

**Senate Committee on Business and Commerce Committee  
Testimony of Kristie C. Ince  
Vice President Regulatory Affairs, tw telecom  
On Behalf of tw telecom and TEXALTEL  
On Issues Relating to Right-of-Way Use Fees  
Imposed on Telecommunications Providers by Municipalities  
August 14, 2012**

Mr. Chairman and members, my name is Kristie Ince and I am the Vice President of Regulatory Affairs for tw telecom, which is a facilities-based competitive telecommunications provider that provides an array of telecommunications, data and internet services to small, medium and large business customers in major markets across Texas and the United States. I am also testifying on behalf of TEXALTEL, which is a non-profit trade association representing the interest of competition and competitive telecommunications carriers in Texas. I am here today to present an overview of the right-of-way use fees imposed on telecommunications providers pursuant to Chapter 283 of the Local Government Code. Tw telecom and TEXALTEL believe that the Chapter 283 right-of-way compensation structure is unwieldy and imposes unreasonable fees on many telecommunications services and therefore, urge the Committee to review the issue of municipal right-of-way compensation and consider an alternative compensation structure.

**Background of Chapter 283**

The right-of-way compensation scheme set forth in Chapter 283 was adopted in 1999. Chapter 283 was enacted in response to two federal court decisions rendered in litigation against the City of Austin and the City of Dallas. In both cases, the federal courts had ruled that a municipality was not authorized to impose a franchise on a telecommunications provider that did not “physically occupy” public rights-of-way. In other words, if a telecommunications provider did not cut a street and install facilities, the municipality was enjoined from requiring that such provider obtain a franchise and pay franchise fees to the municipality. Since many new entrants were reselling the incumbent’s service or using the incumbent’s unbundled network elements to provide service and

therefore had no need to install facilities in public rights-of-way, municipalities across Texas were concerned that if residents migrated to non-franchised service providers, the amount of revenue the municipality received from franchised telecommunications providers would severely decline.

The Legislature perceived that this posed a problem and remedied the situation with the enactment of Chapter 283. First, Chapter 283 abolished franchising requirements for new entrants and allowed all existing franchise holders to terminate their franchises. This approach ensured compliance with the federal court decisions while allowing facilities-based providers the opportunity to shed their franchises and compete with the new providers on an equal footing. Second, Chapter 283 imposed right-of-way use fees on *all* certificated providers that served end-use retail customers through the use of transmission media that was physically located within a public right-of-way.

### **Chapter 283 Right-of-Way Use Fees**

#### **The Access Line**

When deciding on the right-of-way fee structure to be imposed under Chapter 283, the Legislature departed from the traditional “percentage of gross revenues” approach. Instead, the Legislature adopted a compensation scheme that imposes a fee on each “access line” provided. Prior to the enactment of Chapter 283, the City of Houston had initiated a compensation scheme that was partly access line-based. Although the Legislature did not adopt the Houston approach in its entirety, it borrowed liberally from the City of Houston when it devised the fees that each certificated telecommunications provider would pay for “use” of the public rights-of-way. To my knowledge, no other state has adopted a similar ROW use compensation scheme.

The Chapter 283 compensation scheme is a collect and remit service-based compensation scheme that hinges on how the term “access line” is defined and applied. Providers determine the number of “access lines” provided to each customer, calculate the fee for each access line provided and bill the customer accordingly. On a quarterly basis, the provider remits the access line fees it has collected from its customers to the respective city.

The term “access line” is broadly, but vaguely defined in Chapter 283. The PUC has adopted rules clarifying the definition and establishing a methodology for counting and reporting access lines, but there are doubts that the term “access line” is being interpreted and applied in a uniform manner. The likelihood that the term is not being interpreted and applied evenly raises competitive advantage issues among providers as well as adequate compensation concerns among cities.

### **Access Line Categories**

While an “access line” may not be easy to describe, the statutorily created categories of access lines are relatively straightforward. Category 1 includes residential switched access lines and any other access line that provides residential voice service. It also includes point-to-point lines, whether residential or non-residential, to the extent that such lines provide burglar alarm or other similar security services. Category 2 includes non-residential switched access lines and any other access line that provides non-residential voice service. Category 3 includes all other point-to-point private lines, whether residential or non-residential, not otherwise included within Category 1.

Some examples of how an access line may be categorized and counted follow:

Category 1: Your home telephone line is most likely counted and reported as a single Category 1 access line. If your home has a separate fax line, that line is also likely to be counted and reported as a single Category 1 access line. You would be charged the municipal fee two times - - once for each line.

Category 2: If your office here in Austin has a channelized T-1 line, it may be counted and reported as up to 24 access lines, depending on how many channels are needed to provide the voice services ordered. If the T-1 line is not channelized, it may be counted and reported as one Category 2 access line. You would be charged for the number of “channels” on the T-1 that provide voice service or up to 24 times the Category 2 rate.

Category 3: If you have a dedicated point-to-point line between your office in Austin and your office in your hometown, that line is likely to be counted and reported as one Category 3 access line in Austin and one Category 3 access line in your hometown. You would be charged for each end of the circuit or 2 times the Category 3 rate.

### **Access Line Rates**

The rate paid for a Category 1, Category 2 or Category 3 access line varies from city to city. The base rates for access lines were established in 1999 by the PUC according to a statutory formula. With exceptions carved out for litigating cities, each city was directed to determine the amount of revenue received in franchise, license, permit and application fees, and in-kind services or facilities from certificated telecommunications providers during 1998. This amount was referred to as the city's "base amount." At the same time, all certificated providers were required to report the number of access lines, by category, currently provided within each municipality. After the base amounts and access line totals were calculated, municipalities were authorized to effect an allocation of their base amount over each access line category. All or nearly all cities elected to allocate a lower rate for Category 1 and higher rates for Categories 2 and 3. After the cities established the allocation among categories, the PUC published the access line rates applicable to each category in each city.

Two years after the initial access line rates were set; the PUC began annually adjusting the rates upward by an amount equal to one-half the annual change, if any, in the consumer price index. A municipality may decline all or any portion of any increase in the per category access line rates, but most cities increase their access lines annually. The PUC recently issued its Order Setting CPI-Adjusted City-Preferred Access Line Rates for Year 2012. A schedule of the CPI-adjusted access line rates for 2012 for all Texas cities has been provided to the Committee. These rates were implemented July 1, 2012. Currently, 1,132 cities have Category 1, 2 and 3 rates approved by the PUC.

### **Chapter 283 Access Line Fees Today**

Since the implementation of the Chapter 283 compensation scheme, competition in the telecommunications industry has driven the price of

telecommunications services down significantly. At the same time, thanks to advances in technology, telecommunications providers are able to provide more services with fewer burdens on the public rights-of-way. Ironically, while the cost of telecommunications services has gone down and there is less impact on the public rights-of-way, the fees paid for right-of-way use by telecommunications providers have *increased*. Since there is no correlation between the cost of the service provided and the amount of the access line fee assessed on such service, the right-of-way compensation paid by telecommunication providers - - and passed on to their customers, far exceeds the right-of-way compensation paid by other entities that place similar burdens on the rights-of-way. For example, providers of cable and video services pay a statutorily mandated fee of five percent of their gross revenues for their use of the public rights-of-way. Electric providers typically pay municipal franchise fees that are three to five percent of their gross revenue.

As an example of the amount of right-of-way compensation paid when a telecommunications providers serves a business customer, we have included an actual invoice from tw telecom to one of its Category 2 business customers located in the City of Austin. tw telecom provides this customer with voice services via a channelized T-1 line. The monthly cost of service is \$420.00. The amount of the access line fee is \$119.14 or nearly 28% percent of the cost of the service. This is 23 times the Category 2 rate in Austin of \$5.18. The total sum of *all* the taxes and fees applicable to the service purchased by this customer is \$206.71 or roughly 49% percent of the cost of the service. tw telecom and TEXALTEL do not believe that when the Legislature adopted the access line compensation scheme, it intended or envisioned that an access line fee would be 28% percent of the cost of the service sold.

The amount of the access line fee appearing on the sample invoice is not an anomaly. As an attachment to this testimony, we have listed the 2012 access line rates in the cities of Arlington, Austin, Brownsville, Dallas, El Paso, Ft. Worth, Houston, Pasadena, San Antonio, Tyler and Wichita Falls. If the \$420.00 service described on the sample invoice was provided in any of the other cities listed on this chart, the *monthly* amount of the access line fee would range from \$47.61 in Brownsville to \$161.23 in Arlington or roughly 11 percent to 38 percent of the cost of the service. You can see how even a relatively low Category 2 rate in Brownsville still translates to 11 percent of the cost of service. Because the

Category 2 fees are so high, the instinct in the marketplace is to sell services to which the Category 2 fee does not apply. It creates an incentive to differentiate yourself in the market not based on the cost or quality of service, but rather based on how a carrier counts the access lines associated with the service or in which category the carrier places the service. This creates competitive disparity and results in a system where the amount of a fee on the bill is directing the competitive market.

As you can see on the attached bill, the customer pays many other state and federal taxes adding up to 49% of the cost of service, but it is clear to see that the Texas Municipal fee is a standout on the bill at 28% of the cost of service and 57% of the total taxes. This is where consumers should see tax relief.

### **Alternatives to the Chapter 283 Compensation Scheme**

tw telecom and TEXALTEL believe that there should be a correlation between right-of-way fees and the actual burden imposed on the right-of-way or the actual cost a city incurs to manage its public rights-of-way. If, however, right-of-way use fees are to be based on the value of the services carried on the facilities occupying the rights-of-way, then at a minimum we believe that the fees should correspond to the cost of the service. Under the current scheme employed by Chapter 283, there is no correlation between the cost of the service and the amount of the fee.

In 2005, the Legislature established a right-of-way fee structure that tw telecom and TEXALTEL believe could serve as a compensation model for right-of-way fees applicable to telecommunications providers. Under new Chapter 66 of the Texas Utilities Code, holders of state-issued certificates of franchise authority for the provision of cable or video service are required to pay a franchise fee to each municipality in which it provides service in the amount of five percent of the provider's "gross revenue" as such term is defined in section 66.002 ( 6). The definition of gross revenue as set forth in Chapter 66 provides a general framework for a gross receipts compensation scheme that could be made applicable to telecommunications providers. Indeed, it makes no sense to have right-of-way compensation structures vary so disparately between cable and telecommunications providers when their burden on public rights-of-way is so similar.

In general terms, like the gross revenue compensation scheme applicable to cable and video providers, tw telecom and TEXALTEL envision a right-of-way compensation scheme applicable to telecommunications providers whereby those telecommunications carriers that currently pay access line fees would calculate their right-of-way fees based on a percent of the cost of the telecommunications service provided to their end-use customer. We are not proposing to broaden the list of providers who pay right-of-way use fees or narrow the type of service subject to the fee. Rather, tw telecom and TEXALTEL propose that the carriers who currently pay access line fees merely convert to a new gross revenue compensation formula that is similar to the compensation system applicable to cable and video service providers.

If, however, the current access line fee compensation system stays in place, tw telecom and TEXALTEL propose four areas of change that are imperative in making the law fairer. These changes are:

1. Establish a reasonable deadline for **timely completion of authorized reviews.**
2. Establish a **reasonable limitation on the period of assessment for unpaid access line fees.**
3. Establish a **mechanism to recoup overpayment of access line fees.**
4. Establish a **safe harbor mechanism for carriers to obtain direction on how to count and report services.**

**Timely Completion of Authorized Reviews.** In March of 2005 the PUC adopted rules to set forth the way in which cities could audit carriers. That rulemaking made clear that an authorized review must be commenced within 90 days after the filing of a carrier's access line report. The rule did not, however, establish a time frame within which a city must complete the audit. In June of 2005, tw telecom received an audit request from the City of Houston. We complied fully with the audit and it was completed in a timely manner by June of 2006. There were no violations found by the audit. After the audit was complete, we immediately began receiving quarterly letters from the city requesting an

audit of the previous quarter's filings. The letter explained that they were attempting to keep every quarter open so that they could go back and officially audit every quarter from January 2005 forward if necessary. We were given the opportunity to sign a document stating that we would submit to an audit of all our quarters at any time in lieu of receiving these letters. This was an unabashed attempt by the city to get around the new rule requiring them to request an audit not later than 90 days after the most recent quarterly filing. While my company declined to waive our rights under the PUC rules, this was a pyrrhic victory as we are now under constant audit due to the letters we received and continue to receive each quarter from the City of Houston.

This creates a host of internal problems for carriers. It is difficult to accrue for any monetary impacts when the audits are not completed but are rather placeholders leaving the corporation with an open-ended exposure. It also renders the PUC rule regarding the retention of access line records (26.4651) moot. That rule requires companies to maintain records for three years. This action taken by the city causes providers to have to continuously maintain records beyond that time frame. Currently, tw telecom has open audit requests dating back to 2006 from Houston, more than twice the three-year document retention period. Cities need to complete the authorized reviews or audits within a reasonable time frame.

**Period of assessment for unpaid access line fees.** Some cities take the position that there is no limitation on the period that they can assess payment of access line fees. Cities contend that if they find errors in an audit of a company's municipal fee payments, they can extrapolate that mistake back to July 2000 and assessing the carrier for underpayment of access line fees back to 2000. The cities want to go back more than a DECADE to collect for mistakes that may be discovered in an audit even though they did not audit us for those quarters. Cities should not be able to go back to the inception of the law to collect fees. A reasonable limitation period should be established for assessing access line underpayments unless there is evidence of fraud or gross error such as exists in the Tax Code.



**Mechanism to recoup overpayments.** The next major issue that needs to be addressed is a company's right to receive a refund in the event we overpay a city for access line fees. tw telecom experienced this problem first hand. We inadvertently misclassified one of our customers as residing in one city instead of another. The municipal fees in the city where we incorrectly had the customer located were twice as much as the city's fees in which the customer was actually located. This resulted in a very large, \$475,000, overpayment to one city and an underpayment to another. We had also inadvertently overcharged our customer since the city in which they were actually located had a much lower Texas Municipal Fee. We approached the city where the overpayment occurred and they acknowledged the overpayment, but explained that they would not allow us to recoup the overpayment. Importantly, this \$475,000 recoupment was not going back to tw telecom, but rather, half was to be paid to the correct city and half was to be refunded to the customer who was incorrectly charged. At one point because of the city's position on our recoupment, we actually withheld the \$475,000 overpayment from our quarterly remittance to that city. In short order we were told that if we did not make the full remittance immediately, we would be considered unauthorized to be in the city's rights-of-way jeopardizing our facilities and business. We paid them. We have no leverage. Through extended negotiations with the city where the overpayment occurred my company was allowed to recoup the overpayment over a period of years, but the city made it clear that they do not feel that they legally have to do so.

The law has no express provision to provide for refund of an overpayment of the Texas Municipal Fee. Numerous other statutory provisions are in place entitling a taxpayer to refunds of overpaid monies from taxing entities - including cities! But Texas Municipal Fee is not designed as a tax and therefore does not offer the protections to the taxpayer. In fact under Chapter 283, the city where the underpayment occurred could have demanded payment for the access lines since we technically underpaid them and our customer could have sued us for overcharging them. All told, tw telecom faced not recouping the overpayment of \$475,000, paying the correct city \$237,000 and refunding our customer \$237,000.

One last interesting point on this situation, in an authorized review or audit of the Texas Municipal Fees paid to a city by a carrier, any underpayments are recognized and pursued, but overpayments to the city are ignored. There is not an offset because the law does not require it.

**Safe harbor.** Lastly, there is much confusion over how to count new technology access lines leading to competitive disparities in the marketplace. Because the laws are stacked against carriers with respect to this fee, there is absolutely no advantage to approaching the PUC to seek input on how to count an access line. If we do, it leaves us open to open-door audits going back to the inception of the law. We need a process where we could approach the PUC with our questions with some sort of immunity or safe harbor.

tw telecom and TEXALTEL appreciate the opportunity to provide this testimony. We look forward to working with members of the Committee and other stakeholders on this issue after further analysis and review.

## **ATTACHMENTS**

**A. BALANCE DUE, PAYMENTS, ADJUSTMENTS**

Balance Due From a Previous Statement		\$1,259.37
Payments		
Thank you Payment Received		(\$1,259.37)
	<u>Total Payments</u>	<u>\$1,259.37</u>
Adjustment(s)		
	<u>Total Adjustments</u>	<u>\$0.00</u>
	<b><u>TOTAL AMOUNT DUE FOR SECTION A</u></b>	<b><u>\$0.00</u></b>

**B. INTEGRATED SERVICES BUNDLES**

Service Location: [REDACTED]  
Name: [REDACTED]  
Address: [REDACTED] AUSTIN, TX, 78701

<u>Type of Service</u>	<u>PON</u>	<u>Charge From &amp; To</u>	<u>Quantity</u>	<u>Amount</u>
Voice T1 Flat 2way 36		07/20/12 - 08/19/12	1	\$420.00
5000 Flex Call Product		06/20/12 - 07/19/12	1	\$0.00
		<u>TOTAL Service Location: 127073</u>		<u>\$420.00</u>

**TOTAL Charges Without Tax For Section B** **\$420.00**

**Taxes, Fees, Surcharges**

Federal Universal Service Fund (USF) Surcharge	\$11.21
Equalization Surcharge	\$1.38
Public Utility Regulatory Act Assessment	\$0.81
State Franchise Recovery Surcharge	\$2.44
State Sales Tax	\$35.52
Texas Universal Service Fund (TUSF)	\$14.99
911 Business	\$11.50
District Tax	\$4.86
Local Sales Tax	\$4.86
TX Municipal Franchise Fee - Switched Services	\$119.14

**TOTAL Tax For Section B** **\$206.71**

**TOTAL CHARGES FOR SECTION B** **\$626.71**

TX Muni Fee = 28%  
 Total Taxes = 49%  
 Austin  
 Category 2 Rate =  
 \$5.18

**C. BASIC SERVICE**

Service Location: [REDACTED]  
Name: [REDACTED]  
Address: [REDACTED] AUSTIN, TX, 78701

<u>Type of Service</u>	<u>PON</u>	<u>Charge From &amp; To</u>	<u>Quantity</u>	<u>Amount</u>
Local Loop Charge		07/20/12 - 08/19/12	1	\$103.50
LD Calling Card CCSP11_1		07/20/12 - 08/19/12	1	\$0.00
Complete Lines Trunks DSO		07/20/12 - 08/19/12	6	\$145.38
		<u>TOTAL Service Location: 127073</u>		<u>\$248.88</u>

**TOTAL Charges Without Tax For Section C** **\$248.88**

**Taxes, Fees, Surcharges**

Federal Excise Tax	\$7.84
Public Utility Regulatory Act Assessment	\$0.44
State Franchise Recovery Surcharge	\$1.74
State Sales Tax	\$16.36
Texas Universal Service Fund (TUSF)	\$10.70
District Tax	\$2.62
Local Sales Tax	\$2.62

**TOTAL Tax For Section C** **\$42.32**

**TOTAL CHARGES FOR SECTION C** **\$291.20**

**2012 CATEGORY 2 ACCESS LINE**  
**RATES**

<b>ARLINGTON</b>	<b>\$7.01</b>
<b>AUSTIN</b>	<b>\$5.18</b>
<b>BROWNSVILLE</b>	<b>\$2.07</b>
<b>DALLAS</b>	<b>\$6.97</b>
<b>EL PASO</b>	<b>\$5.52</b>
<b>FORT WORTH</b>	<b>\$4.15</b>
<b>HOUSTON</b>	<b>\$5.92</b>
<b>PASADENA</b>	<b>\$3.95</b>
<b>SAN ANTONIO</b>	<b>\$4.11</b>
<b>WITCHITA FALLS</b>	<b>\$3.31</b>

## **Compensation Paid to Texas Municipalities for Use of Public Rights-of-Way**

### **Cable and Video Services**

A fee of 5% based on the definition of “gross revenue” set forth in Section 66.002 (6) of the Utilities Code is assessed on holders of certificates of franchise authority that provide cable and video services. The definition of “gross revenue” expressly excludes any non-cable service or non-video service revenue including without limitation revenue received from telecommunications services or information services.

### **Telecommunications and Voice Services**

A fee per “access line” as defined in Section 283.002 (1) of the Local Government Code is assessed on “certificated telecommunications providers” as defined in Section 283.002 (2) of the Local Government Code. There are three categories of access lines:

Category 1 includes analog and digital residential switched access lines and any other access line that provides residential voice service. It also includes point-to-point private lines, whether residential or non-residential, only to the extent such lines provide burglar alarm or other similar security services.

Category 2 includes all analog and digital non-residential switched access lines and any other access line that provides non-residential voice service.

Category 3 includes all other point-to-point private lines, whether residential or non-residential, not otherwise included in category 1.

The access line fee for each category is a fixed amount that varies from city to city. On an annual basis, the PUC adjusts the rates pursuant to a statutory formula. The definition of an “access line” is fairly straightforward and it is generally easy to categorize access lines. Due to the wide array of technology used to provision access lines, however, the methodology for counting access lines can be complex and burdensome. There is no correlation between the fee assessed and either the cost of the service or the municipality’s cost to manage and preserve the public ROW.

### **Information Services**

Information services, *e.g.*, high speed Internet access and DSL, are not assessed a ROW use fee.

***NOTE: WHEN CABLE AND TELECOMMUNICATIONS SERVICES ARE PROVISIONED BY A SINGLE PROVIDER, TWO ROW USE FEES WILL BE ASSESSED EVEN IF A SINGLE FACILITY IS USED TO PROVISION BOTH SERVICES. BOTH FEES MAY BE PASSED THROUGH TO THE END-USE CUSTOMER.***

**CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS.**

**Subchapter R. PROVISIONS RELATING TO MUNICIPAL REGULATION AND RIGHTS-OF-WAY MANAGEMENT.**

**§26.461. Access Line Categories.**

- (a) **Purpose.** This section establishes three competitively neutral, non-discriminatory categories of access lines for statewide use in establishing a uniform method for compensating municipalities for the use of a public right-of-way by certificated telecommunications providers (CTPs).
- (b) **Application.** The provisions of this section apply to CTPs, as defined by subsection (c)(2) of this section, and to municipalities in the State of Texas.
- (c) **Definitions.** The following words and terms when used in this subchapter, shall have the following meaning, unless the context clearly indicates otherwise.
  - (1) **Access lines** –
    - (A) means a unit of measurement representing
      - (i) each switched transmission path of the transmission media that is physically within a public right-of-way extended to the end-use customer's premises within the municipality, that allows the delivery of local exchange telephone services within a municipality, and that is provided by means of owned facilities, unbundled network elements or leased facilities, or resale; or
      - (ii) each termination point or points of a nonswitched telephone or other circuit consisting of transmission media located within a public right-of-way connecting specific locations identified by, and provided to, the end-use customer for delivery of nonswitched telecommunications services within the municipality; or
      - (iii) each switched transmission path within a public right-of-way used to provide central office-based PBX-type services for systems of any number of stations within the municipality, and in that instance, one path shall be counted for every 10 stations served; or
      - (iv) any other line not described in clauses (i), (ii) or (iii) of this subparagraph that provides voice service delivered by means of owned facilities, unbundled network elements or leased facilities, or resale.
    - (B) The definition of "access line" may not be construed to include interoffice transport or other transmission media that do not terminate at an end-use customer's premises or to permit duplicate or multiple assessment of access line rates on the provision of a single service.
  - (2) **Certificated telecommunications provider (CTP)** – A person who has been issued a certificate of convenience and necessity, certificate of operating authority, or service provider certificate of operating authority by the commission to offer local exchange telephone service or a person who provides voice service.
  - (3) **Public right-of-way** – The area on, below, or above a public roadway, highway, street, public sidewalk, alley, waterway, or utility easement in which the municipality has an interest. The term does not include the airways above a right-of-way with regard to wireless telecommunications.
  - (4) **Residential** – Services provided at residential locations and primarily for residential (non-commercial) use. Definitions in the tariffs or price sheets of the provider, and the determinations made by provider for billing purposes shall control, unless the provider's definitions unreasonably depart from the general definition herein for purposes of avoidance of the payment of appropriate fees to the municipality.
  - (5) **Non-Residential** – All other locations not served by a residential line.
  - (6) **Voice service** – Voice communications services provided through wireline facilities located at least in part in the public right-of-way, without regard to the delivery technology, including Internet protocol technology. The term does not include voice service provided by a commercial mobile service provider as defined by 47 U.S.C. Section 332(d).

**CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS.**

**Subchapter R. PROVISIONS RELATING TO MUNICIPAL REGULATION AND RIGHTS-OF-WAY MANAGEMENT.**

**§26.461 continued**

- (d) **Access line categories.** There shall be three categories of access lines. The three categories shall be as follows:
- (1) Category 1 shall include both analog and digital residential switched access lines and any other access line that provides residential voice service. It shall also include point-to-point private lines, whether residential or non-residential, only to the extent such lines provide burglar alarm or other similar security services.
  - (2) Category 2 shall include all analog and digital non-residential switched access lines and any other access line that provides non-residential voice service.
  - (3) Category 3 shall include all other point-to-point private lines, whether residential or non-residential, not otherwise included within category 1.



**CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS.**

**Subchapter R. PROVISIONS RELATING TO MUNICIPAL REGULATION AND RIGHTS-OF-WAY MANAGEMENT.**

**§26.465. Methodology for Counting Access Lines and Reporting Requirements for Certificated Telecommunications Providers.**

- (a) **Purpose.** This section establishes a uniform method for counting access lines within a municipality by category as provided by §26.461 of this title (relating to Access Line Categories), sets forth relevant reporting requirements, and sets forth certain reseller obligations under the Local Government Code, Chapter 283.
- (b) **Application.** This section applies to all certificated telecommunications providers (CTPs) in the State of Texas.
- (c) **Definitions.** The following words and terms when used in this section, shall have the following meaning, unless the context clearly indicates otherwise.
- (1) **Customer** – The retail end-use customer.
  - (2) **Transmission path** – A path within the transmission media that allows the delivery of switched local exchange service or provides voice service.
    - (A) Each individual switched service shall constitute a single transmission path.
    - (B) Where services are offered as part of a bundled group of services, each switched service in that bundled group of services shall constitute a single transmission path.
    - (C) Services that constitute vertical features of a switched service, *e.g.*, call waiting, caller-ID, do not constitute a transmission path.
    - (D) Where a service or technology is channelized by the CTP and results in a separate switched path for each channel, each such channel shall constitute a single transmission path.
    - (E) Voice service provided through wireline facilities located at least in part in the public right-of-way, without regard to the delivery technology, switched or not, and including Internet protocol technology, shall constitute a single transmission path.
  - (3) **Wireless provider** – A provider of commercial mobile service as defined by §332(d), Communications Act of 1934 (47 U.S.C. §151 *et seq.*), Federal Communications Commission rules, and the Omnibus Budget Reconciliation Act of 1993 (Public Law 103-66).
- (d) **Methodology for counting access lines.** A CTP's access line count shall be the sum of all lines counted pursuant to paragraphs (1), (2), (3), and (4) of this subsection, and shall be consistent with subsections (e), (f) and (g) of this section.
- (1) **Switched transmission paths and services.**
    - (A) The CTP shall determine the total number of switched transmission paths, and shall take into account the number of switched services provided and the number of channels used where a service or technology is channelized.
    - (B) All switched services shall be counted in the same manner regardless of the type of transmission media used to provide the service.
    - (C) If the transmission path crosses more than one municipality, the line shall be counted in, and attributed to, the municipality where the end-use customer is located. Pursuant to Local Government Code §283.056(f), the per-access-line franchise fee paid by CTPs constitutes full compensation to a municipality for all of a CTP's facilities located within a public right-of-way, including interoffice transport and other transmission media that do not terminate at an end-use customer's premises, even though those types of lines are not used in the calculation of the compensation.

**CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS.**

**Subchapter R. PROVISIONS RELATING TO MUNICIPAL REGULATION AND RIGHTS-OF-WAY MANAGEMENT.**

**§26.465(d) continued**

- (2) **Nonswitched telecommunications services or private lines.**
  - (A) Each circuit used to provide nonswitched telecommunications services or private lines to an end-use customer, shall be considered to have two termination points, one on each customer location identified by the customer and served by the circuit.
  - (B) The CTP shall count nonswitched telecommunications services or private lines by totaling the number of terminating points within a municipality.
  - (C) A nonswitched telecommunications service shall be counted in the same manner regardless of the type of transmission media used to provide that service.
  - (D) A terminating point shall be counted in, and attributed to, the municipality where that point is located. In the event a CTP is not able to identify the physical location of the terminating point, that point shall be attributed to the municipality identified by the CTP's billing systems.
  - (E) Where dark (unlit) fiber is provided to an end-use customer who then lights it, the line shall be counted as a private line, by default, unless it is evident that it is used for providing switched services.
- (3) **Central office based PBX-type services.** The CTP shall count one access line for every ten stations served.
- (4) **Voice service.**
  - (A) The CTP shall count each end-use customer provided voice service as one access line. Services that constitute vertical features of a voice service, or are bundled with the voice service shall not be counted as a separate access line.
  - (B) In the event a CTP is unable to identify the physical location of an end-use customer utilizing voice service, but that end-use customer's billing address, as identified in the CTP's billing system, is located inside the boundaries of a municipality, the end-use customer's access line shall be attributed to the municipality where such billing address is located.
- (e) **Lines to be counted.** A CTP shall count the following access lines:
  - (1) all access lines provided to a retail end-use customer;
  - (2) all access lines provided as a retail service to other CTPs and resellers for their own end-use;
  - (3) all access lines provided as a retail service to wireless telecommunication providers and interexchange carriers (IXCs) for their own end-use;
  - (4) all access lines a CTP provides as employee concession lines and other similar types of lines;
  - (5) all access lines provided as a retail service to a CTP's wireless and IXC affiliates for their own end-use, and all access lines provided as a retail service to any other affiliate for their own end-use;
  - (6) dark fiber, to the extent it is provided as a service or is resold by a CTP and shall exclude lines sold and resold by non-CTPs;
  - (7) any other lines meeting the definition of access line as set forth in §26.461 of this title;
  - (8) Lifeline lines;
  - (9) all retail pay telephone access lines; and
  - (10) all lines that provide voice service delivered by means of owned facilities, unbundled network elements or leased facilities, or resale that are not otherwise counted under paragraphs (1)-(9) of this subsection.

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- (f) **Lines not to be counted.** A CTP shall not count the following lines:
- (1) all lines that do not terminate at an end-use customer's premises;
  - (2) lines used by providers who are not end-use customers such as CTP, wireless provider, or IXC for interoffice transport, or back-haul facilities used to connect such providers' telecommunications equipment;
  - (3) lines used by a CTP's wireless and IXC affiliates who are not end-use customers, for interoffice transport, or back-haul facilities used to connect such affiliates' telecommunications equipment;
  - (4) lines used by any other affiliate of a CTP for interoffice transport; and
  - (5) any other lines that do not meet the definition of access line as set forth in §26.461 of this title.
- (g) **Reporting procedures and requirements.**
- (1) Who shall file. The record keeping, reporting and filing requirements listed in this section or in §26.467 of this title (relating to Rates, Allocation, Compensation, Adjustments and Reporting) shall apply to all CTPs in the State of Texas.
  - (2) Initial reporting requirements.
    - (A) No later than January 24, 2000, a CTP shall file its access line count using the commission-approved *Form for Counting Access Line or Program for Counting Access Lines* with the commission. The CTP shall report the access line count as of December 31, 1998, except as provided in subparagraph (C) of this paragraph.
    - (B) A CTP shall not include in its initial report any access lines that are resold, leased, or otherwise provided to a CTP, unless it has agreed to a request from another CTP to include resold or leased lines as part of its access line report.
    - (C) A CTP that cannot file access line count as of December 31, 1998 shall file request for good cause exemption and shall file the most recent access line count available for December, 1999.
    - (D) A CTP shall not make a distinction between facilities and capacity leased or resold in reporting its access line count.
- (h) **Exemption.** Any CTP that does not terminate a franchise agreement or obligation under an existing ordinance shall be exempted from subsequent reporting pursuant to §26.467 of this title unless and until the franchise agreement is terminated or expires on its own terms. Any CTP that fails to provide notice to the commission and the affected municipality by December 1, 1999 that it elects to terminate its franchise agreement or obligation under an existing ordinance, shall be deemed to continue under the terms of the existing ordinance. Upon expiration or termination of the existing franchise agreement or ordinance by its own terms, a CTP is subject to the terms of this section.
- (i) **Maintenance and location of records.** A CTP shall maintain all records, books, accounts, or memoranda relating to access lines deployed in a municipality in a manner which allows for easy identification and review by the commission and, as appropriate, by the relevant municipality. The books and records for each access line count shall be maintained for a period of no less than three years.
- (j) **Proprietary or confidential information.**
- (1) The CTP shall file with the commission the information required by this section regardless of whether this information is confidential. For information that the CTP alleges is confidential and/or proprietary under law, the CTP shall file a complete list of the information that the

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CTP alleges is confidential. For each document or portion thereof claimed to be confidential, the CTP shall cite the specific provision(s) of the Texas Government Code, Chapter 552, that the CTP relies to assert that the information is exempt from public disclosure. The commission shall treat as confidential the specific information identified by the CTP as confidential until such time as a determination is made by the commission, the Attorney General, or a court of competent jurisdiction that the information is not entitled to confidential treatment.

- (2) The commission shall maintain the confidentiality of the information provided by CTPs, in accordance with the Public Utility Regulatory Act (PURA) §52.207.
  - (3) If the CTP does not claim confidential treatment for a document or portions thereof, then the information will be treated as public information. A claim of confidentiality by a CTP does not bind the commission to find that any information is proprietary and/or confidential under law, or alter the burden of proof on that issue.
  - (4) Information provided to municipalities under the Local Government Code, Chapter 283, shall be governed by existing confidentiality procedures which have been established by the commission in compliance with PURA §52.207.
  - (5) The commission shall notify a CTP that claims its filing as confidential of any request for such information.
- (k) **Report attestation.** All filings with the commission pursuant to this section shall be in accordance with §22.71 of this title (relating to Filing of Pleadings, Documents and Other Materials) and §22.72 of this title (relating to Formal Requisites of Pleadings and Documents to Be Filed With the Commission). The filings shall be attested to by an officer or authorized representative of the CTP under whose direction the report is prepared or other official in responsible charge of the entity in accordance with §26.71(d) of this title (relating to General Procedures, Requirements and Penalties). The filings shall include a certified statement from an authorized officer or duly authorized representative of the CTP stating 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.
- (l) **Reporting of access lines that have been provided by means of resold services or unbundled facilities to another CTP.** This subsection applies only to a CTP reporting access lines under §26.467 of this title, that are provided by means of resold services or unbundled facilities to another CTP who is not an end-use customer. Nothing in this subsection shall prevent a CTP reporting another CTP's access line count from charging an appropriate, tariffed administrative fee for such service.
- (m) **Commission review of the definition of access line.**
- (1) Pursuant to the Local Government Code §283.003, not later than September 1, 2002, the commission shall determine whether changes in technology, facilities, or competitive or market conditions justify a modification of the adoption of the definition of "access line" provided by §26.461 of this title. The commission may not begin a review authorized by this subsection before March 1, 2002.
  - (2) As part of the proceeding described by paragraph (1) of this subsection, and as necessary after that proceeding, the commission by rule may modify the definition of "access line" as necessary to ensure competitive neutrality and nondiscriminatory application and to maintain consistent levels of compensation, as annually increased by growth in access lines and consumer price index, as applicable, to the municipalities.
  - (3) After September 1, 2002, the commission, on its own motion, shall make the determination required by this subsection at least once every three years.