The Public Utility Commission of Texas adopts new §26.463 relating to Calculation and Reporting of a Municipality's Base Amount. This section is adopted with changes to the proposed text as published in the September 10, 1999 Texas Register (24 TexReg 7114). This section is adopted under Project Number 20935.

New §26.463 implements the provisions of House Bill 1777 (HB 1777), Act of May 25, 1999, 76th Legislature, Regular Session, Chapter 840, 1999 Texas Session Law Service 3499 (Vernon) (to be codified as an amendment to Local Government Code §283.001, et. seq.). HB 1777 requires the commission to establish a uniform method for compensating municipalities for the use of a public right-of-way by certificated telecommunications providers (CTPs). Not later than March 1, 2000, the commission must establish, for each municipality, rates per access line by category for the use of the rights-of-way in that municipality. The commission's per-access-line rates by category, when applied to the total number of access lines by category in the municipality, shall be equal to the municipality's base amount. This rule establishes the procedures for calculating and reporting municipalities' base amounts and municipalities' desired allocation of their base amounts over the access line categories.

Prior to publication of the proposed rule, the commission staff held workshops on July 9, 1999 and July 30, 1999 at the commission's offices. Input received from the commenters was used to develop the proposed rule. A public hearing on the proposed rule was held at

the commission offices on October 5, 1999 at 9:30 am. Representatives from municipalities and industry, and other affected persons, attended the hearing and provided comments. To the extent the oral comments differ from the submitted written comments, such comments are summarized herein.

In the preamble to the proposed rule, the commission requested specific comments regarding the costs associated with, and benefits that will be gained by, implementation of proposed §26.463. Additionally, the commission sought comments on the proposed definition of "other compensation" defined in subsection (c)(6). The commission also requested parties to comment on whether the term "special assessments" is an understood term-of-art, or whether it should be defined in the rule. Further, the commission requested comments on whether using each municipality's historically utilized accounting methodology and fiscal year in determining the base amount would be preferable to using a single commission-prescribed accounting methodology. Where parties responded to the above questions, those comments have been summarized, as well.

Hearing and Commenters

The following parties filed comments on the rule language: Texas Telephone Association, (TTA); AT&T Communications of the Southwest, Inc. (AT&T); Garland and San Angelo (Garland/San Angelo); Texas Coalition of Cities on Franchised Utility Issues (TCCFUI), a coalition of 67 Texas cities; Texas Municipal League (TML); Sprint Communications Company L.P. (Sprint); GTE Southwest Incorporated (GTESW);

Southwestern Bell Telephone Company (SWBT); Austin, El Paso, Everman, Irving, Laredo, Missouri City, Plano, and Rosenberg (Cities); Addison, Bedford, Colleyville, Euless, Farmers Branch, Grapevine, Hurst, Keller, Killeen, North Richland Hills, Pasadena, Texas City, Tyler, West University Place, and Wharton (Coalition) (hereinafter, Cities and Coalition will be referred to jointly as "Cities"); TEXALTEL; CLEC Coalition; City of Irving; City of Dallas; and City of Fort Worth.

Base Amount Issues

The term "directly" contradicts other portions of the definition of base amount.

Proposed subsection (c)(1) defined "Base Amount" as the sum of revenues received by the municipality in franchise, license, permit, application, excavation, inspection, and other fees directly related to the use of a public-right-of-way. Cities objected to the use of the term "directly" in the proposed definition. They stated that requiring municipalities to include only fees "directly related" to the use of right-of-way appears to contradict the statutory language allowing the inclusion of "other fees." Cities pointed out that "application fees" and "franchise fees," both included as part of the commission's definition of base amount, are not "directly" related to the use of the right-of-way.

The commission agrees with the Cities that the term "directly" might be unclear, given the other terms found in the definition of base amount. Nonetheless, the commission points out that although HB 1777 does not use the word "directly," the clear purpose of

HB 1777 is to establish a uniform method for compensating municipalities for the use of a public right-of-way by CTPs. Because fees and charges under municipal police power authority are not covered by HB 1777, municipalities will be required to differentiate such compensation from compensation for the use of a public right-of-way recovered under HB 1777. Therefore, the commission revises subsection (c)(1) to accommodate the Cities' recommendation by deleting the term "directly" from the definition of base amount. Further, to provide clarity, the commission modifies the language in the definition of base amount to explicitly state the other fees that can be included as part of the base amount.

Fees related to long-distance, cable franchises and wireless providers should not be included.

SWBT requested that the commission clarify subsection (d), relating to determination of a municipality's base amount. SWBT suggested that subsection (d) indicate that the compensation to be included is compensation received from CTPs in calendar year 1998, excluding any fees collected from providers, whether or not they were CTPs, that were not connected to their activities as CTPs. For instance, SWBT stated that cities should not submit cable franchise revenues from a company also operating as a CTP in a city during 1998, nor should cities submit revenues from leases/permits to use rights-of-way exacted from interexchange carriers (IXCs), whether that carrier is a CTP or not.

GTESW made the same points as SWBT, but instead suggested that the commission clarify this issue of what amounts are included in the base amount. GTESW agreed with SWBT that fees paid by an IXC not providing local exchange service should not be included in the base amount. TEXALTEL went on to explain that license fees, representing fees paid by IXCs under "license agreements," should not be in the base amount because they are not for provision of local exchange service; TEXALTEL asserted that income from such license agreement fees should not be included in the base amount because such income will continue to be paid by carriers under those agreements. Specifically, TEXALTEL recommended that "base amount" should not include any fees or other income that will not be eliminated upon implementation of HB 1777.

AT&T argued that HB 1777 as approved by the legislature, and does not address long distance facilities, hence, it is inappropriate to include payments made by interexchange carriers (which might be CTPs) as part of the base amount. GTESW echoed AT&T's comments regarding the appropriateness of including compensation from interexchange carriers. GTESW suggested that the definition of base amount should specifically exclude compensation from an interexchange carrier that may be a CTP, has cable in the right-of-way of the municipality but is not providing local exchange service, and does not have the facilities to offer local exchange telephone service. The CLEC Coalition emphasized that only an access line fee can be charged under HB 1777, and a CTP that can not segregate local and long distance services because that provider has only one set of facilities, is covered under HB 1777. The CLEC Coalition argued that the only

solution available currently for a CTP that may not be able to prove its facilities are used exclusively for local exchange service is to pay access line fees.

Cities on the other hand, believed that the "base amount" should include compensation from all CTPs regardless of the CTPs' status in providing local exchange services, and that the base amount should include fees not related to local exchange telephone service. The City of Fort Worth requested clarification of whether a CTP that is certificated to provide local exchange services in a city but chooses not to actually provide those services, opting to lay lines to be used for long distance instead, is exempt from paying any kind of license fees except those established by the commission.

The commission is persuaded that the base amount should not include fees from CTPs that are interexchange carriers, cable providers or wireless providers. Access lines belonging to IXCs, cable providers, and wireless providers generally do not meet the statutory definition of "access lines" under HB 1777. If the commission were to include compensation from these providers, but exclude their access lines, based upon the statutory definition of "access lines," the burden of compensating the municipality for use of the rights-of-way would be shouldered inequitably by ILECs and CLECs. To obtain consistent results, it is appropriate to include only providers whose access line meet the definition of access lines as defined by §283.002 of the Local Government Code. Through this approach, the commission will ensure that the base amount is comprised of monies from the same providers over whose access lines these fees will be spread. Therefore, the commission revises the definition of base amount to exclude fees from

IXCs, cable and wireless providers, who may be CTPs, but whose lines do not meet the definition of access lines. Compensation from these providers will continue outside the framework of HB 1777. Some parties raised the issue of using shared facilities to provide both local exchange service and long-distance service. The commission believes that this issue would be better addressed in the context of the proposed §26.465 relating to Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers (CTPs).

Compensation from Terminated Agreements

HB 1777 gives CTPs the option to terminate their franchise agreements with municipalities on or before December 1, 1999. TEXALTEL commented that municipalities should only include base amount fees from franchise agreements or ordinances that are terminated as of December 1, 1999. TEXALTEL stated that fees associated with agreements that continue to be in effect after December 1, 1999 should not be a part of the base amount.

While the commission agrees that TEXALTEL's suggestion may have some validity, there are practical and conceptual impediments to implementing this proposal. The date by which CTPs must terminate their existing contracts with municipalities, December 1, 1999, coincides with municipalities' deadline for filing base amount information. In other words, at the time of its base amount filing, a municipality may not be aware whether a certain CTP is terminating its franchise agreement with the municipality.

Therefore, a municipality making a base amount filing before December 1, 1999 may not know which CTP's fees should be included in the base amount and which should be excluded. If a CTP were to wait to notify municipalities of termination until after those municipalities had already filed their figures, an adjustment would be needed to each city's base amount figures.

Further, §283.054(a) of the Local Government Code states that a termination does not affect the calculation of the municipality's base amount. Each reported base amount figure becomes part of the statewide average calculation. Finally, upon expiration of contracts that are not terminated on or before December 1, 1999, compensation under HB 1777 will replace compensation under those contracts. Inclusion of compensation under continuing contracts into the base amount will ensure that the base amount figure is an accurate representation of total revenues received by a municipality from CTPs in 1998 for use of the public rights-of-way. Accordingly, the commission concludes that it is not practical, nor is it the intent of HB 1777, to require municipalities to exclude from the base amount, fees associated with franchise agreements or ordinances that are not terminated.

Other Comments – Effective Agreements

When discussing how a city determines whether a franchise is effective or not, Garland/San Angelo commented that there are certain cities that have perhaps not entered into a formal franchise extension agreement with a CTP, but the CTP has nonetheless

continued to make regular franchise payments. Garland/San Angelo commented that if these cities were in negotiations with CTPs, they should not be excluded from the category of cities that would be considered to have a valid franchise agreement as of January 12, 1999.

SWBT commented that it does not participate in any such oral contract extensions and is not aware of any gentlemen's agreements as described by Garland/San Angelo in SWBT cities.

TML expressed its belief that the situation described by Garland/San Angelo would occur in very limited circumstances. TML stated that if there were indeed such a city that has been receiving compensation without a franchise agreement, then it would be incumbent upon the CTP to affirm that there was, in fact, a franchise agreement in place.

AT&T stated that if the commission makes a determination that a holdover agreement is to be considered effective, notice should be given to the CTP.

Cities commented that the issue of an effective franchise agreement falls into two categories: (1) where the CTP is paying compensation and there is no dispute over the compensation amount; or (2) where the CTP is paying compensation but there is a dispute over the compensation amount. Cities argued that the first arrangement would be considered an effective agreement, based upon mutual agreement. On the other hand,

Cities stated that the second category would not constitute an effective franchise agreement, as it lacked the requisite mutual agreement on terms.

The commission acknowledges the comments of all the parties. The issue of hold-over agreements or gentlemen's agreements is not addressed in HB 1777; the bill speaks only of effective agreements. Should a situation described by Garland/San Angelo arise, as TML commented, it would occur only in limited circumstances. Since it is difficult for the commission to predict all the issues related to a held-over agreement, unique circumstances would be best addressed on a case-by-case basis. Nonetheless, the commission makes a determination that a held-over franchise agreement will be considered to be valid as of January 12, 1999, if the CTP continued to compensate the city without dispute, and the CTP and the municipality were in the process of developing a franchise agreement. The commission has added a definition for effective agreement in subsection (c)(2).

Definition of Other Compensation

Garland/San Angelo, TML, and TCCFUI responded to the commission's request for comments in the proposed preamble, on the definition of the term "other compensation." TML and TCCFUI agreed with the proposed definition of "other compensation." Garland/San Angelo commented that it is not necessary to define "other compensation" because the term is only used in the definition of base amount in subsection (c)(1), and is

qualified in that subsection to be compensation that is related to the use of the public right-of-way.

The commission believes that the term "other compensation" is adequately explained in the definition of base amount and therefore makes no revision to subsection (c)(5).

Definition of Customer, Certificated Telecommunications Provider, and Public Right-of-Way

Cities pointed out that, while the proposed subsection (c)(3) defined "customer," the term is not used anywhere in the rule, and is therefore unnecessary.

The commission agrees with the Cities' recommendation and deletes the definition of "customer" from subsection (c)(3). Also, the commission deletes the definition of certificated telecommunication providers, and public rights-of-way from proposed subsection (c)(2) and (c)(7) as these terms are already defined in §26.461. Paragraphs in subsection (c) have been renumbered to reflect the above changes.

Similarly-Sized City Issues

In subsection (c)(6) the commission defined a similarly-sized city to be one that is within 20% of the population of another city. TML advocated that the figure of 20% should be an approximate measure, rather than a strict limitation, to allow some discretion in the

definition of a similarly-sized city. AT&T stated that there was a benefit in using 20% as far as helping facilitate people's evaluation of what city actually is similarly-sized. The City of Irving suggested using an absolute figure, rather than using a percentage in defining a similarly-sized city.

The commission recognizes the difficulties faced by small municipalities in the state's least populated counties and has chosen to use a dual approach for determining population. In order to provide flexibility for cities of different sizes, the commission has separated cities of under 1000 in population from those with a population of over 1000. For those cities with a population of under 1000, the commission has chosen to use an absolute measure of size, a population within 200 persons. For those cities with a population of over 1000, the commission has chosen to retain the percentage measure of 20%. The commission has revised subsection (c)(6) to reflect this change.

Definition of Special Assessment

The commission solicited comments in the proposed preamble on whether or not the term "special assessment" should be defined in the rule. Garland/San Angelo, TML, and TCCFUI responded stating that the term "special assessment" is a term of art, and does not need a definition. However, TML and Garland/San Angelo have no objection to including a definition. Garland/San Angelo recommended the following definition: "Special assessment means an assessment authorized for public improvements elsewhere in the Local Government Code and in the Transportation Code."

The commission has included a definition for special assessment under (c)(7) with language similar to that proposed by Garland/San Angelo.

Accounting Methods for Computing Base Amount: Fiscal versus Calendar Year and Cash Received versus Revenue Received

Cities, TML, TCCFUI, Sprint, and Garland/San Angelo recommended that the commission not impose upon municipalities any particular accounting methodology. Cities objected to definition of the term "revenue received" in subsection (d)(1) as it requires the calculation of 1998 base amount using a "cash basis" of accounting. Cities recommended that revenue be defined as revenue recorded by the municipality for the calendar year 1998, using GASB (Governmental Accounting Standards Board) principles of accounting, or as otherwise customarily recorded by the municipality.

TCCFUI stated that the definition of "revenue received" in the proposed rule expands the definition contained in HB1777 in a way that was not intended by the legislation. TCCFUI was concerned that the proposed definition would adversely affect some of its member cities by denying full recognition of the growth in franchise revenues. TCCFUI stated that franchise revenues used to calculate the base amount should reflect the growth in telecommunications services which occurred during the full year of 1998. TCCFUI proposed defining "base amount" as the revenue received for rights-of-way usage during 1998. TCCFUI believed this language, if adopted by the commission, would make the

issue of which accounting methodology to use largely irrelevant. TCCFUI further stated that since customers were billed in the fourth quarter of 1998 for franchise fees related to service in that period, and telecommunication providers collected those fees and reflected them on their books for that period, such fees should be reflected in the calculation of base amount for 1998. TCCFUI recommended revising subsection (d)(1) as follows: "Revenue received: Revenue received is defined as payments received by a municipality for use of public rights-of-way during the calendar year 1998."

Sprint recommended that the municipalities should be given the flexibility to continue using their fiscal year accounting methodology as well as their own fiscal year calculations, or the commission-prescribed accounting methodology and calendar year. Garland/San Angelo commented that the imposition of a specific methodology for reporting a municipality's base amount would impose an unreasonable burden on every municipality whose accounting method differed from the commission-imposed methodology.

TML urged the commission to revise the rule to delete any reference to a cash basis of accounting and to allow the city to utilize the same accounting basis for calculation of its base amount as that used by the city in keeping its other accounts. Only SWBT commented that the proposed rule, which required a cash basis of accounting on the part of the cities, is consistent with the statutory language of calculating the "base amount" by means of "revenue received."

Commission Response for Fiscal versus Calendar Year

Local Government Code §283.053(b) and (c)(3) define base amount as the total amount of revenue received by the municipalities from CTPs in 1998, but the bill is silent on whether 1998 represents a fiscal or calendar year. The commission believes that, under rules of statutory construction, 1998 is meant to be interpreted in its everyday meaning, which would represent the calendar year, rather than the more unusual and varied fiscal year. This is also evident from comments filed under this rule. No party has recommended the use of a fiscal year except for Sprint, which suggested giving the municipality the option of using a fiscal year. Further, Local Government Code §283.001(c) states that the purpose of Chapter 283 is to establish a uniform method of compensating municipalities for the use of public rights-of-way by CTPs. If the commission were to prescribe varying fiscal years for base amount calculation and reporting, then, for purposes of consistency, the commission would also have to require the CTPs to report access line counts for each municipality on a fiscal year basis. This would create an unreasonable administrative burden on both the CTPs and the commission. Therefore, the commission believes it is necessary to define a uniform period for calculating the base amount, and adopts calendar year 1998 for reporting purposes. Subsections (d), (e) and (f), all of which make reference to the year 1998, have been revised accordingly.

Commission Response for Cash Received versus Revenue Received

The commission agrees with the majority of commenters that the commission should not impose upon the municipalities any particular accounting methodology. HB 1777 explicitly states that the compensation received by the municipalities is payment for the use of the right-of-way. The base amount calculation is based on historical data and is a one-time calculation. Therefore, the commission removes all references to accounting methodology in the rule. The revised rule gives the municipalities the *option* of adding payments received in 1997 or 1999, only to the extent that those payments that reflect compensation for calendar year 1998. These adjustments are typically made by municipalities using the modified accrual basis of accounting, but are not typically made by municipalities that use the cash basis of accounting. Similarly, the commission concludes that municipalities must exclude payments received in 1998 that represent compensation from other calendar years. This adjustment is necessary to prevent an overstatement of the base amount. Further, the commission has added language indicating that the municipalities may be required to substantiate their base amount calculation at the request of the commission through records and documents maintained by the municipalities. Therefore, the commission revises subsection (d)(1), relating to revenues received, and subsection (i), relating to books and records.

Normalization Issues

The proposed method for calculating base amount in subsection (d) allowed municipalities to normalize (or annualize) their base amounts. As defined, normalization encompassed two types of adjustments. First, it required the removal of unusual or

extraordinary amounts received, and it allowed an annualization of compensation for each CTP providing service at the end of the year. For instance, if a provider operated in a municipality for only six months in 1998, normalization would allow the municipality to double the provider's compensation, to account for the full twelve-month period, and then include that amount as part of the base amount. This type of adjustment is usually done when using historical costs, or in this case, historical compensation, to establish future rates.

GTESW stated it fully supports adjusting (normalizing) 1998 payments to the extent that the agreement entitled the city to receive payment for 1998 use of the public rights-of-way. Similarly, TEXALTEL commented that certain normalization of amounts received by municipalities would be appropriate in order to achieve a realistic picture of fees that were received for the 12 months of 1998. Garland/San Angelo commented that normalization that is limited to ensuring that the base amount reflects exactly 12 months of payments is within the intent of the legislation. Sprint commented that the 1998 base amounts should be normalized and that the amounts received by the municipalities should be as consistent as possible. TCCFUI stated that the 1998 base amount should be normalized and that normalization is implicit in its recommended definition of revenue received, which matches the revenues to the 1998 usage of the right-of-way. Cities believe that annualizing payments for less than 12 months is appropriate because the intent of HB177 is to place municipalities in the posture they would have been before the enactment of the bill.

Only AT&T and TEXALTEL commented that it was not the intent of HB 1777 to allow a municipality to include in its base amount the equivalent of 12 months of payments from a CTP that began to use the rights-of-way and paid for that use only at the very end of 1998. AT&T commented that annualizing a one-month payment places a municipality in a better position than it would have been if the legislation had not been approved.

The commission agrees with the majority of commenters that some normalization of amounts received in 1998 may be necessary to prevent overstatement of the base amount. The commission believes that this type of normalization is within the statutory language of HB 1777. However, the commission believes that the type of normalization that requires "annualization" of payments from a CTP that used the right-of-way for only part of calendar year 1998 is inappropriate. The commission believes that annualization, as described above, is not necessary if a 1998 access line count is used to set the fee-per-line rates. Therefore, the commission revises subsection (d)(1) to reflect a type of normalization that excludes annualization.

Escalation Provisions

Garland/San Angelo commented that the language of proposed subsection (d)(2) is somewhat misleading. Garland/San Angelo stated that if the commission intended the municipality to estimate the value of the escalation provisions through the end of 1999 and the first quarter of 2000, then the rule should explicitly state that. TEXALTEL commented that the rule does not address procedures to establish the base amount for

years beyond March 2000. TEXALTEL believes that where there is an escalation provision in the municipality's existing ordinance or agreement, then the base amount for that municipality would need to be recalculated. Fort Worth expressed concern that if the municipality's escalation factor was tied to growth, then the municipality may not be able to report the escalation factor until growth has occurred.

TML commented that the bill contemplates escalation provisions that are tied either to telecommunications sales tax or Consumer Price Index (CPI), or perhaps some other specific escalators that are explicitly addressed in the agreements between the CTPs and the municipalities. Cities argued that it is important to match the line count period with the period during which revenue is calculated. Cities pointed out that some escalators are implicit because of the growth in the lines.

AT&T commented that it is important to recognize that the access line fee method under HB 1777 has an escalator already built into it. AT&T pointed out that the municipalities will accrue additional revenues as access lines grow and stated that the statute contemplated an actual increase in the rate-per-line, not the increase associated with growth in lines.

The commission agrees with the comments of Garland/San Angelo that the proposed language is misleading. The commission believes it is inappropriate under the bill to estimate escalation. Therefore, the commission revises subsection (d)(2), and requires municipalities to escalate franchise revenues for the calendar year 1999 to the extent it is

known and measurable. This method will be administratively simple and the period will also match with the reporting period for access line count. The commission also agrees with Cities and AT&T that there are two types of escalators. Escalation based on the growth in access lines is inherent in the fee-per-line method and should not be explicitly added to the base amount. On the other hand, fee rate escalators that represent an actual increase in the rate-per-line charged are those that are contemplated under HB 1777 and should be the only type included in the reporting of the base amount. Therefore, the commission revises subsection (d)(2) accordingly.

In-Kind Services – "Received" versus "Provided"

In proposed subsection (e), the commission described methods to value in-kind services and facilities. Proposed subsection (c)(4) defined in-kind services and facilities. Garland/San Angelo commented that the proposed definition of in-kind services and facilities is narrower than allowed by legislation and limits a municipality's ability to include the value of in-kind services and facilities actually received in 1998. Garland/San Angelo commented that the municipality need not have received in-kind services or facilities in 1998, arguing that in-kind must only have been provided, or promised, under existing franchise agreements or ordinances. Cities agreed with Garland/San Angelo that the municipality need not have actually received in-kind services in 1998. Cities stated that the fact that in-kind services have been provided in the franchise agreement would meet the requirements to value in-kind.

GTESW commented that it was the intent of the legislature that a municipality must have actually received in-kind products or services in year 1998 to be eligible for the one percent increase in the base amount.

The commission generally disagrees with Garland/San Angelo and Cities. Section 283.053(b) Local Government Code, explicitly describes in-kind services or facilities as those "received in 1998." The year 1998 has been consistently used as the base year for determining base amount. Therefore, the commission concludes that in-kind services must have been received by a municipality in 1998 to be eligible for inclusion in the base amount. However, in the case of equipment or facilities, where ownership is transferred to the municipality, the commission believes that those facilities will have value each year over the term of the franchise agreement. Therefore, in this limited case, equipment or facilities received prior to or during 1998, which are still of value to the municipality, may be included in the base amount. Subsection (e) has been revised accordingly. The commission also revises the definition of in-kind services and facilities in proposed subsection (c)(4). To highlight the differences in valuation methodology between services and facilities, proposed subsection (c)(4) is expanded into two subsections. Subsection (c)(3)(A) defines in-kind services, and subsection (c)(3)(B) defines in-kind facilities.

In-Kind Facilities and Services – Valuation Methods

Subsection (e)(1), relating to telecommunications equipment, proposed a method for valuing telecommunications equipment. Garland/San Angelo disagreed with using depreciation expense to value telecommunications equipment. Garland/San Angelo commented that the "depreciated book value" should replace the erroneous reference to "depreciated expense." Further, Garland/San Angelo pointed out that it is not appropriate, or even fair, to require municipalities throughout the state to determine the different variables required by the proposed valuation method, such as depreciation rates, net salvage, and weighted access line count. They argue that this information is not widely published and will not be readily available to municipalities.

The commission agrees with Garland/San Angelo that the valuation methodology required under the proposed rule might be burdensome to certain municipalities. Therefore, the commission revises subsection (e)(1) and (e)(4) to provide a simpler method for valuing telecommunications equipment and services.

In-kind Services – Poles, Ducts and Conduits

Information on Rental Charges Not Available

Proposed subsection (e)(3), relating to poles, ducts, and conduits, required municipalities to value poles, ducts, and conduits received as in-kind by calculating "reasonable annual rental fees charged or paid by other utilities for similar facilities." Garland/San Angelo commented that since municipalities will not have this information, they will not be able

to adequately calculate the value of the service, and therefore, the commission should make this information available to the municipalities.

At present, the commission does not have access to information related to reasonable annual rental fees charged or paid by utilities for poles, ducts or conduits. Should such information become available, the commission will provide it to the municipality. However, the onus is on the municipality to obtain this information from CTPs or other utilities to value its in-kind services.

Joint-Use Agreements

TEXALTEL recommended adding the following language to subsection (e)(3) to exclude in-kind facilities from the base amount if there was a joint-use agreement for those facilities: "Where the CTP receives benefits in exchange for allowing the city to use the CTP's poles, ducts and conduits, such as granting the CTP access to the city-owned ducts, conduits or poles, then the value of such access to the CTP's poles, conduits or ducts may not be included in the valuation of in-kind services."

The commission agrees with TEXALTEL's recommendation. HB 1777 is not intended to create duplicative compensation. Where a municipality and the CTP mutually benefited by allowing access to each other's facilities through a joint-use agreement, the CTP has not provided in-kind services to the municipality, as that term is generally understood.

Reciprocated services are not the same as in-kind services. Therefore, the commission revises subsection (e)(3) to generally incorporate TEXALTEL's recommendation.

In-kind – Other Facilities and Services

TTA pointed out that the valuation process described in subsection (e)(5), relating to other facilities and services, does not make any reference to whether the "other goods and services" were actually received by the municipality. TTA also suggested that the use of bids as outlined in this subsection for valuing "other facilities and services" might not be the most appropriate method of valuation. As an alternative, TTA suggested using a survey of suppliers to generate a true construct of market value.

The commission agrees with TTA's suggestions. The absence of any reference in subsection (e)(5) as to whether the "other goods and services" were actually received by the municipality was an inadvertent omission. The commission also agrees with TTA that a survey of suppliers might be a better alternative than seeking bids. Therefore, the commission revises subsection (e)(5) to accommodate TTA's suggestions.

Other Comments – Misleading Title

Garland/San Angelo commented that the title for subsection (f), "Base amount for small municipalities," is misleading and suggested making the title inclusive by changing it to:

"Base amount for small municipalities, municipalities without franchises or ordinances on January 12,1999, and municipalities created since January 12, 1999."

The commission agrees with Garland/San Angelo's comments and revises the title to: "Base Amount for Eligible Municipalities" and modifies subsection (f) to define those eligible municipalities.

Cities that Received No Franchise Compensation in Calendar 1998

Cities and TML stated that if a municipality was incorporated before January 12, 1999, but never really received franchise fees in 1998, then those cities should be treated like a newly incorporated city for the purposes of receiving franchise compensation. SWBT and the CLEC coalition stated that this issue was not contemplated by the statute. City of Irving responded that since this issue was not contemplated by the legislature, the commission's rules should state that a city that did not receive compensation in 1998 would be similar to a city that did not have an effective franchise as of January 12, 1999.

The commission recognizes the comments of all parties. The statute does not specifically address how the base amount should be calculated for cities that were incorporated before January 12, 1999 but never received any compensation in 1998 from CTPs. If the commission does not address this issue, then such cities would be unfairly left without future franchise compensation. Accordingly, the commission adds language to subsection (f) to address this situation as suggested by the City of Irving.

Source for Population Data

Subsection (f) requires municipalities to make certain choices depending upon the population of their county as of December 31, 1999. Also, subsection (c)(6) makes references to the municipality's population. TTA commented that it is uncertain how the county population should be determined.

The commission concludes that it is more efficient to use one source for population data and has revised subsections (f) and (c) (6) to provide a source for population data. The county and municipality population will be based upon the January 1, 1999 estimate developed by the Texas State Data Center. Further, the commission intends to provide to the municipalities the county population data as part of the base amount forms. The commission also clarifies in subsection (f) that when a municipality is located in more than one county, the eligibility shall be determined based upon the county with the largest proportion of the municipality's residents.

Books and Records

In subsection (h), relating to books and records, a municipality was required to record "all monetary transactions with a municipality." Garland/San Angelo pointed out that the requirement that municipalities record all "monetary transactions" with CTPs is not necessary and is vague. Garland/San Angelo stated that if it is the intention of the

commission to require municipalities to record their right-of-way fees in accordance with GAAP (Generally Accepted Accounting Principles) and state and federal guidelines to allow for easy identification and reporting of those fees, then the section should explicitly so state.

The commission agrees with Garland/San Angelo and revises subsection (h) to accommodate Garland/San Angelo's comments, as follows: "Books and records. Subject to request by the commission, a municipality shall provide sufficient records and documentation to substantiate the base amount calculation as prescribed in this subchapter. A municipality shall maintain books and records related to compensation received pursuant to Texas Local Government Code, Chapter 283, in accordance with generally accepted accounting principles and state and federal guidelines in a manner that allows for easy identification and reporting of right of way fees received from each CTP."

Waiver of Subsequent Reporting

In subsection (i)(2)(B), relating to subsequent reporting, the commission required each municipality in the state of Texas to file annually with the commission, a report on municipal compensation received from each CTP by February 1 of the following year. Though no party specifically commented on this reporting requirement, the written and oral comments from municipalities give the general impression that certain municipalities may find it burdensome to comply with commission's reporting requirements. Therefore,

the commission revises subsection (i)(2)(B) to require municipalities to file reports on an as-needed basis.

Waiver of Reporting Requirements

Proposed subsection (k), relating to waiver of reporting requirements, waived the reporting requirements if it was either impractical or unduly burdensome on a municipality to furnish the required information. GTESW objected to this waiver, stating that it is beyond the intent of the legislation for the commission to waive the reporting requirements of a municipality.

The commission agrees with GTESW and has deleted subsection (k) from this section.

Late Filings

Proposed subsection (l)(3), stated that a municipality that did not fulfill its base amount reporting obligations shall continue to receive compensation from CTPs under the terms of any applicable existing or expired agreement or ordinance until the commission determines a rate for that municipality. SWBT commented that allowing municipalities to continue collecting compensation under existing or expired agreements until the updated information is provided to the commission, does not meet the requirements of Chapter 283 of the Local Government Code, and does not provide an incentive for the cities to comply timely. Further, SWBT asserted that the commission has no power

under HB 1777 to permit that process to continue, given its obligation to implement HB 1777 in a competitively neutral and nondiscriminatory fashion. GTESW stated that requiring continued compensation under the terms of an existing or expired agreement places an undue and unreasonable administrative burden on the CTP. GTESW argued that if a municipality fails to meet its reporting obligations, the CTP should not be penalized, but rather the municipality should bear the burden resulting from its failure to provide the commission with the required reports. TEXALTEL stated that the commission's proposed language invites non-compliance if a city perceives that it is better served under existing agreements than under the new rates, and urges the commission to set a fee of zero for cities that do not provide the necessary data. TML stated that municipalities should be allowed to come under the HB 1777 system once they fulfill their filing requirements.

The commission agrees with the commenters that the burden should not be on the CTPs if a municipality fails to fulfill its base amount filing obligations. The commission revises subsection (l) to create a disincentive for a municipality that fails to comply with the reporting requirements of HB 1777. The commission concludes that a municipality's base amount shall be set at zero until the municipality provides the necessary information to complete its filings. Additionally, the municipality shall not collect compensation pursuant to commission rules for the period during which the base amount filing is incomplete.

Allocation of Base Amount

While no parties offered comment on the issue of allocation of base amount, the commission has added subsection (k), to reflect statutory language in HB 1777.

Other Comments – Base Amount True-ups

Several parties present at the public hearing addressed the issue of true-ups to the base amount, due to errors in the initial filing due December 1, 1999 by a municipality. For instance, TCCFUI described the situation where a city is unaware of providers that are operating in the municipality. Because cities will have to include compensation from all CTPs into the base amount, TCCFUI argued that cities should be allowed to adjust the base amount to reflect fees or other information that should have been reported as part of the base amount. Fort Worth expressed concern that the 1998 base amount would be diluted by extra access lines that were in place in 1998, but for which the municipality was not receiving applicable franchise fees. They suggested a possible solution of determining the access line count without using access lines for which no compensation was received.

AT&T urged that, if the commission allows municipalities to true-up base amounts, such true-up should only occur on a very periodic basis. AT&T asserted that *de minimis* increases in the base amount will impose significant burdens on the CTPs. AT&T also recommended that any re-allocation of base amount across categories should be done simultaneously with any adjustments to the base amount.

SWBT agreed that if a city discovers at some later date that it excluded money that should have been included in the base amount, then perhaps the commission should consider this issue. SWBT did not believe, however, that consideration should be on a prospective basis. SWBT argued that the bill was not designed to go back and recover lost revenues for 1998. SWBT pointed out that HB 1777 specifically addresses compensation "received," not compensation that "should have been received." SWBT stated that if the access lines are recovering the 1998 base amount plus any growth, then that is what the cities are entitled to under HB 1777.

TEXALTEL stated that lack of compensation by CTPs for use of the right-of-way is not an issue. They pointed out that if the CTP were reselling those lines, the underlying provider would have compensated the city for use of the right-of-way. In other cases, according to TEXALTEL, where a provider is facilities-based, there would be a 911 agreement, indicating that it would be highly unlikely for CTPs to slip through the cracks.

TML argued that it is only fair to allow industry a true-up of access line counts, where cities are receiving a true-up opportunity to correct mistakes in the base amount. TML recommended that, if allowed, true-ups should be done in a straight shot, with documentation only, and without the opportunity for a contested case hearing.

The CLEC Coalition argued that there is not a sufficient number of cases of non-payment to justify the amount of trouble it would be to put both the providers and the cities through a revamping of the base amount reporting process.

The City of Irving commented that if there is a CTP in the right-of-way that had an effective franchise agreement, but failed to live up to the terms of that agreement, HB 1777 is not intended to allow the CTP to benefit from that failure.

The commission believes that a true-up to the base amount would cause an adjustment to the municipality's access line fee rate and the statewide average rates. Therefore, the commission believes that this issue would be best addressed in the context of the rate rule, which the commission will initiate shortly.

In adopting this section, the commission makes other minor modifications for the purposes of clarifying its intent. All comments, including those 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) (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 rule is also authorized by the provisions of House Bill 1777 (HB 1777), Act of May 25, 1999, 76th Legislature, Regular Session,

chapter 840, 1999 Texas Session Law Service 3499 (Vernon) (to be codified as an amendment to Local Government Code §283.001, *et. seq.*).

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

(A) 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.

(B) The base amount does not include compensation received from interexchange carriers, cable providers or wireless providers, who may be CTPs, but whose lines do not meet the definition of access line under Local Government Code §283.002.

(2) **Effective franchise agreement –** A franchise agreement or ordinance that is adopted and effective by its own terms by January 12, 1999, or by mutual agreement of the parties has been held-over after its expiration date, without dispute, and the municipality and the CTP were in the process of developing a new agreement or ordinance.

(3) **In-kind compensation.**

(A) **In-kind services -** Services received by a municipality from a CTP during calendar year 1998 at either below cost or no cost as part of an effective franchise agreement.

(B) **In-kind facilities –** Facilities received by a municipality from a CTP before or during calendar year 1998 at either below cost or at no cost as part of an effective franchise agreement.

(4) **Litigating municipality** – A municipality that was involved in litigation relating to franchise fees with one or more CTPs during any part of calendar year 1998.

(5) **Other compensation** – Compensation not related to the use of a public right-of-way paid by a CTP to a municipality, including, but not limited

to, fees paid to the municipality to obtain access to municipally-owned poles, ducts, conduits, buildings, and other facilities.

(6) **Similarly sized municipality –**

(A) For municipalities with a population less than 1000, a similarly sized municipality shall be another municipality with a population within 200 more or fewer persons than the reporting municipality's population, located in the same or adjacent county as the reporting municipality.

(B) For municipalities with a population greater than 1000, a similarly sized municipality shall be another municipality with a population within 20% of the reporting municipality's population, located in the same or adjacent county as the reporting municipality.

(C) Municipal population shall be determined using the January 1, 1999 population estimates of the Texas State Data Center.

(D) The reporting municipality and the similarly sized municipality shall have the same CTP with the greatest number of access lines.

(7) **Special assessment –** An assessment authorized for public improvements under the Local Government Code or the Transportation Code.

(d) **Determination of a municipality's base amount.** A municipality's base amount shall be the sum of all applicable revenue received from CTPs, including newly annexed areas, the value of in-kind compensation, and the value of any applicable escalation provisions in effective franchise agreements or ordinances, unless a

municipality's base amount is determined under subsection (f) or (g) of this section.

(1) **Revenue received**. Payments received by a municipality from CTPs as compensation for calendar year 1998 usage of the public right-of-way.

(A) Payments received outside of calendar year 1998 may be included as revenue received only to the extent that these payments represent compensation for calendar year 1998 usage of a public right-of-way.

(B) Payments received in calendar year 1998 that do not represent compensation for calendar year 1998 usage of a public right-of-way shall be excluded.

(2) **Escalation provisions.** The municipality shall calculate and report its fee rate escalation amount that is known and measurable for calendar year 1999, that was specifically prescribed in effective agreements or ordinances, and add that escalation amount to the base amount calculation.

(3) **In-kind compensation**. In-kind services or facilities shall be valued at 1.0% of the base amount unless a municipality can establish before the commission that those services or facilities 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.** If a municipality wants to establish that the total value of in-kind compensation received from CTPs had a greater value in 1998 than 1.0% of the municipality's base amount, it must make a showing consistent with this subsection and meet the filing requirements of subsection (j) of this section.

(1) **Telecommunications equipment**. The municipality shall compute the 1998 value by dividing the original cost of the equipment by the term in years of the effective franchise agreement.

(2) **Dark fiber.** Where a municipality had the option to use the CTP's dark fiber as in-kind compensation in calendar year 1998, the municipality shall value the fiber only to the extent the municipality utilized it in calendar year 1998. The value shall be computed in accordance with paragraph (4) of this subsection. Where a CTP permanently transferred ownership of the dark fiber to the municipality as in-kind compensation before or during calendar year 1998, the value of the dark fiber shall be computed for its entire length in accordance with 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 the municipality utilized them during calendar year 1998. The value of the poles, ducts and conduits shall be based upon reasonable annual rental fees charged or paid by other utilities for similar facilities. Where a municipality and a CTP have

entered into a joint-use agreement for the use of poles, ducts, or conduits, no value shall be included in computing in-kind compensation for such use.

(4) **Telecommunications service**. The municipality shall value the telecommunications service it received as in-kind compensation by determining the fees paid by other municipalities for same or similar services, or through the average price charged in 1998 by three suppliers qualified to provide the service.

(5) **All other facilities and services**. The municipality shall perform a survey of suppliers for all other in-kind facilities and services it received in calendar year 1998, to establish true market values. The municipality shall survey at least three suppliers for each facility or service it is valuing.

(f) **Base amount for eligible municipalities.**

(1) Eligible municipalities include municipalities in counties with a population of less than 25,000 on December 31, 1998, municipalities that did not have an effective franchise agreement or ordinance on January 12, 1999, and municipalities that were not in existence on January 12, 1999. A municipality that was incorporated prior to January 12, 1999 but received no compensation from CTPs for calendar 1998 use of the public right-of-way, shall also be considered an eligible municipality.

(A) If a municipality is located in more than one county, its eligibility shall be determined by the county containing the greatest number of its residents.

(B) County population shall be determined using the Texas State Data Center population estimates for January 1, 1999.

(2) The base amount for an eligible municipality shall, at the election of the governing body of the municipality, be equal to one of the following amounts:

(A) 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; or

(B) 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

(C) 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 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 statewide 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 request by the commission**,** a municipality shall provide sufficient records and documentation to substantiate its base amount calculation as prescribed in this chapter. A municipality shall maintain books and records relating to compensation received pursuant to Texas Local Government Code, Chapter 283, in accordance with generally accepted accounting principles (GAAP) and state and federal guidelines, and in a manner that allows for easy identification and reporting of right-of-way fees received from each CTP.

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

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

(2) **Reporting.** 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) The commission may periodically require each municipality to file with the commission, on an as-needed basis, a report on municipal compensation. The report shall include all amounts received annually pursuant to this section and shall identify quarterly payments from each CTP.

(ii) The commission may request additional documentation if it determines a filing by the municipality is insufficient. If the commission requires additional information, the municipality shall respond and provide the needed

documents to 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 valuing 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 valuation. No later than December 1, 1999, the municipality shall file using the commission-approved *Form for Valuing In-kind Compensation Over 1.0%*. If the commission determines that the value of in-kind compensation is less than the value claimed by the municipality, the value of in-kind compensation 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) **Allocation of Base Amount.** Not later than December 1, 1999, a municipality that wants to propose an allocation of the base amount over specific access line categories shall notify the commission of the desired allocation. The commission shall establish an allocation of the base amount over the categories of access lines if a municipality does not file its proposed allocation by December 1, 1999.

(1) A municipality may request a modification of the commission's allocation not more than once every 24 months by notifying the commission and all affected CTPs in September of that year that the municipality wants to change the allocation for the next calendar year.

(2) A municipality's allocation shall be implemented unless, on complaint by an affected CTP, the commission determines that the allocation is not just and reasonable, is not competitively neutral, or is discriminatory.

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

(1) If a municipality fails to complete its base amount report by the date required by this section, the commission shall assume that the base amount for that municipality is $0.

(2) All commission-established rates and all compensation thereunder shall be applied prospectively from the date the CTPs timely implement the appropriate rates.

(3) A CTP shall not take more than 90 days to implement the rates established by the commission.

(m) **Report attestation.** All filings with the commission pursuant to this section shall be in accordance with the commission-approved FCRC or PCRC instructions, as appropriate. 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 rule, as adopted, 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 rule §26.463 relating to Calculation and Reporting of a Municipality's Base Amount is hereby adopted with changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE 27th DAY OF OCTOBER 1999.

PUBLIC UTILITY COMMISSION OF TEXAS

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Chairman Pat Wood, III

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Commissioner Judy Walsh

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Commissioner Brett A. Perlman