

CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS.

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

§26.463. Calculation and Reporting of a Municipality's Base Amount.

- (a) **Purpose.** This section establishes a uniform method for determining a municipality's base amount and calculating the value of in-kind services provided to a municipality under an effective franchise agreement or ordinance by certificated telecommunications providers (CTPs), and sets forth relevant reporting requirements.
- (b) **Application.** This section applies to all municipalities in the State of Texas.
- (c) **Definitions.** The following words and terms when used in this subchapter, shall have the following meaning, unless the context clearly indicates otherwise.
- (1) **Base amount** – The total amount of revenue received by the municipality from CTPs in franchise, license, permit, application, excavation, inspection, and other fees related to the use of a public right-of-way in calendar year 1998 within the boundaries of the municipality. The base amount may include revenue from newly annexed areas, the value of in-kind services or facilities, or municipal fee rate escalation provisions for certain municipalities as prescribed in subsection (d) of this section.
- (A) The base amount does not include pole rental fees, special assessments, and taxes of any kind, including ad valorem or sales and use taxes, or other compensation not related to the use of a public right-of-way.
- (B) The base amount does not include compensation received from interexchange carriers, cable providers or wireless providers, who may be CTPs, but whose lines do not meet the definition of access line under §26.461 of this title (relating to Access Line Categories).
- (2) **Effective franchise agreement** – A franchise agreement or ordinance that is adopted and effective by its own terms by January 12, 1999, or by mutual agreement of the parties has been held-over after its expiration date, without dispute, and the municipality and the CTP were in the process of developing a new agreement or ordinance.
- (3) **In-kind compensation.**
- (A) In-kind services – Services received by a municipality from a CTP during calendar year 1998 at either below cost or no cost as part of an effective franchise agreement.
- (B) In-kind facilities – Facilities received by a municipality from a CTP before or during calendar year 1998 at either below cost or at no cost as part of an effective franchise agreement.
- (4) **Litigating municipality** – A municipality that was involved in litigation relating to franchise fees with one or more CTPs during any part of calendar year 1998.
- (5) **Other compensation** – Compensation not related to the use of a public right-of-way paid by a CTP to a municipality, including, but not limited to, fees paid to the municipality to obtain access to municipally-owned poles, ducts, conduits, buildings, and other facilities.
- (6) **Similarly sized municipality** –
- (A) For municipalities with a population less than 1000, a similarly sized municipality shall be another municipality with a population within 200 more or fewer persons than the reporting municipality's population, located in the same or adjacent county as the reporting municipality.
- (B) For municipalities with a population greater than 1000, a similarly sized municipality shall be another municipality with a population within 20% of the reporting municipality's population, located in the same or adjacent county as the reporting municipality.
- (C) Municipal population shall be determined using the January 1, 1999 population estimates of the Texas State Data Center.

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- (D) The reporting municipality and the similarly sized municipality shall have the same CTP with the greatest number of access lines.
- (7) **Special assessment** – An assessment authorized for public improvements under the Local Government Code or the Transportation Code.
- (d) **Determination of a municipality's base amount.** A municipality's base amount shall be the sum of all applicable revenue received from CTPs, including newly annexed areas, the value of in-kind compensation, and the value of any applicable escalation provisions in effective franchise agreements or ordinances, unless a municipality's base amount is determined under subsection (f) or (g) of this section.
- (1) **Revenue received.** Payments received by a municipality from CTPs as compensation for calendar year 1998 usage of the public right-of-way.
- (A) Payments received outside of calendar year 1998 may be included as revenue received only to the extent that these payments represent compensation for calendar year 1998 usage of a public right-of-way.
- (B) Payments received in calendar year 1998 that do not represent compensation for calendar year 1998 usage of a public right-of-way shall be excluded.
- (2) **Escalation provisions.** The municipality shall calculate and report its fee rate escalation amount that is known and measurable for calendar year 1999, that was specifically prescribed in effective agreements or ordinances, and add that escalation amount to the base amount calculation.
- (3) **In-kind compensation.** In-kind services or facilities shall be valued at 1.0% of the base amount unless a municipality can establish before the commission that those services or facilities had a greater value in calendar year 1998. Municipalities requesting in-kind compensation above 1.0% of the base amount shall make a request consistent with subsections (e) and (j) of this section.
- (e) **Valuation of additional in-kind compensation.** If a municipality wants to establish that the total value of in-kind compensation received from CTPs had a greater value in 1998 than 1.0% of the municipality's base amount, it must make a showing consistent with this subsection and meet the filing requirements of subsection (j) of this section.
- (1) **Telecommunications equipment.** The municipality shall compute the 1998 value by dividing the original cost of the equipment by the term in years of the effective franchise agreement.
- (2) **Dark fiber.** Where a municipality had the option to use the CTP's dark fiber as in-kind compensation in calendar year 1998, the municipality shall value the fiber only to the extent the municipality utilized it in calendar year 1998. The value shall be computed in accordance with paragraph (4) of this subsection. Where a CTP permanently transferred ownership of the dark fiber to the municipality as in-kind compensation before or during calendar year 1998, the value of the dark fiber shall be computed for its entire length in accordance with paragraph (1) of this subsection.
- (3) **Poles, ducts, and conduits.** Where a municipality had the option to use the CTP's poles, ducts, and conduits as part of its in-kind compensation, it shall value those facilities only to the extent the municipality utilized them during calendar year 1998. The value of the poles, ducts and conduits shall be based upon reasonable annual rental fees charged or paid by other utilities for similar facilities. Where a municipality and a CTP have entered into a joint-use agreement for the use of poles, ducts, or conduits, no value shall be included in computing in-kind compensation for such use.

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- (4) **Telecommunications service.** The municipality shall value the telecommunications service it received as in-kind compensation by determining the fees paid by other municipalities for same or similar services, or through the average price charged in 1998 by three suppliers qualified to provide the service.
 - (5) **All other facilities and services.** The municipality shall perform a survey of suppliers for all other in-kind facilities and services it received in calendar year 1998, to establish true market values. The municipality shall survey at least three suppliers for each facility or service it is valuing.
- (f) **Base amount for eligible municipalities.**
- (1) Eligible municipalities include municipalities in counties with a population of less than 25,000 on December 31, 1998, municipalities that did not have an effective franchise agreement or ordinance on January 12, 1999, and municipalities that were not in existence on January 12, 1999. A municipality that was incorporated prior to January 12, 1999 but received no compensation from CTPs for calendar 1998 use of the public right-of-way, shall also be considered an eligible municipality.
 - (A) If a municipality is located in more than one county, its eligibility shall be determined by the county containing the greatest number of its residents.
 - (B) County population shall be determined using the Texas State Data Center population estimates for January 1, 1999.
 - (2) The base amount for an eligible municipality shall, at the election of the governing body of the municipality, be equal to one of the following amounts:
 - (A) An amount not greater than the statewide average fee per line for each category of access line of the CTP with the greatest number of access lines in that municipality, multiplied by the total number of access lines in each category located within the boundaries of the municipality on December 31, 1998, for a municipality in existence on that date, or on the date of incorporation for a municipality incorporated after that date; or
 - (B) An amount not greater than the base amount determined for a similarly sized municipality in the same or an adjacent county in which the CTP with the greatest number of access lines in the municipality is the same for each municipality. The similarly sized municipality must have computed its base amount using methods other than this paragraph; or
 - (C) The total amount of revenue received by the municipality in franchise, license, permit, and application fees from all CTPs in calendar year 1998 consistent with the methodology prescribed under subsection (d)(1) of this section.
- (g) **Base amount for litigating municipality.** The base amount for a litigating municipality that not later than December 1, 1999, repeals any ordinance subject to dispute in the litigation, voluntarily dismisses with prejudice any claims in the litigation for compensation, and agrees to waive any potential claim for compensation under any franchise agreement or ordinance expired or in existence on September 1, 1999, is, at the municipality's election, equal to one of the following amounts:
- (1) An amount not to exceed the statewide average access line rate on a per category basis for the CTP with the greatest number of access lines in that municipality multiplied by the total number of access lines located within the boundaries of the municipality on December 31, 1998, including any newly annexed areas; or
 - (2) An amount not to exceed 21% of the total sales and use tax revenue received by the municipality pursuant to Texas Tax Code, Chapter 321. The sales and use tax revenue will

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be based on the calendar year 1998 report of taxes collected, as issued by the State Comptroller for a municipality. The amount does not include sales and use taxes collected under:

- (A) Texas Transportation Code, Chapters 451, 452, 453, or 454 for a mass transit authority;
- (B) the Development Corporation Act of 1979 (Article 5190.6, Vernon's Texas Civil Statutes), for a 4A or 4B Development Corporation;
- (C) Texas Local Government Code, Chapters 334 and 335; and
- (D) Texas Tax Code, Chapters 321, 322, and 323, for a special district, including health service, crime control, hospital, and emergency service districts.

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

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

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

(2) **Reporting.** Unless otherwise specified, periodic reporting shall be consistent with this subsection and subsection (m) of this section.

(A) **Initial reporting.** A municipality shall file its base amount using the commission-approved *Form for Calculating Right-of-way Compensation (FCRC)*, or the commission-approved *Program for Calculating Right-of-way Compensation (PCRC)*, with the commission no later than December 1, 1999 under Project Number 20935, *Implementation of HB 1777*.

(B) **Subsequent reporting.**

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

(ii) The commission may request additional documentation if it determines a filing by the municipality is insufficient. If the commission requires additional information, the municipality shall respond and provide the needed documents to the commission within 30 days from the time the municipality receives the request.

(j) **Reporting for additional in-kind compensation.** This subsection applies only to a municipality valuing in-kind compensation at a level greater than 1.0% of its base amount, pursuant to subsection (e) of this section. The municipality maintains the burden of proof for establishing the reasonableness of its valuation. No later than December 1, 1999, the municipality shall file using the commission-approved *Form for Valuing In-kind Compensation Over 1.0%*. If the commission determines that the value of in-kind compensation is less than the value claimed by the municipality, the value of in-kind compensation for that municipality shall, on an interim basis, default to 1.0% of the base amount until the municipality makes a showing consistent with this section and subsection (e) of this section.

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- (k) **Allocation of Base Amount.** Not later than December 1, 1999, a municipality that wants to propose an allocation of the base amount over specific access line categories shall notify the commission of the desired allocation. The commission shall establish an allocation of the base amount over the categories of access lines if a municipality does not file its proposed allocation by December 1, 1999.
- (1) A municipality may request a modification of the commission's allocation not more than once every 24 months by notifying the commission and all affected CTPs in September of that year that the municipality wants to change the allocation for the next calendar year.
 - (2) A municipality's allocation shall be implemented unless, on complaint by an affected CTP, the commission determines that the allocation is not just and reasonable, is not competitively neutral, or is discriminatory.
- (l) **Late, insufficient, or incorrect filing.**
- (1) If a municipality fails to complete its base amount report by the date required by this section, the commission shall assume that the base amount for that municipality is \$0.
 - (2) All commission-established rates and all compensation thereunder shall be applied prospectively from the date the CTPs timely implement the appropriate rates.
 - (3) A CTP shall not take more than 90 days to implement the rates established by the commission.
- (m) **Report attestation.** All filings with the commission pursuant to this section shall be in accordance with the commission-approved FCRC or PCRC instructions, as appropriate. The filings shall be attested to by an officer or authorized representative of the municipality under whose direction the report is prepared or other official in responsible charge of the entity in accordance with §26.71(d) of this title (relating to General Procedures, Requirements and Penalties).