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SERVICES BY THE SAME PROVIDER CHANGE A
MUNICIPALITY’S RIGHT TO FAIR AND REASONABLE
COMPENSATION FOR
USE OF THE PUBLIC RIGHTS-OF-WAY?**

A MUNICIPAL PERSPECTIVE

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Does the Bundling of the “Triple Play” of Services by the Same Provider Change a Municipality’s Right to Fair and Reasonable Compensation for Use of the Public Rights-Of-Way?

A Municipal Perspective

By: Clarence A. West

Municipalities are the trustees of the public property in their respective jurisdictions. As such, cities must ensure that public property, including the public rights-of-way, is not used by private entities for private gain without “fair and reasonable compensation” for that use. This concept, in regard to rights-of-way compensation, is codified in both state and federal law.¹ This paper discusses, from a municipal perspective, how the “triple play” of services being delivered via the public rights-of-way by the same provider may affect those compensation concepts. More specifically, this paper addresses the issue of whether a change in the technology used to deliver multiple services changes a municipality’s right to fair and reasonable compensation for the use of the public rights-of-way to deliver those services.

Providing a “triple play” of services is just a short hand way of stating that several services (voice, data and video) will be bundled together by one provider and delivered to its customers over a single wireline/cable system, perhaps at a discount. It is concluded here that just because services are marketed as a bundle of services over the same wireline distribution system in the public rights-of-way, rather than being provided separately, that should not, in and of itself, cause any change in the overall compensation paid to cities for use of the public rights-of-way to deliver each service.² Rather, each service must be examined on its merits, not by the technology used in the delivery

¹ See TEX. REV. CIV. STATS. ANN. art. 1175; TEX. UTIL. CODE ANN. §§ 14.008, 54.205, 33.008; TEX. LOC. GOV’T CODE §.283.001 *et seq.*; see also *Fleming v. Houston Lighting & Power, Co.*, 138 S.W.2d 520, 522 (Tex. 1940) (upholding a 4% gross revenue fee as reasonable as a “rental” fee for use of the rights-of-way by an electric utility, citing *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 99, 13 S.Ct. 485, 37 L.Ed. 380 (1893)); 47 U.S.C. § 253(c) (1996 Telecommunications Act); 47 U.S.C. § 151 *et seq.* (Telecommunication services); 47 U.S.C. § 542 (cable services, including video programming services provided over a Title II common carrier network as an Open Video System, § 573(c)(2)(B)).

² This paper assumes the public rights-of-way are being used to deliver the services; to the extent services are delivered locally via wireless/radio devices on private property or by satellite, those are variables not addressed in this paper.

system. Additionally, the compensation paid to cities for delivery of services by use of the public rights-of-way should not be allowed to create a competitive advantage for one provider over another.

How providers of the “triple play of services” are compensating cities for use of the rights-of-way is being reviewed in several different forums. Both state legislators and the United States Congress are or will be considering legislation concerning local rights-of-way compensation issues and the Federal Communications Commission (“FCC”) has several pending docketed items concerning Internet protocol (“IP”) delivered services which may affect the compensation paid cities, depending on the application of federal law.

The “triple play” is not new, though some of the providers are new.

The concept of multiple services being provided over the same, or over part of the same, distribution system is not new, as exemplified by the experience of the City of Austin, Texas. Shortly after telecommunications services were “deregulated” in Texas in 1995 by House Bill (H.B.) 2128, Time Warner Telecom of Texas, L.P., owned by the same corporate parent and an affiliate of Time Warner Cable, initiated the provision of telecommunication services in Austin pursuant to a telecommunication franchise, separate and apart from its cable franchise. The telecommunication franchise required Time Warner Telecom to pay the City for the use of the rights-of-way to deliver telecommunication services in the City on the same compensation basis as the incumbent local exchange carrier. The telecommunication services provided by Time Warner Telecom were, at least in part, over the same Time Warner cable/wireline distribution system that had been installed pursuant to the preexisting cable franchise. Throughout that same period of time, pursuant to the Time Warner cable franchise, Time Warner Cable also paid the City of Austin a cable franchise fee based on the cable services provided in the City. Since the adoption of H.B. 1777 in 1999 (adding Chapter 283 of the Local Government Code), Time Warner Telecom has paid the City of Austin access line fees for delivery of its telecommunication services. In 2003, Time Warner Cable Information, L.P., an affiliate of Time Warner Telecom, applied for and received a

certificate from the Public Utility Commission of Texas (“Commission” or “PUC”) in the name of “Time Warner Cable” to provide local exchange services via Voice over Internet protocol (“VoIP”), which are “bundled” with traditional cable video programming and cable modem/broadband services. Pursuant to that certificate, Time Warner Cable currently reports and pays access line fees on VoIP lines in various Texas cities.³

Verizon, a long time incumbent local exchange carrier, is also preparing to provide cable services in several Dallas-area cities in the coming months. It has obtained cable franchises and will pay the 5% franchise fee applicable to cable operators. Verizon, as a certificated provider, will also continue to pay access line fees on its telecommunication services that constitute access lines. Both the cable services and the telecommunication services are being provided via the same distribution system in the public rights-of-way, that system being described by Verizon as “Fiber-to-the-Premises.”

Perhaps the bundling of services and providing them over the same local distribution system in the public rights-of-way is not the issue. Each service needs to be examined on its merits, not by the technology used in the delivery system.

“Telecommunications services”—federal circuit courts look at the “totality of circumstances” to determine if public rights-of-way use fees paid by wireline telecommunications providers are reasonable.

While some federal district courts have held that the phrase “fair and reasonable compensation” as that term is used in section 253(c) of the 1996 Telecommunication Act (47 U.S.C. § 151, *et seq.*) (“1996 Telecom. Act”) means that such fees must be “cost-based,” others have held that such fees are not restricted to being “cost-based” but may be “value-based,” in the nature of rental payments.⁴ However, in the handful of federal

³ *Time Warner Cable Information (Texas), L.P. Application for SPCOA* (Providing Local exchange services via VoIP), Project No. 28303, Amended Notice of Approval, January 21, 2004. Time Warner reserved its rights to later assert either that it did not need such a certificate for VoIP service or that it need not pay access line fees on VoIP service. *See also* the proposed P.U.C. Staff comment as to VoIP providers and the FCC *Vonage Order*, in the Commission’s Open Meeting Agenda March 9, 2005 (P.U.C. Docket No. 29347) discussed *supra*.

⁴ *Compare Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland*, 49 F. Supp.2d 805, 817 (D.Md. 1999), *vacated on other grounds*, 212 F.3d 863 (4th Cir. 2000) (holding “any franchise fees that local governments impose on telecommunications companies must be directly related to the companies' use

circuit courts which have reviewed this issue, there is a general consensus regarding the analysis to use in determining if such fees are reasonable. Virtually all federal circuit courts follow the analyses set out in *TCG Detroit v. City of Dearborn*, one of the first cases to have reviewed this particular issue. 206 F.3d 618, 624-26 (6th Cir. 2000). In *TCG Detroit v. City of Dearborn*, the Sixth Circuit upheld value-based fees and the analysis applied by the District Court that looked at the “totality of the circumstances” to determine if the fees charged were “fair and reasonable.” This analysis included the review of a number of factors to determine if the compensation was reasonable.⁵

Three other federal circuits followed the analysis used by the Sixth Circuit in *TCG Detroit v. City of Dearborn*. Though never coming to a final determination of the issue, in *TCG New York v. City of White Plains*, the Second Circuit follows the same “totality of the circumstances” analysis applied by the Sixth Circuit. 305 F.3d 67, 79-80 (2nd Cir. 2002). Likewise, in *Qwest Corporation v. City of Santa Fe*, 380 F.3d 1258, 1272 (10th Cir. 2004), the Tenth Circuit applies the “totality of the circumstances” analysis used in the Sixth Circuit case. In this particular instance, using that analysis, the Court concludes that the fees charged were unreasonable. In *Qwest Corporation v. City of Portland*, 385 F.3d 1236, 1238, 1244-45 (9th Cir. 2004), the Ninth Circuit did not make a determination on the challenge to the gross revenue-based fees as it determined that the claim was barred by “preclusion” due to prior litigation (a *res judicata* concept).

of the local rights-of-way . . . that is reasonably calculated to compensate [the municipalities] for the costs of administering their franchise programs and of maintaining and improving their public rights-of-way.”) with *Qwest Corp. v. City of Santa Fe*, 224 F. Supp.2d 1305, 1327 (D.N.M. 2002) (holding that “If Congress had intended to limit local governments to charging cost-based fees for the use of public rights-of-way, Section 253(c) of the federal statute would have used the word 'costs' instead of the word 'compensation.' The court went on to provide that it was appropriate for a city to charge "rent" for the use of the rights-of-way, "it is possible for a revenue-based fee to be fair, reasonable, and non-prohibitory . . .” The court rejected the *per se* illegality of a revenue-based fee.)

⁵ *TCG Detroit v. City of Dearborn*, 16 F. Supp.2d 785, 789 (E.D.Mich. 1998), *aff'd*, 206 F.3d 618, 625 (6th Cir. 2000) (“Rather, fair and reasonable is determined by examining the totality of the facts and circumstances.”) The District Court, in *TCG Detroit v. City of Dearborn* identified four non-exclusive factors relevant to whether the fees paid by a telecommunications provider to a city were fair and reasonable: (1) the extent of use of the public rights-of-way; (2) whether other carriers have agreed to comparable compensation (or comparable uses of public rights-of-way); (3) the course of dealings among the parties; and (4) whether the compensation sought is so excessive that it is likely to render doing business unprofitable. *See id.* at 790-91.

However, in talking about the barred claim, the court discusses the prior state court litigation, which upheld a 7% gross receipts fee as reasonable under state law.

Therefore, as to the federal judiciary, the Sixth, Second, Ninth, and Tenth Circuits have directly considered this issue, and while they have reached differing results on the facts of the particular cases, virtually all of them have used the totality of circumstances analysis to determine whether or not a fee is reasonable.

“The extent of use” not “the burden” on the rights-of-way has been the standard on which to base public rights-of-way use compensation in Texas.

Some have suggested that as voice, data and video services are bundled and provided over the same facilities, there is no additional burden to the public right-of-way and thus, no additional fee is due. Compensation for rights-of-way use, at least in Texas, has never been dependent upon “the burden” on the rights-of-way, but rather has depended upon “the extent of use.” Historically, compensation has borne a relationship to the value of the rights-of-way use to the user so that the fee paid for use of the rights-of-way increases with the value to the user. In other words, the more revenue the user gains from the use of the rights-of-way, the higher the rights-of-way fees. Conversely, if less revenue is earned by the user of the rights-of-way, the use fees are lower. Post H.B. 1777/Chapter 283, the more access lines utilized by the provider, the more access line fees charged by the municipality.⁶

The concept that no new “burden” to deliver services equals no change in the fee has never applied to an electric utility delivery company’s rights-of-way compensation in delivering additional kWhs and should not apply to a provider of the “triple play.” Electric delivery utilities compensate cities for use of local public rights-of-way by counting each kWh delivered in the city by the electric distribution and transmission lines in the public rights-of-way, pursuant to Texas Utility Code section 33.008. As the kWhs delivered increase, so does the compensation. There is no relationship to the “burden” to

⁶ Even if one were to analyze the burden on rights-of-way resulting from “triple play,” there are, almost invariably, facility “upgrades” to the various systems to allow the increased capacity to deliver the additional services. These infrastructure “upgrades” are not an insignificant additional “burden” to the rights-of-way as legacy wireline systems are “upgraded” from twisted copper pairs to coaxial to optical fiber-to more optical fiber –to banks of conduits. These upgrades are frequently undertaken more than once by each provider.

the rights-of-way in providing additional kWhs and the compensation paid. With additional kWhs being delivered via the rights-of-way, the rights-of-way have become more valuable, so the rights-of-way compensation increases. The compensation scheme for use of the public-rights-of-ways by electric delivery companies is predicated on additional kWh fees being paid as additional kWhs are delivered in a city as a result of additional demand for electric power over the same wireline distribution system. This additional demand may result from new electrical appliances or new customers. To do otherwise would quickly erode city compensation.

The same is generally true for a natural gas distributor pursuant to city franchises. The city receives a percentage of the gas distributor's gross revenue. As gas revenues increase, so does the amount of compensation, typically being more in the winter than in the summer. The burden to the rights-of-way does not change—just the value to use those rights-of-way by the user.⁷

The same concept has been applied to cable operators “bundling” different tiers of cable services. The rights-of-way compensation owed by a cable operator is based upon a percentage of gross revenues derived by the company from the delivery of cable services (plural not singular) within the city via the public rights-of-way in accordance with federal law, specifically, 47 U.S.C. § 542. This gross revenue-based fee is not dependent upon one particular service but is dependent on the gross revenue from all of the bundled cable services that are delivered. When the “basic tier” of channels is bundled with “premium channels,” which in turn are bundled with “pay-per-view” over the same cable system, no cable provider has suggested that any of these additional cable services would be excluded from the franchise fee base due to no change in the “burden” to the rights-of-way.⁸

Are “information services” or services delivered via an “IP-platform” a silver bullet to free rights-of-way use?

⁷ The infrastructure in the rights-of-way of both the electric delivery system and gas delivery system must also be “upgraded” to carry the additional capacity from time to time, depending on sustained demand.

⁸ As distinguished from “non-cable” services, such as “cable modem service” revenue, which has been excluded from the cable service franchise fee base since it was declared by the FCC not to be a “cable service” in March 2002, but rather was an “information service,” discussed *supra*.

In March 2002, the FCC issued its *Cable Modem Order*, declaring that “cable modem service” is not a “cable service” but rather is an “information service.”⁹ Shortly thereafter, most cable providers ceased paying cities cable service franchise fees on cable modem service. Prior to the FCC ruling, the cable industry considered cable modem service a “cable service” under the Cable Act. Otherwise, it was generally assumed it would be a “telecommunication service” for which there would be certain Title II common carrier obligations with which cable providers would have to comply, open access of the cable system network among them.

After the *Cable Modem Order*, if a service is an “information service,” one can argue that no compensation need be paid for use of the rights-of-way, as such service is neither a “cable service” nor a “telecommunication service.” Subsequently, various providers of services began reviewing their services to see if they were delivering “information services.”¹⁰

The FCC *Cable Modem Order* was appealed to the United States Court of Appeals for the Ninth Circuit in *Brand X Internet Services, Inc. v. Federal Communications Commission*, 345 F.3d 1120 (9th Cir. 2003). The Ninth Circuit disagreed with the FCC in regard to cable modem service being only an “information service” and held that the transmission component was a “telecommunication service.” If cable modem service is part “telecommunication service,” as the Ninth Circuit held, it may, in some circumstances, constitute an access line in Texas if it is provided by a Commission certificated telecommunication provider (“CTP”), or if it is not provided by a CTP to use the rights-of-way, a city franchise is required. How “cable modem service”

⁹ *Inquiry Concerning High-Speed Access to Internet over Cable and other Facilities, Declaratory Order and Notice of Proposed Rulemaking*, 17 FCC Recd. 4798 (2002) (“*Cable Modem Order*”).

¹⁰ 47 U.S.C. § 153 (defining the term “information service” to mean “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”) However, just because cable modem service is an “information service” does not necessarily exempt it from requiring a franchise under state law to provide the service.

will ultimately be characterized is now pending before the U.S. Supreme Court on a writ of certiorari in the *Brand X* case.¹¹

The FCC also has pending the *IP-enabled Services, Notice of Proposed Rulemaking* (“*IP-Rulemaking*”).¹² In that proceeding it is anticipated that the FCC will determine how the various IP-services are to be characterized. Specifically, whether IP-services are an “information service,” a “telecommunication service” or a “cable service,” and whether such service is or is not “interstate” in nature. The characterization will determine if Title II or other Title obligations under the Communications Act may apply, such as interexchange carrier access charges, 911, universal services contributions, and perhaps the extent of any federal preemption of either state or local regulations as to these services.

In that *IP-Rulemaking*, the FCC indicates certain obligations may be applicable, whatever the technology used, when the public switched telephone network (“PSTN”) is used by the provider. As to VoIP obligations, the FCC notes:

As a policy matter, we believe that **any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network.** We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.¹³ (emphasis added)

Additionally, several FCC Commissioners’ comments mention interconnection with the PSTN adding certain obligations. Commissioner Martin alluded to this when he states:

The NPRM acknowledges that VoIP offerings, at times, may or may not need to use the public switched network (“PSTN”) and ask how we should take their key distinctions into account. The item also makes clear that **functionally equivalent services should be subject to similar obligations** and that the cost of the PSTN should be borne equitably among those that use it in similar ways. (emphasis added)

¹¹ *Brand X Internet Services, Inc. v. Federal Communications Comm’n*, 345 F.3d 1120 (9th Cir. 2003), *cert granted*, (U.S. Dec. 3, 2004)(No. 04-277 and 04-281).

¹² *In The Matter of IP-Enabled Services, Notice of Proposed Rulemaking*, WC Docket No. 04-36.

¹³ *Id.* at para. 33 (The compensation the FCC referred to generally were interexchange access charges or universal service contributions, not rights-of-way fees.); see para. 61 for virtually identical language.

While most of the FCC discussion is in the context of interexchange access charges between interexchange carriers and universal service contributions, the same concept of functionally equivalent services bearing an equal obligation should be applied with regard to access line fee charges in Texas when there is use of the PSTN by a CTP- which also entails use of the municipalities public rights-of-way.

VoIP is “functionally” a “telecommunication service.”

VoIP is functionally a “telecommunication service.” VoIP is used as a “telecommunication service” by consumers and is marketed and functions as a “telecommunication service” by VoIP providers such as Vonage. One of the rationales as to VoIP being an “information service” rather than a “telecommunication service” is that the data is “manipulated” and “changed” by the VoIP provider from an analogue signal to packets of data in order that it may be transmitted via the Internet. The FCC termed this “protocol processing,” and stated that if there was no net change, protocol processing was not to effect the classification.¹⁴ In VoIP there is “protocol processing” with no net change. The data is “manipulated” to travel via the Internet, but it is of no consequence to the ultimate function or the consumer. No permanent change occurs in the data being sent. The manipulation of data only occurs in order to use the Internet as a means of sending the data.

The ultimate goal of the VoIP provider is to be indistinguishable from a conventional telephone call. When a telephone call is made through VoIP, the voice goes in one end and must sound exactly identical, and in the same timeframe, when it is received at the other end. VoIP is marketed as being exactly like the consumers’ phone service. In other words, the consumer should not be able to perceive change in the “data.” The aim is to have VoIP sound the same and be time identical to a phone call. In fact, if there were a perceptible manipulation in the words or the intonations or pauses in the telephone call, it would not be a service that many consumers would want. VoIP is purchased because it is sold as being identical to traditional telephone service. VoIP technology requires different software formatting than traditional telecommunications

¹⁴*In the Matter of Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd. 11501, 11526-27, (“1998 FCC Report to Congress” herein).

services but it is in reality no different than when a conventional telephone call changes the caller's voice to an electronic analogue signal. As the FCC has stated, "the classification of a provider should not depend on the type of facility used."¹⁵

The Federal Communications Commission *Vonage Order*

Prohibition of the regulation of a service usually does not equate to a prohibition of compensation for use of the public rights-of-way.¹⁶ However with the advent of Chapter 283 in 1999, there is a "statutorily" created relationship between the regulation of telecommunication services by the Commission (by certification) and payment of compensation to cities for use of the rights-of-way.¹⁷ This distinction between state regulation of certain telecommunication services, such as VoIP, and required municipal rights-of-way compensation may need to be addressed in light of the recent FCC *Vonage Order*.¹⁸

The *Vonage Order* provided in its conclusion that:

. . . the Minnesota Commission ***may not require Vonage to comply with certification, tariffing, or other related requirements as conditions to offering DigitalVoice in that state.*** Moreover, for services having the ***same capabilities as DigitalVoice***, the regulations of other states must likewise yield to important federal objectives. To the extent other entities, such as cable companies, provide VoIP services, we would ***preempt state***

¹⁵ 1998 FCC Report to Congress, at 11530, para. 59.

¹⁶ For example, currently cities do not regulate telephone service in Texas, and have not since 1975 with the adoption of PURA. See *General Tel. Co. v. City of Perryton*, 552 S.W.2d 888, 892 (Tex. App.—Amarillo 1977, writ ref'd n.r.e.), However, this non-regulation of the services did not preclude compensation being paid to cities for use of the public rights-of-way. See *Central Power & Light Co. v. Public Util. Comm'n*, 17 S.W.3d 780, 785 (Tex. App.—Austin 2000, pet. denied)(discussing the distinction between the franchise contractual obligations between an electric utility and a city on the payment of a franchise fee as not being part of the Commission's regulatory authority, with the role of the Commission being exclusive in determining the recoupment allocation among customers).

¹⁷ If there is no certification, under other state law, such as Texas Civil Statute art. 1175, cities have an independent statutory basis for right-of-way compensation. In other words, cities can require a franchise for use of the public rights-of-way to provide telecommunication and other service delivery.

¹⁸ *In the Matter of Vonage Holding Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Memorandum Opinion, and Order* (FCC 04-267, adopted November 9, 2004, released November 12, 2004). ("*Vonage Order*").

regulation to an extent comparable to what we have done in this Order.¹⁹
(emphasis added)

Only if there is provision of voice over the Internet “having the **same capabilities** as [Vonage’s] **DigitalVoice**” service does the *Vonage Order* apply. Even then, the preemption of state regulation is only to the extent allowed by the *Vonage Order*, i.e. preemption of state regulations such as “**certification**, tariffing, or other related requirements **as conditions to offering DigitalVoice [service] in that state.**” (emphasis added). There is no mention by the FCC of any prohibition as to compensation for use of the public rights-of-way, as long as it is not a “condition for offering service.”²⁰

Compensation for the use of rights-of-way is not a “condition of entry.” An analogy can be made to the “conditions of offering” services, as referred to by the *Vonage Order* to the prohibitions of barriers to entry referred to in 47 U.S.C. section 253.²¹ What constitutes such barriers has been discussed by several federal circuit courts. In *Qwest Corporation v. City of Santa Fe*, 380 F.3d 1258, 1269 (10th Cir. 2004), the Court specifically states, “We agree with the District Court; the near-naked requirement of a registration or lease with the City is not prohibitive within the meaning of the statute [47 U.S.C. § 253].”²² Payment of a fee for use of the rights-of-way is not a condition of providing service.

¹⁹ *Id.* para. 46. Further, in para. 14, the FCC noted that it had reached this conclusion “. . . irrespective of the definitional classification of DigitalVoice under the Act, i.e., telecommunications or information service, a determination we do not reach in this Order.”

²⁰ *Id.* at para. 1. The FCC expresses “no opinion here on general laws governing entities conducting business within the state, such as state laws concerning taxation . . . general commercial dealings. . . .and other business practices.”

²¹ 47 U.S.C. § 253(a) proscribes state or local statutes, regulations, or legal requirements that “may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications services.”

²² Citing both the Sixth Circuit and the FCC. See *TCG Detroit v. City of Dearborn*, 16 F. Supp.2d 785, 789 (E.D.Mich. 1998), *aff’d*, 206 F.3d 618, 624-25 (6th Cir. 2000); *In re Classic Telephone, Inc.*, 11 F.C.C.R. 13082, 13097 (1996). In *TCG Detroit* at 624, the Court stated, “TCG then describes the fee required to obtain the franchise as an afterthought, which conditionally lifts that prohibited prohibition. This is sophistry. The provider must apply for a franchise; the city assesses a franchise fee; no fee paid, no franchise given. That cannot “be described as a prohibition [within the meaning of Section 253(a)]. . . .”

Currently VoIP access lines are being counted and compensation is being paid by CTPs, such as Time Warner and Cox Communications, in compliance with Commission certificates issued to them.²³

There are several readily apparent distinctions between Vonage DigitalVoice service and some VoIP services provided by CTPs in Texas. One distinction is that Vonage's DigitalVoice was neither facility based nor did it purport to be a "local exchange service." It did not provide 911 services or several other components of basic local exchange service (as discussed below). Those are different and distinct from the VoIP services being provided by Time Warner and Cox Communications, as they are required to provide such services in compliance with the issued certificates.

On March 9, 2005, the Commission, at least tangentially, considered this issue. In Public Utility Commission (PUC) Docket No. 29347, the Commission is considering whether the definition of an "access line" should be modified in accordance with the criteria in Texas Local Government Code section 283.003. In the March 2, 2005, PUC staff recommendation letter to the Commission it recommended not to change the definition and to close the rulemaking. In that letter the staff notes the FCC *Vonage Order* and its comments on possible preemption of state commissions as to regulation of VoIP providers.²⁴ The Commission essentially is holding the matter in abeyance until June pending the end of the legislative session and perhaps until action by the FCC on the IP-Enabled rulemaking.

If it is determined by the Commission that VoIP services of certain providers cannot be regulated by the Commission due to the *Vonage Order*, that Order does not

(quoting *AT&T Communications v. City of Austin*, 975 F.Supp. 928, 939 (W.D. Tex. 1997), and referring to the threat of criminal sanctions and fines for the failure of an entity to obtain municipal consent as a prohibited requirement).

²³ *Time Warner Application for SPCOA* (Providing Local exchange services via VoIP), Project No. 28303, Amended Notice of Approval, January 21, 2004 (Time Warner stated that its application was not to be taken as an "agreement" or "concession" that a certificate was required, but agreed to comply with the certificate requirements, including reporting and paying on VoIP access lines, while reserving its rights to change that practice as there became additional legal clarity surrounding the proper treatment of VoIP services.); *Application of Cox Texas Telecom., LP. for a Service Provider Certificate of Operating Authority*, (P.U.C.No. 29348).

²⁴ The March 2, 2005 P.U.C. Staff recommendation letter on page 4 and in footnote 7, refers to paragraph 2 of the *Vonage Order*. ("Redefinition P.U.C. Staff recommendation letter")

necessarily preclude the Commission (or the State of Texas, by separate legislation) from establishing a registration regime that does not regulate the VoIP services, but does require VoIP providers that use physical facilities in the public rights-of-way to register at the Commission. In so registering, they would continue to be required to report VoIP end-users as access lines, as it is defined presently, or as may be modified by the Commission, and pay access line fees to cities.²⁵

S. 150 and the “Texas Exception” in regard to access line compensation

The recent adoption by the U.S. Congress of the Internet Tax Nondiscrimination Act (“S. 150”), and its specific exception for Texas access line fees, lends weight to the authority of the Commission to promulgate a registration process to continue the access line fee by VoIP providers. The Texas exception provides:

SEC. 1109. EXCEPTION FOR TEXAS MUNICIPAL ACCESS LINE FEE. Nothing in this Act shall prohibit Texas or a political subdivision thereof from imposing or collecting the Texas municipal access line fee pursuant to Texas Local Govt. Code Ann. ch. 283 (Vernon 2005) and the definition of access line as determined by the Public Utility Commission of Texas in its Order Adopting Amendments to Section 26.465 As Approved At The February 13, 2003 Public Hearing¹, issued March 5, 2003, in Project No. 26412.²⁶

As quoted above, S. 150 refers to the Commission’s Final Order in Docket No. 26412. In that Order, the Commission expressly recognizes the trend of switching technology moving from circuit switches to packet switches by its deletion of the word “circuit” from the definition of a “transmission path.”²⁷ This change is critical in light of

²⁵ The authority of the Commission to promulgate rules to alter the certification of VoIP providers and allow the registration process is arguably contained in the broad authority of the Commission under Texas Local Government Code section 283.058, which provides “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.”

²⁶ Internet Tax Nondiscrimination Act, Pub. L. No. 180-435, December 3, 2004 (“S.150”) which amended the “The Internet Tax Freedom Act” (47 U.S.C. 151 note 1) by adding two sections as to Voice and other services over the Internet. “SEC. 1108. EXCEPTION FOR VOICE SERVICES OVER THE INTERNET. Nothing in this Act shall be construed to affect the imposition of tax on a charge for voice or similar service utilizing Internet Protocol or any successor protocol. This section shall not apply to any services that are incidental to Internet access, such as voice-capable e-mail or instant messaging.” and section 1109, the “Texas Access Line Fee exception”, quoted above.

²⁷ *Commission’s Final Order Adopting Amendments To §26.465* (Docket No. 26412, Approved Feb.13, 2003, filed March 6, 2003), pp. 12.

the decline in circuit switches and the rise of packet “switching” over the Internet. The preamble in the Commission’s Final Order in Docket No. 26412 also discusses the criteria that must be met to constitute an “access line.”²⁸ Determining whether a particular telecommunication service constitutes an access line is based on meeting the criteria of “basic local telecommunication service” (“BLTS”). The Commission summarized previous decisions by concluding, “. . .that the commission finds that POTS [plain old telephone service] lines are access lines, because regulation ensures that POTS meets the eight requirements of BLTS.”²⁹ Therefore, the Commission concluded, if VoIP is used to provide POTS, then it must meet the BLTS criteria to be certified by the Commission, and would constitute an “access line.” In the “redefinition PUC Staff recommendation letter” this is reiterated.³⁰

Any discrimination in the amounts of compensation paid to cities by providers of services that are delivered via the public rights-of-ways, such as only some paying “access line fees” must be eliminated; otherwise, some VoIP providers will have a competitive advantage over other providers of local exchange services simply due to the technology used to deploy the service.

“Cable Services” via an “IP-Platform” that use the public rights-of-way

Pending before the FCC are four “forbearance” petitions filed by the “Baby Bells” requesting forbearance as to the application of Title II [common carrier obligations], and perhaps forbearance of other Titles of the Communication Act (including Title VI as to cable services) based on new technologies used in the delivery of services. The two largest Texas incumbent local exchange carriers have both filed such forbearance petitions, focusing on “new” delivery systems—SBC, as to “IP-Platform Services” and

²⁸ *Id.* at 12-16.

²⁹ *Id.* at 16. (emphasis added).

³⁰ Redefinition P.U.C. Staff recommendation letter, page 4.

Verizon, as to “Broadband Services.”³¹ While forbearance of Title II obligations in and of themselves should have no affect on rights-of-way compensation, the linkage in Texas by Chapter 283 of compensation to state certification could impact access line fee as well as cable television franchise fees.

As to an entity providing cable services, including a Title II common carrier, that is addressed in several provisions of 47 U.S.C. section 521, *et seq.* (“Cable Act”). It is specifically addressed in sections 571-73 in regard to “Video Programming Provided By Telephone Companies.” Therefore, unless there was clear forbearance in regard to the application of Title VI (cable service) obligations, the forbearance petitions should have no impact on compensation by a Title II common carrier as a provider of cable services. The application of Title VI obligations are dependant on cable service being provided with use of the rights-of-way, not as to the delivery technology.³² Under federal law, “cable services,” including those provided via an Open Video System of a Title II carrier, cannot be provided without a franchise, and that franchise may set forth the compensation, subject to a “cap” of 5% of the gross revenues derived from cable.³³

The definition of a “cable system” excludes a Title II carrier from being a “cable system” except “to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services.”³⁴ “Interactive on-demand services” is defined as “a service providing video programming to subscribers over switched networks on an on-demand, point-to-point basis, but does not include services providing video programming

³¹ *SBC Request for forbearance*, FCC WC Docket No. 04-29; *Verizon Request for forbearance*, FCC WC Docket No. 04-440; *BellSouth Request for forbearance*, FCC WC Docket No. 04-405; *Qwest Request for forbearance*, FCC WC Docket No. 04-416.

³² 47 U.S.C. § 522 (7)(B) (providing that an entity that “serves subscribers without using any public rights-of-way” is excepted from the definition of what constitutes a “cable system”).

³³ *City of Dallas v. Federal Communications Comm’n*, 165 F.3d 341, 345, 347-49 (5th Cir. 1999) (holding that an OVS provider must have a franchise). *But see City of Austin v. Southwestern Bell Video*, 193 F.3d 309 (5th Cir. 1999), *cert. denied*, 529 U.S. 1082 (2000).

³⁴ 47 U.S.C. § 522 (7)(C).

prescheduled by the programming provider.”³⁵ If the video programming is solely pay-per-view, only then is the Title II system not a “cable system” under the Cable Act.

In *City of Austin v. Southwestern Bell Video*, the United States Court of Appeals for the Fifth Circuit has, in a split decision, construed what constitutes a “cable operator” in such a way as to allow another narrow exception as to when a cable franchise may not be required. 193 F.3d 309 (5th Cir. 1999). The Fifth Circuit held that Southwestern Bell Video Services (SWBV), an affiliate of Southwestern Bell Telephone (SWBT), a Title II carrier, was not a “cable operator” when SWBV leased capacity from SWBT for video transport under the tariff termed “Supertrunking Video Service.” The Court stated:

Moreover, SWBV ***does not have an exclusive right to use the SWBT’s supertrunking video service, and, like any other customer*** SWBT to whom the service is available, ***must pay a standard tariff*** to utilize supertrunking video service. (emphasis added)³⁶

In *Southwestern Bell Video* the affiliate was not a “cable operator” under the Cable Act because the affiliate did not own the system nor did the affiliate manage the system. Instead, it paid a “standard” tariff price for the non-exclusive Supertrunking Video Service--a tariffed service that any other video provider could avail themselves in using SWBT’s Title II facility as an open network.³⁷

Possible State law changes

It should not go without mention that the Texas Legislature is reviewing the issues presented here. The House Committee on Regulated Industries was charged with examining certain telecommunication access to rights-of way issues. Specifically, Charge No. 4 was to:

³⁵ 47 U.S.C. § 522 (12).

³⁶ *City of Austin v. Southwestern Bell Video*, 193 F.3d 309, 312 (5th Cir. 1999), *cert. denied*, 529 U.S. 1082 (2000). Judge Fitzwater, in a dissent, criticizes the majority in misconstruing “cable operator” and attempting to rewrite corporate law.” *Id.* at 313, n.3. *But see City of Ames v. Heritage Communications*, 861 F.2d 185 (8th Cir. 1988)(holding two affiliates with a common corporate parent were cable operators with a cable system. One of the affiliates was the franchised cable operator; the other provided cable services to students at a local university and they unsuccessfully argued that they were not part of the “cable system.”) .

³⁷ 47 U.S.C. §§ 202 (a), 203 (c); TEX. UTIL. CODE § 53.004 (a).

Examine issues related to access of right-of-way and easements to ensure state laws encourage nondiscriminatory access for all broadband service providers regardless of technology used to offer the service or the regulatory status of the provider.

The Committee released its report on those charges to the 79th Legislature a few months ago. In discussing Charge No. 4, the Committee Report reviews some of the same variables that we are discussing today including the distinctions between services and the fees that are paid by various providers, depending on the technology used.

The recommendation by the Committee was that:

Texas law should be amended to ensure that fees, terms, and conditions for access to the public rights-of-way are competitively and technologically neutral as they apply to any communications service provider.

In early February 2005, H.B. 789 was filed by the Chairman of the Committee, Representative King, which if adopted as proposed, would grant the Commission authority to address these issues. It provides in part:

“Sec. 54.205. MUNICIPALITY'S RIGHT TO CONTROL ACCESS.
(b) The legislature finds that controversy exists between municipalities and providers of voice and video services over the appropriate method by which municipalities should be compensated for use of the public right of way. The commission is directed to develop a new mechanism that shall be technology neutral for the compensation of municipalities that shall apply uniformly to providers of voice and video services that provide that service including community antenna television services and commercial mobile service. The new mechanism shall be revenue neutral and shall replace all current forms of compensation whether by franchise, ordinance or statute. The commission is granted such authority as is required to perform this duty; however, this paragraph shall not be construed to grant any jurisdiction to the commission to otherwise regulate video services in this state.”³⁸

³⁸ Several substitutes for H.B. 789 have been filed. The one initially approved by the Committee on March 17, 2005, had similar but more detailed language requesting a Commission study on the matter with a report to the legislature in 24 months. There are also on-going negotiations on HB 3179 as to compensation.

For the Commission to develop a new “revenue neutral” rights-of-way compensation mechanism that is “technology neutral” such that it will apply uniformly to all providers of voice services, including wireline and cell telephone providers, and all video service providers, including satellite and wireline cable television providers, covering all delivery technologies, including IP–platforms (to use SBC’s vernacular), will be a challenge. To accomplish this goal, it will take all parties, cities and the service providers working in good faith together.

Can there be a level playing field for the “triple play” players?

The challenging issue currently being addressed at both the state level (through the Texas Legislature and PUC) and at the federal level (through the U.S. Congress and the FCC), is achieving both a competitive and level playing field for all providers of the “triple play” of services by ensuring that all those who provide services pay in an equal manner while also ensuring that cities are properly compensated for the use of their rights-of-way. In other words, if a cable provider is providing telecommunication services, they should pay access line fees, or something comparable to what a certificated telecommunication provider is paying in access line fees for providing telecommunication services. On the other hand, a telecommunication provider who is providing video programming services, which would otherwise constitute “cable services,” should be paying the equivalent of the 5% of gross revenue as a federally, statutorily defined “cable system” operator pays for use of public rights-of-way. Lastly, “non-traditional,” essentially software purveyors of VoIP service should compensate cities for the use of their rights-of-way, as those rights-of-way are needed to complete the wireline calls. Lastly, it has been suggested that direct television satellite cable service providers should compensate cities for the use of the rights-of-way in providing those services to the extent the rights-of-way are used. While the downlink of services by a satellite provider uses little, if any, public rights-of-way, the upstream connectivity to select on-demand services does use rights-of-way, typically as a standard landline telephone connection (for which an access line should be paid.). Local fees and taxes on a

satellite provider are restricted by federal law, but the state may tax a satellite provider and send a portion of those taxes back to cities.³⁹

Possible alternatives to a rights-of-way fee to achieve “intermodal” competitive neutrality

There are several in the industry who, in order to achieve competitive parity, seek an equal fee for all providers of equivalent services, regardless of the technology delivery method. For example, traditional wire line telecommunication service providers are paying an access line fee, but some VoIP providers are not. Cable television providers traditionally have paid 5% of their gross revenue derived from use of their cable system, in accordance with the Federal Cable Act, but the two “major” ILECs in the state have taken different paths. As discussed above, Verizon is seeking (albeit reluctantly) cable franchises and paying the 5% cable franchise fee, the other major ILEC in the state, SBC, has indicated that as the services will be delivered via an IP-Platform, they will not seek cable franchises—and if that is the case, they may not be paying the franchise fee. Additionally, satellite cable service providers have neither paid franchise fees nor provided the kind of in-kind services that wire line cable providers have as allowed under the Cable Act. Lastly, while cell/wireless mobile telephone providers do not use, at least extensively, the rights-of-way in the sense of having physical devices in the rights-of-way, they do have to have their signals transmitted through the rights-of-way, through interconnection agreements or otherwise, to connect and complete calls to other wireline end users. Therefore, it has been suggested that to ensure that all providers of functionally equivalent services pay the same kind of fees to cities for the transmission of those signals through the rights-of-way, by whatever technology, that an intermodal communications fee or tax be paid. The suggestion has been to use the state sales tax model overlaid over the various service providers to calculate that fee to avoid any

³⁹ Note to 47 U.S.C. § 152. “Preemption of Local Taxation with Respect to Direct-to-Home Services”, (Pub.L. 104-104, title VI, Sec. 602, Feb. 8, 1996, 110 Stat. 144), provided in part that: “(a) A provider of direct-to-home satellite service shall be exempt from the collection or remittance, or both, of any tax or fee imposed by any local taxing jurisdiction on direct-to-home satellite service.” But that “(c) This section shall not be construed to prevent taxation of a provider of direct-to-home satellite service by a State or to prevent a local taxing jurisdiction from receiving revenue derived from a tax or fee imposed and collected by a State.”

reinvention of the wheel as to what should be included/excluded in the base amount of the fee. The current state sales tax very broadly provides what constitutes telecommunication services and what constitutes cable programming services.⁴⁰ Those definitions may need to be modified to include Internet-based transmission of services or Internet protocol-based transmission of services to include either video programming or VoIP. At this point, it is just speculation as to whether this will come to pass, but there have been discussions concerning this competitively neutral tax/fee. In unraveling this conundrum in the months ahead, the twin goals of ensuring competitive neutrality and encouraging competition, while at the same time ensuring that cities are compensated for use of their public lands, will be challenging.

Conclusion

To guess how and even if municipal rights-of-way fees will or will not continue to be paid on these various “triple play” of services as new technologies and laws evolve would be speculation, considering all of the variables. From a city perspective, whatever the delivery technology, whether it is by IP technology or not, if it is a wireline delivery system that occupies and uses the public rights-of-way, be it twisted copper pairs, coaxial cable or fiber optic cable, public rights-of-way use is compensable. That compensation must be fair and reasonable, and in Texas, it has always been a value-based compensation. In other words, changes in transmission technology should not alter the right to fair and reasonable compensation for the use of Texas public property, including use of its rights-of-way.

⁴⁰ TEX. TAX CODE § 151.0033 "Cable television service" means the distribution of video programming with or without use of wires to subscribing or paying customers.”; § 151.0103 “For the purposes of this title only, 'telecommunications services' means the electronic or electrical transmission, conveyance, routing, or reception of sounds, signals, data, or information utilizing wires, cable, radio waves, microwaves, satellites, fiber optics, or any other method now in existence or that may be devised, including but not limited to long-distance telephone service. The term does not include: (1) the storage of data or information for subsequent retrieval or the processing, or reception and processing, of data or information intended to change its form or content; (2) the sale or use of a telephone prepaid calling card; or (3) Internet access service.”

PROJECT NO. 29719

RULEMAKING TO ADDRESS	§	PUBLIC UTILITY COMMISSION
MUNICIPAL AUTHORIZED	§	OF TEXAS
REVIEW OF ACCESS LINE	§	
REPORTING		

**(STAFF RECOMMENDATION-Still Pending as of March 20, 2005)
ORDER ADOPTING NEW § 26.469 AS APPROVED AT THE MARCH 9, 2005,
OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts new §26.469, relating to Municipal Authorized Review of a Certificated Telecommunication Provider's Business Records with no changes to the proposed text as published in the December 17, 2004, issue of the *Texas Register* (29 TexReg 11511). The new rule will define the scope and procedures attendant to an authorized review of a provider's business records by a municipality pursuant to Texas Local Government Code §283.056(c)(3). This new rule is adopted under Project Number 29719.

The commission received comments on the proposed new section from the Coalition of Cities and the City of Houston (Coalition); SBC Texas; GTE Southwest Inc. d/b/a Verizon Southwest (Verizon); Sprint Corporation (Sprint); CLEC Coalition and the City of Garland.

The comments that were received by commission staff indicated that there was a consensus among the parties to accept this rule as proposed at the December 2, 2004, Open Meeting. The only suggested modification to the rule was requested by Sprint. Additionally, some parties included comments containing proposed language changes to be included in the preamble to the rule.

Comments on Specific Rule Provisions

Sprint stated its concern regarding §26.469(c)(4)(b), which requires that the review be performed on-premises at the principal Texas office of the certificated telecommunications provider (CTP), unless otherwise agreed by the CTP and the

municipality. Sprint suggested that the word “Texas” be removed from this section since its business records reside at its corporate headquarters in Overland Park, Kansas. Sprint argued that if a municipality determines that an on-premises review is necessary, it is more efficient to conduct that review at the location where the business records are kept. Sprint maintained that the majority of the audit could be handled by regular, overnight and electronic mail.

The City of Garland argued that if municipal representatives had to travel to Kansas, travel time alone would add substantially to the process, along with the uncertainties caused by travel delays. Efficiency would be better attained by having Sprint ship the records to Texas.

Commission response

The commission did not receive comments from any other party which participated in the negotiation of this rule voicing any concerns regarding the requirement of having an authorized review held at the CTP’s principal Texas office. The commission notes that under P.U.C. Subst. R. §26.465(i), relating to Methodology for Counting Access Lines, and Reporting Requirements for Certificated Telecommunications Providers, a CTP is required to maintain all records, books, accounts, or memoranda relating to access lines deployed in a municipality in a manner which allows for easy identification and review by the commission and, as appropriate, by the relevant municipality. The commission finds that in order to provide easy identification and review for the commission and the municipalities, it is incumbent upon the CTP to provide access to all records, books, accounts, or memoranda at the principal Texas office of the CTP. The commission therefore, declines to adopt Sprint’s recommendation to remove the word “Texas” from P.U.C. Subst. R. §26.469(c)(4)(b).

Comments on Preamble Language

The written comments that pertained to the preamble were received from the Coalition of Cities and the City of Houston (Coalition); SBC Texas; GTE Southwest Inc. d/b/a Verizon Southwest (Verizon); Sprint Corporation (Sprint); CLEC Coalition and the City of Garland.

Business Records

The Coalition argued that the preamble should provide clarity as to the types of CTP business records which are subject to access by having commission staff list examples of types of business records that should be available for access. The Coalition suggested that the following business records be included in the preamble: (1) List of Services; (2) Procedure(s) used to determine classification of products and services as access lines and identification of categories of access lines; (3) Street address guide (SAG); (4) Adequate proof agreements; (5) Samples of billing records or invoices to customers; (6) Underlying records to support uncollectible customer accounts; and (7) Records as to lines added or dropped relevant to the reviewing period. The Coalition stated that the CTP's billing system should be sufficient to substantiate compliance with the access line reporting requirements pursuant to P.U.C. SUBST. R. §26.467(k)(2). Moreover, the Coalition noted that records are to be maintained in a manner which allows for easy identification and review consistent with P.U.C. SUBST. R. §26.465(i). The Coalition further argued that a list of all services that the CTP provides is necessary to ensure that all services have been characterized properly, categorized correctly, and that they have been designated as an access line.

SBC Texas argued that the Coalition continues to try to modify the intent of the Texas Legislature by changing the authorized review into an audit. SBC Texas contended that if that had been the intent of the Legislature, then the municipalities would have been granted the authority that ordinarily accompanies an audit, or the ability to conduct "an unfettered examination". Furthermore, SBC Texas contended that an authorized review is not and was not intended to be, a term of art that means the same as the word audit. According to SBC Texas, these terms relate to the level of assurance regarding the

reliability of an assertion in a financial statement. An audit provides high, but not absolute, assurance that the information subject to the audit is free of material misstatements, and is expressed in an audit report as reasonable assurance. A review, on the other hand, provides moderate assurance that the information subject to review is free of material misstatements and is expressed in an audit report as negative assurance. SBC stated that it is important to note that there is a difference between an audit and an authorized review and that the legislature clearly intended a less intrusive form of review.

SBC Texas further stated that had the CTPs and the municipalities been able to agree on sample descriptions of the types of records that should be subject to an authorized review, those examples would have been set forth in the agreed rule. Samples of billing records and customer proprietary network information are of significant concern to the CTPs. In addition, SBC Texas stated that the Coalition has risen for the first time, the issue regarding the category of documents that is referred to records as to lines added or dropped relevant to the reviewing period.

SBC Texas indicated that it's not clear as to what is meant by this description and why it would be presented as requiring a clarification when it was never discussed during two years of negotiations. SBC Texas submitted that the commission should reject the request for these added requirements under the guise of sample descriptions.

Sprint argued that clarification of the type of business records necessary to conduct an authorized review is unnecessary since subsection (c)(3) of the proposed new section states that the CTP must provide the requesting municipality with a written list of the types of business records necessary to conduct an authorized review. Sprint noted that the Coalition's request for "detailed descriptions of services" provided substantially changes the intent of the proposed new section because it conflicts with subsection (c)(3) of the proposed new section, which requires a CTP to provide "brief" descriptions of the business records that are necessary to conduct an authorized review.

The CLEC Coalition noted that the parties agreed to establish general guidelines in the proposed new section because they could not agree on a “laundry list” of business records subject to review. The CLEC Coalition and Verizon objected to the Coalition’s attempt to identify specific types of business records, after the fact, through clarification to the preamble. The CLEC Coalition’s objection was also premised on its argument that CTPs are varied in their record keeping and many CTPs employ outside vendors to prepare access line reports.

Commission response

The commission finds that the proposed new section sets forth very general guidelines. In addition, the commission recognizes that the parties reached an agreement on the basic terms of the proposed new section with the understanding that further issues could be worked out cooperatively during the authorized review process. During such a process, the parties could determine the significance of various issues and identify those issues that continue to be in dispute. The commission believes that it is premature to place stipulations or numerous clarifications on this rule prior to the parties conducting a number of authorized reviews to determine what areas of dispute require resolution in the form of an amendment to this rule. However, the commission also believes that it would be in the best interest of the parties for the commission to communicate what it views as examples of business records that may be utilized during an authorized review. These examples are not intended to be all-inclusive nor an indication that such business records must be produced by a CTP if not currently generated in its normal course of business. Since the types of business records necessary to conduct an authorized review may vary with each CTP, the commission finds it is not possible to identify a comprehensive list of business records in the preamble. The commission notes that the Coalition has suggested numerous types of business records as examples to be placed in the preamble. It is reasonable to expect that some of the business records listed by the Coalition would vary by company, consequently, the commission chose not to include those records in the examples

below; however, the commission expects the parties to work cooperatively to determine the additional business records that will be reviewed.

The commission agrees with SBC Texas that the release of customer billing statements that contain Customer Proprietary Network Information (CPNI) is of significant concern. Pursuant to Section 222 of the 1996 Federal Telecommunications Act (FTA), the commission determines that CTPs shall not be required to provide customer billing statements. On the other hand, examples of different types of business records that may be provided by the CTP are:

1. List of services that are being provided by the CTP including a brief description of each service. The commission agrees with the Coalition that the list of services is required by the municipalities to determine if services have been categorized correctly by the CTPs.
2. Street address guide (SAG). The commission notes that street address information is initially provided by the municipalities to the CTPs to be entered into the SAG. The commission agrees with the Coalition that a SAG would enable the municipalities to compare what addresses the CTP shows to be in the city limits as to what addresses the municipality actually has in the city limits to ensure that access lines have been reported correctly.
3. Support documentation for write-offs or uncollectible accounts. The commission notes that §26.467(k)(3)(A)(iii) states that if a CTP deducts or includes a direct write-off pursuant to §26.467(m)(2), the CTP shall complete a reconciliation report, showing a monthly delineation of the amount added to the total payment due to previously uncollectible direct write-offs, and the amount deducted from the total payment due to direct write-offs. The commission finds that since this report should already be submitted as part of the quarterly access line report filing under §26.467(k)(3)(A)(iii), it should be made available to the municipalities during the authorized review.
4. Adequate proof agreements. The commission notes that §26.467(k)(4)(H) states that a CTP, whether an underlying CTP or reselling CTP, shall make its adequate proof agreements available for review by municipalities and the

commission upon request. The commission finds that since adequate proof agreements are currently required under §26.467(k)(4)(H), such agreements should be made available to the municipalities during the authorized review.

The commission has the expectation that the CTP and the municipality will work together to identify business records necessary to successfully complete the authorized review. Such cooperative effort should ultimately provide assurance to the municipalities that the CTPs have been correctly and accurately categorizing, reporting and submitting compensation to the municipalities for all access lines that are being served within the municipalities' city limits.

Time Period of Records Subject to Review

The Coalition argued that Texas Local Government Code §283.056(c)(3) mandates that an authorized review must be commenced within 90 days after the filing of a CTP's access line report, however, it does not restrict the time period for which the records may be examined. The Coalition stated that when no previous examination of the initial access line reports and supporting documents has been performed, it is paramount that these records be examined to determine the initial characterization of services and the designation of access line categories. The Coalition cited P.U.C Subst. R. §26.465(i) that states, in part, "...The books and records for each access line count shall be maintained for a period of at least three years", as evidence that the commission intended for the municipalities to have access to CTP records for this period of time. The City of Garland concurred with the Coalition's comments.

The CLEC Coalition objected to any clarification of this rule as they deem it is unnecessary.

Sprint argued that the Coalition is attempting to rewrite the proposed new section with its clarifications. The proposed new section contains a 90-day window to conduct an authorized review of the CTP's records in order to ensure compliance with access line

reporting requirements. This rule is consistent with Texas Local Government Code §283.056(c)(3), which requires a municipality to inspect a CTP's records within 90 days of the filing of a CTP's access line report.

Verizon objected to the Coalition's attempt to rewrite the rule after committing to the rule as it had been negotiated between the parties.

SBC Texas argued that the Coalition, in its interpretation of the 90-day limitation in the Texas Local Government Code §283.056(c)(3), has ignored a very important word – the word “if”. The Texas Legislature has allowed municipalities to conduct authorized reviews if commenced within 90 days after the filing of a CTP's report of access lines pursuant to Texas Local Government Code §283.056(c)(3). SBC Texas averred that in the review of all the relevant language allowing authorized reviews as exceptions to the prohibition against broader inspection of CTP business records, the Coalition's argument fails.

Commission response

The commission finds that, pursuant to Texas Local Government Code §283.056(c)(3), a municipality may perform an inspection of a provider's business records to the extent necessary to conduct an authorized review, if commenced within 90 days after the filing of a certificated telecommunications provider's report of access lines. Since CTPs file access line reports on a quarterly basis, the commission finds that the only access line report which shall be subject to an authorized review by the municipalities is the access line report for the quarter for which a municipality initiated an authorized review within the 90 day time limit imposed by Texas Local Government Code §283.056(c)(3). The commission determines that the computation of the 90-day filing deadline, for the purpose of municipal authorized review, should commence on the first day of the access line reporting period for the next quarter. This practice shall allow a CTP an opportunity to file any amendments or corrections to a previously filed access line count for the quarter for which a municipality seeks authorized review. Moreover, it will eliminate any

possible confusion as to what point the 90-day clock would commence for a municipality to file an intent to conduct an authorized review, in the event that a CTP filed modifications to its quarterly access line report prior to the start of the next reporting period. The commission recognizes that a CTP shall maintain the books and records for each access line count for a period, at minimum, of three years in accordance with P.U.C. Subst. R. §26.465(i). The business records from other quarters may be utilized to determine the accuracy of the access line count report for the quarter subject to the authorized review. However, the municipalities may not challenge the accuracy of access line reports for quarters in which a municipality failed to initiate an authorized review within the time limit imposed by Texas Local Government Code §283.056(c)(3). The commission, however, notes that a municipality may initiate civil court actions, pursuant to Texas Local Government Code §283.051(b), to prosecute alleged right-of-way fee payment deficiencies related to erroneous access line counts for quarters not eligible for an authorized review as discussed above. The aggrieved municipality in such a civil action may exercise rules related to civil discovery under the Texas Rules of Civil Procedure to obtain business records relevant to such disputed access line counts.

The commission recognizes that a CTP is not required to maintain such historical business records beyond the three year mandate. However, the commission expects that a CTP should, to the extent practicable, provide any and all pertinent historical business records in excess of three years of age in its care, custody or control. The commission believes that such cooperative effort between the CTP and municipality is consistent with the provisions of this new rule and the underlying purposes of Texas Local Government Code, Chapter 283 in assuring accurate and efficient municipal authorized access line count reviews.

The commission may revisit the record retention provisions in P.U.C. Subst. R. §26.465(i) in the event that a three-year review of pertinent historical business records is insufficient to establish appropriate accuracy or if collaborative efforts fail to produce additional relevant business records within the care, custody or control of the CTP.

Administrative Remedy

The Coalition maintained that Texas Local Government Code §283.051(b) does not affect the right of a municipality to initiate legal action against a CTP that uses the public right-of-way to provide local exchange telephone service within a municipality and has not compensated the municipality in accordance with Texas Local Government Code Chapter 283. The City of Garland concurred with the Coalition's comments.

The CLEC Coalition argued that the Coalition's request for clarification of municipal rights is an attempt to determine substantive rights and should be rejected.

Verizon objected to the Coalition's attempt to rewrite the rule after committing to the rule as it had been negotiated between the parties.

SBC Texas argued that the language that the Coalition has suggested including in the preamble is an indication that the authorized review is not an administrative remedy. SBC Texas further explained that the CTPs and the municipalities disagreed as to whether an authorized review is an administrative remedy to be exhausted prior to filing suit on a failure to comply with access line reporting requirements. SBC Texas stated that the Legislature granted jurisdiction pursuant to Texas Local Government Code §283.058 to the commission over municipalities and certificated telecommunications providers necessary to enforce Texas Local Government Code Chapter 283 and to ensure that all other legal requirements are enforced in a competitively neutral, non-discriminatory, and reasonable manner. SBC Texas maintained that the administrative remedies provided through the commission should be exhausted before municipalities seek judicial intervention.

Commission response

The commission finds that Texas Local Government Code §283.051(b) specifically addresses the right of a municipality to initiate legal action against a certificated telecommunications provider that uses a public right-of-way to provide local

telephone service within the municipality and has not compensated the municipality in accordance with Texas Local Government Code Chapter 283.

The commission disagrees with SBC Texas’s contention that a municipality must exhaust all administrative remedies before initiating a civil action to recover appropriate right-of-way fees. The commission notes that Texas Local Government Code §283.051(b), in addressing the recovery of such fees, does not specifically require the exhaustion of administrative remedies with this administrative body before pursuing civil action to recover delinquent fees. Further, the statute does not specifically state that the commission has primary jurisdiction in matters relating to the recovery of right-of-way fees. In the absence of specific contrary language, the commission finds that the specific statute represents the Legislature’s intent and mandate that a municipality has the option to recover such fees before this agency or in a civil court.

All comments, including any not specifically referenced herein, were fully considered by the commission.

This new section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2005) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction and Texas Local Government Code §283.058, which grants the commission the jurisdiction over municipalities and CTPs necessary to enforce the whole of Chapter 283 and to ensure that all other legal requirements are enforced in a competitively neutral, nondiscriminatory, and reasonable manner.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and Texas Local Government Code §283.056 and §283.058.

§26.469. Municipal Authorized Review of a Certificated Telecommunication Provider's Business Records.

(a) **Purpose.** This section establishes uniform guidelines for a municipal authorized review of a certificated telecommunications provider's (CTP) access line reports, pursuant to Texas Local Government Code §283.056(c)(3).

(b) **Application.** This section applies to all municipalities and CTPs in the State of Texas except to the extent exempt under §26.468(c) of this title (relating to Procedures for Standardized Access Line Reports and Enforcement Relating to Quarterly Reporting).

(c) **Municipal Authorized Review Procedural Guidelines**

(1) Municipalities are encouraged to informally ask questions about access line counts or municipal fee payments with the appropriate CTP in a timely manner. CTPs are encouraged to provide reasonable answers to access line count and municipal fee payment questions of the municipalities in a timely manner.

(2) Not later than 90 days after the filing of a CTP's quarterly report of access lines, as required by §26.468 of this title, a municipality shall notify a CTP of its intent to conduct an authorized review of the CTP's business records to ensure compliance with access line reporting requirements. This notification shall be in writing and sent via certified mail to the CTP contact person named on the commission's Municipal Access Line Reporting System (MARS) website and shall include a summary of the municipality's concern(s) and/or reason(s) for the review. Such notice may be modified and amended in a subsequent written notice using the same process.

- (3) Not later than 21 days from the CTP's receipt of notice under paragraph (2) of this subsection, the CTP shall provide to the requesting municipality a written list of the types of business records that are necessary to conduct an authorized review as requested in the notice, with brief descriptions for identification purposes.

- (4) The municipality shall determine which business records from the list provided by the CTP will be subject to review and provide written notice to the CTP. The CTP shall provide the requested business records within 30 days from the municipality's written request. The CTP shall provide the business records to the municipality in the following manner:
 - (A) The CTP shall provide access to the requested business records on its premises.
 - (B) The on-premises review shall be conducted at the principal Texas office of the CTP, unless otherwise agreed by the CTP and the municipality.
 - (C) Business records shall remain the property of the CTP and may not be removed or reproduced without the express written permission of the CTP.
 - (D) Business records may be produced in a compatible electronic format or paper copy at the discretion of the CTP.

- (5) A CTP may redact customer-specific proprietary information as necessary for compliance with federal or state law. Information deemed confidential or proprietary by the CTP must be so noted, and each participating party and its representative(s) shall protect such confidential or proprietary information as provided in Texas Local Government Code §283.005. CTPs may require all persons participating in the authorized review to execute a non-disclosure agreement prior to providing access to documents or other information.

(d) **Commission Resolution of Disputed Issues**

- (1) **Informal dispute resolution.** If cooperative efforts between the parties have failed to resolve all issues related to the authorized review, the commission staff may mediate any dispute(s) filed by the CTP or the municipality.

- (2) **Formal complaint to the commission.** A formal complaint may be filed with the commission by either a CTP or Municipality to resolve remaining disputed issues not settled by informal dispute resolution pursuant to paragraph (1) of this subsection. The commission shall provide notice of the filing of a formal complaint to all municipalities and all CTPs in accordance with established commission procedural rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority. It is therefore ordered by the Public Utility Commission of Texas that §26.469 relating to Methodology for Counting Access Lines and Reporting Requirements for Certified Telecommunications Providers is hereby adopted with no changes to the text as proposed.

**ISSUED IN AUSTIN, TEXAS ON THE _____ DAY OF _____
2005.**

TEXAS

COMMISSIONER

PUBLIC UTILITY COMMISSION OF

JULIE PARSLEY, COMMISSIONER

PAUL HUDSON, CHAIRMAN

BARRY T. SMITHERMAN,