

The Public Utility Commission of Texas (commission) proposes new §26.463 relating to Calculation and Reporting of a Municipality's Base Amount. The proposed new rule implements the provisions of House Bill 1777, 76th Legislature, Regular Session (1999) (HB 1777), which authorizes the commission to determine a uniform method for calculating municipal franchise compensation paid by certificated telecommunications providers (CTPs). The proposed new rule is part of a series of rules that will be adopted by the commission to implement HB 1777. Project Number 20935 has been assigned to this proceeding.

D. Diane Parker, Senior Attorney, Office of Policy Development and Elango Rajagopal, Senior Policy Analyst, Office of Regulatory Affairs, have determined that for each year of the first five-year period the proposed section is in effect, there may be fiscal implications to local governments as a result of enforcing or administering the section. The costs are attributable to standardizing the way municipalities are compensated for the use of the public right-of-way. Further, costs will vary between municipalities due to the diversity of existing telecommunications franchises and the methods by which municipalities currently obtain compensation from CTPs. Ms. Parker and Mr. Rajagopal do not anticipate any fiscal implications to the state government.

Ms. Parker and Mr. Rajagopal have determined that for each year of the first five years the proposed section is in effect, the public benefit anticipated as a result of enforcing the section will be a uniform method of compensating municipalities for the use of the public right-of-way by certificated telecommunications providers. This uniformity will promote competition for local telephone service in Texas by ensuring that certificated telecommunications providers do not obtain a competitive advantage or disadvantage in their ability to obtain use of a public right-of-way within a municipality. There is no anticipated effect on small businesses or micro-businesses as a result of enforcing this section.

Ms. Parker and Mr. Rajagopal have also determined that for each year of the first five years the proposed section is in effect there should be no effect on a local economy, and therefore, no local employment impact statement is required under Administrative Procedure Act §2001.022.

In proposing this section, the commission's objective is to establish a method for compensating municipalities for the use of a public right-of-way by CTPs that: (1) is administratively simple for municipalities and telecommunications providers; (2) is nondiscriminatory; (3) is competitively neutral; (4) is consistent with the burdens on municipalities created by the incursion of CTPs into a public right-of-way; (5) provides fair and reasonable compensation for the use of a public right-of-way; and (6) is consistent with state and federal law.

The commission seeks any comments on the proposed rule that interested parties believe are appropriate. Parties should organize their comments in a manner consistent with the organization of the proposed rule. In particular, the commission invites comments regarding the proposed definition of "other compensation" defined in subsection (c)(6) of this section. Specifically, the commission is interested in learning whether the proposed definition provides clarity and whether it is consistent with the intent of HB 1777. In addition, the commission requests comments on whether the term "special assessments," as referred to in subsection (c)(1) of this section, is an understood term-of-art, or whether it should be defined in the rule. Parties proposing to define the term in the rule are requested to submit a definition for "special assessments" that is consistent with the provisions of HB 1777. Further, the commission seeks comments on whether using each municipality's historically-utilized accounting methodology and fiscal year in determining the base amount is preferable to using a single commission-prescribed accounting methodology (cash or modified accrual with or without normalization). In responding to this question, parties are requested to address whether the 1998 base amounts should be normalized. Finally, the commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section.

Comments on the proposed new rule (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326,

Austin, Texas 78711-3326, within 20 days after publication. All comments should refer to Project Number 20935. The commission staff will conduct a public hearing on this rulemaking under Government Code §2001.029 at the commission offices located in the William B. Travis building, 1701 North Congress Avenue, Austin, Texas 78701, on Tuesday, October 5, 1999, at 9:30 a.m.

This new rule is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (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. This proposed rule is also authorized by House Bill 1777, 76th Legislature, Regular Session (1999) which amends the Local Government Code by adding §283.055, which provides that not later than March 1, 1999, the commission shall establish rates per access line by category for the use of a public right-of-way by certificated telecommunications providers in each municipality, and the statewide average of those rates. The rates when applied to the total number of access lines by category in the municipality shall be equal to the base amount.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and Local Government Code §283.055.

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

- (a) **Purpose.** This section establishes a uniform method for determining a municipality's base amount and calculating the value of in-kind services provided to a municipality under an existing franchise agreement or ordinance by certificated telecommunications providers (CTPs), and sets forth relevant reporting requirements.
- (b) **Application.** This section applies to all municipalities in the State of Texas.
- (c) **Definitions.** The following words and terms when used in this subchapter, shall have the following meaning, unless the context clearly indicates otherwise.
- (1) **Base amount** – The total amount of revenue received from CTPs, during calendar year 1998, by the municipality in franchise, license, permit, application, excavation, inspection, and other fees, directly related to the use of a public right-of-way within the boundaries of the municipality, including all newly annexed areas. The base amount does not include pole rental fees, special assessments, and taxes of any kind, including ad valorem or sales and use taxes, or other compensation not related to the use of a public right-of-way.
- (2) **Certificated telecommunications provider (CTP)** – A person who has been issued a certificate of convenience and necessity (CCN), certificate of

operating authority (COA) or service provider certificate of operating authority (SPCOA) by the commission to offer local exchange telephone service.

- (3) **Customer** – An end-use customer.
- (4) **In-kind services and facilities** – Services or facilities provided to a municipality by a CTP during calendar year 1998 below cost or at no cost as part of a franchise agreement or ordinance.
- (5) **Litigating municipality** – A municipality that was involved in litigation relating to franchise fees with one or more certificated telecommunication providers during any part of calendar year 1998.
- (6) **Other compensation** – Compensation paid to a municipality not related to the use of a public right-of-way. It shall include, but is not limited to, fees paid to the municipality to obtain access to municipally-owned poles, ducts, conduits, buildings, and other facilities.
- (7) **Public right-of-way** – The area on, below, or above a public roadway, highway, street, public sidewalk, alley, waterway, or utility easement in which the municipality has an interest. The term does not include the airwaves above a right-of-way with regard to wireless telecommunications.
- (8) **Similarly sized municipality** – A municipality with a population that is within 20% of the population of another municipality in the same or adjacent county, as of the date of the most recent census.

- (d) **Determination of a municipality's base amount.** A municipality's base amount shall consist of the sum of all applicable revenue received from CTPs, the value of in-kind services, and the value of any applicable escalation provisions in existing franchise agreements and ordinances, unless a municipality's base amount is determined under subsection (f) or (g) of this section.
- (1) **Revenue received.** Revenue received is defined as payments received and recorded by the municipality in calendar year 1998 using the cash basis of accounting. Adjustments may be made to the 1998 recorded amounts only for unusual or extraordinary events other than normal billing/payment lag. Adjustments should be made, for example, to normalize the base amount to reflect exactly 12 months of payments from each CTP which was using the right-of-way on December 31, 1998. Any proposed adjustments must be fully explained and justified in the municipality's initial reporting prescribed in subsection (i) of this section.
- (2) **Escalation provisions.** The value of escalation provisions received by the municipality during calendar 1999 and the first calendar quarter of 2000, specifically prescribed in applicable agreements or ordinances, effective or adopted by January 12, 1999, shall be added to the base amount calculated pursuant to paragraph (1) of this subsection.
- (3) **In-kind services.** In-kind services or facilities provided to municipalities by CTPs shall be valued at 1.0% of the base amount unless a municipality

demonstrates to the commission that the services or facilities received by the municipality had a greater value in calendar year 1998. Municipalities requesting in-kind compensation above 1.0% of the base amount shall make a request consistent with subsections (e) and (j) of this section.

(e) **Valuation of additional in-kind compensation.** Municipalities may provide evidence that the total value of in-kind services or facilities received from CTPs in calendar year 1998 exceeded the in-kind threshold of 1.0% of the municipality's base amount. The municipality's request to exceed the threshold must be consistent with this subsection and meet the filing requirements of subsection (j) of this section.

(1) **Telecommunications equipment.** The municipality shall compute the annual depreciated expense of each piece of equipment it received as in-kind compensation, in calendar year 1998. The rate of depreciation and net salvage shall be the weighted-average depreciation rate and net salvage of the two largest incumbent local exchange companies in the State of Texas. The weighting shall be determined by the access line count reported by the individual carriers in the earnings report filed at the commission under Project Number 20469, *1998 Telecommunication Utilities Annual Earnings Report pursuant to Subst. R. §26.73(b)*. The rates of depreciation to be used include those approved by the Federal Communications Commission.

- (2) **Dark fiber.** Where a municipality had the option to use the CTP's dark fiber as in-kind compensation in calendar 1998, the municipality shall value the fiber only to the extent it utilized them in calendar 1998. The valuation shall be based on the methods prescribed in paragraph (4) of this subsection. Where a CTP permanently transferred ownership of the dark fiber to the municipality as in-kind compensation in calendar 1998, the fiber shall be valued for its entire length using the methods prescribed in paragraph (1) of this subsection.
- (3) **Poles, ducts, and conduits.** Where a municipality had the option to use the CTP's poles, ducts, and conduits as part of its in-kind compensation, it shall value those facilities only to the extent it utilized them during calendar 1998. The valuation shall be based upon reasonable annual rental fees charged or paid by other utilities for similar facilities.
- (4) **Telecommunications service.** The municipality shall compute the weighted-average retail price of each relevant telecommunications service it received as in-kind compensation in calendar year 1998. The retail price shall be the price charged by the two largest incumbent local exchange companies in the State of Texas. The weighting shall be determined by the access line count reported by the individual carriers in the earnings report filed at the commission under Project Number 20469, *1998 Telecommunication Utilities Annual Earnings Report pursuant to Subst. R. §26.73(b)*. If the service was offered at a discounted price, the in-kind

value for that service shall be the difference between the weighted-average retail price and the discounted price.

- (5) **All other facilities and services.** The municipality shall seek bids for all other in-kind goods and services to determine the true market value. The bid-seeking process shall be consistent with the methods the municipality uses for other purchases.

- (f) **Base amount for a small municipality.** A small municipality is considered to be a municipality located within a county with a population of less than 25,000 on December 31, 1998. Where a municipality is located in more than one county, the larger of the populations shall apply. The base amount for a small municipality, or a municipality that either did not have an effective franchise agreement or ordinance on January 12, 1999, or was not in existence on that date, shall, at the election of the governing body of the municipality, be equal to one of the following amounts:
 - (1) An amount not greater than the statewide average fee per line for each category of access line of the CTP with the greatest number of access lines in that municipality, multiplied by the total number of access lines in each category located within the boundaries of the municipality on December 31, 1998, for a municipality in existence on that date, or on the date of incorporation for a municipality incorporated after that date;

- (2) An amount not greater than the base amount determined for a similarly sized municipality in the same or an adjacent county in which the CTP with the greatest number of access lines in the municipality is the same for each municipality. The similarly sized municipality must have computed its base amount using methods other than this paragraph; or
 - (3) The total amount of revenue received by the municipality in franchise, license, permit, and application fees from all CTPs in calendar year 1998 consistent with the accounting methodology prescribed under subsection (d)(1) of this section.
- (g) **Base amount for litigating municipality.** The base amount for a litigating municipality that not later than December 1, 1999, repeals any ordinance subject to dispute in the litigation, voluntarily dismisses with prejudice any claims in the litigation for compensation, and agrees to waive any potential claim for compensation under any franchise agreement or ordinance expired or in existence on September 1, 1999, is, at the municipality's election, equal to one of the following amounts:
- (1) An amount not to exceed the state average access line rate on a per category basis for the CTP with the greatest number of access lines in that municipality multiplied by the total number of access lines located within the boundaries of the municipality on December 31, 1998, including any newly annexed areas; or

- (2) An amount not to exceed 21% of the total sales and use tax revenue received by the municipality pursuant to Texas Tax Code, Chapter 321. The sales and use tax revenue will be based on the calendar year 1998 report of taxes collected, as issued by the State Comptroller for a municipality. The amount does not include sales and use taxes collected under:
- (A) Texas Transportation Code, Chapters 451, 452, 453, or 454 for a mass transit authority;
 - (B) the Development Corporation Act of 1979 (Article 5190.6, Vernon's Texas Civil Statutes), for a 4A or 4B Development Corporation;
 - (C) Texas Local Government Code, Chapters 334 and 335; and
 - (D) Texas Tax Code, Chapters 321, 322, and 323, for a special district, including health service, crime control, hospital, and emergency service districts.
- (h) **Books and records.** Subject to review by the commission, a municipality shall maintain books and records relating to compensation received pursuant to Texas Local Government Code, Chapter 283, separate from compensation received from other sources. In accordance with generally accepted accounting principles (GAAP) and consistent with state and federal guidelines, a municipality shall record all monetary transactions with its CTP(s), whether direct or indirect, in a

manner which allows for easy identification and reporting of transactions which have occurred with each individual CTP.

(i) **Reporting procedures and requirements.**

(1) **Who shall file.** The record keeping, reporting and filing requirements listed in this section shall apply to all municipalities in the State of Texas.

(2) Unless otherwise specified, periodic reporting shall be consistent with this subsection and subsection (m) of this section.

(A) **Initial reporting.** A municipality shall file its base amount using the commission-approved *Form for Calculating Right-of-way Compensation (FCRC)*, or the commission-approved *Program for Calculating Right-of-way compensation (PCRC)*, with the commission no later than December 1, 1999 under Project Number 20935, *Implementation of HB 1777*.

(B) **Subsequent reporting.**

(i) Each municipality shall file annually with the commission a report on municipal compensation received from each CTP by February 1 of the following year. The reporting shall commence in 2001 and shall include all amounts received pursuant to this section from each CTP and shall include payments from each CTP made on a quarterly basis.

- (ii) The commission may request documentation if it determines a filing by the municipality is insufficient. If the commission requires additional information, the municipality shall respond to any request from the commission within 30 days from the time the municipality receives the request.

- (j) **Reporting for additional in-kind compensation.** This subsection applies only to a municipality filing a request to value in-kind compensation at a level greater than 1.0% of its base amount, pursuant to subsection (e) of this section. The municipality maintains the burden of proof for establishing the reasonableness of its request. No later than December 1, 1999, the municipality shall file its request using the commission-approved *Form for Valuing In-kind Services Over 1.0%*. If the commission determines that the value of in-kind services is less than the value claimed by the municipality, the value of in-kind services for that municipality shall, on an interim basis, default to 1.0% of the base amount until the municipality makes a showing consistent with this section and subsection (e) of this section.

- (k) **Waiver of reporting requirements.** The commission may waive the reporting requirement for specific information required by this section if it determines that it is either impractical or unduly burdensome on a municipality to furnish the

requested information. To obtain a waiver of any reporting requirement, a municipality shall submit a written request to the commission, explaining the reasons for the waiver, no later than ten days prior to the date the information is required to be reported. Nothing in this section shall be construed to limit CTPs' access to municipal records under the Texas Open Records Act.

(1) **Late, insufficient, or incorrect filing.**

- (1) If a municipality fails to file the FCRC or PCRC report by the date required by this section, the commission shall not set rates for that municipality until the later of May 1, 2000 or up to 90 days after the filing is received by the commission.
- (2) If the commission determines that the filing under subsection (i) of this section is insufficient or incorrect, the commission shall not set rates for that municipality until the municipality has completed its filing under subsection (i) of this section.
- (3) A municipality that did not fulfill its reporting obligations under subsection (i) of this section, shall continue receiving compensation from CTPs under the terms of any applicable existing or expired agreement or ordinance until the commission's determination of rates for the municipality and the CTPs' implementation of those rates. All commission established rates and all compensation thereunder shall be

applied prospectively from the date the commission determines the rates for the municipality and the CTPs timely implement the appropriate rates.

- (m) **Report attestation.** All filings with the commission pursuant to this section shall be in accordance with §22.71 of this title (relating to Filing of Pleadings and Other Materials) and §22.72 of this title (relating to Formal Requisites of Pleadings to Be Filed With the Commission). The filings shall be attested to by an officer or authorized representative of the municipality under whose direction the report is prepared or other official in responsible charge of the entity in accordance with §26.71(d) of this title (relating to General Procedures, Requirements and Penalties).

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

**ISSUED IN AUSTIN, TEXAS ON THE 27th DAY OF AUGUST 1999 BY THE
PUBLIC UTILITY COMMISSION OF TEXAS
RHONDA G. DEMPSEY**