

PROJECT NO. 24639

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| RULEMAKING TO IMPLEMENT | § | PUBLIC UTILITY COMMISSION |
| ENFORCEMENT PROCEDURES | § | |
| RELATING TO QUARTERLY | § | |
| ACCESS LINE REPORTS | § | OF TEXAS |

**ORDER ADOPTING NEW §26.468
AS APPROVED AT THE JULY 11, 2002 OPEN MEETING**

The Public Utility Commission of Texas (commission) adopts new §26.468, relating to Procedures for Standardized Access Line Reports and Enforcement Relating to Quarterly Reporting with changes to the proposed text as published in the May 3, 2002 *Texas Register* (27 TexReg 3690). The rule ensures that quarterly access line reporting pursuant to §26.467 of this title (relating to Rates, Allocation, Compensation, Adjustments, and Reporting) will be performed in a uniform and timely manner. Further, it applies the commission's already-existing enforcement procedures for failure to comply with quarterly reporting requirements. This new section was adopted under Project Number 24639.

The commission received comments on the proposed new section from John Staurulakis, Inc. (JSI Clients), AT&T Communications of Texas, L.P. (AT&T), the State of Texas (Texas), MCI WorldCom Communications Inc. (MCI WCom), Verizon Southwest (Verizon), Southwestern Bell Telephone, L.P. (SWBT), Fort Bend Telephone Company doing business as TXU Communications (TXU), Texas Statewide Telephone Cooperative Inc. (TSTCI), and the Texas Coalition of Cities for Utility Issues and the City of Plano (TCCFUI).

General Objections

AT&T argued that the Public Utility Regulatory Act (PURA) §15.023(a) specifies that the commission has authority to assess administrative penalties against a person regulated under PURA who violates PURA or a rule or order adopted under PURA. AT&T contended that this means that the commission does not have authority under PURA to assess administrative penalties for violations of the Local Government Code or violations of rules or orders adopted under the Local Government Code, and contended that, similarly, the Local Government Code does not explicitly grant the commission authority to assess administrative penalties. AT&T maintained that the commission's general authority under PURA, which historically has been at least as broad as that conferred in Local Government Code §283.058, has never been sufficient authority to assess administrative penalties, and that, consequently, §283.058 also cannot confer such authority on the commission.

AT&T contended that §283.058 clearly grants the commission equal and nondiscriminatory jurisdiction over municipalities as well as over certificated telecommunications providers (CTPs), and that if the commission has the authority to assess administrative penalties for a CTP's failure to report or for inaccurate reporting, then under §283.058 the commission also has the authority to assess administrative penalties against a municipality that violates a provision of §283.056.

SWBT recommended that the implementation of an administrative penalty structure be delayed until the resolution of related disputed issues, which include but are not limited to categorization and counting of access lines and the accuracy and completeness of information provided by municipalities regarding annexations.

The commission disagrees with AT&T's conclusions regarding the relationship between PURA §§14.001, Power to Regulate Public Utilities, 14.002, Rulemaking Authority, and 15.023, Administrative Penalties, and Local Government Code §283.058. Section 283.058 is an additional grant of jurisdiction to the commission "over municipalities and certificated telecommunications providers." The additional grant of jurisdiction is not in lieu of but in conjunction with the jurisdiction granted to the commission by PURA §14.001 and §14.002. Therefore, just because the commission exercises jurisdiction pursuant to Local Government Code §283.058, that exercise of jurisdiction is not to the exclusion of other statutory powers such as those authorized by PURA §14.001 and §14.002.

Moreover, AT&T is mistaken when it argues that §26.468(e) [renumbered as subsection (f)] is inconsistent with PURA §15.023 when it attempts to assess administrative penalties for violations of the Local Government Code. To the contrary, §26.468 subjects CTPs to administrative penalties in a manner totally consistent with the commission's jurisdiction under PURA §15.023. Specifically, PURA §15.023 provides that "[t]he commission may impose an administrative penalty against a person regulated under this title who violates this title or a rule or order adopted under this title." The requirement to file access line reports that is being

enforced by §26.468(e) [renumbered as subsection (f)] was promulgated by the commission under authority of PURA §14.002. *See* 25 TexReg 1619 (February 25, 2000) wherein the commission adopted the provision requiring CTPs to file quarterly municipal access line reports. The requirement to file access line reports was adopted pursuant to PURA §14.002 and the failure to file those reports would be a violation of a rule "adopted under this title" and properly subjected to administrative penalties.

Furthermore, the commission notes that in Project Number 20935, *Rulemaking to Implement HB 1777*, AT&T filed comments supporting the "commission's general authority under PURA and existing commission rules" to "address any enforcement matter arising out of implementation of HB 1777." (*See* 25 TexReg 1618 (February 25, 2000)) Consistent with AT&T's comments in Project Number 20935, the amendments herein relate to and arise from the implementation and enforcement of Local Government Code, Chapter 283 (House Bill 1777, 76th Legislative Session). Consistent with AT&T's earlier comments, the amendment is properly within the commission's jurisdiction to enforce by way of administrative penalties.

The commission agrees with AT&T's observation that Local Government Code §283.058 grants the commission equal and nondiscriminatory jurisdiction over municipalities as well as over CTPs. However, in the context of this rulemaking, the requirement to file access line reports is placed upon CTPs and not municipalities. Therefore, it is not clear what AT&T would have the municipalities file in an equal and nondiscriminatory manner. Thus, AT&T's generalized

comment, seeking unspecified procedures to impose administrative penalties for unspecified violations, requires no action by the commission at this time.

The commission finds that SWBT's plea for a delay in the implementation of this section until other disputed issues are resolved is inappropriate. The commission has other ongoing rulemakings to address the specific issues SWBT referenced. The commission finds that it would be imprudent to unduly delay enforcement action until every possible disputed issue is resolved.

§26.468(b) Application

Texas opposed an exemption for carriers with contracts or franchise agreements absent an initial determination by the commission that the exemption actually exists. Texas argued that an exemption should be established by CTPs through a filing on at least an annual basis, subject to review by commission staff and possible response by the affected cities. Texas maintained that this process would allow the commission a means of distinguishing exempt CTPs from those that simply failed to report, and held that an annual report would give the commission necessary information without unduly burdening the CTPs.

TXU argued that §26.465(h) of this title (relating to Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers) permits CTPs who did not terminate their franchise agreements with cities by December 1, 1999 to continue

operation under these agreements until the franchise agreement is either terminated or expires, and offered proposed language to reflect this exemption.

TSTCI asserted that the language of subsection (b) should reflect that those CTPs operating under existing franchise agreements or ordinances are not required to file quarterly access line reports, and offered language that would exempt CTPs that are still bound by existing municipal contracts from this new requirement and would harmonize §26.465(h) with §26.468(b). TSTCI contended that a quarterly report would be unnecessary and administratively burdensome for those CTPs, especially where long term agreements are in effect.

JSI Clients argued that the commission should recognize the existing exemption from reporting municipal access lines for CTPs who are operating under pre-HB 1777 municipal franchise fee agreements and offered a modified version of the language submitted by Fort Bend Telephone Company doing business as TXU Communications. JSI Clients argued that because these CTPs' quarterly reports would only be used for the limited purpose of tracking universal CTP reporting, such a reporting requirement is both burdensome and unnecessary, and not in the public interest.

JSI Clients and TSTCI both argued that to distinguish those CTPs operating under franchise agreements from CTPs who are in violation of the existing rules, the commission could request confirmation or require those CTPs to notify the commission in writing of their status as pre-HB 1777 franchise fee CTPs. At such time as the CTP's status changed with respect to individual

municipal franchise fee agreements, the CTP would once again be required to provide written notification of this change and report municipal access lines as specified in §26.468.

Verizon proposed language to address the CTPs that have not terminated all existing franchise agreements.

TCCFUI argued that CTPs claiming an exemption from the provisions of Local Government Code, Chapter 283, should be required to establish the exemption with the commission on a quarterly basis. The commission should then decide whether to grant the exemption based upon all evidence provided by the CTP and the response provided by affected municipalities.

Due to the provisions in §26.465(h), CTPs operating under a municipal franchise agreement are exempted from the reporting requirements pursuant to §26.467. Some exempt CTPs operate solely in nonparticipating municipalities, and therefore, the commission has not been tracking these exempted CTPs, which has led to some difficulty in distinguishing them from CTPs that simply failed to report.

To bring clarity to the exemption for enforcement purposes, the commission modifies the proposed rule to address two objectives: (1) to document which CTPs are claiming exemptions and in which municipalities, so that this information will be available if disputes arise in the future; and (2) to distinguish nonreporting CTPs that are exempt in all the municipalities in which they operate from nonreporting CTPs that are not in compliance with the reporting

requirements for the purposes of ongoing proceedings. A notification process as recommended by most parties would help the commission to meet the first goal. To meet the second goal, however, the commission must bring the functionality and certainty of the Municipal Access Line Reporting System (MARS) to bear on the process of exempting CTPs.

These objectives require the commission to collect different information from CTPs with different exemptions. Therefore, the commission must distinguish between fully exempt CTPs and partially exempt CTPs. Exempt CTPs are those CTPs that claim exemption in any municipality pursuant to §26.465(h). Fully exempt CTPs are exempt CTPs that do not have any access lines to report in any municipality participating in the fee-per-access line compensation scheme, as set forth in Local Government Code, Chapter 283, and Chapter 26, Subchapter R of the commission's Substantive Rules (relating to Provisions relating to Municipal Regulation and Rights-of-Way Management). Partially exempt CTPs are exempt CTPs that also operate in and have access lines to report for any municipality participating in the fee-per-access line compensation scheme, as set forth in Local Government Code, Chapter 283, and Chapter 26, Subchapter R of the commission's Substantive Rules.

Most parties argued that an exemption should be granted on a one-time or annual basis to relieve the burden on exempt CTPs. The commission finds that it can do this for partially exempt CTPs. However, to integrate fully exempt CTPs into the MARS, the commission finds those CTPs that do not have any access lines to report in any participating municipality must renew their claim every quarter, as suggested by TCCFUI. A quarterly renewal of the exemption will suit the

three-fold purpose of (1) allowing the commission to easily distinguish fully exempt CTPs from CTPs that simply failed to comply with the reporting requirements, (2) engendering some familiarity with the system for fully exempt CTPs in the event that any of their franchise agreements expire or are terminated, and (3) identifying those CTPs with franchise agreements that will expire within the course of a year, thus updating the commission's database in a timely manner. By having these fully exempt CTPs simply log into the MARS and click a button every three months, the commission believes the burden, if any, on these CTPs will be minimal.

To further reduce this burden, the commission finds that a fully exempt CTP needs to renew this exemption only as long as it remains fully exempt. If a fully exempt CTP begins to operate in a municipality participating in the fee-per-access line scheme as set forth in Local Government Code, Chapter 283, and Chapter 26, Subchapter R of the commission's Substantive Rules, or if a municipality in which the CTP has been operating becomes a participating municipality, the CTP has become a partially exempt CTP, and no longer must renew the exemption on a quarterly basis. The reasoning for this distinction is that a fully exempt CTP, similar to a noncompliant CTP, currently creates no record in MARS, which the system interprets as noncompliance. By renewing the exemption on a quarterly basis, the fully exempt CTP will create a record in MARS that will allow the system to exempt the CTP without imposing any reporting requirements upon it.

Therefore, the requirements set upon exempt CTPs are as follows. Each exempt CTP, whether fully or partially exempt, must file with the commission a notarized document listing the

municipalities in which it is operating under existing franchise agreements by August 15, 2002, which will coincide with end of the reporting period for the second quarter of 2002. This baseline document will assist the commission in resolving future disputes. All exempt CTPs are responsible for ensuring that a current notarized list is on file with the commission, and must file another notarized list no later than 45 days from the end of the preceding calendar quarter if the list of municipalities in which it is claiming exemption changes.

By August 15, 2002, all fully exempt CTPs must log onto MARS and claim this exemption by clicking the appropriate button, which will help the commission meet the objective of easily distinguishing fully exempt CTPs from nonexempt but noncompliant CTPs. The fully exempt CTPs must continue to log into MARS during every quarterly reporting period and claim this exemption by clicking the appropriate button. A fully exempt CTP no longer needs to renew the exemption in MARS if it becomes a partially exempt CTP by any means. To reflect these changes, the commission therefore amends subsection (c) to include the definition of "exemption," "fully exempt CTP," and "partially exempt CTP," adds new subsection (e) and rennumbers proposed subsection (e) to (f).

§26.468(d) Reporting procedures

MCI WCom proposed a correction at §26.468(d) to address that MARS is not defined in §26.467 and that subsection (e) [renumbered as subsection (f)] bases penalties on failure to comply with the requirements of subsection (d). MCI WCom urged discretionary use of MARS, pointing to

apparent start-up problems with the system and arguing that while it takes 30 minutes to input data on a floppy disk, data input on MARS requires five hours.

Verizon offered language for §26.468(d) that would clarify that all CTPs not exempt under §26.465(h) shall file the Quarterly Access Line Reports as required under §26.467 of this title electronically using the MARS.

TCCFUI contended that §26.468(d) should be reworded to clarify that the filing of quarterly access line reports is required under §26.467, rather than that the use of MARS is required under §26.467.

AT&T maintained that the use of MARS should be deemed discretionary because of the extensive amount of time required to input access line data into the system, which presents another potential point of error in the process of reporting access lines.

The commission agrees with the clarity of the general proposed changes in language to §26.468(d), and modifies subsection (d) accordingly. The commission disagrees with the specific changes proposed by MCI WCom and Verizon, the former of which would make using the MARS voluntary and the latter of which would address the exemption process now addressed in new subsection (e). However, for clarity on the exemption issue, the commission adopts new subsections (d)(1) and (d)(2) to specify exactly how CTPs in different situations can meet the reporting requirements.

Contrary to the argument that use of the MARS should be discretionary, the commission recognizes that new systems intended to automate processes are perceived as problematic at implementation. However, as the process matures, what was once new becomes routine and users' perceptions change as modifications to systems improve performance. In the absence of specific complaints about and proposed modifications to the new MARS system, the commission has no specific comment to which it can respond. However, the commission encourages CTPs to recommend modification of the system to staff so that staff may consider all suggestions reasonably calculated to improve system performance and efficiency.

§26.468(e) (renumbered as subsection (f)) Failure to comply

Texas argued that inclusion of the factors which will be considered in assessing a penalty is unnecessary in the rule as these factors are adequately delineated in PURA §15.023 and commission Procedural Rule §22.246 of this title (relating to Administrative Penalties), and therefore opposed the suggestion that an amendment incorporating a "self-reporting of error factor," as proposed by SWBT, Verizon, and AT&T in their comments, is necessary.

MCI WCom recommended the deletion of language in the proposed rule that governs application of administrative penalties, citing PURA §15.023 and §22.246 as sufficient for the purpose of applying administrative penalties to any violations of §26.468. MCI WCom proposed new language that would impose no administrative penalties upon CTPs voluntarily reporting any

filing errors or inaccuracies or upon CTPs acting promptly to correct the errors or inaccuracies if they are inadvertent or accidental.

AT&T argued that the factors that the proposed rule says the commission will consider, although they are not exhaustive, appear one-sided, as none of the factors suggest that the commission will consider whether a CTP's reporting error was inadvertent or unintentional, or whether the CTP was making a good faith effort to comply and non-compliance was due to factors beyond the CTP's control. AT&T asserted that proposed subsections (e)(1) and (e)(2) [renumbered as (f)(1) and (f)(3)] do not really appear to address factors to be considered in applying administrative penalties, but appear to simply list potential violations, and recommended that the commission structure the rule so that violations are listed separately from factors to be considered in applying an administrative penalty. AT&T further argued that the rule should be withdrawn and republished with a more comprehensive and non-discriminatory list of violations that also takes into account municipalities' obligations and restrictions under Chapter 283, and that the commission should not list specific violations but craft the rule to more generally apply to the provisions of Chapter 283. AT&T asserted that the commission should clarify whether the factors in §22.246(c)(3) are meant to apply to violations under proposed §26.468.

SWBT argued that if a CTP voluntarily presents evidence of an error or timely corrects any accidental or inadvertent errors, then no penalties should apply, because administrative penalties should not create a disincentive for CTPs to report and correct their errors.

Verizon proposed modifying §26.468(e) [renumbered as subsection (f)] to add self-reporting and timely initiation of corrective action as factors to further distinguish between inadvertent errors and willful violations. Verizon further recommended adding language that would not apply administrative penalties if a CTP voluntarily reports any filing errors or inaccuracies, or the error or inaccuracies are inadvertent or accidental and the CTP acts promptly to correct the errors or inaccuracies.

TCCFUI requested that the commission address the issue of CTPs that may provide service in several municipalities but are only reporting access lines some of those municipalities. TCCFUI argued that the failure of the CTP to file an access line report for any of the municipalities in which it provides service constitutes a failure to comply with proposed new §26.468(d).

While the comments proposing the addition of a self-reporting factor may be well intended, they are short-sighted because they assume that at the time penalties are proposed or recommended, commission staff would know or have reason to know that the violations were inadvertent or unintentional. While these factors may be appropriate to consider by way of affirmative defenses, they are clearly not necessary to the initial determination of whether a CTP has violated a provision of this rule and the computation of a recommended penalty. Likewise, the existence or lack of good-faith will not be known by staff during the initial penalty recommendation stage. Moreover, all statutory factors addressing the mitigation of a proposed penalty must be considered and good-faith efforts fall within that category. The commission

believes that good faith efforts to correct violations and issues related to inadvertence are more properly addressed in the settlement proceedings provided for in §22.246 of this title.

The industry comments appear to misunderstand the purpose for listing the factors that will be considered. PURA §15.023 list certain factors that the commission must consider before assessing an administrative penalty. The factors listed in PURA §15.023 are generic in nature and not all of the factors apply to every violation. The factors set forth in new §26.468 translate the generic factors that are applicable to reporting violation by identifying the specific factors that uniquely apply to the violation of this new section. Therefore, the factors in §22.246(c)(3) are meant to apply to violations under proposed §26.468 as delineated.

The commission notes that incentives are not limited to the type suggested in the industry comments. CTPs must understand that they have the primary obligation to accurately collect and report the access line data required for payment to municipalities for use of the right of way. The entire statutory and regulatory scheme depends upon the accuracy of the initial reports. The burden must remain on CTPs at the initial reporting of access lines to get it right. CTPs must understand that a breakdown in the initial report of data will be subjected to administrative penalties. Thus, the incentive must be focused on getting the access line counts right the first time and not promote an environment that suggests a CTP "can file it and fix it later." Getting the access line counts right the first time should not be burdensome to CTPs because, after all, the counting of access lines is fundamental to a CTP's core business functions. Also, most CTPs

pass this fee-per-access line through to their customers, and must therefore assess this fee correctly through accurate access line counts.

The commission agrees with AT&T's comment that proposed subsections (e)(1) and (e)(2) [renumbered as subsections (f)(1) and (f)(3)] list potential violations rather than factors to be considered in applying administrative penalties, and thus it is appropriate to separate the specific failures to comply from the delineation of factors by leaving the former in renumbered subsection (f) [formerly subsection (e)] and moving the latter to new subsection (g).

The commission agrees with TCCFUI's comment regarding partial reporting, but believes that the rule, as proposed, contemplates such a situation. Section 26.468 does not grant partial credit. Any failure to report is a failure to report, and shall be considered as such, including situations where a CTP fails to report in some participating municipalities but not in others.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission makes other minor modifications for the purpose of clarifying its intent.

This section is adopted under the Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §14.002 (Vernon 1998 & Supp. 2002) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. This proposed rule is also authorized by the Texas Local Government Code

§283.055 and §283.058 (Vernon 1998 & Supplement 2002), which requires CTPs to file a quarterly access line report and gives jurisdiction to the commission over municipalities and CTPs to enforce legal requirements in a competitively neutral and non-discriminatory manner.

Cross Reference to Statutes: PURA §§14.001, 14.002 and 15.023; Local Gov't Code §283.055 and §283.058.

§26.468. Procedures for Standardized Access Line Reports and Enforcement Relating to Quarterly Reporting.

- (a) **Purpose.** This section standardizes access line reports and implements enforcement procedures relating to quarterly reporting.
- (b) **Application.** The section applies to all certificated telecommunications providers (CTPs) operating in municipalities in the State of Texas.
- (c) **Definition.** The following words and terms, when used in this section, shall have the following meaning unless the context clearly indicates otherwise:
- (1) **Certificated telecommunications provider (CTP)** — As defined under Local Government Code §283.002.
 - (2) **Municipal Access Line Reporting System (MARS)** — An Internet Web application designed for the reporting of quarterly access line counts.
 - (3) **Exemption** — As defined in §26.465(h) of this title (relating to Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers).
 - (A) **Fully exempt CTP** — A CTP claiming exemption that has no access lines to report for any municipalities participating in the fee-per-access line compensation scheme, as required under §26.467 of this title (relating to Rates, Allocation, Compensation, Adjustments and Reporting).

- (B) **Partially exempt CTP** — A CTP claiming exemption that is also operating in and has access lines to report for other municipalities participating under the fee-per-access-line compensation scheme, as required under §26.467 of this title.
- (d) **Reporting procedures.** All CTPs shall file the Quarterly Access Line Reports as required under §26.467 of this title electronically using the MARS, unless the CTP is fully exempt as defined in subsection (c)(3)(A) of this section.
- (1) **CTPs with municipal access lines.** CTPs shall file all access lines by municipality pursuant to §26.467(k)(3) of this title.
- (2) **CTPs with no municipal access lines.** CTPs with no access lines in the State of Texas shall file "Zero Access Lines in Texas."
- (e) **Exemption.**
- (1) **All exempt CTPs.** Both fully and partially exempt CTPs shall:
- (A) by August 15, 2002, file a notarized document listing the municipalities in which it is operating under existing municipal franchise agreements; and
- (B) if the notarized list in subparagraph (A) of this paragraph should change, file an updated notarized list no later than the 45 days from the end of the preceding calendar quarter.
- (2) **All fully exempt CTPs.** All fully exempt CTPs shall:
- (A) by August 15, 2002, use the MARS to claim the exemption;

- (B) subsequently, no later than 45 days from the end of the preceding calendar quarter, use the MARS to renew this exemption; and
 - (C) discontinue renewing this exemption if the CTP should become a partially exempt CTP.

- (f) **Failure to comply.** Failure to comply with subsection (d) of this section is subject to administrative penalties pursuant to §22.246 of this title (relating to Administrative Penalties). Instances of noncompliance include, but are not limited to:
 - (1) failure to report;
 - (2) untimely reporting; and
 - (3) inaccurate reporting.

- (g) **Factors to consider in imposing penalties.** Failures to comply, as delineated in subsection (f) of this section, are subject to administrative penalties, procedures, and factors set forth in §22.246 of this title. In assessing the administrative penalties, the commission shall take into consideration additional factors which include, but are not limited to:
 - (1) impact of inaccurate or delayed reporting on municipalities;
 - (2) the number of days the report was filed late; and
 - (3) history of previous violations.

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 §26.468 relating to Procedures for Standardized Access Line Reports and Enforcement Relating to Quarterly Reporting is hereby adopted with changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE _____ DAY OF JULY 2002.

PUBLIC UTILITY COMMISSION OF TEXAS

Rebecca Klein, Chairman

Brett A. Perlman, Commissioner