Way Ordinance violated any part of PURA, any

Commission Rule, or "offend[ed] the public interest." The matter is being litigated currently at the State Office of Administrative Hearings (SOAH), with the last conference being held on May 2, 2002.

Comments on Current Right-of-Way Issues

"The courts cannot interfere [with a police power ordinance] unless it appears that the ordinance represents a clear abuse of municipal discretion, and the 'extraordinary' burden rests on one attacking the ordinance to show that no conclusive, or even controversial or issuable fact or condition existed which would authorize the governing board of the municipality exercise the discretion confided to it in the passage of that zoning ordinance under attack". City of Bellaire v. Lankin, 317 S.W.2d 43, 45 (Tex. 1958) - Texas Supreme Court upholding a zoning ordinance.

1. Municipal Authority to Require a Utility to Relocate its Facilities, at the Provider's Expense:

Potentially the most serious and costly challenge is to the City's authority to require a utility to relocate its facilities at the utility's expense to accommodate construction of a City project. Historically, the utilities have been required to relocate facilities at their expense pursuant to statutory and common-law authority, which are typically clarified by City ROW Ordinances to some degree. These projects might be a street renovation project or a water and sewer project.

Relocation Case Law Authority:

Texas Courts have repeatedly held that telecommunications providers and other utilities can "be required to remove at their own expense any installation owned by them and located in the public rights-of-way whenever such relocation is made necessary by highway improvements." *State of Texas v. City of Austin*, 331 S.W.2d 737, 741 (Tex. 1960). *"The utility may always be required, in the valid exercise of the police power by proper governmental authority, to remove or adjust its installations to meet the needs of the public for travel and transportation."* (emphasis added) *Id.* The rationale is that the main purposes of roads and streets are for "travel and transportation" and that use of roads and streets for placement of "telegraph, telephone and water lines, and for other purposes" is "subservient to the main

uses and purposes of such roads and streets." *City of San Antonio v. Bexar Metropolitan Water Dist.*, 300 S.W.2d 491, 492 (Tex. Civ. App. San Antonio 1958, writ ref'd) (Water District required to pay the costs for relocating its water lines to conform with the plans of the County or City for maintaining and improving roads and streets).

Telecommunication Relocation:

The statutory authority requiring telecommunications providers to relocate facilities at their expense was codified in 1975. It is now in the Tex. Util. Code § 54.203(c). The statute provides:

"The governing body of *a municipality may require a certificated telecommunications utility to relocate the utility's facility at the utility's expense to permit the widening or straightening of a street* by:

- (1) giving the utility 30 days notice; and
- (2) specifying the new location for the facility along the right-of-way of the street."

A question could be raised on whether the enactment of Tex. Util. Code § 54.203(c) (on widening and straightening relocation) in 1975 somehow limits or restricts the earlier - and broader - case law. *City of Austin* and the other cases which predate the statute do not limit a municipality's right to require relocation at the utility's expense to "widening or straightening" of the streets. Rather, these cases have articulated a municipality's right to control "travel and transportation" as the basis for a valid exercise of the police power. As a general rule, a later enacted statute does not invalidate existing case law unless the language of the statute is clear and explicit for that purpose. *Norfolk Redevelopment and Housing Auth. v. Chesapeake and Potomac Tel. Co. of Virginia*, 464 U.S. 30, 104 S.Ct. 304 (1983) [The U.S. Supreme Court affirmed that a later enacted statute (The Uniform Relocation Assistance and Real

Property Acquisition Practices Act, 42 U.S.C. § 4601 et seq.) did not change long-established common-law principle that a utility forced to relocate from a public right-of-way must do so at its own expense].

2. **Statutory Authority as to Initially Adopting Regulations as to the Location of Telecommunication Facilities and Subsequently Adopting Regulations to Change the Location of Those Facilities:**

Tex. Util. Code § 181.089 (Municipal Regulation) provides in part:

- (a) The appropriate authorities of *a municipality* through which a line of a telephone or telegraph corporation is to pass *may adopt*, by ordinance or another method, *regulations* governing the corporation *that specify the: (1) location of the facilities of the corporation; (2) kinds of post . . . ; or (3) height at which the wires of the corporation must be placed.*
- (b) *After the construction* of the telephone or telegraph line, the appropriate authorities of *the municipality, after giving the corporation or its agents an opportunity to be heard, may direct any change in: (1) the construction or location of facilities; or (2) the height at which the corporation may locate the wires.*
(emphasis added)

While not a "relocation" statute, Tex. Util. Code § 181.089 expressly authorizes a city to both select a location for facilities (i.e., placement in the rights-of-way) and allows a city to designate a new location at the utility's cost for placement of new facilities in the public rights-of-way. To change locations the City must give the utilities a notice under Tex. Util. Code § 181.089(b) to allow the utilities and other companies an opportunity to be heard as to the new location, perhaps underground.

3. Statutory Authority for the Municipality to Impose Conditions on a Telecommunication Utility User of Public Property:

While this statute (adopted in 1995 with the "deregulation" of telecommunication providers) principally concerns building access issues as to "public property", they do establish reasonable standards that may arguably be applied in the right-of-way.

The Tex. Util. Code § 54.260(a) provides that public property owners can also address safety and appearance issues. The public property owner may *"(1) impose a condition on a utility that is reasonably necessary to protect: (A) the safety, security, appearance, and condition of the property; and (B) the safety and convenience of other persons."*

Tex. Util. Code § 54.260(a)(3) provides that a public property owner may "impose a reasonable limitation on the number of such utilities that have access to the owner's property, if the owner can demonstrate a space constraint that requires the limitation."

Subsection (a)(1) would not only buttress the city's existing police powers but would add "appearance and condition of the property" to the criteria which the city may consider in locating facilities in the public rights-of-way, Subsection (a)(3) would allow the city to limit the number of providers once the right-of-way space was filled.

4. "As Built" Maps, "Sole Business Discretion" and Engineered Plans:

Few things seem as basic as a city requiring maps and construction drawings as to the location of facilities in the public rights-of-way. While construction maps for the initial permit are filed with the city, the actual final construction location of the facilities can vary, both in depth and location from the initial construction maps. Therefore, cities frequently request after construction that "as-built" maps be filed with the city. These maps are needed for both ongoing city public right-of-way projects and in the event of an emergency (i.e., a water line or gas line break) to locate facilities quickly.

While most new providers do furnish as-built maps, a few incumbent providers had taken the position that as they historically had not provided them, they could not prospectively. It was stated that as they did not prepare them except where hard or concrete conduits or other "permanent structures" are used. Several providers have asserted that these maps may contain confidential-proprietary information. They may also assert that the maps cannot be prepared with the confidential and proprietary information excluded until sometime (unknown) in the future. City should request either deletion of the confidential or proprietary information, or that it be labeled as such for protection. As an alternative, providers have "offered" that the city may review what records they do have at the local office. While some of these issues have been resolved, several still remain.

One provider has asserted that the formatting is a matter subject to their "sole business discretion," and that the City has no authority to request a particular format, per Tex. Loc. Gov't Code ANN. § 283.056(c). Whether "sole business discretion" extends to map formatting is at best arguable. A reasonable usable format for the City may be requested.

At least one provider initially asserted that the "Underground Facility Damage Prevention and Safety Act" ("One-Call") (Utility Code, Title 5, Chapter 251, formerly Tex. Civ. Stat. Art. 9033), fulfills the function of an as-built map. The "One-Call" Statute was adopted to have all entities that excavate use the rights-of-way make "one call" to locate facilities in the rights-of-way. Then each entity with existing facilities in the rights-of-way is notified, and it then marks the surface of the streets as to the location of its facilities. Depth is not given. While the information required under the "One Call" statute is helpful to cities, it is not a replacement for a detailed "as-built" map.

As mentioned, several cited cases have upheld the requirements to provide "engineered plans", as being reasonable. To avoid right-of-way disruption due to improper construction, more cities are requiring that plans be sealed by a professional engineer. One provider argued that cities were

pre-empted from requiring such a seal, as telecommunications companies, they asserted, were exempted from providing engineered plans that involve the "science and art of telephony" under Sec. 20(d) of the State Engineering Practice Act [Tex. Civ. Stat. Art. 3271a]. Austin recently adopted such a requirement (Chapter 15-12). Austin reasonably took the position that the installation of telecommunications infrastructure in the rights-of-way (conduits, wires, etc.) is not part of the "science and art of telephony".

5. Street Maintenance Fee:

In *City of Arlington v. Scalf*, (Pending appeal in the Ct. App., 2nd Dist., Fort Worth, No. 02-02-00072-CV, as of April 1, 2002), a resident of the City of Arlington challenged a City fee that was added to water bills to fund street repairs in the city as an unlawful "tax". The trial court granted a summary judgment in favor of the plaintiff. The City, and in an Amicus filed by TML, it was argued that Article XI, § 5 of the Texas Constitution, the City of Arlington Charter, and Local Government Code § 51.001 grant a home rule city the full power of local self-government, and as the fee is not inconsistent with the Constitution or State statutes, the fee is lawful.

SURVEY OF TEXAS STATUTES RELATING TO MUNICIPAL POLICE POWER AND COMPENSATION AUTHORITY OVER THOSE WHO PLACE FACILITIES IN, ON, OVER, ACROSS AND ALONG THE PUBLIC RIGHTS-OF-WAY

There are an array of statutes that provide express municipal authority concerning both the police powers of a city to regulating the placement of facilities in, on, over, along or across the public rights-of-way and for the compensation paid by those entities that have use of the rights-of-way. There are statutes which apply broadly, such as Texas Revised Civil Statutes Article 1175(1) which contains authority both as to police power regulations and compensation for those who use the public rights-of-way, and statutes which pertain to the type of entity that may be using the rights-of-way, both as to police power regulations and compensation paid.

There are several specific statutes concerning telecommunication providers, principally Chapter 283 of the Local Govt. Code, entitled "Management of Public Right-of-Way Used by Telecommunication Provider in Municipality" (1999). (codified version of House Bill 1777) There are other specific statutes which deal with electric utilities separately from pipeline entities and within the pipeline municipal regulatory framework there are separate statutes for natural gas pipelines, crude petroleum product pipelines and hazardous liquids pipelines. Additionally, there are statutes which distinguish between natural gas "distribution" pipelines as opposed to pipelines that are natural gas "transmission" pipelines.

I. GENERAL MUNICIPAL POLICE POWER AUTHORITY:

Tex. Transp. Code, Title 6, "Roadway", ch. 311, "General Provisions Relating to Municipal Streets", § 311.002 - "General Authority of Home-Rule Municipality" (derived from statutes originally enacted in 1858).

In 1858, the legislature originally delegated "exclusive control" of the streets to home rule cities to "control [and] regulate" (*City of Waco v. Powell*, 32 Tex. 258 (Tex. 1869); see also *West v. Waco*, 294 S.W. 832 (Tex. 1927) and *Central Power and Light v. PUC*, 17 S.W.3rd 780, Pages 784-785 (Tex. 2000)).

(See Tex. Transp. Code § 311.002 "General Authority for General-Law Municipality" and Tex. Transp. Code § 311.003 - "Additional Authority of Type A General-Law Municipality").

Tex. Rev. Civ. Stat. Ann. Art., Title 28, "Cities, Towns and Villages", Article 1175(1) - Home Rule Cities "Enumerated Powers" (derived from statutes originally enacted in 1913):

Provides that a city may "prohibit the use of any street . . . of the city by any telegraph, telephone, electric light, . . . gas company or other character of public utility without first obtaining the consent of the [city] . . . and upon paying compensation . . . and upon such condition as may be provided"

"Use" has been defined to be any physical use, including tunneling under a street (*West Texas Utilities Co. v. City of Baird*, 286 S.W.2d 185 (Tex. Civ. App. – 1986, n.r.e.)).

This has been the primary statutory authority concerning police power and compensation for the use of rights-of-way.

(See also Tex. Loc. Gov't Code Ann., ch. 282, "Municipal Authority Over Public Grounds", Tex. Loc. Gov't Code Ann. § 282.001-282.003 as to the exclusive authority to control and grant franchises to use "public grounds". Derived from statute originally enacted in 1913. "Public Grounds" is undefined in the statute).

TEX. UTIL. CODE ANN., Title 2 – Preserves Cities Police Power and Compensation Rights:

TEX. UTIL. CODE ANN. § 14.008 (In original PURA 1975)

Provides that "this title [Title 2 - § 11 - § 63 - PURA] does not restrict the rights and powers of a municipality to grant or refuse a franchise to use the streets . . . or to make a statutory change for that use." It also provides that a municipal franchise cannot have terms that interfere with PUC powers. (Similar to TEX. UTIL. CODE ANN. § 54.205 in ch. 54 on telecommunication entities).

Title 2 (PURA) Does Not Restrict Cities Historic Rights:

TEX. UTIL. CODE ANN. § 54.205 - "Municipality's Right to Control Access" (From original PURA 1975) – provides that Title 2 of the TEX. UTIL. CODE ANN. [§ 11-§ 63 – PURA], does not restrict cities historic right to "control and receive reasonable compensation for access to" city right-of-way. (Similar to TEX. UTIL. CODE ANN. § 14.008 discussed above).

II. TELECOMMUNICATION PROVIDERS:

Telecommunication Providers' statutory authority to use of rights-of-way and to pay compensation to cities arose in the early part of the late 1800's and early 1900's with the growth of both the telegraph industry and then the telephone industry.

TEX. UTIL. CODE ANN. § 181.082 - "Authority to Install Facility in Relation to Public Property" (derived from statutes originally enacted in 1874.)

This statute granted telegraph companies (and later telephone companies) the right to use public rights-of-way in the State.

TEX. UTIL. CODE ANN. § 181.089 - "Municipal Regulation" (derived from statutes originally enacted in 1874).

Provided express authority for cities to regulate the location and height of telephone and telegraph facilities in the city.

TEX. UTIL. CODE ANN. § 181.089 (Municipal Regulation) provides in part:

- "(a) The appropriate authorities of *a municipality* through which a line of a telephone or telegraph corporation is to pass *may adopt*, by ordinance or another method, *regulations* governing the corporation *that specify the: (1) location of the facilities of the corporation; (2) kinds of post . . . ; or (3) height at which the wires of the corporation must be placed.*
- (b) *After the construction* of the telephone or telegraph line, the appropriate authorities of *the municipality, after giving the corporation or its agents an opportunity to be heard, may direct any change in: (1) the construction or location of facilities; or (2) the height at which the corporation may locate the wires.*" (emphasis added)

Requirements For City Consent and Compensation:

Article 1175(1) - Home Rule Cities "Enumerated Powers" (originally enacted in 1913):

Expressly required telegraph and telephone companies, to receive city's consent if they are to use city rights-of-way and to pay compensation, subject to the "conditions" set by the city. Other statutes that relate to telecommunication providers' use of the rights-of-way are as follows:

Tex. Loc. Gov't Code Ann., ch. 283 (HB 1777-1999) now provides that certificated (to provide local exchange service) telecommunication providers do not need a city franchise, and establishes compensation by number of "access lines" in the city.

Telecommunication Relocation:

TEX. UTIL. CODE ANN. § 54.203(c). "Service in Annexed or Incorporated Areas".

Applies only to a PUCT "certificated" telecommunication provider (certificated to provide local exchange service) (Codified in 1975, as part of the original PURA). The statute provides:

"The governing body of a municipality may require a certificated telecommunications utility to relocate the utility's facility at the utility's expense to permit the widening or straightening of a street by:

- (1) giving the utility 30 days notice; and
- (2) specifying the new location for the facility along the right-of-way of the street."

A question could be raised on whether the enactment of TEX. UTIL. CODE ANN. § 54.203(c) (on widening and straightening relocation) in 1975 somehow limits or restricts the earlier - and broader - case law to relocate at the utility's expense. *State of Texas v. City of Austin*, 331 S.W.2d 737, 741 (Tex. 1960) and the other cases which predate the statute do not limit a municipality's right to require relocation at the utility's expense to only the "widening or straightening" of the streets. Rather, these cases have articulated a municipality's right to require relocation to preserve and enhance the "travel and transportation" aspects of a public street. As a general rule, a later enacted statute does not invalidate existing case law unless the language of the statute is clear and explicit for that purpose. *Norfolk Redevelopment and Housing Auth. v. Chesapeake and Potomac Tel. Co. of Virginia*, 464 U.S. 30, 104 Sup. Ct. 304 (1983) [The U.S. Supreme Court affirmed that a later enacted statute (The Uniform Relocation Assistance and Real Property Acquisition Practices Act, 42 U.S.C. § 4601 et seq.) did not change long-established common-law principle that a utility forced to relocate from a public right-of-way must do so at its own expense].

Title 2 (PURA) Does Not Restrict Cities Historic Rights:

TEX. UTIL. CODE ANN. § 54.205 - "Municipality's Right to Control Access" (From original PURA 1975) – provides that Title 2 of the TEX. UTIL. CODE ANN. [§ 11-§ 63 – PURA], does not restrict cities historic right to "control and receive reasonable compensation for access to" city right-of-way. (Similar to TEX. UTIL. CODE ANN. § 14.008 discussed above).

Conditions As Access To "Public Property":

TEX. UTIL. CODE ANN. § 54.260 - "Condition of Property Owner" (1995)

While this statute (adopted in 1995 with the "deregulation" of telecommunication providers) principally concerns building access issues as to "public property", they do establish reasonable standards that may arguably be applied in the right-of-way.

The TEX. UTIL. CODE ANN. § 54.260(a) provides that public property owners can also address safety and appearance issues. The public property owner may *"(1) impose a condition on a utility that is reasonably necessary to protect: (A) the safety, security, appearance, and condition of the property; and (B) the safety and convenience of other persons."*

TEX. UTIL. CODE ANN. § 54.260(a)(3) provides that a public property owner may "impose a reasonable limitation on the number of such utilities that have access to the owner's property, if the owner can demonstrate a space constraint that requires the limitation."

Subsection (a)(1) would not only buttress the city's existing police powers but would add "appearance and condition of the property" to the criteria which the city may consider in locating facilities in the public rights-of-way, Subsection (a)(3) would allow the city to limit the number of providers once the right-of-way space was filled.

(In Subtitle "C" – "Telecommunications Utilities" of Title 2, PURA TEX. UTIL. CODE ANN. § 51.002(a) "Definitions" in (8) and (11) respectively: "Public utility" is an entity providing communications as a "dominant carrier." "Telecommunication Utility" is defined broadly as any communication carrier who conveys telecommunication via a telephone system.)

III. ELECTRIC SERVICE UTILITIES WHICH USE THE RIGHTS-OF-WAY:

Article 1175(1) - Home Rule Cities "Enumerated Powers" (From statute originally enacted in 1913):

As "electric light" companies are one of the specific public utilities expressly mentioned in Article 1175, there is authority both under Article 1175 and other Texas statutes as to municipal police power regulation of electric utilities and as to compensation.

Utility Code, Title 4, "Delivery of Utility Services", Subtitle B. "Provisions Regulating Delivery of Services":

Subchapter C, "Provisions Applying to Electric Utilities" (§ 181.041-181.047)

TEX. UTIL. CODE ANN. § 181.041 Definitions:

"Electric utility" is defined to include both investor owned electric utilities, municipal electric utilities and electric cooperatives formed under Chapter 161 of the Utility Code.

TEX. UTIL. CODE ANN. § 181.042 "Authority to Construct, Maintain and Operate Lines"
(formerly Art. 1436.)

Provides that an electric utility may construct lines "over, under, across, on or along" the rights-of-way.

As originally adapted in 1911 it only authorized lines to go "across" public right-of-way, but was replaced in 1949 due to "adverse" litigation to electric utilities, then Article 1436a to authorized lines to go "along" right-of-way also (now codified in TEX. UTIL. CODE ANN. § 181.042). (See *Mason v. West Texas Utilities*, 237 S.W.2d 273 (Tex. 1957 as to legislation history and as to pre-amendment, see *Incorp. Town of Hempstead vs. Gulf States Utility*, 206 S.W.2d 227 (Tex. 1947); *Koslosky v. Tex. Elec. Service Co.*, 213 S.W.2d 853 (Tex. Civ. App. – Eastland, 1948)):

TEX. UTIL. CODE ANN. § 181.043 - "Consent Required in Municipality":

Electric Utilities may use the local city rights-of-way only with the city's "consent and subject to the direction" of the city. If no consent – no franchise – the utility must remove it's facilities.

(See *Town of Lindsay v. Cooke County Electric Co-op Ass'n.*, 502 S.W.2d 117, (Tex. 1973), Cert. denied, 94 Sup. Ct. 1993, 416 U.S. 970, 40 L.Ed. 2nd 559).

TEX. UTIL. CODE ANN. § 181.045(c) - "Standards for Construction, Operation, and Maintenance of Lines":

Expressly provides that a municipal ordinance may control as to construction standards.

TEX. UTIL. CODE ANN. § 181.047 - "Effect of Municipal Incorporation on Line Previously Constructed":

- (a) allows a 10 year grandfathering when newly annexed areas include electric lines;
- (b) requires city consent to use streets after 10 years;
- (c) allows the city to require relocation of electric facilities at the electric utilities cost after the widening and straightening of a street. (See also TEX. UTIL. CODE ANN. § 37.101(c) discussed below);

- (d) allows a Tex. Tax Code § 182.025 - "Charge by a City" - Fee with a cap for electric utilities per TEX. UTIL. CODE ANN. § 33.008 (the kWh Fee) and with a 2% gross receipts cap for Gas pipelines.

(See also P.U.C. SUBST. R. § 25.101 (c)(6) concerning municipal construction standards and electric transmission lines).

TEX. UTIL. CODE ANN., Title 2, PURA, § 37.101 "Service in Annexed or Incorporated Areas", (enacted with original PURA 1975).

- (a) allows service to continue in an annexed or incorporated area;
- (b) allows electric utility to use streets (subject to TEX. UTIL. CODE ANN. § 14.008 discussed below);
- (c) "The governing body of a municipality may require an electric utility to relocate the utility's facilities at the utility's expense to permit the widening or straightening of a street by: (1) giving the electric utility 30 days' notice; and (2) specifying the new location for the facility on a right-of-way of a street." [and see also TEX. UTIL. CODE ANN. § 181.047(c) discussed above];
- (d)(2) preserves the right to "levy a tax or other special charge for the use of the streets", per Tex. Tax Code § 182.025.

Provides for relocation of an electric utility's facilities at their cost for a widening and straightening project.

TEX. UTIL. CODE ANN., Title 2 (PURA), does not restrict cities rights to franchise or change for use.

TEX. UTIL. CODE ANN. § 14.008 (In original PURA 1975)

Provides that "this title [Title 2 - § 11 - § 63 - PURA] does not restrict the rights and powers of a municipality to grant or refuse a franchise to use the streets . . . or to make a statutory change for that use." It also provides that a municipal franchise cannot have terms that interfere with PUC powers. (Similar to TEX. UTIL. CODE ANN. § 54.205 in Ch. 54 on telecommunication entities).

Title 2 (PURA) Does Not Restrict Cities Historic Rights:

TEX. UTIL. CODE ANN. § 54.205 - "Municipality's Right to Control Access" (From original PURA 1975) – provides that Title 2 of the TEX. UTIL. CODE ANN. [§ 11-§ 63 – PURA], does not restrict cities historic right to "control and receive reasonable compensation for access to" city right-of-way. (Similar to TEX. UTIL. CODE ANN. § 14.008 discussed above).

TEX. UTIL. CODE ANN., ch. 41, "Electric Cooperatives and Competition" (1999) § 41.005 - "Limitation on Municipal Authority":

Prohibits any municipal authority, directly or indirectly, over services and operations of a cooperative "except with respect to operations, to the extent necessary to protect health, safety, or welfare." It also provides an electric cooperative may be charged a fee per Tex. Tax Code § 182.025 and TEX. UTIL. CODE ANN. § 33.008 (kWh Fee).

Police Powers Cannot be Contracted Away, But Are Reserved for City:

The Texas Supreme Court has held that the police power authority over electric utilities cannot be contracted away in a franchise, but are reserved to the city. Therefore, while it has been argued by some electric utilities that their franchise controls for the full term as to police power regulations that is incorrect. Even if there are police power regulations in a current franchise, the city is free subsequent to that franchise to change or add different police power regulations, so long as they are reasonable and consistent with other statutory authority. (*See Texas Power & Light Co. v. City of Garland* 431 S.W.2d 511 (Tex. 1968)).

Compensation to City from Electric Utility:

While a city may charge compensation for use of the right-of-way, as authorized by Art. 1175(1), that compensation may be altered by statute. Additionally, even if a city has been paid a certain percentage by a current franchise, the state can reduce that percentage during the term of the franchise. That is exactly what happened to the City of Beaumont, where it had a franchise fee of four (4) percent and subsequent legislation capped the franchise fee to two (2) percent, (absent an agreement between the city and the utility for a higher fee.) A later enacted statute will control as to the amount of franchise fees. (*City of Beaumont v. Gulf States Utilities*, 163 S.W.2d 426 (Ct. Civ. App.-Beaumont 1942)).

Tex. Tax Code § 182.025(b) - "Charge by City" (formerly Art. 7060). The original 2% of gross receipts "cap" as to electrical utilities has now changed to the per kWh calculation provided for in TEX. UTIL. CODE ANN. § 33.008. As that kWh calculation is based on 1998 revenue, in which a number of cities had a 4% gross receipts fee, this effectively doubles the previous 2% cap. There is case law authority holding that a four (4) percent gross receipts franchise fee from an electric utility is a reasonable fee. (*Fleming v. Houston Lighting and Power*, 138 S.W.2d 520 (Tex. 1940)).

IV. POLICE POWERS, COMPENSATION AND PIPELINES:

Article 1175(1) (originally enacted in 1913):

Although "gas companies" are specifically mentioned in Article 1175, the term is not defined in Article 1175.

There are additional statutes specifically relating to "natural gas" and other types of pipelines. There are statutes relating to both "transportation" and "distributing" natural gas pipelines and there are statutes relating to pipelines transporting other products, such as hazardous liquid pipelines and crude petroleum pipelines. As to pipelines, there is a restriction on cities concerning the certain safety regulations, as those safety regulations are promulgated by the Railroad Commission, which preempts the city police power in that area.

A. "Gas Corporations" (only "over and across" public right-of-way, not "along" public right-of-way):

TEX. UTIL. CODE ANN., Title 4, "Delivery of Utility Services", (§ 161-§ 186)

Subtitle B, "Provisions Regulating Delivery of Services", Chapter 181, "Miscellaneous Powers and Duties of Utilities" grants to pipeline entities the authority to use the rights-of-way in the state, and requires consent and conditions set by a city to use city rights-of-way.

Subchapter A, "Powers and Duties of Gas and Electric Corporations" (§ 181.001-181.009)

TEX. UTIL. CODE ANN. § 181.005-181.006 provides for the regulation of a "gas corporation" (undefined).

TEX. UTIL. CODE ANN. § 181.005 (originally 1911) - "Authority to Lay and Maintain Lines".

Grants the right to a "gas corporation" to lay lines "over and across" a public road but not "along", and in a city only with the city's consent and "subject to the direction" of the city.

[Case Law on "Along" vs. "Across": *Incorporated Town of Hempstead v. Gulf States Util. Co.*, 206 S.W.2nd 227, (Tex. 1947). This was an electric utility case and although the statute as to electric utilities was amended in 1949 to allow electric utilities to lay facilities "along" the street, this statute has not been amended as to a "gas corporation" to lay "along" a street. See the discussion of electric utilities above.]

TEX. UTIL. CODE ANN. § 181.006 - "Consent Required by Municipality"

Provides for use of city streets by a "gas corporation" but only with the "consent of and subject to the direction of the" city.

B. Local Natural Gas Distribution Systems – "Gas Companies" and "Gas Utilities" (and "Gas Works" for purposes of certain compensation):

Article 1175 provides for municipal regulation of "gas companies," (undefined in statute) both as to police power and compensation.

TEX. UTIL. CODE ANN., Title 3, "Gas Regulation", (§ 101-§ 124), Subtitle A, "Gas Utility Regulatory Act" (GURA) (§ 101-§ 105).

Note: "Gas Utility" is defined in three places – TEX. UTIL. CODE ANN., § 101.003(7); § 121.001; and § 181.121(2). The definitions are not identical.

TEX. UTIL. CODE ANN., § 101.003 "Definitions" (7):

"Gas Utility" – a person that owns or operates for compensation facilities that transmit or distribute synthetic or natural gas for sale or resale that is not subject to FERC [interstate], with several specific exclusions.

Preserves city franchise and compensation authority:

TEX. UTIL. CODE ANN., Subtitle A, (§ 101-§ 105), Ch. 103, "Jurisdiction and Power of Municipalities", § 103.002 "Franchises".

Provides that Subtitle A does not restrict city rights to grant or refuse franchise or to make a statutory change for that use.

Subtitle B. "Regulations and Transportation and Use", Chapter 121 – Natural "Gas Pipelines"

TEX. UTIL. CODE ANN. § 121.001 - "Definition of Gas Utility".

"Gas utility" is broadly defined as any person that "owns, manages, operates, leases or controls . . . a pipeline . . . facility that . . . transports, conveys, distributes or delivers natural gas (A) for public use or service for compensation . . . (B) for sale to . . . persons . . . distributing or selling natural gas . . . (C) for sale or delivery to a person operating under a franchise . . . (D) for sale or delivery to the public for domestic or other use [or that otherwise] owns or manages a pipeline . . . that is for the transporting or carrying natural gas, whether for public hire or not" This definition includes a natural gas pipeline entity as a common carrier, wholesaler or as a retailer.

TEX. UTIL. CODE ANN. § 121.202 - "Municipal and County Authority":

This statute reserves "safety regulation" to the Railroad Commission, but provides that a city may adopt ordinances for "mapping, inventorying, installing, or relocating pipelines over, under, along or across" a city street. This statute also allows a city to require in its ETJ the "mapping or taking an inventory" of natural gas pipelines.

Chapter 121 grants no rights to use city streets. That is only granted in TEX. UTIL. CODE ANN., ch. 181, §§ 182.022-182.024 as to a "Gas Utility", discussed below.

TEX. UTIL. CODE ANN., Title 4, "Delivery of Utility Services", (§ 161-§ 186). Subtitle B, "Provisions Regulating Delivery of Services", ch. 181, "Miscellaneous Powers and Duties of Utilities"

Subchapter B, "Provisions Applying to Gas Utilities" (§ 181.021-§ 181.026)

TEX. UTIL. CODE ANN. § 181.022-181.023 and 181.025 provides for regulation of "gas utilities".

TEX. UTIL. CODE ANN. Title 4, ch. 181 § 181.021(2) - "Definitions".

"Gas utility" is defined as "transporting or distributing gas for public consumption." While this definition is not identical to the one in Chapter 101 or Chapter 121 of the Nat. Res. Code § 121.001 for a "Gas Utility", it is also very broad.

TEX. UTIL. CODE ANN. § 181.022 - "Authority [of a "Gas Utility"] to Lay and Maintain Gas Facility".

Provides that a gas utility has the right to lay and maintain a gas facility "through, under, along, across or over a public" road.

TEX. UTIL. CODE ANN. § 181.023 - "Consent Required of Municipality":

Provides that for a "gas utility" to use city streets to lay "under, along, across and over" it may do so only with city consent and "subject to the direction" of the city.

TEX. UTIL. CODE ANN., § 181.026 "Effect of Municipal Incorporation on Gas Facility Previously Laid".

Grants a 10 year grandfathering to gas utility as to lines already laid prior to being in a city, thereafter city consent is required.

Compensation of Certain "distributing" Gas Pipelines:

Tex. Tax Code § 182.025 - "Charges by a City" provides:

- (a) authorizes a city to charge a "public utility" for use of the streets;
- (b) caps the charge at two (2%) percent of the gross receipts of the sale of gas in the city.
- (e)(3) Broadly defines "public utility" as: "a person who owns or operates a gas . . . works . . . used for local sale and distribution located within . . . [a] city".
- (The term "gas works" includes a system of "pipes through which the gas flows and is delivered to the premises of consumers", *Eddins-Walcher Butane Company v. Calvert*, 298 S.W.2d 93, 96 (Tex. 1957)).

This 2% charge would apply to any natural gas pipeline company delivering gas to more than one end-use customer in the city.

Case Law on "local sale and distribution" and applicability of City 2% charge:

Distinction Between Natural Gas Pipeline Facilities "Distributing" to More Than One Customer:

The more-than-one-customer-distribution distinction is a critical distinction. Local "distribution" entails additional local compensation authority under the Tax Code. There are two cases which discuss the "distribution"/compensation issue. In 1939, the Texas Supreme Court determined that a natural gas company which provided services to one customer was not a "distributing" pipeline facility, and therefore was not subject to the state gross receipts tax. (*Utilities Natural Gas Co. v. State*, 128 S.W.2d 1153 (Tex. Comm. App. 1939)). In 1989, it was determined that "delivering gas to more than one consumer within a city, constitutes a distribution function" and is subject to the gross receipts tax. (*Bullock v. Pioneer Corporation*, 774 S.W.2d 302, 306 (Tex. Civ. App.-Austin 1989); see also AG-Opinion, JM-150 (1984) on industrial consumers being included as consumers for purposes of the Tax Code). This same gross receipts "tax" is also available for cities to collect under Tex. Tax Code § 182.025. Therefore, it needs to be determined whether there are natural gas pipeline sales to more than one end-use customer. If

there is, the Tax Code allows up to 2% of the gross receipts to be paid to the city by the natural gas pipeline company, as it meets the definition of a "Public Utility" for purposes of the Tax Code. (Tex. Tax Code § 182.025 - "Charges by City").

C. Crude Petroleum Common Carrier Pipelines:

Tex. Nat. Res. Code, Title 3, "Oil and Gas";

Tex. Nat. Res. Code, ch. 111, "Common Carriers, Public Utilities and Common Purchasers".

This chapter addresses Crude Petroleum Common Carrier pipelines.

Tex. Nat. Res. Code § 111.001 "Definitions":

Defines "public utility" as an entity that owns, operates or manages crude petroleum storage tanks or facilities for the public for hire.

Tex. Nat. Res. Code "Common Carriers" § 111.002 – defines a "Common Carrier" as a person owning, operating or managing a pipeline that transports crude petroleum, coal, carbon dioxide or hydrogen for the public for hire.

Tex. Nat. Res. Code Ann. § 111.020(a) - "Pipeline on Public Stream or Highway":

Authorized crude pipeline common carriers to lay pipelines "along, across or under a . . . highway".

Tex. Nat. Res. Code Ann. § 111.022 - "Right to Use Street or Alley in City or Town":

Use of city streets requires city consent and under direction of the city.

D. Hazardous Liquid Pipelines:

Tex. Nat. Res. Code, ch. 117, "Hazardous Liquid Pipeline . . . Pipeline Industry"

Tex. Nat. Res. Code Ann. § 117.001 – "Definition" – Defined a "Hazardous Liquid" to include petroleum products.

Tex. Nat. Res. Code, ch. 117 grants no special right to use rights-of-way. That authority is in TEX. UTIL. CODE ANN., ch. 181 as to "gas corporations" or "gas utilities", and/or in Tex. Nat. Res. Code, ch. 111 § 111.020 and § 111.022, as to "crude petroleum" common carriers, however, making use of a street in a city is subject to city consent and under city direction.

Tex. Nat. Res. Code Ann. § 117.101(b) and (c) - "Limitation on Powers of Cities".

Authorizes a city to adopt construction standards "for installing or relocating" pipelines but establishes that all safety standards for hazardous liquids are set by federal and state law.

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