

PROJECT NO. 29719

RULEMAKING TO ADDRESS § PUBLIC UTILITY COMMISSION
MUNICIPAL AUTHORIZED REVIEW §
OF ACCESS LINE REPORTING § OF TEXAS

ORDER ADOPTING NEW §26.469
AS APPROVED AT THE MARCH 31, 2005, OPEN MEETING

The Public Utility Commission of Texas (commission) adopts new §26.469, relating to Municipal Authorized Review of a Certificated Telecommunication Provider's Business Records with no changes to the proposed text as published in the December 17, 2004 issue of the *Texas Register* (29 TexReg 11511). The new rule will define the scope and procedures attendant to an authorized review of a provider's business records by a municipality pursuant to Texas Local Government Code §283.056(c)(3). This new rule is adopted under Project Number 29719.

The commission received comments on the proposed new section from the Coalition of Cities and the City of Houston (Coalition); SBC Texas; GTE Southwest Inc. d/b/a Verizon Southwest (Verizon); Sprint Corporation (Sprint); CLEC Coalition and the City of Garland.

The comments that were received by commission staff indicated that there was a consensus among the parties to accept this rule as proposed at the December 2, 2004, Open Meeting. The only suggested modification to the rule was requested by Sprint. Additionally, some parties included comments containing proposed language changes to be included in the preamble to the rule.

Comments on Specific Rule Provisions

Sprint stated its concern regarding §26.469(c)(4)(b), which requires that the review be performed on-premises at the principal Texas office of the certificated telecommunications provider (CTP),

unless otherwise agreed by the CTP and the municipality. Sprint suggested that the word “Texas” be removed from this section since its business records reside at its corporate headquarters in Overland Park, Kansas. Sprint argued that if a municipality determines that an on-premises review is necessary, it is more efficient to conduct that review at the location where the business records are kept. Sprint maintained that the majority of the audit could be handled by regular, overnight and electronic mail.

The City of Garland argued that if municipal representatives had to travel to Kansas, travel time alone would add substantially to the process, along with the uncertainties caused by travel delays. Efficiency would be better attained by having Sprint ship the records to Texas.

Commission response

The commission did not receive comments from any other party which participated in the negotiation of this rule voicing any concerns regarding the requirement of having an authorized review held at the CTP’s principal Texas office. The commission notes that under P.U.C. Subst. R. §26.465(i), relating to Methodology for Counting Access Lines, and Reporting Requirements for Certificated Telecommunications Providers, a CTP is required to 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 commission finds that in order to provide easy identification and review for the commission and the municipalities, it is incumbent upon the CTP to provide access to all records, books, accounts, or memoranda at the principal Texas office of the CTP. The commission

therefore, declines to adopt Sprint's recommendation to remove the word "Texas" from P.U.C. Subst. R. §26.469(c)(4)(b).

Comments on Preamble Language

The written comments that pertained to the preamble were received from the Coalition of Cities and the City of Houston (Coalition); SBC Texas; GTE Southwest Inc. d/b/a Verizon Southwest (Verizon); Sprint Corporation (Sprint); CLEC Coalition and the City of Garland.

Business Records

The Coalition argued that the preamble should provide clarity as to the types of CTP business records which are subject to access by having commission staff list examples of types of business records that should be available for access. The Coalition suggested that the following business records be included in the preamble: (1) List of Services; (2) Procedure(s) used to determine classification of products and services as access lines and identification of categories of access lines; (3) Street address guide (SAG); (4) Adequate proof agreements; (5) Samples of billing records or invoices to customers; (6) Underlying records to support uncollectible customer accounts; and (7) Records as to lines added or dropped relevant to the reviewing period. The Coalition stated that the CTP's billing system should be sufficient to substantiate compliance with the access line reporting requirements pursuant to P.U.C. Subst. R. §26.467(k)(2). Moreover, the Coalition noted that records are to be maintained in a manner which allows for easy identification and review consistent with P.U.C. Subst. R. §26.465(i). The Coalition further argued that a list of all services that the CTP provides is necessary to ensure

that all services have been characterized properly, categorized correctly, and that they have been designated as an access line.

SBC Texas argued that the Coalition continues to try to modify the intent of the Texas Legislature by changing the authorized review into an audit. SBC Texas contended that if that had been the intent of the Legislature, then the municipalities would have been granted the authority that ordinarily accompanies an audit, or the ability to conduct “an unfettered examination.” Furthermore, SBC Texas contended that an authorized review is not and was not intended to be a term of art that means the same as the word audit. According to SBC Texas, these terms relate to the level of assurance regarding the reliability of an assertion in a financial statement. An audit provides high, but not absolute, assurance that the information subject to the audit is free of material misstatements, and is expressed in an audit report as reasonable assurance. A review, on the other hand, provides moderate assurance that the information subject to review is free of material misstatements and is expressed in an audit report as negative assurance. SBC stated that it is important to note that there is a difference between an audit and an authorized review and that the legislature clearly intended a less intrusive form of review.

SBC Texas further stated that had the CTPs and the municipalities been able to agree on sample descriptions of the types of records that should be subject to an authorized review, those examples would have been set forth in the agreed rule. Samples of billing records and customer proprietary network information are of significant concern to the CTPs. In addition, SBC Texas stated that the Coalition has raised for the first time, the issue regarding the category of documents described as "records as to lines added or dropped relevant to the reviewing period".

SBC Texas indicated that it's not clear as to what is meant by this description and why it would be presented as requiring a clarification when it was never discussed during two years of negotiations. SBC Texas submitted that the commission should reject the request for these added requirements under the guise of sample descriptions.

Sprint argued that clarification of the type of business records necessary to conduct an authorized review is unnecessary since subsection (c)(3) of the proposed new section states that the CTP must provide the requesting municipality with a written list of the types of business records necessary to conduct an authorized review. Sprint noted that the Coalition's request for "detailed descriptions of services" provided substantially changes the intent of the proposed new section because it conflicts with subsection (c)(3) of the proposed new section, which requires a CTP to provide "brief" descriptions of the business records that are necessary to conduct an authorized review.

The CLEC Coalition noted that the parties agreed to establish general guidelines in the proposed new section because they could not agree on a "laundry list" of business records subject to review. The CLEC Coalition and Verizon objected to the Coalition's attempt to identify specific types of business records, after the fact, through clarification to the preamble. The CLEC Coalition's objection was also premised on its argument that CTPs are varied in their record keeping and many CTPs employ outside vendors to prepare access line reports.

Commission response

The commission finds that the proposed new section sets forth very general guidelines. In addition, the commission recognizes that the parties reached an agreement on the basic terms of the proposed new section with the understanding that further issues could be worked out cooperatively during the authorized review process. During such a process, the parties could determine the significance of various issues and identify those issues that continue to be in dispute. The commission believes that it is premature to place stipulations or numerous clarifications on this rule prior to the parties conducting a number of authorized reviews to determine what areas of dispute require resolution in the form of an amendment to this rule. However, the commission also believes that it would be in the best interest of the parties for the commission to communicate what it views as examples of business records that may be utilized during an authorized review. These examples are not intended to be all-inclusive nor an indication that such business records must be produced by a CTP if not currently generated in its normal course of business. Since the types of business records necessary to conduct an authorized review may vary with each CTP, the commission finds it is not possible to identify a comprehensive list of business records in the preamble. The commission notes that the Coalition has suggested numerous types of business records as examples to be placed in the preamble. It is reasonable to expect that some of the business records listed by the Coalition would vary by company, consequently, the commission chose not to include those records in the examples below; however, the commission expects the parties to work cooperatively to determine the additional business records that will be reviewed.

The commission agrees with SBC Texas that the release of customer billing statements that contain Customer Proprietary Network Information (CPNI) is of significant concern. Pursuant to Section 222 of the 1996 Federal Telecommunications Act (FTA), the commission determines that CTPs shall not be required to provide customer billing statements. On the other hand, examples of different types of business records that may be provided by the CTP are:

1. List of services that are being provided by the CTP including a brief description of each service. The commission agrees with the Coalition that the list of services is required by the municipalities to determine if services have been categorized correctly by the CTPs.
2. Street address guide (SAG). The commission notes that street address information is initially provided by the municipalities to the CTPs to be entered into the SAG. The commission agrees with the Coalition that a SAG would enable the municipalities to compare what addresses the CTP shows to be in the city limits as to what addresses the municipality actually has in the city limits to ensure that access lines have been reported correctly.
3. Support documentation for write-offs or uncollectible accounts. The commission notes that §26.467(k)(3)(A)(iii) states that if a CTP deducts or includes a direct write-off pursuant to §26.467(m)(2), the CTP shall complete a reconciliation report, showing a monthly delineation of the amount added to the total payment due to previously uncollectible direct write-offs, and the amount deducted from the total payment due to direct write-offs. The commission finds that since this report should already be submitted as part of the quarterly access line report filing under

§26.467(k)(3)(A)(iii), it should be made available to the municipalities during the authorized review.

- 4. Adequate proof agreements. The commission notes that §26.467(k)(4)(H) states that a CTP, whether an underlying CTP or reselling CTP, shall make its adequate proof agreements available for review by municipalities and the commission upon request. The commission finds that since adequate proof agreements are currently required under §26.467(k)(4)(H), such agreements should be made available to the municipalities during the authorized review.**

The commission has the expectation that the CTP and the municipality will work together to identify business records necessary to successfully complete the authorized review. Such cooperative effort should ultimately provide assurance to the municipalities that the CTPs have been correctly and accurately categorizing, reporting and submitting compensation to the municipalities for all access lines that are being served within the municipalities' city limits.

Time Period of Records Subject to Review

The Coalition argued that Texas Local Government Code §283.056(c)(3) mandates that an authorized review must be commenced within 90 days after the filing of a CTP's access line report, however, it does not restrict the time period for which the records may be examined. The Coalition stated that when no previous examination of the initial access line reports and supporting documents has been performed, it is paramount that these records be examined to

determine the initial characterization of services and the designation of access line categories. The Coalition cited P.U.C Subst. R. §26.465(i) that states, in part, "...The books and records for each access line count shall be maintained for a period of at least three years," as evidence that the commission intended for the municipalities to have access to CTP records for this period of time. The City of Garland concurred with the Coalition's comments.

The CLEC Coalition objected to any clarification of this rule as they deem it is unnecessary.

Sprint argued that the Coalition is attempting to rewrite the proposed new section with its clarifications. The proposed new section contains a 90-day window to conduct an authorized review of the CTP's records in order to ensure compliance with access line reporting requirements. This rule is consistent with Texas Local Government Code §283.056(c)(3), which requires a municipality to inspect a CTP's records within 90 days of the filing of a CTP's access line report.

Verizon objected to the Coalition's attempt to rewrite the rule after committing to the rule as it had been negotiated between the parties.

SBC Texas argued that the Coalition, in its interpretation of the 90-day limitation in the Texas Local Government Code §283.056(c)(3), has ignored a very important word – the word "if." The Texas Legislature has allowed municipalities to conduct authorized reviews if commenced within 90 days after the filing of a CTP's report of access lines pursuant to Texas Local Government Code §283.056(c)(3). SBC Texas averred that in the review of all the relevant

language allowing authorized reviews as exceptions to the prohibition against broader inspection of CTP business records, the Coalition's argument fails.

Commission response

The commission finds that, pursuant to Texas Local Government Code §283.056(c)(3), a municipality may perform an inspection of a provider's business records to the extent necessary to conduct an authorized review, if commenced within 90 days *after the filing of a certificated telecommunications provider's report of access lines*. Since CTPs file access line reports on a quarterly basis, the commission finds that the only access line report which shall be subject to an authorized review by the municipalities is the access line report for the quarter for which a municipality initiated an authorized review within the 90 day time limit imposed by Texas Local Government Code §283.056(c)(3). The commission determines that the computation of the 90-day filing deadline, for the purpose of municipal authorized review, should commence on the first day of the access line reporting period for the next quarter. This practice shall allow a CTP an opportunity to file any amendments or corrections to a previously filed access line count for the quarter for which a municipality seeks authorized review. Moreover, it will eliminate any possible confusion as to what point the 90-day clock would commence for a municipality to file an intent to conduct an authorized review, in the event that a CTP filed modifications to its quarterly access line report prior to the start of the next reporting period. The commission recognizes that a CTP shall maintain the books and records for each access line count for a period, at minimum, of three years in accordance with P.U.C. Subst. R. §26.465(i). The business records from other quarters may be utilized to determine the accuracy of the

access line count report for the quarter subject to the authorized review. However, the municipalities may not challenge the accuracy of access line reports for quarters in which a municipality failed to initiate an authorized review within the time limit imposed by Texas Local Government Code §283.056(c)(3).

The commission recognizes that a CTP is not required to maintain such historical business records beyond the three year mandate. However, the commission expects that a CTP should, to the extent practicable, provide any and all pertinent historical business records in excess of three years of age in its care, custody or control. The commission believes that such cooperative effort between the CTP and municipality is consistent with the provisions of this new rule and the underlying purposes of Texas Local Government Code, Chapter 283 in assuring accurate and efficient municipal authorized access line count reviews.

The commission may revisit the record retention provisions in P.U.C. Subst. R. §26.465(i) in the event that a three-year review of pertinent historical business records is insufficient to establish appropriate accuracy or if collaborative efforts fail to produce additional relevant business records within the care, custody or control of the CTP.

Administrative Remedy

The Coalition maintained that Texas Local Government Code §283.051(b) does not affect the right of a municipality to initiate legal action against a CTP that uses the public right-of-way to provide local exchange telephone service within a municipality and has not compensated the

municipality in accordance with Texas Local Government Code Chapter 283. The City of Garland concurred with the Coalition's comments.

The CLEC Coalition argued that the Coalition's request for clarification of municipal rights is an attempt to determine substantive rights and should be rejected.

Verizon objected to the Coalition's attempt to rewrite the rule after committing to the rule as it had been negotiated between the parties.

SBC Texas argued that the language that the Coalition has suggested including in the preamble is an indication that the authorized review is not an administrative remedy. SBC Texas further explained that the CTPs and the municipalities disagreed as to whether an authorized review is an administrative remedy to be exhausted prior to filing suit on a failure to comply with access line reporting requirements. SBC Texas stated that the Legislature granted jurisdiction pursuant to Texas Local Government Code §283.058 to the commission over municipalities and certificated telecommunications providers necessary to enforce Texas Local Government Code Chapter 283 and to ensure that all other legal requirements are enforced in a competitively neutral, non-discriminatory, and reasonable manner. SBC Texas maintained that the administrative remedies provided through the commission should be exhausted before municipalities seek judicial intervention.

Commission response

The commission acknowledges the filed comments of the parties on the issue of exhaustion of administrative remedies related to the application of municipal authorized reviews of access line reports pursuant to Local Government Code, Chapter 283. However, at this time, the commission declines to express comment on this issue but reserves the right to address it in the event of a subsequent relevant case, controversy or court decision.

All comments, including any 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, Supplement 2005) (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 and Texas Local Government Code §283.058, which grants the commission the jurisdiction over municipalities and CTPs necessary to enforce the whole of Chapter 283 and to ensure that all other legal requirements are enforced in a competitively neutral, nondiscriminatory, and reasonable manner.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and Texas Local Government Code §283.056 and §283.058.

§26.469. Municipal Authorized Review of a Certificated Telecommunication Provider's Business Records.

- (a) **Purpose.** This section establishes uniform guidelines for a municipal authorized review of a certificated telecommunications provider's (CTP) access line reports, pursuant to Texas Local Government Code §283.056(c)(3).
- (b) **Application.** This section applies to all municipalities and CTPs in the State of Texas except to the extent exempt under §26.468(c) of this title (relating to Procedures for Standardized Access Line Reports and Enforcement Relating to Quarterly Reporting).
- (c) **Municipal Authorized Review Procedural Guidelines.**
- (1) Municipalities are encouraged to informally ask questions about access line counts or municipal fee payments with the appropriate CTP in a timely manner. CTPs are encouraged to provide reasonable answers to access line count and municipal fee payment questions of the municipalities in a timely manner.
 - (2) Not later than 90 days after the filing of a CTP's quarterly report of access lines, as required by §26.468 of this title, a municipality shall notify a CTP of its intent to conduct an authorized review of the CTP's business records to ensure compliance with access line reporting requirements. This notification shall be in writing and sent via certified mail to the CTP contact person named on the commission's Municipal Access Line Reporting System (MARS) website and shall include a summary of the municipality's concern(s) and/or reason(s) for the review. Such notice may be modified and amended in a subsequent written notice

using the same process.

- (3) Not later than 21 days from the CTP's receipt of notice under paragraph (2) of this subsection, the CTP shall provide to the requesting municipality a written list of the types of business records that are necessary to conduct an authorized review as requested in the notice, with brief descriptions for identification purposes.
- (4) The municipality shall determine which business records from the list provided by the CTP will be subject to review and provide written notice to the CTP. The CTP shall provide the requested business records within 30 days from the municipality's written request. The CTP shall provide the business records to the municipality in the following manner:
 - (A) The CTP shall provide access to the requested business records on its premises.
 - (B) The on-premises review shall be conducted at the principal Texas office of the CTP, unless otherwise agreed by the CTP and the municipality.
 - (C) Business records shall remain the property of the CTP and may not be removed or reproduced without the express written permission of the CTP.
 - (D) Business records may be produced in a compatible electronic format or paper copy at the discretion of the CTP.
- (5) A CTP may redact customer-specific proprietary information as necessary for compliance with federal or state law. Information deemed confidential or

proprietary by the CTP must be so noted, and each participating party and its representative(s) shall protect such confidential or proprietary information as provided in Texas Local Government Code §283.005. CTPs may require all persons participating in the authorized review to execute a non-disclosure agreement prior to providing access to documents or other information.

(d) **Commission Resolution of Disputed Issues.**

- (1) **Informal dispute resolution.** If cooperative efforts between the parties have failed to resolve all issues related to the authorized review, the commission staff may mediate any dispute(s) filed by the CTP or the municipality.
- (2) **Formal complaint to the commission.** A formal complaint may be filed with the commission by either a CTP or Municipality to resolve remaining disputed issues not settled by informal dispute resolution pursuant to paragraph (1) of this subsection. The commission shall provide notice of the filing of a formal complaint to all municipalities and all CTPs in accordance with established commission procedural rules.

This agency hereby certifies that the adoption 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 new §26.469 relating to Methodology for Counting Access Lines and Reporting Requirements for Certified Telecommunications Providers is hereby adopted with no changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE _____ DAY OF _____ 2005.

PUBLIC UTILITY COMMISSION OF TEXAS

JULIE PARSLEY, COMMISSIONER

PAUL HUDSON, CHAIRMAN

BARRY T. SMITHERMAN, COMMISSIONER