The Public Utility Commission of Texas adopts new §26.467 relating to Rates, Allocation, Compensation, Adjustments, and Reporting. This section is adopted with changes to the proposed text as published in the December 31, 1999 *Texas Register* (24 TexReg 11846). This section is adopted under Project Number 20935.

New §26.467 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.). The new rule is responsive to state policy articulated in HB 1777 to: (1) encourage competition in the provision of telecommunications services; (2) reduce the barriers to entry for providers of services so that the number and types of services offered by providers continue to increase through competition; (3) ensure that providers of telecommunications services do not obtain a competitive advantage or disadvantage in their ability to obtain use of a public right-of-way within a municipality; and (4) fairly reduce the uncertainty and litigation concerning franchise fees. In addition, this section is designed to ensure that municipalities: (1) retain the authority to manage a public right-of-way within the municipality to ensure the health, safety, and welfare of the public; and (2) receive from certificated telecommunications providers fair and reasonable compensation for the use of a public right-of-way within the municipality. This section, relating to rates, allocation, compensation, and reporting, is adopted in accordance with the directive of HB 1777 that, not later than March 1, 2000, the commission shall establish for each municipality, rates per access

line by category for the use of the rights-of-way in that municipality, and the statewide average of those rates per access line by category for each certificated telecommunications provider, if necessary.

Prior to publication of the proposed rule, the commission staff held a workshop on December 18, 1999, at the commission's offices. Input received from the commenters was used to develop the proposed rule. In addition, a workshop was held on January 7, 2000, at the commission's offices. A public hearing on the proposed rule was held at the commission's offices on January 21, 2000. Representatives from municipalities and industry, and other affected persons, attended the hearing and provided comments. To the extent 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 the proposed §26.467. The commission stated that it would consider the costs and benefits in deciding whether to adopt the rule. Additionally, the commission sought comments on whether municipalities whose agreements or ordinances include fee rate escalation provisions are entitled to receive such additional compensation until the natural expiration date of their franchise agreement or ordinance, even though those agreements or ordinances may have been terminated by CTPs by December 1, 1999. The commission asked parties that believe that municipalities are entitled to this additional compensation to provide specific implementation details for including this compensation as part of the base amount. In particular, the commission asked for

explanation on how the commission should establish new rates for those municipalities with fee rate escalation provisions. The commission requested that parties provide specific statutory citation for their rationale.

Where parties responded to the above questions, those comments have also been summarized herein. As a result of the comments received during the comment period and at the public hearing, the rule has been extensively revised and rewritten. Discussion of the comments will refer to the sections of the rule as published in the Texas Register and will note the new location of any affected provision.

Hearing and Commenters

The following parties filed written comments: Austin, El Paso, Everman, Irving, Laredo, Missouri City, Plano, and Rosenberg (Cities); Addison, Baytown, Bedford, Colleyville, Euless, Farmers Branch, Grapevine, Hurst, Keller, Killeen, North Richland Hills, Pasadena, Texas City, Tyler, West University Place, and Wharton (Coalition) (Cities and Coalition filed jointly as "City Coalition"); Cities of Garland and San Angelo (Garland/San Angelo); City of Houston (Houston); City of San Antonio (San Antonio); Texas Coalition of Cities For Utility Issues (TCCFUI), a coalition of 101 Texas cities; and the Texas Municipal League (TML). The comments of these parties are summarized generally as comments from municipalities.

AT&T Communications of the Southwest, Inc. (AT&T); GTE Southwest Incorporated (GTESW); Metropolitan Fiber Systems of Dallas, Inc., Metropolitan Fiber Systems of Houston, Inc., Brooks Fiber Communications of Texas, Inc., MCIMetro Access Transmission Services, LLC, and Worldcom Technologies, Inc. (jointly referred to as MCIWorldCom); and Southwestern Bell Telephone Company (SWBT). The comments of these parties are summarized generally as comments from industry.

Consumers Union and Office of Public Utility Counsel (OPC) also filed written comments.

The following parties did not file written comments but provided oral comments at the public hearing: City of Dallas (Dallas); City of El Paso (El Paso); City of Irving (Irving); Allegiance Telecom, Inc., e.spire Communications, Inc., GST Telecom, ICG Communications, Inc., Intermedia Communications, Inc., Nextlink Texas, Inc., and Time Warner Telecom of Texas (CLEC Coalition); TEXALTEL; and the Office of the Attorney General (OAG), representing state agencies as consumers.

Summary of comments and commission responses

Preamble question regarding fee rate escalation

Municipalities unanimously responded that municipalities whose agreements or ordinances include fee rate escalation provisions are entitled to receive such additional compensation until

the natural expiration date of their franchise agreement or ordinance, even though such agreements or ordinances may have been terminated by CTPs on or before December 1, 1999. TML commented that the rule must, therefore, be amended to address escalation provisions contained in franchise agreements and ordinances extending beyond the year 1999. TML, endorsed by TCCFUI, asserted that agreement on this compromise bill (HB 1777) was only reached when municipalities agreed to allow a CTP to terminate a franchise agreement or its obligations under a franchise ordinance under the condition that CTPs continue to pay the compensation due under the agreement or ordinance, including any escalation of compensation, at the time such compensation would be due under the agreement or ordinance. At the public hearing, TML asserted that the fee rate escalation under the franchise ordinance would live on beyond the providers' termination of an agreement. TML highlighted the importance of including both terms in the bill, agreement and ordinance, for the reason that a telephone company would be unable to repeal a city ordinance. But, TML added that there is no distinction between whether a fee rate escalation provision is in an agreement or in an ordinance because the language of HB 1777 preserved the escalator itself.

TML argued that the key language supporting its analysis is the last sentence of Local Government Code §283.053(b), which describes what comprises the base amount, and specifically includes escalation provisions. TCCFUI asserted that the use of the plural term, "provisions," is inclusive of all escalation provisions in existing franchise agreements or ordinances, not merely those that apply to a single year. TML noted that the limitation on fee rate escalation provisions is that the compensation associated with those provisions cannot be

added into the base amount before the escalation provisions become effective under the existing franchise agreement or ordinance. Therefore, asserted TML, in year 2001 the base amount should be amended to include amounts attributable to fee rate escalation.

TML mentioned that it did not expect the issue of fee rate escalation provisions to be significant to more than 10% of its member cities, but that for some cities, particularly Houston, the issue has great significance. TML specifically cited Houston's participation in the bill negotiations and argued that Houston would never have agreed to the bill if the city would not be allowed to collect the escalation amounts due under its franchise ordinance after 1999.

Describing its vocal participation in the negotiations over HB 1777, Houston stated that the compromise reached in Chapter 283 of the Local Government Code, to which industry agreed, required only that escalation provisions become effective no sooner than when they become due under the franchise or ordinance adopted before January 12, 1999. Houston explained that its escalation provision was adopted on July 22, 1998, as part of a codified ordinance of universal application to all telecommunications providers (Ordinance Number 98-593), regardless of the term of their agreement with Houston, in order to ensure a non-discriminatory rate structure. Houston asserted that its escalation provision clearly qualifies under HB 1777 as "specifically prescribed in applicable agreements or ordinances effective or adopted by January 12, 1999."

In their written comments, several cities described the financial impact upon revenues of failure to include future fee rate escalation. Houston stated that failure to amend the proposed

substantive rule would result in a potential loss of municipal fee revenue to Houston in the following amounts: year 2000, $5 million; year 2001, $10.9 million; year 2002, $16.8 million; year 2003, at least $16.8 million; and every year thereafter, at least $16.8 million. Similarly, San Antonio asserted that it would incur a significant financial loss if fee rate escalation provisions were disallowed, conservatively estimating a loss of revenue of $430,000 for the period April 1, 2000 through December 31, 2000, with future loss of revenue compounded by the removal of escalation revenues from the revenue base. San Antonio's fee rate escalation provisions of their existing franchise agreements are based upon the annualized change in the Consumer Price Index (CPI) and financial projections have been made based on stable revenue growth that is founded on the escalation provisions of the existing agreements. San Antonio echoed the sentiments of TML and Houston, explaining that their support of the legislation was premised on the understanding that the implementation of such legislation would not negatively impact municipalities. Similarly, Garland/San Angelo asserted that it is commonly understood that all parties involved in the negotiation of HB 1777 agree that municipalities should be made whole and allowed to receive the benefit of the escalation provisions as they become due. San Antonio contended that the implementation of this legislation should not become an opportunity for CTPs to reduce their financial obligations to a municipality as previously mutually agreed upon in agreements, which were the result of good faith negotiations. San Antonio observed that "fair and reasonable compensation for the use of a public right-of-way", pursuant to Local Government Code §283.001(b)(2), has been defined through the negotiation of existing franchise agreements to include escalation provisions; accordingly, to not allow these mutually agreed-

upon escalation provisions, alters what has been defined as fair and reasonable compensation by both parties.

Houston explained that its ordinance establishes rates per linear foot of public right-of- way occupied that are used to compute total compensation from telecommunications providers for four 12-month periods beginning October 1, 1998, and ending September 30, 2002; thereafter, the rate per linear foot escalates with the CPI until the expiration of all agreements on December 31, 2003. Houston clarified that its rate per linear foot, which is used to determine total annual compensation, specifically escalates in stated increments from 1998-2002, until the escalation is fully phased-in, and that for periods thereafter, annual escalations pursuant to CPI maintain rates at the full phase-in amount. Further, Houston stated that there is no statutory authority for limitation of the operation of an escalation provision such as Houston's and proposed giving effect to municipal escalation provisions.

At the public hearing, Houston elaborated on the interplay between an agreement and an ordinance, explaining that, because its fee rate escalation provision is not in the agreement with the CTP but in its code of ordinances, the understanding during the negotiations was that termination of the agreement could not override the ordinance. Responding to the discussion, El Paso added that cities enacted umbrella ordinances to govern the terms of all franchises in order to be non-discriminatory. El Paso believed that the deliberate wording of the statute, "franchises or ordinances," was designed to address this situation.

Arguing that "HB 1777 essentially grandfathers the bargains struck by municipalities for compensation for use of rights-of-way," City Coalition also supported the continuation of fee-rate-escalations for years beyond 1999. City Coalition argued that whether CTPs choose to terminate the underlying agreements is irrelevant for purposes of determining compensation. Garland/San Angelo echoed this position, citing Local Government Code §283.054(a), as clear evidence that a termination of a contract is not intended to prevent municipalities from obtaining the full benefit of agreements they made with the telecommunications providers through franchise provisions. As to implementation of revisions to base amounts, Garland/San Angelo argued that this is clearly contemplated under HB 1777 and could be easily included in the commission-allowed revisions during September of each year.

Similarly, City Coalition recommended that these adjustments to the base amount be made each calendar year pursuant to a municipality's filings prior to September 30 of each year. City Coalition observed that, because HB 1777 plainly indicates that a municipality's base amount "shall include the municipal fee rate escalation provisions," the fee rate escalations are not "additional compensation." Instead, City Coalition contended that fee rate escalations are a legislatively mandated component of the base amount, with the only restriction that these escalations be given effect only at the agreed-upon dates of the original instrument. In its comments, City Coalition recommended the inclusion of a separate subsection (d)(2) to provide municipalities a yearly opportunity to increase their base amount by giving effect to fee rate escalations provisions; TCCFUI endorsed the language proposed by City Coalition.

SWBT, the only industry party that filed written comments on the question of fee rate escalation provisions, argued that only the fee rate escalation provisions in fixed-term agreements or ordinances continue until the end of the fixed term, regardless of whether the CTP elects to terminate. SWBT argued that the fee rate escalation provisions in renewable or automatically renewing agreements or ordinances end upon a CTP's election to terminate. SWBT distinguished "qualified" fee rate escalation provisions as those that are found in fixed-term agreements or ordinances, and that truly are fee rate escalations wherein a rate is adjusted by a specified percentage or changes in the CPI. SWBT argued that fee rate escalations are basically only found in fee-per-line agreements or ordinances.

El Paso expressed strong disagreement at the public hearing in response to SWBT's comments regarding limiting the fee rate escalations to franchises or ordinances that specify a fee per line rate. El Paso stated that there is no reason for the term "fee rate escalation" to be limited to only agreements or ordinances that had fee per line rates. Observing that all these payments to municipalities are fees, El Paso contended that escalation is not tied to a fee-per-line rate, but is meant to describe increases in the levels of payment that are required by the ordinance or the franchise. Responding to staff questions about the effect of termination upon fee rate escalation provisions, El Paso asserted that the same law that granted the right to terminate the agreement also preserved certain terms of that agreement, namely, the fee rate escalation provisions.

Additionally, SWBT requested that rate adjustments be calculated so as not to multiply their effect and result in a windfall to cities. SWBT suggested that any escalation be applied only to

the access lines of those CTPs that were bound by that preexisting agreement or ordinance. SWBT did agree that the increased dollar amount (associated with escalation of the lines of only certain CTPs) should be divided by the most recent access line counts of all CTPs with access lines in the municipality to calculate a new rate. SWBT noted that this calculation would increase the access line rate slightly for all CTPs but not at the same rate as the percentage increase in fee rate escalation. SWBT proposed adding a new section to provide a uniform system for calculating the fee rate escalation. SWBT also proposed language that would subject a municipality's petition to the applicable requirements of the commission's procedural rules.

Replying to SWBT's comments regarding application of fee rate escalation provisions to other providers, Coalition of Cities asserted that the fee rate escalation should be applied to everyone in a nondiscriminatory manner going forward. Coalition of Cities opined that, absent HB 1777, a new provider would have been subject to franchise fees in effect at the time of entry, and thus, would have paid at the higher rate. SWBT responded that the kinds of various ordinances that are in effect are unknown and, if applied to all other carriers in a city, could bump up municipal revenues far beyond what was expected. SWBT argued that the basis for compensation under HB 1777 is no longer about the benefit of the bargain struck under a contract; rather compensation is based on the agreement or ordinance in effect at the time the bill (HB 1777) was passed. TML responded that the bill was not intended to deny valid and agreed-to escalation provisions just because of difficult or complicated implementation.

Commission response

The commission does not agree with municipal commenters that HB 1777 provides for the continuation of fee rate escalations for years beyond the effective date of the right-of-way fees adopted under HB 1777 and, therefore, declines to add language providing a mechanism to incorporate fee rate escalations on an ongoing basis. The commission agrees with City Coalition that fee rate escalations are a legislatively mandated component of the base amount. Section 283.053(b) of the Local Government Code requires the base amount prescribed under that subsection to include the municipal fee rate escalation provisions and the value of in-kind services or facilities received in 1998, but prohibits that additional compensation from becoming part of the base amount before it becomes effective under the existing franchise agreement or ordinance. Municipal commenters rely upon this latter language for the position that the legislation allows additional compensation, in the form of fee rate escalations, to be added to the base amount as they become effective under the city's franchise agreement or ordinance, as if those agreements or ordinances were not terminated and were still in effect. In other words, municipal commenters assert that they are entitled to compensation under both HB 1777 and their terminated contracts. The commission does not support this interpretation of HB 1777.

The commission interprets Local Government Code §283.053(b), ("...additional compensation may not become part of the base amount before it becomes effective under the existing franchise agreement or ordinance.") to prohibit municipalities from depreciating to present value the total value under the fee rate escalation provision over the life of the contract and including this future

revenue stream as part of the 1998 base amount. Further, the commission interprets Local Government Code §283.054(a), ("A termination under this subsection does not affect the calculation of the municipality's base amount under Section 283.053.") to require the commission to give effect to provisions of a terminated contract between December 1, 1999 (the date by which agreements or obligations under an ordinance had to be terminated) and March 1, 2000 (the date by which the commission must develop rates.)

Local Government Code §283.054(a) goes on to state: "A provider may elect to terminate a franchise agreement or obligations under an existing ordinance as of the effective date of the right-of-way fee rates adopted in accordance with the commission's rules adopted under this chapter." This section clearly establishes that providers' obligations under their old franchise agreements or under the ordinances in effect at the time of termination end because of the providers' election to terminate pursuant to HB 1777. To allow municipalities to annually adjust their base amounts due to fee rate escalation would mean that the obligations of the CTPs continue beyond March 1, 2000 and, therefore, would be inconsistent with the statute.

The commission believes that the focus on the inclusion of fee rate escalation in the base amount inappropriately disregards the fact that the sole function of the base amount is to develop initial access line rates. Once the base amount is established, including all revenues for 1998, in-kind services received in 1998, and fee rate escalation as of the effective date of the commission's adopted initial right-of-way rates, as appropriate, the role of the base amount is completed. From then forward, changes are made to access line rates, not to the base amount. For example, under

§283.055(g) of the Local Government Code, the commission is required to annually adjust the rates per access line by one-half the annual change in the CPI. The base amount is a means to an end—it is the means by which a rate is developed to ensure full compensation to a municipality. There is no language in HB 1777 directing the commission to revisit the base amount and annually recalculate rates to allow for inclusion of fee rate escalation. Similarly, HB 1777 does not permit the commission to lower rates, once these rates have been established to reflect line growth. Rather, HB 1777 struck a balance to permit a standard increase of municipal revenues from the levels in effect at enactment due to both line growth and inflation.

Central to the municipalities' arguments is that the base amount should be revised annually to include compensation attributable to fee rate escalation provisions. This analysis requires that, for cities having fee rate escalation provisions, a new set of rates would have to be established annually on a staggered basis as each city’s fee rate escalation provision becomes effective under that municipality's franchise agreement or ordinance. The commission finds that Local Government Code, Chapter 283 does not direct the commission to adjust rates annually to reflect fee rate escalation. Pursuant to Local Government Code §283.055 relating to the commission's determination of fees, the commission must establish rates on March 1, 2000. Thereafter, rates can be revised only under certain circumstances.

Section 283.055, Local Government Code explicitly provides only three ways in which the access line rates, by category, established by the commission can be adjusted. First, Local Government Code §283.055(d), allows a municipality to request a modification of the

commission's default allocation once every 24 months. Changing the default allocation will result in a change in the rates. Next, additional changes to the rates will come under Local Government Code §283.055(g). This section requires the commission to adjust all cities' access line rates beginning 24 months after the date the commission establishes access line rates by an amount equal to one-half the annual change, if any, in the CPI. Finally, rates may change pursuant to Local Government Code §283.055 (h). This section allows an affected municipality to annually decline all or any portion of any increase in the access line rates.

Conspicuously missing from Local Government Code §283.055, is language to direct the commission to adjust rates as a result of fee rate escalation provisions. Moreover, Local Government Code §283.053 relating to calculation of the base amount, is silent on any revisions to the base amount itself. Clearly, adjustments to the base amount or changes to commission-established rates are very significant issues. Had the legislature intended to annually revise the base amount and establish new rates, or adjust rates in some other way, it could easily have added language in either Local Government Code §283.053 or §283.055 to make clear the commission's responsibility to make such adjustments.

Contrary to Houston's assertion that there is no statutory authority for limitation of the operation of an escalation provision, HB 1777 very clearly limits the operation of Houston's escalation provision by allowing CTPs to terminate franchise agreements and ordinances under Local Government Code §283.054. Section 283.054 allows a municipality to "collect franchise fees and other charges under that franchise agreement or ordinance until the date on which the

agreement or ordinance expires by its own terms or is terminated." The legislature equated contract termination to contract expiration in this section. There is no indication that the legislature intended certain portions of the terminated agreement to continue in force, nor does El Paso provide any support for its contention that certain terms of the agreement, including fee rate escalation and perhaps other provisions, are preserved.

Municipalities' emphatic reliance upon the benefit of their bargain, the bargained-for exchange in their individual agreements or ordinances, and other contract-related principles disregards the stated goal of HB 1777—to establish a uniform method for compensating municipalities. Individual contracts, by their very nature, are non-uniform. Fee-per-line rates are a uniform system that meets all the stated purposes under Local Government Code §283.001(c). Moreover, municipalities' argument disregards the fact that HB 1777 creates a completely new framework for compensating municipalities for the use of public rights-of-way, thereby changing the status quo altogether. The commission believes that, in light of the forward-looking and progressive intent of HB 1777, it would be inappropriate to maintain a parallel compensation structure based upon terminated agreements or ordinances.

Furthermore, because fee rate escalation provisions are designed to capture varying aspects of growth within a municipality, to allow the continued inclusion of those amounts under the commission's rules implementing HB 1777 will amount to double compensation to the municipalities while, simultaneously, subjecting customers to duplicative fees. While it may be true that for some cities the uniform compensation framework of HB 1777 will slow the rate of

increase of municipal compensation as compared with certain individual contracts, it is not true that compensation will remain static under HB 1777. As is evident under the line-counting methodology of HB 1777 and the commission's rules, for every new line that is added from now into the future, municipal compensation will increase. Similarly, for every line added when a municipality annexes an unincorporated area, municipal compensation will increase under HB 1777. When, in 2002, as required by HB 1777, the commission adjusts the rates per access line for each municipality by an amount equal to one-half the annual change in the CPI, municipal compensation will again increase. The commission concedes that the only type of growth not captured under HB 1777 is growth in vertical services, previously tracked by gross receipts agreements or ordinances. However, the deliberate selection of a fee-per-line structure underscores the legislature's rejection of this old mode of compensation.

Since fee rate escalation provisions are typically tied either to increases in CPI or increases in revenue attributable to growth in lines, they closely parallel the identical growth sources captured under HB 1777. Accordingly, interpreting HB 1777 to permit the continuing applicability of contract fee rate escalation provisions beyond the effective date of the initial right-of-way fees adopted by the commission would require CTPs, and, therefore, customers, to compensate municipalities twice. Even under a value theory this duplicative approach is excessive. The commission concludes that to permit municipalities to retain fee rate escalation provisions and to enjoy the benefits under HB 1777 would not serve the public interest and would not comport with the intent of HB 1777.

General matters

SWBT proposed that a new section be created to add definitions for the terms "fee rate escalation provision", "unbundled network element (UNE)", and "commission clearinghouse." (This last term is one SWBT created as part of SWBT's proposed rule framework.)

During the public hearing, parties discussed whether the statewide average rate, per category that the commission will develop should be a weighted average or not. Staff observed that developing statewide rates weighted by access line count would likely result in higher access line rates, given that rates in the populous urban municipalities (where there are more access lines) are higher than municipal fees assessed in rural, less-populated areas (where there are less access lines). TML stated that an average was used because Chairman Gary Walker of the House Land and Resources Committee essentially indicated that he wanted something in the bill to allow small cities in rural areas to collect more revenue than they had received in the past because he felt that these small cities in rural areas had been at a negotiating disadvantage vis-à-vis larger cities. Accordingly, TML expected to see the base amounts for rural cities that chose the statewide average to increase. TML observed that, under HB 1777, city councils have the option to decline part of the increased revenue. Accordingly, TML expressed support for staff's use of a weighted average (weighted by access line counts) to calculate statewide average rates, by category.

Commission response

The commission disagrees with SWBT's proposal to create new definitions for "fee rate escalation provision" and "UNE". The commission does not believe that these terms require additional elaboration. As to the terms SWBT has created, such as "commission clearinghouse", the commission will not be using these terms so no definition is necessary. Accordingly, the commission declines to add a section containing definitions.

Regarding the discussion over use of a weighted average, the commission appreciates the clarification on this point and will develop statewide average rates weighted by access line counts.

Subsection (c)(1)

Proposed subsection (c)(1) required the commission to establish initial rates for each category of access lines in a municipality no later than March 1, 2000, and allowed for initial rates to be updated before April 1, 2000, pursuant to proposed subsection (d). The updated rates would be in effect until a municipality makes revisions to its rates pursuant to proposed subsection (f).

TCCFUI supported the rate determination provisions of proposed subsection (c), particularly the use of 1998 access line counts provided under subsection (c)(2). TCCFUI asserted that to

prevent dilution of the per line charge, the access line count must be consistent with the 1998 base amount period.

AT&T recommended modifying the last sentence of proposed subsection (c)(1) for clarity because, although the commission requires updated rates to remain in effect until revised, no similar provision applies to initial rates that are not updated.

Commission response

The commission agrees with AT&T that the treatment of initial rates should be clarified. Accordingly, the commission has added wording to proposed subsection (c)(1) (renumbered as new subsection (f)) to make clear that initial rates remain in effect unless and until those rates are updated and/or revised. All references in proposed subsection (c)(1) relating to updated rates have been moved under new subsection (g).

Subsection (c)(2)

Proposed subsection (c)(2) required the commission to use a 1998 access line count for establishing rates for access lines.

TCCFUI, Cities and City Coalition agreed with the line count periods established under proposed subsection (c)(2). Garland/San Angelo agreed with comments filed by TCCFUI, Cities and the City Coalition regarding the line count period.

Commission response

Proposed subsection (c)(2) has been moved to new subsection (c) and combined with the language from proposed subsection (c). In an effort to clarify the relationship between access line counts and the establishment of access line rates, the commission determines that a formula would be helpful. Accordingly, the commission has added language to new subsection (c) explaining the commission's formula for developing access line rates.

Subsection (c)(3)

Proposed subsection (c)(3) (renumbered as subsection (d)) outlined procedures for estimating 1998 access line counts from 1999 data. Proposed subsection (c)(3)(A) and (c)(3)(B) outlined methods to deriving a 1998 access line count from a 1999 line count by developing statewide access line growth rates for 1999. Proposed subsection (c)(3)(C) outlined procedures for a municipality to petition the commission to use a municipality specific growth factor rather than using the statewide growth rate.

SWBT claimed that municipalities' petitions for use of different growth factors for 1999 should be subject to notice and other applicable requirements of the commission's procedural rules. SWBT commented that these procedures would afford affected CTPs the opportunity to participate in, and to offer evidence relevant to, the commission's decision-making process.

TCCFUI and City Coalition concurred with the proposed mechanisms for determining access line counts and the specific growth rates set forth in proposed subsection (c)(3)(A) and (B). TCCFUI also concurred with proposed subsection (c)(3)(C) (which allowed the use of municipality specific growth rates) because it would allow a city to correct any gross inequity that might result from application of the statewide growth rates specified in subsection (c)(3)(A) and (c)(3)(B).

Commission response

The commission generally agrees with SWBT's suggestion that proposed subsection (c)(3) (renumbered as (d) and revised and reorganized) should be revised to give CTPs notice of municipalities' requests to use of different growth factors for 1999. However, the commission finds merit in requiring municipalities to notify affected CTPs and in allowing CTPs to provide alternative information for the commission's consideration. Accordingly, the commission has revised this section to clarify that CTPs may object to municipality-specific growth rate(s), by category, but must provide actual 1998 line count data for the commission to consider. The commission notes that the use of growth rates altogether would be unnecessary if CTPs provide

the statutorily mandated 1998 line counts. In the absence of such information, accommodations must be made to meet the clearly articulated statutory requirements.

Accordingly, the commission has added language in new subsection (d)(3)(B) to require a municipality requesting to use different growth factors for 1999 to provide a copy of its request to all CTPs that have filed access line counts for the municipality no later than March 15, 2000. In addition, in renumbered new subsection (d), the commission has set a deadline of March 31, 2000 on CTPs' objections to the requests. The commission has also clarified that, until the request approval process has been resolved, the access line rates established by the commission using the growth rate(s) pursuant to proposed subsections (c)(3)(A) and (B) (renumbered as (d)(1) and (2), respectively) shall be implemented. Further, upon resolution of any objections to the request approval process, newly renumbered (d)(3)(D) requires the commission to develop new access line rates incorporating the new growth rate(s), by category, as appropriate.

Subsection (d)

Proposed subsection (d) (generally renumbered as subsection (g)) provided municipalities with a one-time opportunity in the year 2000 to update the base amount and allocation formula that each municipality filed pursuant to §26.463 relating to Calculation and Reporting of a Municipality's Base Amount.

TCCFUI strongly supported allowing updates to municipality filings, saying that this will enable cities and the commission to make necessary adjustments to ensure that the municipal fees charged are fair and in accordance with the stated goals of HB 1777. TCCFUI believed that the adjustment provisions are reasonable and necessary given the accelerated statutory deadlines mandated by HB 1777. TCCFUI stated that this would allow cities to avoid unanticipated customer impacts and will result in a more successful implementation of HB 1777.

City Coalition commented that updates should be annual, not one-time because cities need to update for a variety of reasons. Municipal parties uniformly requested including language in subsection (d)(1) (renumbered as subsection (g)(1)(A)) to address adjustments attributable to fee rate escalation provisions. City Coalition specifically recommended the inclusion of language providing a yearly opportunity to give effect to escalation provisions by increasing the base amount. In addition, City Coalition recommended that cities should be allowed to petition the commission to increase the base amount when facility owners that compensated a city independently, and were therefore, excluded from the base amount, begin to compensate a city under the provisions of HB 1777.

SWBT suggested clarifying proposed subsection (d) (renumbered as subsection (g)) to state that a municipality may file a petition subject to commission procedural rules and to update its year 2000 rates only on two bases: calculation errors or changes attributable to year 2000 fee rate escalation provisions. SWBT commented that any updates to municipality filings should be

subject to commission approval, therefore recognizing a CTP's right to contest adjustments claimed by cities.

MCIWorldCom observed that although the proposed rule allowed true-up provisions for municipalities' base amounts and allocation, respectively, no true-up was available for CTPs' line counts. At the public hearing, MCIWorldCom identified problems in timely providing accurate initial access line counts, in part due to difficulties in allocating access line counts between a core city and suburbs. MCIWorldCom requested some time to be able to fix any errors in the count in the initial report. AT&T also pointed out that nothing in the proposed rule allows CTPs to fix their access line count. Similarly, SWBT proposed language to afford CTPs a one-time opportunity to correct calculation errors. MCIWorldCom proposed a true-up period for CTPs to run from January 25, 2000, through February 24, 2000, for CTPs to revise their access line numbers in extraordinary circumstances such as inadvertent errors and math mistakes.

Commission response

The commission declines to adopt City Coalition's recommendation to retroactively increase the base amount when facilities owners that are presently non-CTPs obtain certification from the commission and begin to compensate a municipality in the future pursuant to HB 1777. The commission finds that there is no basis under HB 1777 for such an adjustment. The formula for calculating base amount under HB 1777 is clearly outlined. HB 1777 defines base amount to include compensation from providers who were CTPs in 1998. Accordingly, compensation from

non-CTPs is outside HB 1777. Should a non-CTP obtain certification to provide local exchange service, any access lines of the newly certificated CTP will be considered new lines and will be compensated at the commission-established rates as would any new line not previously reported under HB 1777. Therefore, making retroactive adjustments to the base amount to capture compensation from non-CTPs who become CTPs at a later date would be inconsistent with the statute's definition of base amount.

As explained previously, the commission does not agree that HB1777 allows the inclusion of fee rate escalation provisions beyond the establishment of the commission's rates on March 1, 2000. Accordingly, the commission declines to add language providing an annual opportunity for municipalities to revise the base amount to include amounts determined under franchise agreement or ordinance fee rate escalation provisions. The commission has added language to new subsection (g) to accommodate fee rate escalations for the period between January 1, 2000 to March 1, 2000. The commission's allowance of the one-time base amount update in proposed subsection (d) was solely designed to compensate for errors or omissions attributable to the rapid transition to the HB 1777 process. However, affording municipalities a one-time chance to ensure that their 1998 figures are accurate should not be seen as the basis for allowing perpetual revisions. In particular, the commission finds no support in HB 1777 for the proposition that the base amount should be annually adjusted upward as contracts that were not terminated under HB 1777 begin to expire. Therefore, the commission declines to amend the rule to allow annual revisions to the base amount.

In response to SWBT's suggestion that municipal petitions are subject to notice and other applicable commission procedural rules, the commission generally agrees that requiring municipalities to provide notice to affected CTPs is appropriate and has added clarifying language in new subsection (g).

The commission disagrees with SWBT that the base amount should be updated only due to calculation errors or fee rate escalation provisions. The commission believes that base amount should also be updated if a municipality receives delayed payments for 1998 use of rights-of-way from certificated telecommunication providers. This allowance is consistent with the commission rules for calculating base amount established under §26.463 of this title (relating to Calculating and Reporting of a Municipality's Base Amount). The commission will continue to exercise appropriate oversight in reviewing municipal base amounts and will crosscheck municipal figures against CTP filings.

The commission agrees with MCIWorldCom and SWBT that CTPs should be afforded the opportunity to correct errors in reported access line counts. The commission acknowledges the difficulties inherent in developing a retrospective access line count that takes into consideration a new definition of access lines, the creation of three categories of access lines, and the requirement to report on a city-by-city basis. Nonetheless, access line counts are the cornerstone of the fee-per-line system established under HB1777 and must be accurate to ensure the success of the entire uniform method of compensating municipalities for the use of a public right-of-way by CTPs. Moreover, as the establishment of rates is dependent upon precise access line counts,

by category, for 1998, the commission supports allowing CTPs the opportunity to correct errors in reported access line counts, under certain circumstances. Given the importance of this baseline information, corrections must be made in a timely and efficient manner, to ensure that revised access line counts can then be translated into revised rates. The commission notes that the timely filing of corrected access line counts is particularly important given that cities will be filing their base amount and allocation revisions between March 1 and March 31, 2000. Accordingly, to allow time to process revised access line counts the commission has imposed a deadline of March 15, 2000 for CTPs to file revised access line counts. The commission has added language to this effect under new subsection (g)(2).

The commission intends the March 15, 2000 deadline to act as a final time limit, not a one-time opportunity. After the required filing of the access line count on January 24, 2000, should a CTP discover errors, that CTP should immediately update its access line count and file it with the commission. As the commission works to meet its March 1, 2000 deadline for developing rates for each municipality in Texas, it will endeavor to incorporate any updated information received by February 20, 2000. Therefore, in essence, the commission is allowing an extensive true-up period, as suggested by MCIWorldCom.

Subsection (d)(1)

Proposed subsection (d)(1) (renumbered as subsections (g)(1) and (g)(1)(A)) allowed a municipality, on or before April 1, 2000, to petition the commission to update its base amount with appropriate justification for the update.

SWBT argued that municipalities should not be permitted to "update" their year 2000 rates based on 1998 fees they either chose not to collect, or failed to collect until the year 2000. SWBT contended that there is no sound policy reason or statutory authorization to support allowing municipalities who did not collect fees from all CTPs within their boundaries in 1998 now, to adjust their rates in 2000. SWBT asserted that cities knew or should have known who was operating within their 1998 jurisdictions by construction permits applied for or sales tax paid.

Commission response

The commission disagrees with SWBT's contention that there is no sound policy reason to support allowing municipalities to adjust rates based on the failure to collect rates in 1998. Because the legislature chose to base future rates upon the base year of 1998, it is critical that the base year fully reflects a city's revenues. That is not to say, however, that the commission has set limitless opportunities for municipalities to begin collecting long overdue fees. While the commission believes it appropriate public policy to allow time for legal actions to run their course and to result in judgments or settlements, the commission does not agree that this process should be uncontrolled. The commission has allowed this one-time opportunity to cities that have worked to address issues of outstanding payments in a prompt manner. As to future

recovery of unpaid franchise fees, municipalities will continue to be able to pursue their legal rights in court. It is essential that issues from the past achieve closure to allow implementation of the new fee-per-line system in an administratively feasible manner.

Subsections (d)(2), (d)(3) and (d)(4)

Proposed subsection (d)(2) (renumbered as subsection (g)(1)(B)) allowed a municipality that has filed its own allocation formula before December 1, 1999, to petition the commission and file an updated allocation formula before April 1, 2000. Proposed subsection (d)(3) (renumbered as subsection (g)) mandated that the commission use the new base amount and allocation formula filed pursuant to proposed subsection (d)(1) and (d)(2) to establish updated access line rates for a municipality. Proposed subsection (d)(4) (combined into renumbered subsection (g)(3)) stated that a municipality wishing to choose lower access line rates than its initial or updated rates must notify the commission and all CTPs in that municipality of the lower rate(s) it chooses no later than April 1, 2000.

Garland/San Angelo generally agreed that all municipalities should have an opportunity under proposed subsection (d)(2) (renumbered as subsection (g)(1)(B)) to adjust the allocation formula during the first year of application of the access line fees in order to revise any unintended consequences of the chosen allocation methodology. Garland/San Angelo pointed out that, after the commission establishes fees per access line using a city's allocation methodology, and the rates are not as intended, misunderstandings or errors may become apparent to municipalities.

However, Garland/San Angelo noted that if the commission notifies municipalities of the rates per access line by March 1, 2000 the municipalities will need sufficient time to review and assess whether the fees actually turned out as intended and, if not, will need additional time to revise the allocation. Accordingly, to allow sufficient time for municipal governing bodies to act upon re-allocation, Garland/San Angelo proposed changing the deadline for petitioning the commission for changes to the allocation formula from April 1, 2000 to at least May 1, 2000. Garland/San Angelo reiterated the need for more time for municipalities to determine whether to choose lower access line rates than initial rates under proposed subsection (d)(4) (combined into renumbered subsection (g)(3)). At the public hearing, Irving emphasized the constraints upon municipal decision-making imposed under the Open Meeting Act. Irving asked that the commission not shorten the 30-day period currently allotted to cities. TML pointed out that getting the word out to cities would be difficult enough in 30 days.

SWBT recommended amending proposed subsection (d)(2) (renumbered as subsection (g)(1)(B)) to require municipalities to notify all affected CTPs of their revised allocation formulas and to not permit cities to change their formula more than once every 24 months. Also, SWBT suggested amending proposed subsection (d)(3) (renumbered as subsection (g)) to make clear that any "updates" to municipality filings are not automatic, but instead are subject to commission approval, thereby recognizing CTPs' right to contest changes to allocations and other claimed adjustments. Furthermore, SWBT proposed detailed rule language for contesting the filings of municipalities or CTPs. GTESW raised the same issue at the public hearing.

As to contesting municipal allocations, at the public hearing, industry parties agreed that it would be fair to presume that CTPs will contest allocations that result in rates greater than the price of the service. However, parties could not unequivocally state that lower ratios between rates and prices would be unobjectionable. OAG contended that reasonable municipal fees, as established in rates, should be less than half the price of the service. Municipal parties indicated agreement with the bright-line test for contesting allocations, pointing out that cities have actively sought to avoid creating rates that approach the value of the service; municipal parties asserted that any such occurrence in the past was accidental and remedied soon after it occurred. TML did point out, however, that there could be unique circumstances, particularly where a point-to-point service has a very low price that should not jeopardize the entire allocation. TML, City Coalition and City of Houston opined that it would be rare for an access line rate to be set higher than the price of the service and would probably be a mistake that could be easily fixed.

At the public hearing, SWBT explained that it could not accommodate conversion to new rates on a city-by-city basis; if the rates of one city change, it jeopardizes SWBT's ability to implement those rates for every city in Texas because SWBT has a single billing system, not a billing system for each city. AT&T and GTESW shared these concerns. SWBT observed that its implementation must take place by June 1, 2000 regardless of whether a city changes rates after March or April. Because SWBT produces releases to its billing systems every three months, September would be the next window for SWBT to make changes to its billing systems.

AT&T suggested that the commission consider allowing a CTP to request a good-cause exemption from the 90-day implementation deadline due to adjustments to a few cities' rates delaying implementation of the entire billing system. TML responded that cities would be unlikely to object to such an exemption so long as the CTP continued paying under the preexisting franchise agreement or ordinance until the new rates go into effect. When asked by staff whether cities would forego any right to true-up between expected payments under HB 1777 and continuing payments under a franchise agreement for the period of time associated with a delay in the CTP's implementation of revised rates, TML indicated its goal was to be accommodating. To that end, TML observed that HB 1777 was not intended to create windfalls for cities.

Additionally, GTESW proposed incorporating language to ensure that CTPs have up to 90 days to implement any rate changes from the commission, as well as to clarify that CTPs shall continue to compensate a municipality at current rates until updated rates are implemented by the CTPs. At the public hearing, GTESW also asked about the commission's turnaround time to develop updated rates based upon adjustments made by cities.

Commission response

The commission cannot accommodate the time extension requested by Garland/San Angelo. The commission will endeavor to provide municipalities with commission-established rates on or before March 1, 2000. To provide municipalities maximum flexibility to review the results of

their allocation choices, the commission has already afforded cities 30 days. The commission must also afford its staff sufficient time to implement any adjustments made by cities. Accordingly, the commission declines to allocate additional time for purposes of municipal decision-making.

The commission acknowledges that Local Government Code §283.055(d) explicitly affords CTPs the right to complain about a municipality's allocation on the basis that the allocation is not just and reasonable, is not competitively neutral, or is discriminatory. The commission agrees with SWBT that updates to municipal filings are subject to commission approval and that revisions to allocation formulas must be just and reasonable, non-discriminatory and competitively neutral. As requested by GTESW and SWBT, the commission has added language in new subsection (i) to outline the process for resolution of municipal allocation matters.

Furthermore, although parties could not unequivocally state that lower ratios between rates and prices would be unobjectionable, all parties agreed that, where the access line fee, by category, is greater than or equal to the market price of a service, CTPs would contest allocation decisions. Given that allocation must be just and reasonable, competitively neutral and non-discriminatory, the commission found it appropriate to create a presumption to that effect. The commission has added new subsection (i)(3) to establish that where market price of a service is equal to or less than the access line rate for that category, as developed using a municipal allocation formula,

that formula shall be presumed to be discriminatory, not just and reasonable and not competitively neutral.

In new subsection (k), the commission has significantly clarified the process by which CTPs must implement rate changes. Under HB 1777, CTPs are allowed, to the extent required, 90 days after the date the commission establishes rates on March 1, 2000 to implement the commission-established access line rates. The commission notes that HB 1777 contemplates that some CTPs will be able to implement the rates sooner but that, to the extent a CTP requires the full 90 days, they are afforded the time needed to do so. The commission strongly urges CTPs that are able to implement commission-established rates in less than 90 days to begin doing so. To that end, the commission has included language in new subsection (k)(1) to make this responsibility unambiguous.

However, the commission has taken into consideration the fact that affording municipalities a 30-day window from March 1, 2000 to March 31, 2000 in which to update rates and allocation formulas will require the commission to establish new rates. The institution of updated rates will require additional changes to billing systems. To minimize the disruption to CTPs' billing systems and to avoid unnecessarily confusing customers' bills, the commission has allowed CTPs flexibility to make necessary changes within 90 days of the effective dates of any updated or revised rates under new subsection (k)(2)(A). The commission notes, however, that the adjustment to the 90-day statutory deadline is limited to situations where a CTP must implement updated or revised rates.

In new subsections (k)(2) and (k)(3), the commission has added language to clarify under which rates a CTP must compensate a municipality in circumstances where the commission-established rates of March 1, 2000 are in effect, or those rates are updated and/or revised, respectively. The commission agrees with TML that HB 1777 was not designed to create windfalls for municipalities. The commission observes that, once municipalities are afforded an extra opportunity to adjust their base amount filings and/or allocation formulas, CTPs must still be assured of the time required to properly implement the resulting rates. Accordingly, a CTP is to pay a municipality at the rates under the franchise agreement or ordinance until such time as the CTP timely implements the commission-established rates and such rates are not subject to true-up.

Subsection (e)

Proposed subsection (e) (remains as subsection (e)) required that the commission develop a default allocation formula for each municipality such that the rates for each category of access line in that municipality would be the same, essentially a 1:1:1 ratio.

TCCFUI, Garland/San Angelo, City Coalition, and OPC requested that the commission change the proposed default allocation, arguing that a ratio of 1:1:1 will tend to result in shifting the burden of paying municipal fees to residential customers. Irving argued that a 1:1:1 ratio is punitive upon cities. Garland/San Angelo noted that, regardless of how franchise fees were

calculated in the past, in most every municipality the residential customers have paid a smaller amount of the franchise fee than have commercial customers; compressing all three categories into one will result in imposing a fee increase on residential customers and a fee decrease on commercial customers, something that municipalities and CTPs have managed to avoid for many years.

Garland/San Angelo urged the commission to establish a rational, fair and meaningful default allocation, claiming that a ratio of 1:1:1 is not meaningful. City Coalition described it as a "non-allocation." Garland/San Angelo contended that having flat rates for each category of lines would not be a meaningful substitute for allocation. Garland/San Angelo contended that it is not the "fault" of the cities that there are various methods to access franchise fees--this was at the urging of incumbent local exchange companies (ILECs).

TML, as endorsed by City Coalition, argued that the proposed default allocation provision is inappropriate because: (1) it would punish, rather than assist, those cities, often smaller cities with few resources, who relied on assistance from the commission to establish an allocation in which the city could have confidence; (2) it would unnecessarily create more work for the commission; and (3) it is inconsistent with HB 1777 and prior law. At the public hearing, OPC also argued that this was a departure from historical practice, which has never been 1:1:1. At the public hearing, TML pointed out that the three categories of access lines are based on the concept of categories with different values.

OPC suggested using a statewide average default allocation. EL Paso expanded on this point at the public hearing, suggesting that the default allocation should be changed annually to reflect any changes in the ratios between statewide average rates for each category. On a slightly different note, Houston suggested that a more equitable approach be applied to the default allocation formula to mirror the most prevalent reported allocation formula for the county in which the municipality is located.

TCCFUI maintained that the default allocation method should preserve existing ratios among access line categories. TCCFUI argued that the most practical method would be to have the default allocation formula reflect the ratio between the statewide average rates for the three access line categories. TCCFUI proposed language suggesting that, since the commission will have calculated the statewide average rate for each category, it would be easy to calculate the ratio between the three categories. City Coalition asserted that the ratio for the default allocation would not be arbitrary if the commission looks to historical ratios between the access line categories.

Generally, the historical ratio between the basic residential rate, the non-residential rate and the private line rate has been around 1:3:5 or 1:3:6, according to City Coalition's comments at the public hearing. Garland/San Angelo suggested a default allocation of 1:2.5 and 1:2.6 respectively for categories 1 and 2, which they put forth as the existing ratio for SWBT's and GTESW's tariffed rates for average residential and commercial service. Garland/San Angelo noted that these ratios reflect the practical application of the pass-through, at least for these two

providers, the largest providers in the state, and, thus, they believe use of these ratios would result in an allocation that more closely reflects the status quo in most cities. At the public hearing, SWBT disagreed that a default allocation of 1:2.5:6 is the norm. SWBT believed that the norm, as such, is indeterminable and varies considerably across the state. GTESW also raised questions about how a norm could be determined. SWBT supported the proposed 1:1:1 default allocation.

TML asserted that an allocation in the range of 1:2.5:6 reflects existing ratios, but claimed that cities would be satisfied with a default allocation ratio that set the residential rate as 1, the non-residential rate between 2 and 3, and the point-to-point rate from 3 to 12. Alternatively, TML and City Coalition suggested that, rather than declaring an actual allocation in the rule, the rule could provide that the default allocation will be the average, or norm, of all the allocations selected by the cities, as determined by the commission.

TML acknowledged that under the proposed rules a city that did not set its own allocation by December 1, 1999, would be allowed to request a modification of the commission's default allocation not more than once every 24 months, thereby allowing a city dissatisfied with the 1:1:1 default allocation to change it. But TML observed that a 1:1:1 ratio would result in more work for both commission and municipal staffs, as municipalities would be forced to return in September to request a reallocation. TML also noted that a few cities would want a 1:1:1 ratio. Despite the opportunity afforded cities to bypass the default allocation and develop their own

allocation, TML emphatically urged the commission to replace the current proposal for equal rates with one that is more representative of the allocations selected by most cities.

Describing the multitude of questions received in workshops and in telephone inquiries, TML described allocation as the most difficult concept for city personnel to grasp, particularly in small cities. According to TML, city personnel gratefully and enthusiastically endorsed allowing the commission staff to establish the allocation. TML expressed concerns that cities' reliance on advice from TML and the commission about allocation will make the cities feel misled, having learned that (1) their rates for future growth are lower than those of other cities; (2) neither TML nor commission staff provided them the help they anticipated; and (3) in order to resolve the problem they must now go through another seemingly complex, possibly expensive procedure before the commission.

TML asserted that there is no rational basis for the proposed default allocation of equal rates for each category. At the public hearing, TML and City Coalition added that no distinction between urban and rural ratios should be made, as issues in both communities are similar. Garland/San Angelo recommended that a default rate be used only in a municipality that has used a percentage allocation, instead of a ratio. TML stressed that the default allocation must be expressed as a ratio, instead of a percentage to avoid cities' losing revenue by inadvertently allocating to a category that had no lines in 1998.

At the public hearing, TML, TEXALTEL, and AT&T argued against staff's proposal to leave the 1:1:1 ratio in place for now and revisit it at a later date. These parties did not believe revisiting the 1:1:1 default allocation later would solve the current problem.

TML also asserted that an equal line rate default is inappropriate because the purpose behind allowing different categories of lines in HB 1777 was to maintain and carry forward the longstanding statewide tradition of basing franchise compensation on value. Citing numerous examples, TML asserted that collection of the value of the use of public property is the normal rule in Texas. TML explained that the overall policy is that public land or property is not to be used, leased, rented, sold or otherwise disposed of for less than its value. TML continued that, if a default allocation were adopted that does not recognize different values according to the type of line and is equal for all categories, it would represent a significant departure from legal precedent and municipal practice.

At the public hearing, AT&T expressed support for a 1:1:1 ratio based on the fact that an allocation is a political decision, not a decision that reflects any incremental burden on the right-of-way of one class of access lines versus another one. GTESW echoed AT&T's sentiment that allocation is a political decision best left up to the cities.

At the public hearing, El Paso expressed the view that it expected the default allocation to be revised annually, just as the statewide average rate would change.

Commission response

After considering municipalities' unanimous requests for the commission to change its default allocation, the commission has revised proposed subsection (e) to set a default allocation of 1:2.3:3.5. The commission has also added language to clarify how the commission established the default allocation and that the commission will establish access line rates for municipalities using the default allocation unless a municipality has filed its own allocation or updates its own allocation pursuant to new subsection (g)(1)(B).

The commission believes that municipal representatives' suggestions to generally preserve existing ratios in the default allocation ratio by using municipal filings has merit. At the time the commission developed its proposed default allocation, municipal filings had not been processed. Therefore, no information was available as to a statewide average allocation. However, at this time, the commission has processed and applied municipal filings under HB 1777, thereby allowing the commission to calculate an average allocation. The commission notes that the commission's new default allocation is an average of filed allocation ratios, not a ratio of the statewide average rates for each category. Also, rather than merely propose a methodology by rule, as was suggested by some commenters, the commission believes it more appropriate and timely to put all affected parties on notice of the specific default allocation. Moreover, when the commission averaged municipalities' allocations, the ratio of 1:2.3:3.5 fell squarely within the range of existing ratios preferred by municipal representatives. Therefore, the commission believes that this revised default allocation preserves existing ratios in a fair manner.

The commission recognizes the importance of the default allocation to the HB 1777 process. Many of the municipalities that have chosen the default allocation are rural, or may lack resources to expend researching allocation issues. Should the proposed 1:1:1 default allocation result in a redistribution of franchise fees, with residential customers experiencing an increase and business customers enjoying a decrease, as argued by TML, TCCFUI and City Coalition, municipalities would be forced to seek a reallocation. As noted by TML, the very cities that most often chose the default allocation are the cities with, arguably, the least resources. Therefore, the commission finds it probable that these municipalities would also be the least likely to pursue reallocation. Thus, customers in rural or small municipalities could be disproportionately affected by a flawed default allocation, because it would remain in effect longer, given municipalities' limited resources to seek reallocation. The commission believes that a revised default allocation of 1:2.3:3.5 is more likely to provide a long-term solution, thereby preserving resources for all parties to HB 1777—CTPs, municipalities and the commission.

Subsection (f)

Proposed subsection (f)(1) (renumbered as subsection (h)(1)) allowed a municipality wishing to change its rates within the maximum established rates to do so by notifying the commission and all CTPs with access lines in that municipality during September of the year of their desire to revise the access line rate. Proposed subsection (f)(2) (renumbered as subsection (h)(2))

provided two options for revising allocation formulas—once every 12 months for municipalities that filed their own allocation formulas on December 1, 1999, and once every 24 months for municipalities that used the commission default allocation rather than developing their own.

TCCFUI supported the provisions allowing cities to revise access line rates. Houston proposed adding language to proposed subsection (f) (renumbered as subsection (h)) to make clear that allowable municipal adjustments include the addition of compensation under fee rate escalation provisions. Garland/San Angelo asserted that this subsection seemed fair but that there should not be any onerous conditions placed upon any filing of a reallocation. Garland/San Angelo suggested clarifying improvements to proposed subsection (f) (renumbered as subsection (h)).

MCIWorldCom observed that proposed subsection (f)(2)(A) (deleted) would allow a municipality to revise its allocation formula every 12 months in September but set no parameters on the allocation formula itself. MCIWorldCom queried whether an allocation of 100% to the non-residential class of customers would be acceptable to the commission. City Coalition complimented the commission for the flexibility afforded to cities for annual revisions, stating that the process outlined by the commission would lower consumer rates, and would allow municipalities to modify allocation formulas. City Coalition urged the commission to make minor changes to the subsection by allowing cities to revise their allocations "before" September 30 of each year as opposed to "during" September of each year.

GTESW recommended that the provision that would allow revision of municipalities allocation formula once every 12 months be deleted, arguing that the legislature did not intend to allow municipalities to make frequent adjustments to their allocation factors. GTESW emphasized that one of the stated purposes of HB 1777 was to provide an administratively simple method of compensation for municipalities and CTPs. GTESW argued that the language in Local Government Code §283.055(d), mandates that allocations be changed no more than once every 24 months. Echoing GTESW's comments, SWBT proposed deleting the word "annual" to be consistent with SWBT's other suggestion for proposed subsection (d) (renumbered as subsection (g)) that a municipality be allowed to revise its allocation formula no more often than once every 24 months. Again, for consistency with its suggestion in proposed subsection (d) (renumbered as subsection (g)), SWBT recommended amending proposed subsections (f)(1) and (f)(2) (renumbered as subsections (h)(1) and (h)(2), respectively) to require notice of the revisions so that CTPs may be afforded the opportunity to contest allocations. GTESW also observed that, although the statute allows CTPs the right to question allocation factors, the commission has not built any time into the proposed rules for CTPs to do so.

Commission response

The commission declines Houston's suggestion that fee rate escalation language be added to this subsection, as discussed previously. The commission agrees with Garland/San Angelo that a municipality that petitions for a change to its allocation must also provide the commission with the appropriate allocation formula. Proposed subsection (f)(2) (renumbered as subsection (h)(2))

has been revised accordingly. The commission also agrees with City Coalition's observations about the timing of city's filings, and will make minor revisions to proposed subsection (f) (renumbered as subsection (h)). Further, the commission concurs with the concerns raised by MCIWorldCom on questionable allocations. However, the commission does not believe that it should set any parameters on allocation, as none are present in the Local Government Code. In response to GTE and SWBT's comments, the commission notes that the Local Government Code §283.055(d) gives CTPs the option to question a municipality's allocation. On complaint from an affected CTP, the commission will evaluate whether the municipality's allocation results in access line rates that are competitively neutral and nondiscriminatory. In its evaluation, the commission will take into consideration factors including, but not limited to, the difference between the price of the service and the access line rate, and the number of lines in particular category. Further, the commission has added new subsection (i) to allow for complaints by CTPs regarding a municipality's initial or revised allocation.

Although the commission initially proposed allowing municipalities the opportunity to revise their own allocation formula annually, the commission has reconsidered this position. The commission agrees with GTESW and SWBT regarding the myriad difficulties associated with allowing annual revisions of allocation formulas. Local Government Code, Chapter 283, gives municipalities the option to change their allocation from the default allocation formula once every 24 months. However, HB 1777 is silent regarding whether a municipality can change its own allocation formula and if so, how often. The commission still supports allowing municipalities an additional 30 days to reevaluate their allocation and base amount choices in

order to minimize unintended consequences to customers, particularly because industry supported the long-term benefits of such a choice. The commission believes that the 30-day period between March 1, 2000 and March 31, 2000 will afford municipalities sufficient flexibility to address inequities in rates resulting from flawed allocation decisions. However, after evaluating the administrative difficulties associated with an annual revision of allocation formulas and the accompanying revisions to rates and billing systems, the commission believes that the most reasonable and administratively simple approach is to limit revisions to allocation formulas and therefore, to access line rates. More importantly, consideration must be given to the effect upon customers in this entire process. Constant changes to municipal fees on customers' bills will add unnecessary confusion to the already complicated customer bill. Therefore, the commission has deleted proposed subsection (f)(2)(A), and revises its original language in proposed subsection (f)(2)(B) (renumbered as subsection (h)(2)) to allow all municipalities to make changes to their allocation formula only once every 24 months. The commission clarifies that this does not include the changes a municipality can make to its allocation formula before March 31, 2000.

Subsection (g)

Proposed subsection (g) (renumbered as subsection (k)), paragraph (1) stated that a CTP should report access line counts, by category, for each municipality, to the commission on a quarterly basis.

AT&T observed that the proposed rule is silent as to the ability of affiliated CTPs to provide a single access line report rather than multiple reports. In order to promote administrative efficiency, AT&T recommended that this subsection be clarified to explicitly allow a CTP to report its own access lines and its affiliates' access lines in an aggregated filing. AT&T anticipated such an arrangement would lead to consolidated payments to municipalities, as well. AT&T suggested adding language to the proposed subsection to expressly allow such filings. AT&T's language also established that a disaggregated line count for each CTP must be made available on request of the commission or a municipality.

SWBT proposed deleting proposed subsection (g) (renumbered as subsection (k)) altogether as duplicative of already adopted §26.465(g)(2)(B). At the public hearing, AT&T stated their understanding that, 45 days after the end of the quarter, the access line count filing would be due simultaneously with the payment to the municipalities. AT&T saw no physical way to report access line counts on the very data that they are supposed to be capturing in the last month of reported data. SWBT responded that because the reporting period covers April, May and June, with the quarterly report due to the commission on June 30, the proposed timeframe would be impossible. SWBT observed that it will not even have those access line counts on June 30 to report, so it has no way to accommodate the commission's proposed schedule.

Garland/San Angelo commented that proposed subsection (g)(1) (renumbered as subsection (k)) was not sufficiently detailed and would not require the type of quarterly report mandated under Local Government Code §283.055(j). Garland/San Angelo recommended that proposed

subsection (g)(1) (renumbered as subsection (k)) be revised to include these statutory requirements.

Commission response

The commission agrees with AT&T that a CTP should be able to file aggregated reports on behalf of its affiliates and has added new subsections (l)(5) and (l)(6). The commission has no objection to a CTP's filing reports on behalf of its affiliates so long as, upon request by either the commission or an affected municipality, those reports can clearly identify the lines belonging to each affiliate, by category, by municipality. This would be consistent with the "arm's length" requirements of Federal Communications Commission (FCC) rules on affiliate transactions. The purpose of the quarterly reporting is to ensure that a municipality in which a CTP is operating is adequately compensated under the Local Government Code, Chapter 283. If an affiliate operates in a municipality, the burden of paying franchise fees pursuant to the Local Government Code, Chapter 283, rests on the affiliate and not the parent company. By separately identifying the access lines belonging to the affiliate, by category, each municipality can discern the financial obligations of the affiliate vis-à-vis the underlying parent company.

The commission disagrees with SWBT that proposed subsection (g) (renumbered as subsection (k)) duplicates adopted §26.465(g)(2)(B) relating to Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers. Moreover, the commission has made significant revisions to the language regarding subsequent reporting under

new subsection (k). The commission believes its revised language addresses the timing concerns raised by AT&T and SWBT, and the need for more specificity brought up by Garland/San Angelo.

Subsection (g)(2)

Proposed subsection (g)(2) (renumbered as subsection (m)(3)) stated that beginning in the year 2001, CTPs must report annually to the commission the amounts collected in municipal franchise fees from ratepayers and the total franchise fees paid to municipalities. This report shall be filed with the commission no later than January 31 for municipal franchise fees remitted and collected for the preceding year.

AT&T suggested that this proposed subsection be stricken. AT&T commented that the proposed subsection would require CTPs to implement entirely new billing and collection protocols to track the customers billed a municipal fee and allocate bill payments in order to determine when the fee has been paid. AT&T observed that there are presently a number of fees and assessments that CTPs must pay which are not subject to this type of requirement, such as the Universal Service Fund (USF) assessment, the Telecommunications Infrastructure Fund (TIF) assessment and the 911 service fee. Moreover, AT&T argued that it is unclear how a CTP would comply with this requirement if the CTP does not bill these fees as a line item on customers' bills or in instances where the CTP does not bill this fee to a customer but is required to pay the fee to the municipality. AT&T claimed that the reporting period fails to recognize that the collection and

payment period may not yet have concluded prior to the due date of the proposed report. AT&T asserted that this requirement would be inconsistent with the goal of administrative simplicity.

SWBT and GTESW explained that reporting payments to municipalities and amounts collected from ratepayers on a company basis would be very easy, but to break that information down to a city-by-city basis would take much longer. SWBT suggested that extending the deadline to March 1, 2000 (two weeks after payment is made) would accommodate the time needed to break down information on a municipality-by-municipality basis. SWBT and GTESW explained that the administrative resources necessary to generate a summary spreadsheet report would take some time.

GTESW also stated that it sees as a potential difficulty the fact that GTESW captures how much they have collected by city and by category, in a given month, but it cannot capture those lines where no payment has been made. GTESW explained that although GTESW tracks uncollectibles on a city-by-city basis, it could not match up uncollectible accounts with the access line categories. AT&T shared these concerns and observed that simplified billing demands create additional difficulties. AT&T added that allocating amounts recovered to specific categories is complicated by competitive market issues, such as bundling of services.

SWBT recommended amending proposed subsection (g)(2) (renumbered as subsection (m)(3)) to require CTPs to file annual reports, by March 1, of all fees collected and paid for the preceding

year, instead of requiring filing on the proposed January 31 filing date. SWBT asserted that the annual report should not be due prior to the date quarterly payments are due.

Commission response

The commission has modified proposed subsection (g)(2) (renumbered as subsection (m)(3)) to require CTPs to report only upon commission request the amounts collected in municipal fees from ratepayers and the municipal fees paid to municipalities.

Subsection (h)

Proposed subsection (h) (renumbered as subsection (l)) addressed franchise fee compensation to a municipality pursuant to the Local Government Code, Chapter 283. It explained that CTPs are to compensate municipalities based upon a monthly access line count and attempted to track the language of HB 1777 regarding how resellers are not required to pay municipalities directly. To that end, the proposed rule addressed issues of proof of payment to be provided by reselling CTPs to underlying CTPs.

Garland/San Angelo and TML found the proposed language of subsection (h)(1) (renumbered as subsection (l)(2)) ambiguous as to the relationship between the quarterly payment and the monthly line count, and requested that this rule be clarified to require CTPs to pay a quarterly amount calculated on monthly access line counts. GTESW recommended that the last sentence

of proposed paragraph (1) (renumbered as subsection (l)(2)) be clarified to require the CTP to multiply the rate by the number of access lines reported each month to determine the total compensation to the municipality.

TML and City Coalition contended that the proposed rule fails to carry out the legislative mandate of §283.006(c) of HB 1777 because nothing in these sections affirmatively states that a reseller or rebundler CTP is required to pay, either directly or through the underlying CTP, for those resold or rebundled lines, and nothing clearly resolves the problem of a CTP that provides more access lines than they purchase from the underlying provider. To dispel any ambiguity, TML, City Coalition, El Paso, Houston and Garland/San Angelo recommended that an affirmative statement be added that all CTPs, not merely those that own facilities in the rights-of-way, are required to pay fair and reasonable compensation on the basis of the number of access lines over which they provide service. City Coalition suggested tracking the language of Local Government Code §283.055(f), which requires all CTPs to report their access lines and to pay on the access lines they report. TML and SWBT proposed that the intent of HB 1777 would be accomplished by reflecting that a CTP that leases or otherwise acquires lines from an underlying CTP has the option of paying the city directly or through the underlying CTP. At the public hearing, TEXALTEL reiterated its request that payment should be made as simple as possible for resellers.

TML asserted that the proposed rule is ambiguous enough to allow a reseller to argue that so long as it reports, it has fully complied, and then to attempt to shift liability for further

compliance to the underlying facility-owning CTP. AT&T asserted that the proposed rule fails to address the situation of a retail CTP that provides inadequate proof to the wholesale CTP, arguing that a wholesale CTP should not be held liable for the action or inaction of a retail CTP. SWBT proposed to make explicit the obligation of all CTPs to pay, directly or indirectly and to clarify that the underlying CTP is not liable for fees associated with access lines provided to another CTP's end-use customers. SWBT contended that this would prevent the underlying CTP's customers from bearing the burden of a defaulting reseller CTP, with the municipalities' remedy being to pursue the defaulting CTP. GTESW observed that a notification from the reselling CTP to the underlying CTP of direct payments to the municipality would serve as a release of liability for the underlying CTP for future reporting and remitting. City Coalition added that the liability for payment would rest with the CTP serving the end use customers.

Addressing issues of proof under proposed subsection (h)(3) and (4) (renumbered as (l)(4)), MCIWorldCom proposed that a written agreement between the reseller and wholesaler specifying that the reseller will be remitting municipal fees should be sufficient proof and should be sent with the first municipal payment, thereby placing the burden to remit fees appropriately upon the reseller. GTESW suggested that notification should be required no later than April 1, 2000 or within 60 days prior to the start of any subsequent calendar quarter. GTESW added that such an agreement should be a notarized letter signed by an officer of the reseller. Similarly, San Antonio suggested that the examples of adequate proof under proposed subsection (h)(4) (deleted) should, at a minimum, be defined as an agreement between the provider of the services and the municipality, which will legally bind the provider to pay the fees to the municipality.

MCIWorldCom observed that allowing only copies of municipal receipts or copies of payments made is too limiting because of time delays in payments, concerns about supplying detailed proprietary customer information to the wholesaler CTP, and the need to match the reporting burden to the CTP with the relationship to the end-use customer. Requiring copies of receipts and/or payments made to cities "after the fact", or after billing is unfair and puts the underlying CTP at a competitive disadvantage, claimed GTESW.

SWBT suggested that proposed subsection (h) (renumbered as subsection (l)) specify that the first payments are due by August 15, 2000, consistent with the due date for the first reports for year 2000 access lines. SWBT also suggested language to clarify that payments are to include fees for access lines as of the date upon which the CTP implements commission-established rates, which would also make clear that CTPs are afforded the full statutory 90-day period within which to implement the rates.

SWBT recommended adding language to proposed subsection (h) (renumbered as subsection (l)) to specify that one-tenth of the applicable category 2 fee should be paid for each station served in the case of central office-based PBX-type services, as agreed to by the commission in the preamble to §26.465. Additionally, SWBT suggested adding language requiring a municipality to designate the name and address of the person to whom reports and payments are to be sent. Further, SWBT provided a series of options for CTPs who elect to pay indirectly, to take into account the difficulties of one CTP's administration of another CTP's payments. To that end,

SWBT suggested language permitting the underlying CTP to charge an appropriate administrative fee for paying on behalf of another CTP. SWBT argued that such recovery should include costs and expenses, including loaded labor rates, for being required to participate in a commission or municipality request, audit, or review of another CTP. As part of its options, SWBT proposed using the commission as a clearinghouse for payments to municipalities paid indirectly by UNE purchasers and non-CTP-facilities lessees.

Garland/San Angelo proposed removing the terms "franchise" or "franchise fees" since CTPs will no longer be collecting or remitting franchise fees unless they have chosen not to terminate existing franchise agreements.

AT&T contended that the rule, as proposed, would be difficult to implement because a wholesale CTP needs to know *before* the beginning of a reporting quarter whether the retail CTP will count its access lines and pay the municipality directly in order to determine whether the wholesale CTP must count and pay for the retail CTP. AT&T suggested that the commission should allow a wholesale CTP to obtain this information before a reporting period and rely on notification ("adequate proof") from the retail CTP that the retail CTP will be responsible for submitting access line counts and paying to municipalities the associated fees. AT&T suggested language amending proposed subsection (h) (renumbered as subsection (l)). In addition, AT&T believed that paragraphs (2) and (3) of proposed subsection (h) (renumbered as subsections (l)(3) and (l)(4), respectively) should be consolidated and revised to track the provisions of Local Government Code §283.055(i).

SWBT observed that nothing is in proposed subsection (h) (renumbered as subsection (l)) that deals with a company who is leasing the facilities of a cable company. TEXALTEL raised concerns that, if the wording of proposed subsection (h) (renumbered as subsection (l)) resulted in a lower fee per line paid by a CTP using the lines of a cable affiliate than the fee a CTP would pay through its underlying provider, such a result would be untenable and anticompetitive. AT&T reminded these speakers that any company providing telephony service using capacity leased from a cable company would be a CTP subject to the commission's jurisdiction.

At the public hearing, AT&T stated that the issue of payment by an underlying carrier on behalf of a reseller is not just an ILEC situation; an ILEC or a competitive local exchange company (CLEC) could be on the hook for the reselling CTP's failure to pay the municipality. Also, AT&T and CLEC Coalition emphasized that federal court decisions have been very clear that resellers do not have to execute a franchise with a municipality or make direct payments to the municipality. CLEC Coalition argued that a CTP that resells lines, purchases UNEs from an ILEC, or leases capacity from a cable company is not using the rights of way. Accordingly, CLEC Coalition described this as an intercarrier compensation issue under private contracts, over which the commission has no jurisdiction. El Paso disagreed, asserting that because HB 1777 requires fees to be paid on all access lines, and all access lines are used to establish rates, it would not make sense to carve out any access lines from the HB 1777 framework. To do so would be unfair, not competitively neutral and discriminatory, clearly against the intent of the law, asserted El Paso.

At the public hearing, Dallas suggested adding rule language to allow cities to distinguish between CTPs that have chosen to pay directly and those that have chosen to pay indirectly through the underlying carrier. TEXALTEL asserted that the affidavit provided by the reseller already addresses this problem. Thus, if the reseller has not provided the affidavit to the underlying carrier and the cities that it is going to pay its own fees, then the reseller has chosen to pay through the underlying carrier. GTESW and SWBT responded that, although they will be able to identify which resellers are paying municipalities directly, they are unsure whether they can develop a listing of all the carriers that have paid in a given month, particularly given the deadlines under HB 1777. SWBT added that it does not report fee collection on a reseller-by-reseller basis, since resellers are treated as normal business customers. However, SWBT clarified that UNE providers are handled under an entirely different billing system than is a one-to-one reseller. Because UNEs are sold on a central office/exchange basis and an exchange covers more than one city, SWBT stated that its records cannot identify the city in which the UNE actually terminates. Furthermore, SWBT indicated that it does not know either the category or the numbers of access lines being provided under that UNE.

Garland/San Angelo pointed out at the public hearing that the commission has the authority under Local Government Code §283.055(k), to ask for additional information in the quarterly reports. Garland/San Angelo argued that the city should be able to use the quarterly reports to determine whether the city is receiving payment from a reseller by cross-checking direct payments with payments from an ILEC like SWBT. Similarly, TEXALTEL added that because

HB 1777 applies to all CTPs, which are listed with the commission and which must all file quarterly reports, a cross-check between these sources will identify whether a non-filing or non-paying CTP is slipping through the cracks. City Coalition mentioned that the commission would be in a position to identify CTPs that fail to file. But SWBT argued that the identity of paying and non-paying CTPs, as referenced in HB 1777, is not available, given the structure of SWBT's billing system; SWBT added that the bill only requires this information "to the extent possible." At the public hearing, AT&T observed that, if lines are not reported in the first place, then they would not be identified in the quarterly access line reports.

Commission response

The commission agrees with the majority of municipal commenters that proposed subsection (h) (renumbered as subsection (l)) did not establish a clear relationship between the quarterly payment and the quarterly access line count report. As highlighted by the industry, the proposed subsection also failed to clearly establish the responsibilities of an underlying CTP and a reselling CTP regarding compensating municipalities pursuant to the Local Government Code, Chapter 283. Accordingly, proposed subsection (h) (renumbered as subsection (l)) has been revised to require all CTPs to report access line counts to the commission quarterly and to compensate municipalities consistent with the reports. As to SWBT's suggestions that the rule require a municipality to designate the name and address of the person to whom reports and payments are to be sent, the commission notes that such designations are contained in the

municipal base amount filings. The commission will make such information available to CTPs. Accordingly, the commission declines to add language to the rule.

The commission believes that this approach is consistent with the intent of HB 1777. In particular, Local Government Code §283.055(f), mandates that CTPs pay a quarterly amount calculated monthly based on the commission-established access line rates and the reported access line counts. The language of HB 1777 in no way differentiates between types of CTPs in terms of their obligation to report access line counts and to pay municipal compensation pursuant to reported access line counts. Further, Local Government Code §283.006 (c), requires the commission to ensure that access lines fees are paid on a competitively neutral and non-discriminatory basis by CTPs that provide more access lines than they purchase from an underlying provider of resold services or UNEs. During the public hearing, and throughout the numerous workshops held in this project, ILECs have emphasized their inability to report on behalf of a provider of UNEs. In order for a wholesale provider to report on behalf of the reselling CTP, the wholesale, or underlying, provider would need to have access to detailed customer information from the reselling CTP to be able to report and compensate on behalf of a reselling CTP. In addition to end-use customer information being critical to the HB 1777 framework, this detailed customer information is also sensitive and proprietary business information. The commission concludes that it is not feasible to require the underlying CTP to have the sole responsibility for delivering this essential data. Given the frequency of the access line count reporting, each CTP must bear the responsibility to report and pay a municipality

based on those quarterly reports. To this end, the commission determines that CTPs shall exclude lines that are resold or leased to another CTP from their reporting and compensation.

The commission recognizes that certain CTPs may be able to establish a business relationship to sufficiently address any concerns regarding the sharing of proprietary information such that reporting and compensation responsibilities may be undertaken, by agreement, by the underlying CTP. Accordingly, the commission revises proposed subsection (h) (renumbered as subsection (l)) to allow the flexibility for a reselling CTP to report and compensate municipalities through an underlying carrier so long as the reselling CTP and the underlying CTP have reached an intercarrier agreement. This provision should address several timing and notice concerns raised by AT&T, GTE, MCIWorldCom and SWBT. It will be up to the two CTPs to develop a framework for reporting and compensating municipalities. The commission refrains from including definitive language on when and how a reselling CTP should report and compensate through the underlying CTP as this issue would be best left to the parties to address. The commission also notes that it has addressed SWBT's request to permit the underlying CTP to charge an administrative fee in subsection (l)(8). The commission declines to add the level of specificity requested by SWBT because these matters are more appropriately addressed in agreements between CTPs.

The commission disagrees somewhat with the CLEC Coalition's position regarding resellers' responsibilities under HB 1777. Local Government Code, §283.006(a), states that a CTP that does not use a public right-of-way may not be required to compensate a municipality directly.

The commission notes, however, that they must still compensate a municipality, and can, if they so choose, do so directly. Clearly, HB 1777 does not exempt resellers from compensating municipalities. While a reseller may not be required to enter into a franchise agreement with a municipality as a result of federal court decisions, resellers still have to compensate municipalities access line rates pursuant to the Local Government Code, Chapter 283. To that end, the commission revises proposed subsection (h) (renumbered as subsection (l)) to explain that certain CTPs have the option of compensating municipalities indirectly.

The commission addresses SWBT's concerns regarding the first payment of municipal fees pursuant to HB 1777 by articulating specific dates for reporting and compensating municipalities, and allowing the full statutory period of 90 days for implementing initial rates under new subsection (k). Further, the commission agrees with Garland/San Angelo that the terms "franchise" and "franchise fees" are not appropriately used in the proposed rule and deletes these terms.

The commission addresses Dallas's request in renumbered subsection (l)(6) by requiring CTPs to identify to the commission those resellers with whom they have intercarrier agreements to compensate municipalities and file quarterly reports to the commission. The commission believes that requiring the underlying provider to identify in the quarterly report which access lines belong to a reselling CTP would be unduly burdensome. However, the commission has required CTPs to provide line count information on a disaggregated basis, if requested by the commission or an affected municipality, in renumbered subsection (l)(6).

The commission declines to add SWBT's language to specify that one-tenth of the applicable category 2 fee should be paid on central-office based PBX-type services. Because CTPs have exercised different options in the counting and reporting of central office-based PBX-type services (pursuant to §26.465), the commission believes that adding SWBT's proposed language could have unintended consequences that contravene the requirements of HB 1777. The counting of and compensation of central office-based PBX-type services must be consistent and if the commission determines that the issue is unclear, the commission may clarify this matter by amending §26.465.

The commission agrees with AT&T that any company providing telephony service using capacity leased from a cable company would be a CTP subject to the commission's jurisdiction. Subsections (k)(2)(C), (k)(3)(B) and (l)(1) of this section reiterate the general obligation of all CTPs under Local Government Code §283.055(f) to pay fees on all reported access lines. Therefore, the commission declines to amend the rule to explicitly address the leasing of cable facilities.

Subsection (i)

Proposed subsection (i) (renumbered as subsection (m)), relating to pass-through, placed limits on how a CTP can recover its municipal franchise compensation from its customers within the boundaries of a municipality. Specifically, proposed subsection (i) (renumbered as subsection

(m)) stated that a CTP shall not recover a total amount greater than the sum of the amounts derived from the multiplication of access line rates by the number of lines, per category, for that municipality. This proposed subsection also established that, consistent with Public Utility Regulatory Act (PURA) §54.206, pass-through of the commission's rates established under the Local Government Code, Chapter 283, shall be considered to be a pro rata charge to customers. Finally, proposed subsection (i) (renumbered as subsection (m)) outlined procedures for recovering uncollectible municipal franchise amounts.

TCCFUI, Garland/San Angelo and TML opposed proposed subsections (i)(1) – (3) (renumbered as subsection (m)) that authorized CTPs to collect from all customers within a municipality the amount of uncollected municipal fees within the municipality. San Antonio, on the other hand, had no objection to an adjustment of municipal fees for uncollected municipal fees. However, San Antonio pointed out that such adjustments would be simpler if they were made in a manner consistent with calendar year reporting. San Antonio suggested that such an adjustment should be made in April of each year beginning in 2001 to be less disruptive to customers.

TCCFUI argued that providing a mechanism for a CTP to recover uncollectible municipal fees exceeds the commission's statutory authority under HB 1777; the statute does not authorize recovery of uncollectible municipal fees. City Coalition generally endorsed TCCFUI's arguments regarding recovery of uncollectible fees. Similarly, TML pointed out that HB 1777 contains no language about uncollected fees. TCCFUI explained that there is no definition of the term "uncollectible fees" in the Local Government Code §283.002, and no allowance is made for

uncollectibles under the Local Government Code §283.055. TCCFUI contended that the Local Government Code §283.055 specifically prescribes how municipal fees are to be calculated and it includes no provision for recovery of uncollectible fees. TCCFUI pointed out that HB 1777 states that access lines are the basis on which fees to municipalities are to be paid; "access line fees" are the rates set per line per category. TCCFUI asserted that additions to or modifications of rates are governed by the statute and are set with regard to actual line counts and escalator provisions; adjustments to those rates are also established by statute but only for limited reasons. TCCFUI and TML asserted that the mechanism to allow a CTP to recover uncollectible municipal fees, which are an element of its cost of service, is, in reality, a ratemaking mechanism beyond the scope of HB 1777 specifically, and beyond the Local Government Code in general. TCCFUI and TML observed that HB 1777 did not confer any additional general ratemaking jurisdiction on the commission. To the extent that a mechanism allowing recovery of uncollectible fees does constitute general ratemaking, TCCFUI observed that it violates the rate freeze under PURA §58.054 and §59.024. TCCFUI asserted that recovery of uncollectible municipal fees is, in effect, a prohibited increase in basic local service rates and would require a ratepayer to pay more than his or her pro rata share of municipal fees.

TCCFUI noted that HB 1777 guarantees municipalities the opportunity to recover in the initial year no less than was received in 1998. But money received by cities in 1998 did not include revenue from uncollectible accounts; therefore, to surcharge for uncollectibles would result in the CTP's collecting a greater per line fee from paying customers. TML added that the pass-through is not a part of the Local Government Code, Chapter 283; instead, it is authorized in

PURA and should not be included in this rule. TML and Garland/San Angelo observed that CTPs' remedy for failure of a customer to pay a bill is well established—termination of service for non-payment. To allow CTPs to adjust access line rates instead of terminating service for non-payment would give the industry an unfair advantage, claimed TML.

Garland/San Angelo argued that, because payments of access line fees to municipalities under Chapter 283 are not based upon gross revenues or receipts, the issue of bad debt should never arise. Garland/San Angelo opined that, just as no customer should have the option of not paying only a portion of its bill, such as the municipal fee, a CTP should never have the option of not collecting that particular access line fee from the customer. With all of the large number of itemized fees and taxes on telephone bills, Garland/San Angelo observed that customers do not have the option of not paying certain of those many fees. Garland/San Angelo asserted that there is no statutory or rational basis, therefore, for singling out access line fees for different treatment. Garland/San Angelo raised multiple concerns with the confusing language in proposed subsections (i)(1)-(3) (renumbered as subsection (m)), and suggested that the language could lead to unacceptable results. In particular, Garland/San Angelo objected to shifting the burden of payment of the access line fees from the CTP to the CTP's customers.

City Coalition recommended that proposed subsection (i) (renumbered as subsection (m)) be struck, arguing that it does not implement HB 1777, but that instead, PURA §54.206 does. SWBT proposed substantial revisions to proposed subsection (i) (renumbered as subsection (m))

in order to prevent a CTP from passing through amounts in excess of amounts paid to municipalities without infringing on the right of pass-through.

OPC agreed with the provisions of proposed subsection (i) (renumbered as subsection (m)). OPC's principal concern was ensuring that the proposed rule complies with state law, results in recovery of municipal fee payments from end-use customers that is consistent with municipal payments, and is competitively neutral. OPC noted that the Local Government Code §283.051, closely linked the commission-established per-line rate to be paid to a municipality with the pass-through amount to be collected from each customer under PURA §54.206. OPC contended, in fact, that the legislature decided to fix the amount of the municipal fee authorized to be recovered as a line item pass-through under PURA §54.206.

OPC noted that, more importantly, PURA §54.206 requires CTPs to collect the pass-through only by means of a "pro rata charge to the customers." Therefore, OPC summarized, under the commission's proposed rule the amount recovered from each customer will be proportionately equivalent to the amount the CTP pays the municipality through the per-line fee for that customer's access line. OPC contended that the language in proposed subsection (i) (renumbered as subsection (m)) is the only way to assure that the burdens placed on the end-use customer are consistent with the burdens on municipalities created by the CTPs' incursions into public rights-of-way. OPC argued allowing CTPs to set the pass-through at a different level than the per-line fee introduces an element of inefficiency into the cost recovery mechanism. OPC explained that such a result threatens competitive neutrality because it enables CTPs with large, well-

established residential customer bases to subsidize other customer classes through pass-through averaging, an option not available to new entrants that have not established a sizeable residential customer base.

Consumers' Union supported proposed subsection (i) (renumbered as subsection (m)), contending that the intent of HB 1777 is for end-use customers to pay the charge assessed to their customer group, no more and no less, thereby avoiding cost-shifting. Consumer's Union expressed a general preference that charges, such as the municipal charge, be assessed on a percent of revenue basis, as flat fees result in relatively higher increases in monthly bills for low volume customers.

GTESW recommended that instead of a one-time adjustment to customer bills, the CTP should be allowed to reduce its remittance to a city for uncollectibles incurred during the reporting period. This would prevent customers who pay from having a one-time charge for customers who do not pay their bills and would also maintain stability in rates for customers, argued GTESW.

Houston proposed amending proposed subsection (i) (renumbered as subsection (m)(2)) by deleting the last four words before the numbered paragraphs, as well as the numbered paragraph that follow. Houston believed that the language, as proposed, allows CTPs to make their own rates for which there is no authority.

At the public hearing, TML amended its position and asked that proposed subsection (i) (renumbered as subsection (m)) be deleted entirely because, after reading PURA §54.206, TML was no longer certain that the pass-through is applicable to HB 1777. OPC disagreed with TML's suggestion that this subsection be deleted altogether, arguing that this subsection operates to ensure that the development of three access line categories, and the allocation between those categories would not be in vain. OPC observed that there must be some sort of linkage between the rate established by the commission and the amount that is passed through to end use customers. TML and City Coalition advocated deletion of paragraphs (1), (2) and (3) and deletion of the references to PURA §54.206. TML and City Coalition noted that there is no mention of uncollectibles in HB 1777 and that the language as proposed would lead to a ridiculous outcome. Moreover, TML and City Coalition argued that the proposed language would create a new remedy for collecting uncollectible bills, allowing CTPs to raise their access line rates. City Coalition observed that the remedy for non-payment is termination of service, which is part of a CTP's cost of doing business.

Dallas stated that uncollectibles had been verified in the past. Under proposed subsection (i) (renumbered as subsection (m)), Dallas asserted that a CTP could now indiscriminately list items as uncollectible and that the cities would be unable to verify the information. Dallas believed that the issue of allowing a surcharge for uncollectible municipal franchise fees would need to be addressed in another proceeding, as part of a ratemaking case. Alternatively, GTESW mentioned that in the past, CTPs had the burden of proof to prove uncollectibles, which is an option here. However, to do so, the proposed rule language would need to be revised, observed

GTESW, to establish how CTPs could prove uncollectibles. GTESW also preferred that paragraphs (1), (2) and (3) be deleted because they do not reflect GTESW's approach to resolving the issue of recovery of uncollectibles.

SWBT put forth that the simplest way to not burden the good customers is to deduct the payments from the city as they do under the gross receipts types of ordinances. Also, SWBT stated that pass-through is not the proper subject for HB 1777, as it is addressed under PURA. SWBT emphasized that uncollectibles are not simply a cost of doing business that CTPs will bear. SWBT and GTESW also preferred that paragraphs (1), (2) and (3) state that the CTP may reduce the amount paid to the city for that relevant quarter, by the amount of the uncollectibles, to clarify that no other method, such as factorization, is allowed. SWBT responded that direct write-offs is a term of art and is a very defined accounting term. AT&T commented that the language should be "may" instead of "shall" to cover situations where CTPs do not pass-through municipal fees.

Commission response

In response to the numerous commenters concerned about the commission's approach to the issue of uncollectible municipal fees, the commission deletes paragraphs (1)-(3) of proposed subsection (i) (renumbered as subsection (m)) and adds revised language. The commission finds that HB 1777 does not, as such, provide guidance on this issue. However, parties generally agreed that municipalities and CTPs have developed practices for addressing uncollectible fees

pursuant to past agreements or ordinances. At the public hearing, parties reached an agreement, in principle, to this effect. Although the parties were thereafter unable to reach consensus on specific language, the commission believes it important to clarify this matter. The commission includes language to new subsection (m)(2), which would allow a CTP to deduct uncollectible amounts from its compensation to a municipality, and later pay that amount to the municipality if recovered through its collection process. The new language represents a position that parties agreed to in principle during the public hearing. Further, based upon comments from TML and City Coalition at the public hearing, the commission has also removed references to PURA §54.206 to avoid unnecessary confusion.

As pointed out by Consumers' Union, the intent of HB 1777 is for end-use customers to pay the charge assessed to their customer group—no more and no less. The commission agrees with OPC's observation that proposed subsection (i) (renumbered as subsection (m)) operates to ensure that the development of categories and allocations within those categories is not in vain, and that there will be linkage with the ultimate rate or pass-through. The commission, therefore, retains the proposed language on pass-through with the modifications discussed above.

Subsection (j)

Proposed subsection (j) (renumbered as subsection (n)), relating to compensation from customers of Lifeline or other low-income assistance programs, stated that a municipality may choose to forgo municipal franchise compensation from access lines serving such customers by timely

notifying its CTPs of this decision. Proposed subsection (j) (renumbered as subsection (n)) further stated that upon receipt of such notification, CTPs shall not pass through a municipal franchise fee to those end-use customers.

MCIWorldCom proposed adding language at the end of the section that would allow a CTP to exclude access lines that belong to customers of Lifeline or other low income assistance programs from its access line count report, if a municipality has chosen to forge compensation from those lines. San Antonio supported the option to exempt such customers from municipal franchise compensation, but recommended that cities be allowed to recover such revenue losses by adjustments to the municipal fees for other residential customers. OPC supported the adoption of this subsection as proposed because this restriction on pass-through to low-income customers ensures that the municipal franchise fee pass-through does not undercut other commission policies aimed at encouraging the use of the network by these customers.

SWBT proposed amendments to this subsection to make clear that CTPs in municipalities that choose to forgo access line fee compensation from Lifeline customers are relieved of any obligation to pay fees on such access lines. SWBT contended that this would ensure that other end use customers do not bear the burden of the municipality's decision.

At the public hearing, SWBT suggested splitting out the Lifeline customers on the line count report in order to provide municipalities with information with which to make a decision about including or excluding compensation from those access lines. Dallas commented on the one-

time opportunity for municipalities to decide whether to forego compensation associated with Lifeline access lines. Dallas stated that numerous city representatives would like the opportunity to change their minds regarding compensation from the access lines of Lifeline customers, as they see how it plays out. Dallas suggested an annual revision opportunity, just as has been allowed for allocation and base amount adjustments. In response, GTESW requested ample notification, at least 60 days, to allow CTPs time to incorporate this information into billing systems.

Commission response

The commission agrees with MCIWorldCom's proposal and has added language to new subsection (n) that would allow a CTP to exclude from reporting access lines that belong to customers of Lifeline or other low income assistance programs, should a municipality decide to forge compensation from those lines.

The commission agrees with SWBT that CTPs in municipalities that choose to forego access line fee compensation from customers of Lifeline or other low-income assistance programs are relieved of any obligation to pay fees on such access lines. The entire purpose behind allowing municipalities to forego compensation from these lines was to ensure that, at the city's discretion, these customers that are least able to pay are not burdened with municipal fees. Accordingly, the commission modifies proposed subsection (j) (renumbered as subsection (n)) to clarify this issue.

The commission also concurs with the public hearing comments from Dallas that cities should have the option to change their mind about whether to forego compensation associated with the access lines of customers on the Lifeline or other low-income assistance programs. The commission has held a constant position that many of these issues are local issues and should be dealt with locally. Therefore, in recognition of changing municipal needs, the commission amends proposed subsection (j) (renumbered as subsection (n)) to allow municipalities to revisit the issue of foregoing compensation from Lifeline customers' access lines on an annual basis. The commission also finds GTESW's request for prior notification compelling. Adjustments relating to pass-through of fees to certain customers is a billing change. As such, CTPs need time to make adjustments to their billing systems to accommodate municipal decisions. Recognizing the logistics of billing, the commission is satisfied with GTESW's proposal and has generally incorporated it into renumbered subsection (h).

The commission does not agree with San Antonio's proposal to allow municipal fees associated with customers of Lifeline or other low-income assistance programs to be spread out among all other customers. The commission has established three categories at the specific request of cities; there is no authority to create another category for Lifeline or low-income assistance program access lines. The commission concludes that, to exempt these access lines from payment would essentially create a separate category of lines that do not pay access fees. The commission finds no justification for requiring other customers to bear the additional financial burden, particularly given the commission's interest in ensuring that pass-through amounts

closely reflect commission rates. As an exercise of municipal authority, municipalities can choose to forego a certain amount of compensation in the interests of municipal public policy.

Penalty/Enforcement

TCCFUI recommended that a section be added specifying penalties for non-compliance with requirements of the rule. TCCFUI proposed that penalties include fines for under-reporting or misreporting of access lines, and certificate revocation for repeated violations for failure to report at all. TCCFUI supported the penalty provision language recommended by City Coalition. TCCFUI suggested that notification to all other CTPs and municipalities is essential once a certificate is revoked; notification should come with recommendation that all contracts, permits and licenses based on a telecommunications provider having a certificate should be void.

Emphasizing how the accuracy of CTPs' access line reports is vital to the effectiveness of HB 1777 and the fair and reasonable compensation of cities for the use of their public property, TML advocated a penalty to put muscle behind these requirements. TML did not propose a penalty for inadvertent or unintentional errors; instead, TML suggested that intentional misreporting should be subject to a significant fine, with penalties for repeated offenses escalating to ultimate revocation of certification.

City Coalition advocated the imposition of penalties for failure to comply with the commission's rules, arguing that a CTP that fails to report its access lines to the commission should face

revocation of its certificate. City Coalition further stated that, for a CTP that files incorrect reports, an appropriate penalty would range from substantial fines to cancellation of certificate for repeat offenders. City Coalition and Garland/San Angelo suggested a provision be added regarding penalties in these circumstances. TML emphasized how the accuracy of CTPs' access line reports is vital to the effectiveness of HB 1777 and the fair and reasonable compensation of cities for the use of their public property.

AT&T responded that the bill already allows a municipality to seek enforcement through a judicial proceeding. AT&T also believed that the commission has general authority under PURA to enforce its rules. AT&T saw no benefit to adding additional language providing for a different penalty process.

Commission response

The commission agrees with AT&T that the commission's general authority under PURA and existing commission rules is sufficient to address any enforcement matters arising out of implementation of HB 1777 and, therefore, declines to add language relating to penalties or enforcement.

Compensation for lines in a city's right-of-way where no end-user is in that city

TML and CLEC Coalition raised the issue of compensation for lines placed in public right-of-ways in municipalities where no end-users are located, and suggested that this issue should be addressed in §26.467. TML and CLEC Coalition identified three cities outside Houston—Bellaire, Southside Place, and West University Place—where a CTP intends to install lines in those cities' rights-of-way in order to connect to a central office or switching station, but where the lines will be used to provide local exchange service to end-use customers in another municipality. TML argued that HB 1777 does not support an interpretation that would deny compensation to these cities. Citing Local Government Code §283.002(1)(A)(i), TML asserted that in a situation where access lines cross a right-of-way in a municipality, but do not extend to end-use customers in that same municipality, HB 1777 does not apply because the line(s) in question are not access lines. Accordingly, TML asserted that no compensation would be paid under HB 1777 because this type of line is outside the scope of the bill, just like the line(s) of an interexchange carrier (IXC) that passes through a city. Therefore, argued TML, the compensation due the city in this fact situation is controlled by law outside HB 1777—the city would be entitled to collect franchise compensation, and the most common method for doing so is through a linear foot charge, although the parties may agree on a different methodology. TML added that Local Government Code §283.057(f) is inapplicable to this type of situation. At the public hearing, Irving observed that costs incurred in a municipality for work performed in a right-of-way must be recovered.

Commission response

After both municipal and industry representatives expressed a desire at the public hearing to work jointly on addressing this issue, the staff suggested that this matter be handled comprehensively by affected parties in a separate rulemaking. At the public hearing, the staff suggested that the parties combine efforts and provide a joint proposal to the commission. Parties agreed to do so. Accordingly, the issue of compensation for lines in a city's rights-of-way where no end-use customers are in that right-of-way will not be addressed in this rule and will be taken up in a later rulemaking.

Calculation of CPI

SWBT proposed adding new language to make explicit reference to the CPI adjustment provided for in Local Government Code §283.055(g).

Commission response

The commission agrees with SWBT's suggestion and has added language in new subsection (j) to explain that, beginning 24 months after the commission establishes access line rates, the rates per access line category shall be annually adjusted in September for each municipality by one-half the annual change, if any, in the most recent CPI.

Communication of Rates.

GTESW proposed that the commission publish rates by municipality, by category of service on the commission website and include the effective date of any rates resulting from escalation provisions of current agreements. This information will simplify the process for new CTP entrants, contended GTESW. AT&T echoed these concerns, stating that in order to charge the appropriate fee to customers in a municipality, a CTP must have adequate notice of the revised fee to update its billing system prior to issuing bills for the month in which the new rates are proposed to be effective. In order to avoid problems, it is important that the commission establish a systematic method by which any changes to access line fees are distributed to CTPs as least 90 days prior to the first month in which the revised fees are to be effective, suggested AT&T. Establishing a set date would allow a more orderly implementation of these rates. In the absence of an established schedule, AT&T asserted that the new compensation scheme will be overwhelming and not administratively simple.

Commission response

The commission recognizes the need to timely provide notice to CTPs of revised fees. The commission has set deadlines throughout these rules for commission action. At this time, however, details regarding posting municipal access line rates on the website have not been finalized. Further, because the commission intends to use a variety of methods to disseminate this critical information, the commission does not find it appropriate to specify, by rule, which

method the commission shall use. Accordingly, the commission declines to add language to address this matter.

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 section is also authorized by 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 the Local Government Code §283.055), which provides that not later than March 1, 2000, 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 shall be applied to the total number of access lines by category in the municipality. 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. On a quarterly basis, certificated telecommunication utilities are required to file a report with the commission that shows the number of access lines the provider has within each municipality at the end of each month of the quarter, and are

required to pay the municipality a quarterly amount calculated monthly based on the reported access line counts and the commission's access line rates.

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

§26.467. Rates, Allocation, Compensation, Adjustments and Reporting.

(a) **Purpose**. This section establishes the following:

(1) rates for categories of access lines;

(2) default allocation for municipalities;

(3) adjustments to the base amount and allocation;

(4) municipal compensation; and

(5) associated reporting requirements.

(b) **Application**. The provisions of this section apply to certificated telecommunication providers (CTPs) and municipalities in the State of Texas.

(c) **Rate determination**. The sum of the amounts derived from multiplying the rate for each category of access line by the total number of access lines in that category in a municipality shall be equal to the base amount. The rate for each of the access line categories established pursuant to §26.461 of this title (relating to Access Line Categories) shall be calculated using a 1998 access line count in general accordance with the following formula:

B =	Total base amount for 1998.
A1 =	Allocation by percentage to Category 1 access lines.
A2 =	Allocation by percentage to Category 2 access lines.
A3 =	Allocation by percentage to Category 3 access lines.
L1 =	Number of access lines in Category 1.
L2 =	Number of access lines in Category 2.
L3 =	Number of access lines in Category 3.
R1 =	Fee per access line rate for Category 1.
R2 =	Fee per access line rate for Category 2.
R3 =	Fee per access line rate for Category 3.
R1 =	(A1*B)/L1
R2 =	(A2*B)/L2
R3 =	(A3*B)/L3
B =	(L1*R1) + (L2*R2) + (L3*R3)

(d) **Estimating a 1998 access line count**. If a CTP does not provide an actual 1998 access line count, the commission shall use the CTP's 1999 access line count, reported pursuant to §26.465 of this title (relating to Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers), to derive an estimated 1998 access line count.

(1) **Estimating access line count for category 1 (residential) access lines**. The estimated statewide growth rate for category 1 access lines in 1999 is 4.5%. This percentage is determined using the statewide growth rate for residential access lines as reported to the Texas Legislature in the 1997 and 1999 reports entitled "Scope of Competition in Telecommunications Markets." The commission shall estimate a municipality's 1998 access line count for category 1 by discounting 4.5% from the 1999 line count for category 1 lines reported by a CTP.

(2) **Estimating access line count for category 2 (non-residential) and category 3 (point-to-point) access lines**. The estimated statewide growth rate for category 2 and category 3 access lines in 1999 is 7.0%. This percentage is determined using the statewide growth rate for business access lines as reported to the Texas Legislature in the 1997 and 1999 reports entitled "Scope of Competition in Telecommunications Markets." The commission shall estimate a municipality's 1998 access line count for category 2 and category 3 by discounting 7.0% from the 1999 line count for category 2 and category 3 lines reported by a CTP.

(3) **Municipal request for exception.**

(A) No later than March 15, 2000, a municipality may request the use of a municipality-specific growth rate(s), by category, for estimating its 1998 access line count, instead of using the estimated statewide growth rates determined under paragraphs (1) and (2) of this subsection. The municipality's request shall include its proposed growth rates(s), along

with proof and methodology for deriving the growth rate(s), from public and verifiable sources.

(B) No later than March 15, 2000, a municipality that requests to use a municipality-specific growth rate(s) shall provide a copy of its filing to all CTPs that have filed access line counts for the municipality.

(C) No later than March 31, 2000, any CTP that has filed access line counts for that municipality may file objections to the municipality's proposed growth rate(s), if any. In order to be considered, an objection must include actual 1998 line count data for that municipality.

(D) Until resolution of the request approval process, the estimated statewide growth rate(s) determined under paragraphs (1) and (2) of this subsection shall be used to determine the municipality's 1998 access line count. Upon resolution of any objections to the request approval process, the commission shall develop a new access line count for 1998 incorporating the new growth rate(s), by category, as appropriate.

(e) **Default allocation**. The commission's default allocation shall be a ratio of 1:2.3:3.5 for access line categories 1, 2, and 3 respectively. This default allocation represents an average of all allocation ratios filed by municipalities with the commission pursuant to §26.463 of this title (relating to Calculation and Reporting of a Municipality's Base Amount).

(1) The commission shall establish access line rates for municipalities using the default allocation unless a municipality has filed its own allocation pursuant to §26.463 of this title.

(2) The access line rates established by the commission for municipalities using the default allocation shall remain in effect until a municipality updates its initial allocation pursuant to subsection (g) of this section or revises its allocation pursuant to subsection (h) of this section.

(f) **Initial rates**. No later than March 1, 2000, the commission shall establish rates for each category of access line in a municipality. These rates shall be considered to be initial rates. The initial rates shall be implemented no later than 90 days from the date the commission establishes the rates. These initial rates shall remain in effect until the rates are updated pursuant to subsection (g) of this section or revised pursuant to subsection (h) of this section.

(g) **Updated rates**. No later than April 14, 2000, the commission shall establish updated rates for each category of access line in a requesting municipality. The initial rates established under subsection (f) of this section shall be updated to incorporate municipal filings pursuant to paragraph (1) of this subsection and/or CTP filings pursuant to paragraph (2) of this subsection, as appropriate. Subject to approval by the commission, the updated municipal and CTP information shall be used to establish updated access line

rates. The updated rates shall be in effect until revised pursuant to subsection (h) of this subsection.

(1) **Updates to municipal base amount filings.** No later than March 31, 2000, a municipality may update its base amount and allocation filed with the commission pursuant to §26.463 of this title. No later than March 31, 2000, a municipality that filed a request to update its base amount and/or allocation shall forward a copy of its filing to all CTPs who have filed access line counts for the municipality.

(A) **Updates to base amount.** A municipal filing for updates to base amount shall use a methodology for calculating the base amount that is consistent with §26.463 of this title, and shall include appropriate justification for the update. Appropriate justification may include:

(i) receipt of late payments from CTPs attributable to 1998 usage of rights-of-way;

(ii) reduction to judgment of disputed payments attributable to 1998 usage of rights-of-way;

(iii) settlement of disputed payments attributable to 1998 usage of rights-of-way;

(iv) eligibility under effective agreements or ordinances to receive a known and measurable amount due to specifically prescribed fee rate escalations provisions for the period between January 1, 2000 and March 1, 2000; and

(v) an inadvertent base amount computational error.

(B) **Updates to allocation**. A municipality that has filed with the commission its own allocation pursuant to §26.463 of this title may file an updated allocation no later than March 31, 2000.

(2) **Updates to CTP access line counts**. No later than March 15, 2000, a CTP may request to update its access line count filed with the commission pursuant to §26.465 of this title. A CTP's request for updates to access line count shall use a methodology for counting access lines that is consistent with §26.465 of this title, and shall include appropriate justification for the update. Appropriate justification may include, but is not limited to:

(A) an inadvertent access line count computational error;

(B) reconciliation of reported retail and resold access line lines; and

(C) access line counting issues associated with merger, sale, or transfer of CTPs.

(3) **Choosing lower than maximum rate(s).** The rates obtained by applying the allocation to the base amount and dividing the amounts allocated to each category by the appropriate number of access lines in that category in a municipality shall be considered to be maximum rates for a municipality. No later than March 31, 2000, a municipality that wishes to choose lower access line rate(s) than the maximum initial rates established under subsection (f) of this section, shall notify the commission and all CTPs that filed access line counts for that municipality of the lower access line rate(s) it chooses. If a municipality's request to choose

lower initial rate(s) is higher than its updated rates, the updated rates shall remain in effect until revised pursuant to subsection (h) of this section.

(h) **Revised rates**. No later than October 15 of each calendar year, upon request from a municipality pursuant to paragraphs (l) and (2) of this subsection, the commission shall establish revised access line rates for each category of access line in a municipality, as applicable. A CTP shall apply the revised rates to access lines in a municipality in January of the next calendar year and compensate a municipality pursuant to the revised rates.

(1) **Adjustments within established rates.** No later than September 1 of each calendar year, a municipality may change its rates within the maximum rates by notifying the commission and all CTPs in that municipality that its wishes to revise its access line rate for the next calendar year. In its notification to the commission and the CTPs, the municipality shall indicate the rates that it wishes to have the commission apply in the next calendar year. Upon such notification, the commission shall revise the rates accordingly.

(2) **Revising allocation formula.** No later than September 1 of each calendar year, and not more than once every 24 months, a municipality may petition a modification of the default allocation or its own allocation by notifying the commission and all affected CTPs in the municipality. In its notification to the commission and the CTPs, the municipality shall designate the allocation that it wishes to have the commission apply in the next calendar year.

(i) **Resolution of municipal allocations.**

(1) The commission shall implement a municipality's allocation unless, the commission determines that the allocation is not just and reasonable, is not competitively neutral, or is discriminatory.

(2) No later than March 15, 2000 any affected CTP may complain regarding a municipality's initial allocation filed pursuant to §26.463 of this title. No later than April 7, 2000 any affected CTP may complain regarding a municipality's updated allocation filed pursuant to subsection (g)(1)(B) of this section. No later than September 15 of any calendar year any affected CTP may complain regarding a municipality's revised allocation filed pursuant to subsection (h)(2) of this section.

(3) Where the market price of a telecommunications service is less than or equal to the amount derived from multiplying the access line rates with the number of access lines used to provide that service, the allocation used to develop the access line rate shall be presumed to be discriminatory, not just and reasonable and not competitively neutral.

(j) **Consumer price index (CPI) adjustment to commission-established rates.** Beginning 24 months after the commission establishes access line rates, the commission shall annually adjust the rates per access line by category for each municipality by an amount equal to one-half the annual change, if any, in the most recent consumer price index

(CPI), as determined by the Federal Bureau of Labor Statistics. Such adjustments shall be made in September preceding the calendar year in which the CPI adjusted access line rates are to take effect.

(k) **CTP implementation of commission-established rates.** CTPs shall continue to compensate municipalities at the rates required under the terms of the expired or terminated agreements or ordinances until the CTP implements the commission established initial and/or updated rates. A CTP not subject to an existing franchise agreement or ordinance that wants to construct facilities to offer telecommunications services in the municipality shall pay fees that are competitively neutral and non-discriminatory, consistent with the charges of the most recent agreement or ordinance between the municipality and the CTP serving the largest number of access lines within the municipality until the right-of-way fees established by the commission take effect.

(1) **Development of billing systems.** No later June 1, 2000, CTPs shall complete the development of billing systems necessary to implement access line rates, by category, as established by the commission.

(2) **Initial quarterly compensation and reporting.**

(A) **Implementation.** CTPs may apply the commission-established initial and updated rates (as applicable) to access lines in a municipality for the second calendar quarter of 2000 (the months of April, May and June).

(B) **Quarterly access line count report**. No later than August 15, 2000, CTPs that implemented commission-established rates pursuant to

subparagraph (A) of this paragraph shall file the first quarterly access line count report with the commission. The report shall include a count of the number of access lines, by category, by municipality, at the end of each month of the preceding quarter (April, May and June) that the CTP implemented commission-established rates. The quarterly report shall exclude lines that are leased or resold to other CTPs unless an intercarrier agreement has been reached pursuant to subsection (l) of this section. The CTP shall include with the report a certified statement from an authorized officer or duly authorized representative of the CTP certifying that the information contained in the report is true and correct to the best of the officer's or representative's knowledge and belief after inquiry. On request and subject to the confidentiality protections of the Local Government Code, §283.005, each CTP shall provide each affected municipality with a copy of the report required by this subsection.

(C) **Compensation**. No later than August 15, 2000, CTPs that applied commission established rates pursuant to subparagraph (A) of this paragraph shall pay municipalities, compensation for the preceding quarter at that rate. The municipal compensation shall be the amount equal to the rate per category of access line multiplied by the monthly access line count reported pursuant to subparagraph (B) of this paragraph.

(D) **True-up.** Where a municipality is compensated under the terms of an expired franchise contract, agreement or ordinance for the period between

March 1, 2000 and June 30, 2000, no true-up to the commission established rates will be allowed for that period.

(3) **Subsequent quarterly compensation and reporting.** All CTPs shall implement commission-established initial and updated rates (as applicable) no later than July 1, 2000, and revised rates (as applicable) for the subsequent quarters.

(A) **Quarterly access line count report**. No later than October 15, 2000, a CTP shall file a quarterly access line count report for the preceding calendar quarter with the commission. All subsequent quarterly access line count reports shall be due no later than 45 days from the end of the preceding calendar quarter. The quarterly access line count report shall include a count of the number of access lines, by category, by municipality, for the end of each month of the preceding quarter. The report shall exclude lines that are resold or leased to other CTPs unless an intercarrier agreement has been reached pursuant to subsection (l) of this section. The CTP shall include with the report a certified statement from an authorized officer or duly authorized representative of the CTP certifying that the information contained in the report is true and correct to the best of the officer's or representative's knowledge and belief after inquiry. On request and subject to the confidentiality protections of the Local Government Code, §283.005, each CTP shall provide each affected municipality with a copy of the report required by this subsection.

(B) **Compensation**. Beginning July 1, 2000, CTPs shall apply the most recent commission-established rates to access line in a municipality. The municipal compensation shall be an amount equal to the rate per category of access line multiplied by the number of access lines in that category in that municipality at the end of each month in a quarter as reflected in reports filed pursuant to subparagraph (A) of this paragraph. All CTPs shall pay to municipalities the compensation for the third calendar quarter of 2000, no later than October 15, 2000. All payments for subsequent quarters shall be made no later than 45 days from the end of that quarter.

(4) **Waiver of reporting requirements.** A CTP that has reached an intercarrier agreement pursuant to subsection (l) of this section shall be relieved of the quarterly access line count reporting requirements until the expiration of that agreement.

(l) **Reporting and compensation on behalf of another CTP**. Notwithstanding any other subsection, a CTP may report and compensate a municipality on behalf of another CTP subject to the following terms.

(1) All CTPs are responsible for reporting to the commission their own quarterly access line count report and compensating each municipality pursuant to subsection (k) of this section.

(2) CTPs that own facilities in the rights-of-way of municipalities shall directly compensate each municipality quarterly, based upon a monthly access line count.

The compensation shall be the amount equal to the rate per category of access line multiplied by the number of access lines in that category in that municipality, at the end of each month, for the preceding quarter.

(3) CTPs that do not own facilities in the rights-of-way of municipalities have the option of compensating the municipality through the underlying CTP, so long as the reselling CTP and the underlying CTP have reached a written agreement.

(4) An underlying CTP and a reselling CTP may reach an agreement that the underlying CTP shall file the quarterly access line count report in each municipality, by category, on behalf of the reselling CTP, and also compensate the municipality for those lines. The quarterly access line count report may be filed with the commission on an aggregated basis.

(5) A CTP may file access line counts in each municipality for itself and its affiliates that are CTPs on an aggregated basis.

(6) A CTP that reports on behalf of another CTP shall, on request from the commission or a municipality, provide a disaggregated line count for each CTP included in the report filed pursuant to subsection (k) of this section.

(7) No later than 45 days after entering into an agreement to provide joint access line counts and municipal compensation pursuant to paragraphs (4) and (5) of this subsection, a CTP that reports and compensates municipalities on behalf of another CTP shall identify in a report filed with the commission, the CTPs on whose behalf access line counts will be reported to the commission.

(8) Nothing in this section shall prevent a CTP from charging to another CTP a reasonable administrative fee for reporting and compensating a municipality on behalf of another CTP to which it has resold, leased, or otherwise provided access lines.

(9) Nothing in this section shifts the liability from a reselling CTP for non-payment of municipal compensation and failure to report pursuant to this section.

(m) **Pass-through.** A CTP recovering its municipal compensation from its customers within the boundaries of a municipality shall not recover a total amount greater than the sum of the amounts derived from the multiplication of access line rates by the number of lines, per category, for that municipality. Pass-through of the commission's rates established under this chapter shall be considered to be a pro rata charge to customers.

(1) Where a CTP chooses to pass through the municipal fee to its customers such CTP shall not pass through any costs associated with its administration of municipal fees. The pass-through amount shall not exceed the access line rate, by category, established by the commission for that municipality.

(2) A CTP shall be allowed to deduct from its current payment any amounts that are direct write-offs as a result of its collection efforts. Any amounts subsequently recovered from the customer after the direct write-offs shall be included in the amounts payable to the cities in the month(s) received. There shall be no reduction in payment for any estimated uncollectible allowances reported for financial purposes by the CTP.

(3) Beginning January 1, 2001, on request from the commission, a CTP shall report the amounts collected in municipal fees from customers and the municipal fees paid to municipalities for a period determined by the commission. This report shall be filed with the commission by the CTP no later than 60 days from the date the CTP receives this request.

(n) **Compensation from customers of lifeline or other low-income assistance programs.** A municipality may choose to forgo municipal compensation from access lines serving Lifeline customers or customers of other similar low-income assistance programs. A municipality electing this option shall notify all CTPs in the municipality of this decision before September 1 on any given year. Upon receipt of such notification, CTPs shall exclude such end-use customers from their quarterly access line count, not pass through a municipal fee to such end-use customers for the next calendar year, and shall be relieved of any obligation to pay fees on such access lines to the municipality.

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 §26.467 relating to Rates, Allocation, Compensation, Adjustments and Reporting is hereby adopted with changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE 10th DAY OF FEBRUARY 2000.

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