

**SB 5-SECTION BY SECTION ANALYSIS of CHAPTER 66, TEXAS UTILITY
CODE, STATE-ISSUED CABLE AND VIDEO SERVICE FRANCHISE**

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**SB 5-SECTION BY SECTION ANALYSIS of CHAPTER 66, TEXAS UTILITY CODE,
STATE-ISSUED CABLE AND VIDEO SERVICE FRANCHISE
By Clarence A. West**

I. GENERAL OVERVIEW OF SB 5—STATE-ISSUED CABLE SERVICE AND VIDEO SERVICE FRANCHISING REGIME—Below is a general overview of SB 5, followed by a more detailed section by section analysis.

Effective Date and Eligibility for state issued franchise:

For over twenty years the cable franchising process as laid out in the 1984 Cable Act has worked very well in Texas.¹ Under federal law cable services can not be provided unless there is cable franchise granted by the state designated franchising authority.² Franchising authority being defined in the Cable Act as “any governmental entity empowered . . . to grant a franchise.”³ What governmental entity in a state is the franchising authority is determined by each state’s laws. In some states, the franchising authority’s are counties; in a few states, it is the state utility commission; and in Texas, of course, it has been cities as the traditional franchising authority as to users of the public rights-of-way since 1858.⁴ With the adoption of SB 5 as of September 1, 2005 the “franchising authority” for cable services and video services changed from the city to the state, acting through the Public Utility Commission of Texas (“PUCT”). As of September 1, 2005 a city no longer has the authority to grant a cable franchise. Cable services and video service franchises will be granted exclusively by the PUCT based on an application filed in accordance with the new Chapter 66 of the Utility Code (“Chapter 66”). Current incumbent cable service providers’

¹ Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, codified as 47 U.S.C. § 521, *et. seq.* (The “1984 Cable Act”). The 1984 Cable Act has been amended twice, in 1992, by the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385; and in 1996, by the Telecommunication Act of 1996, Pub. L. No. 104-104. (The current law, as amended up to 1996, will sometimes be referred to as either the “Cable Act” or “Title VI”).

² 47 U.S.C. § 541(d).

³ 47 U.S.C. § 522(10).

⁴ The Texas state legislature in 1858 originally delegated “exclusive control” of the streets to cities in Texas. *City of Waco v. Powell*, 32 Tx. 258 (Tex. 1869), see also *West v. Waco*, 294 S.W. 832 (Tex. 1927). Municipal authority to grant franchises is codified into Texas state law in several places. The more prominent are in the Texas Transportation Code, § 311.001, *et seq.* and in Texas Civil Article 1175(1). That statute provides in pertinent part that a city may prohibit “the use” of public rights-of-way by “any telegraph, telephone, electric light, . . . gas company or other character of public utility without first obtaining a consent” of the city and “upon paying compensation . . . and upon such condition as may be provided.”

franchises (the provider with the largest number of subscribers in the city, as a defined term in Chapter 66, are not affected and those incumbent providers are not eligible to apply for such a state-issued franchise until the expiration date of that incumbent's current franchise. The only exception is that any cable service provider (other than the incumbent cable provider) which have less than a 40% penetration rate among the subscribers in its authorized (not actual) service area are eligible to terminate their franchise by giving notice to the city and apply for a state franchise if the did so by January 1, 2006.

Summary of State-issued cable service or video service franchise standards and requirements:

The new Chapter 66 of the Utility Code establishes the following "standards" for a state-issued cable service or video service franchise.

Compensation and other Payments:

There are two required payments under a state-issued franchise.

5% Franchise fee (Section 66.005): The state issued cable service or video franchise requires that the cable services and video service provider pays directly to each city in which it provides service a franchise fee of 5% of its gross revenue (a defined term in Chapter 66), even if the incumbent cable provider is paying a smaller percentage or on different gross revenue base amount.

Pro rata and 1% Payment in lieu of in-kind PEG/I-Net facilities (Section 66.006): Chapter 66 also provides that if the incumbent cable provider pays any *cash* payments to the city in support of public educational, governmental channels or to support an institutional network, those cash payments are matched by the state-issued franchise holder as calculated by the city on a per subscriber basis. After the expiration of the incumbent cable franchise, all the state-issued franchise holders pay, at the cities choice, either an additional PEG capital support fee equal to 1% of its gross revenue or a fee equal to the per subscriber cash payments that were made under the expired incumbent's cable franchise.

Grandfathered I-net capacity and "free" cable drop services (Section 66.006 (d)):

Two specific services continue to be provided by a cable provider even after the franchise expires or is terminated. Both Institutional network capacity and any "free" cable service drops to city and school facilities are to continue to be provided until the expiration of the franchise or January 1, 2008 , whichever is later, thereafter if the city wants to continue those services, they are provided at the providers "actual incremental cost" (a defined term in Chapter 66.) As to the Institutional network capacity, the city pays the provider that actual incremental cost, as to cable service drops to

city and school facilities, the actual incremental cost is deducted by the provider from the required franchise fees paid the city.

Public, Educational and Governmental Channels (Section 66.009):

The number of Public, Educational and Governmental (“PEG”) Channels provided by a state issued franchise holder shall not be fewer than the number of PEG channels “activated” as of September 1, 2005. For those cities without any PEG Channels, there are entitled up to three PEG Channels if the city population is over 50,000 and up to 2 PEG Channels if the city population is less than 50,000. Specific programming utilization criteria are set forth in the section 66.009 (d) and (e). Interconnections to the incumbent provider and the new entrant are required to be negotiated in good faith and interconnection may not be denied (Section 66.009 (h)).

Other selected provisions:

There are no build-out requirements for state-issued franchise holders (Section 66.007), and customer service standards do not apply after there is a second wireline provider (Section 66.0087). Discrimination of service in any “local area” based on the income of residential subscribers is prohibited, but there may be an issue as to what constitutes a “local area” (Section 66.014). Police powers of the city are reserved, with a few limited restrictions, similar to current law exceptions. (Section 66.003(b) (3), (c) (2); Section 66.011; Section 66.013) The Public Utility Commission has no jurisdiction as to the review such police power ordinances (Section 66.011(e); Section 66.012 (c)). SB 5 also provides for a legislative and PUCT study of rights-of-way compensation, with a reporting deadline of December 31, 2006 (Section 66.017).

Non-certificated wireline “voice service” added to Chapter 283 as an access line--There are two amendments in SB 5 as to what services may constitute an access line for purposes of Chapter 283 of the Local government Code. SB 5 *adds a definition* of “voice service” to mean “*voice communications services provided through wireline facilities located at least in part the public right-of-way, without regard to the delivery technology, including Internet protocol technology.*” SB 5 also revised the definition of a certificated telecommunications provider (“CTP”) to include “*a person that provides voice service*”; therefore a CTP need not be *certificated* by the PUCT to be a CTP required to report on access lines and pay access line fees. There remain possible federal preemption issues as to “computer-to-computer” [“peer-to-peer”] “software application” VoIP services. The PUCT initiated a Rulemaking to amend the PUCT Rules to include voice service by

uncertificated providers (PUCT Project No.31973). The proposed rule was published for comment in February.⁵

II. SECTION BY SECTION SUMMARY OF THE SB 5, TEXAS STATE-ISSUED CABLE AND VIDEO FRANCHISING REGIME.

Amends Subtitle C, Title 2, Utilities Code, by adding a new Chapter 66

CHAPTER 66. STATE-ISSUED CABLE AND VIDEO FRANCHISE

Sec. 66.001. FRANCHISING AUTHORITY. The Public Utility Commission (PUCT) is designated as the sole franchising authority for a state-issued franchise for the provision of cable service or video service (called the “PUCT-issued franchise” in this summary) -- i.e. Cities no longer have authority to issue franchises for cable or video services.

Sec. 66.002. DEFINITIONS. Defines "actual incremental cost" [intended to be only actual out-of-pocket-cost], "cable service" [traditional Title VI [federal law] cable service], "cable service provider", "communications network", "franchise", "**gross revenues" [broadly defined, with both subscriber and non-subscriber revenue, including franchise fees and other fees and charges paid by the subscriber, advertising revenue, without netting out commissions, and excluding “launch fees” [for programmers paying marketing, unless above cost]**⁶, "incumbent cable service provider" [serves largest number of cable subscribers in the City, Chapter 66 contemplates only one in each city], "public right-of-way", "video programming", "**video service" [includes providers without regard to delivery technology, including Internet protocol technology]**⁷, and "video service provider" [includes providers without regard to delivery technology].

⁵ Attached as Appendix C.

⁶ This definition of “gross revenue” is consistent with the maximum 5% gross revenue fee authorized by 47 U.S.C. § 542 (a). *See also City of Dallas, Tex. v. F.C.C.*, 118 F.3d 393 (5th Cir. 1997) construing the 5% gross revenue fee very broadly.

⁷ "video service" being a term that is meant to include any Internet provided (“IP”) video service in the event it is determined that such IP- video service providers are not “cable service providers” under Title VI.

Sec. 66.003. STATE AUTHORIZATION TO PROVIDE CABLE SERVICE OR VIDEO SERVICE.

(a) **After September 1, 2005** to provide cable service or video service in Texas, an entity or person must file an application for a PUCT-issued franchise with the PUCT. However, an entity providing cable service or video service under a current municipal franchise agreement is not required to have a PUCT-issued franchise certificate with respect to such municipality until the franchise agreement expires, except as provided by Section 66.004.

(a-1) The PUCT must notify an applicant for a PUCT-issued franchise whether the applicant's affidavit described by Subsection (b) is complete before the 15th business day after the applicant submits the affidavit.

(b) **The PUCT must issue a certificate of franchise authority to offer cable service or video service before the 17th business day after receipt of a completed affidavit** submitted by the applicant and signed by an officer or general partner of **the applicant affirming** certain information, including, **agreeing “to comply with all applicable municipal regulations regarding the use and occupation of public rights-of-way in the delivery of the cable service or video service, including the police powers of the municipalities in which the service is delivered”** and **providing “a description of the service area footprint to be served within the municipality, if applicable, otherwise the municipality to be served by the applicant, which may include certain designations of unincorporated areas, which description shall be updated by the applicant prior to the expansion of cable service or video service to a previously undesignated service area.”**

(c) The **certificate of franchise authority issued by the PUCT** must contain certain information, including, “a grant of authority to use and occupy the public rights-of-way in the delivery of that service, **subject to the laws of this state, including the police powers of the municipalities in which the service is delivered.**”

(d) **No longer is City consent required for a transfer**, as the certificate of franchise authority issued by the PUCT is fully transferable to any successor in interest to the entity to which

it is initially granted. It does require a notice of the transfer to be filed with the PUCT and the relevant municipality within 14 business days of the completion of such transfer.

(e) At any time the certificate of franchise authority issued by the PUCT may be unilaterally terminated by the cable service provider or video service provider by submitting notice to the PUCT.

Sec. 66.004. ELIGIBILITY FOR PUCT-ISSUED FRANCHISE. (a) A cable service provider or a video service **provider that currently *has or had* previously received a city franchise to provide cable service or video service with respect to such municipalities is not eligible** to seek a PUCT-issued franchise as to those municipalities **until the expiration date of the existing franchise agreement**, except as provided by Subsections (b) and (c).⁸

(b) **Beginning September 1, 2005 but before January 1, 2006, a cable provider with less than 40% of the total cable subscriber in its authorized service area may unilaterally terminate its city franchise.** The area to be used is the **service area as authorized by the cable franchise. If it is city-wide authorization in the franchise, use the entire city; if the franchise only authorizes a smaller geographic area, use that smaller area. It is not the area actually served—but the area authorized to be served that is the geographic area to use.** Written notice is to be given to both the PUCT and the affected municipality. The municipal franchise is terminated on the date the PUCT issues its certificate of franchise authority.

(c) A cable service provider that serves fewer than 40 percent of the total cable customers in a municipal franchise area and that elects under Subsection (b) to terminate an existing municipal franchise is responsible for ***remitting to the affected municipality before the 91st day after the date the municipal franchise is terminated any accrued but unpaid franchise fees due under the terminated franchise.*** If the cable service provider has a credit remaining from prepaid franchise fees, the provider may deduct the amount of the remaining credit from any future fees or taxes it must pay to the municipality under this Chapter.

⁸ The eligibility criteria and other transitional “grandfathering” provisions as to incumbent cable providers has been challenged in federal court in Austin in *Texas Cable & Telecommunication Association v. PUC, et al.* (Case No. 05-CV-721, Judge Lee Yeakel.) filed September 8, 2005. Defendants’ Motions to Dismiss and the Plaintiff’s Motion for Summary Judgment were filed, with argument set for May 22, 2006. See Appendix for a summary of the case.

(d) It is a bar to eligibility to apply for a PUCT certificate if a cable service provider or video service provider *has or had* a franchise to provide cable service or video service in a specific municipality and if any *affiliates or successor entity*⁹ of the cable or video provider *has or had a franchise* agreement granted by that specific municipality. This provision was included to ensure that a grandfathered franchise stays grandfathered until it expires—and the eligibility requirement is not avoided by a subsequent transfer during its term.

(e) “The terms "*affiliates or successor entity*" in this section shall include but not be limited to *any entity receiving, obtaining, or operating under a municipal cable or video franchise through merger, sale, assignment, restructuring, or any other type of transaction.*”

“*[H]as or had*” in (a) and (d) along with “*receiving, obtaining, or operating*” in (e) should close the loop as to any transferred franchises not being eligible for a ste-issued franchise until expiration.

(f) Savings clause as to the enforcement to the cable franchise, except as provided in this chapter, that nothing in this chapter is intended to abrogate, nullify, or adversely affect in any way the contractual rights, duties, and obligations existing and incurred by a cable service provider or a video service provider before the enactment of this chapter.

Sec. 66.005. FRANCHISE FEE. (a) The holder of a PUCT-issued franchise shall pay each municipality in which it provides cable service or video service a franchise fee of five percent based upon the definition of gross revenues as set forth in this chapter. This is the maximum rate as set by federal law.¹⁰ It also requires that the same 5% franchise fee apply to any unincorporated areas that are subsequently annexed by a municipality after the effective date of the PUCT-issued franchise.

(b) **The franchise fee is payable quarterly, within 45 days after the end of the quarter for the preceding calendar quarter. It requires that each payment be accompanied by a summary explaining the basis for the calculation of the fee. It expressly authorizes a**

⁹ The following subsection (e) intentionally broadly defines "affiliates or successor entity."

¹⁰ 47 U.S.C. § 542 (b). “For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services.”

municipality to review the business records of the cable service provider or video service provider to the extent necessary to ensure compensation in accordance with Subsection (a), and in the event of a dispute concerning compensation, bring an action in a court of competent jurisdiction.

(c) Consistent with federal law, the holder of a PUCT-issued franchise may recover from the provider's customers any fee imposed by this chapter.¹¹

Sec. 66.006. IN-KIND CONTRIBUTIONS TO MUNICIPALITY. (a) **Per subscriber payment-***The holder of a PUCT-issued franchise, until the expiration of the incumbent cable service provider's agreement, "shall pay a municipality . . . the same cash payments on a per subscriber basis as required by the incumbent cable service provider's franchise agreement."* All cable service providers and all video service providers are to report quarterly to the municipality the total number of subscribers served within the municipality in order to calculate the fee.

This per subscriber payment by the holder of a PUCT-issued franchise is to be calculated quarterly by the municipality "by multiplying the amount of cash payment under the incumbent cable service provider's franchise agreement by a number derived by dividing the number of subscribers served by a video service provider or cable service provider [the holders of a PUCT-issued franchise] by the total number of video or cable service subscribers in the municipality [the total of the city franchised cable subscribers] ."

The numerator is the number of subscribers of "a" video or cable service provider that holds a PUCT issued franchise. Each PUCT issued franchisee is calculated separately, as the section refers to "a" provider.

The denominator is not the total number of subscribers of both the video *and* cable subscribers added together. It is one *or* the other; "or" is used in the statute—not "and". It will almost always be the subscribers of the "cable provider", as that is the incumbent cable provider and not the subscribers of a "video service provider". In some instances, if the incumbent franchise provider asserts that they are not a Title VI cable provider, then they would be the "video" provider.

Per subscriber basis formula:

Incumbent cable provider cash payments times:

¹¹ 47 U.S.C. § 542 (c) and (f).

Subscribers served in the City by a holder of PUCT issued franchise
Total number of cable service subscribers of the incumbent cable provider in the city

Example:

Incumbent cable provider has cash payment of \$2,000 per month (or \$0.20 per subscriber) for PEG capital support times:

A PUCT-issued franchisee has 1,000 subscribers
Incumbent cable provider has 10,000 subscribers.

To calculate the *per subscriber basis* payment, divide 1,000 by 10,000, which equals 1/10 or 10%. 10% of the \$2,000 cash payment of the incumbent is \$200. This \$200 payment by the PUCT-issued franchise also calculates to \$0.20 per subscriber. The PUCT-issued franchisee pays on a per subscriber basis the same as the incumbent provider, as intended by the formula.

When the incumbent cable provider franchise has a set fixed fee per subscriber per month: As the amount of the fee paid on a per subscriber basis is always the same as the incumbent when the incumbent has a fixed per subscriber fee per month in the franchise, there is no reason to go through the calculation exercise, as the fee per subscriber will be the same for all-the incumbent cable provider and the PUCT issued franchisees. Therefore that set per subscriber fee should be paid by all providers, based on the number of subscribers of each.

The *per subscriber basis* payment are to be paid to the municipality in the same manner as the franchise fee, i.e. quarterly within 45 days after the end of the quarter for the preceding calendar quarter.

(b) **The 1% fee--** The holder of a PUCT-issued franchise, **on the expiration of the incumbent cable service provider's agreement, shall pay a municipality in which it is offering cable service or video service one percent of the provider's gross revenues, as defined by this chapter, or at the municipality's election, the per subscriber fee that had been paid to the municipality under the expired incumbent cable service provider's agreement, in lieu of in-kind PEG compensation and grants.** These payments are to be paid to the municipality in the same manner as the franchise fee, i.e. quarterly within 45 days after the end of the quarter for the preceding calendar quarter.

(c) **No credit on franchise fee-**The fees paid to municipalities under this section are paid in accordance with 47 U.S.C. Sections 531 [PEG and I-Net requirements] and 541(a) (4) (B)

[general franchise requirements] and may be used by the municipality as allowed by federal law; provides that further, these payments are not chargeable as a credit against the franchise fee payments authorized under this chapter.¹²

(d) **Institutional networks capacity and cable services to community buildings (city and schools) continue to be provided by the cable provider that was furnishing services pursuant to its municipal cable franchise until January 1, 2008, or until the term of the franchise was to expire, whichever is later, and thereafter the services shall continue, but with a municipality paying the cable provider its “actual incremental cost” for the I-Net capacity to the extent the municipality wants to continue receiving them and as to the “free” cable drops to city and school facilities, the cable provider may deduct the “actual incremental cost” to the extent the municipality wants to continue receiving them.** Some Cities have or will be giving notice to school districts of when this actual incremental cost for the “free cable drops” will begin to accrue in order that they may both budget for it and/or determine if they want the drops to continue and request the incumbent cable provider to calculate that **“actual incremental cost”**. The continuation of these specific services would apply to any cable provider with a terminated franchise, not just the incumbent’s, but would also include those franchises terminated under the 40% termination provision of Section 66.004 (a). Arguable, if those franchises that were terminated under the 40% exception had an original termination date beyond January 1, 2008, they may be required continue to provide those services until that original termination date, depending on the interpretation of “until the term of the franchise was to expire” in the context of an earlier statutory termination date.

¹² The 1% PEG fee is being challenged as exceeding the 5% gross revenue cap of 47 U.S.C. § 542 (b) *Texas and Kansas City Cable L.P., d/b/a/ Time Warner Cable v. City of West University Place, et al.*, Case No. H 05-4177, U.S. District, Court, Southern District of Texas (filed December 12, 2005.) (“*Cable’s 1 % PEG Fee Suit*”). Such percentage PEG fees have been expressly approved by the FCC Cable Services Bureau in a letter opinion of June 25, 1999, to the City of Bowie, (14 FCC Rcd 9596, 9597-98) “The legislative history explains that ‘Subsection 622(g)(2)(C) [47 U.S.C. § 542(g)(2)(C)] establishes a specific provision for PEG access in new franchises. In general, this section defines as a franchise fee only monetary payments made by the cable operator, and does not include as a “fee” any franchise requirements for the provision of services, facilities or equipment. ***As regards PEG access in new franchises, payment for capital costs required by the franchise to be made by the cable operator are not defined as fees under the provision*** [47 U.S.C. § 542 (g) (2) (C)]. These requirements may be established by the franchising under Section 611(b) [47 U.S.C. § 531(b)] or Section 624(b) (1) [47 U.S.C. § 544(b)].” (Bold and italics added) Attached is a copy of the FCC letter. Both parties have filed motions for summary judgment in mid-April. See attached Appendix for a summary of the case.

Sec. 66.007. BUILD-OUT. Mandatory city-wide build-out provisions are prohibited as to holder of a PUCT-issued franchise. How exactly this provision is to be construed in conjunction with the anti-discrimination provisions of section 66.014 is not clear. But as part of the statutory intent, it was stated in the Senate Journal that a potential subscriber residing outside the “local area” had standing to make a claim. (See comments on section 66.014.)

Sec. 66.008. CUSTOMER SERVICE STANDARDS. The holder of a PUCT-issued franchise must comply with customer service requirements consistent with the Federal Communications Commission (“FCC”) customer service standards as set forth in 47 C.F.R. Section 76.309(c) until there are two or more wireline providers offering service, excluding the direct-to-home satellite service, in the relevant municipality. In other words, once there are two wireline providers no customer standards will apply.¹³ A city may under section 66.013 (3) request the cable provider or video provider to submit reports within 30 days on the customer service standards if the provider is subject to the standards and has continued and unresolved customer service complaints indicating a clear failure on the part of the holder of a PUCT-issued franchise to comply with the standards. There are no other required reports as to compliance and it is not clear what, if any, enforcement sanctions would apply for non-compliance, other than possible court action. The PUCT has not been expressly granted any jurisdiction in this area. **The customer service standard as to an incumbent cable franchisee would continue to apply and could be enforced until they were eligible and obtained a PUCT issued franchise.**

Sec. 66.009. PUBLIC, EDUCATIONAL, AND GOVERNMENTAL ACCESS CHANNELS (PEG). (a) **The holder of a PUCT-issued franchise must provide, not later than 120 days after a request by a municipality, with capacity in its communications network to allow PEG access channels for noncommercial programming.**

(b) **Currently activated PEG Channels are Grandfathered-The holder of a PUCT-issued franchise must provide no fewer than the number of PEG access channels a municipality has activated under the incumbent cable service provider's franchise agreement as of September 1, 2005.**

¹³ The FCC customer standards may continue to apply due to federal preemption of the state law by FCC rules, 47 C.F.R. § 76.309 (c). “Effective July 1, 1993, a cable operator *shall be subject to the following customer service standards*” (Bold and italics added.).

(c) **Min. PEG Channels**-The cable service provider or video service provider **must furnish a certain amount of PEG channels if a municipality did not have PEG access channels as of September 1, 2005. For those cities without any PEG Channels, there are entitled up to three PEG Channels if the city is over 50,000 and up to 2 PEG Channels if they are less than 50,000.**

(d) **Min. PEG Utilization Criteria**- Any PEG channel provided that is **not utilized by the municipality for at least eight hours a day need not be made available to the municipality, but it may be programmed at the cable service provider's or video service provider's discretion.** However, at such time as the municipality can certify to the cable service provider or video service provider a schedule for at least eight hours of daily programming, the cable service provider or video service provider is required to restore the previously lost channel but is not required to carry that channel on a basic or analog tier. These criteria should not be difficult to meet as it does not exclude repeat programs. It is a minimum to make sure there are not “blank” channels.

(e) **Min. PEG Utilization Criteria for additional access channels**-If a municipality has not utilized the minimum number of access channels as permitted by Subsection (c), they are to be provided upon 90 days' written notice if the municipality meets certain standards: **If a municipality has one active PEG channel and wishes to activate an additional PEG channel, the initial channel must have both 12 hours of programming on each calendar day and have at least 40 percent of the 12 hours of programming for each business day on average over each calendar quarter must be non-repeat programming. Nonrepeat programming shall include the first three video-castings of a program. If a municipality is entitled to three PEG channels under Subsection (c) and has in service two active PEG channels, each of the two active channels must have both 12 hours of programming on each channel each calendar day and at least 50 percent of the 12 hours of programming for each business day on average over each calendar quarter is non-repeat programming for three consecutive calendar quarters.**

(f) **The operation of any PEG access channels is the responsibility of the municipality receiving the benefit of such channel, and the holder of a PUCT-issued franchise bears only the responsibility for the transmission of such channel. The holder of a PUCT-**

issued franchise is responsible for providing the connectivity to each PEG access channel distribution point up to the first 200 feet.

(g) The municipality must ensure that all transmissions, content, or programming to be transmitted over a channel or facility by a holder of a PUCT-issued franchise are provided or submitted to the cable service provider or video service provider in a manner or form that is capable of being accepted and transmitted by a provider, without requirement for additional alteration or change in the content by the provider, over the particular network of the cable service provider or video service provider, which is compatible with the technology or protocol utilized by the cable service provider or video service provider to deliver services.

(h) The holder of a PUCT-issued franchise and an incumbent cable service provider, where technically feasible, must use reasonable efforts to interconnect their cable or video systems for the purpose of providing PEG programming. The interconnection may be accomplished by direct cable, microwave link, satellite, or other reasonable method of connection. The holders of a PUCT-issued franchise and incumbent cable service providers are expressly required to negotiate in good faith and **incumbent cable service provider are prohibited from withholding interconnection of PEG channels.**

(i) A court of competent jurisdiction to have exclusive jurisdiction to enforce any requirement under this section not the PUCT.

Sec. 66.010. NONDISCRIMINATION BY MUNICIPALITY.

(a) The holder of a PUCT-issued franchise may install, construct, and maintain a communications network within a municipal public right-of-way and a municipality must provide the holder of a PUCT-issued franchise with open, comparable, nondiscriminatory, and competitively neutral access to the public right-of-way. All use of a public right-of-way by the holder of a PUCT-issued franchise is nonexclusive and subject to Section 66.011, municipal police power.

(b) A municipality may not discriminate against the holder of a PUCT-issued franchise regarding (1) the authorization or placement of a communications network in a public right-of-way; (2) access to a building; or (3) a municipal utility pole attachment term.¹⁴

Sec. 66.011. MUNICIPAL POLICE POWER; OTHER AUTHORITY.

(a) **Police Power Management of Right-of-Way Regulations allowed with some restrictions**-Authorizes a municipality to enforce police power-based regulations in the management of a public right-of-way that apply to the holder of a PUCT-issued franchise within the municipality which are reasonably necessary to protect the health, safety, and welfare of the public and competitively neutral, not unreasonable or discriminatory.

Certain municipal requirements are prohibited, such as (1) requiring the filing of reports and documents with the municipality that are not required by state or federal law and that are not related to the use of the public right-of-way **except that a municipality may request maps and records maintained in the ordinary course of business for purposes of locating the portions of a communications network that occupy public rights-of-way**; (2) a municipality may not request information concerning the capacity or technical configuration of the holder of a PUCT-issued franchisee's facilities; (3) **a municipality may not request inspection of the holder of a PUCT-issued franchisee's business records except to extent permitted under Section 66.005(b) [to verify correct compensation has been paid]**; (4) a municipality may not request that the holder of a PUCT-issued franchise that is self-insured under the provisions of state law obtain insurance or bonding for any activities within the municipality, except that a self-insured provider shall provide substantially the same defense and claims processing as an insured provider; (5) **a bond may not be required from a provider for any work consisting of aerial construction except that a reasonable bond may be required of a provider that cannot demonstrate a record of at least four years' performance of work in any municipal public right-of-way free of currently unsatisfied claims by a municipality for damage to the right-of-way.**¹⁵

¹⁴ These non-discriminatory access to rights-of-ways provisions are similar to provisions in the Public Utility Regulatory Act, Utility Code. Sec. 54.204, as to telecommunication providers.

¹⁵ Several of these provisions are similar to provisions in Chapter 283, Loc. Gov. Code. Sec. 283.056, as to certificated telecommunication providers.

(b) **Construction Permits allowed-A municipality may require the issuance of a construction permit, without cost, to the holder of a PUCT-issued franchise** that is locating facilities in or on a public right-of-way in the municipality, notwithstanding any other law. The terms of the permit must be consistent with construction permits issued to other persons excavating in a public right-of-way.

(c) A municipality, in the exercise of its lawful regulatory authority, must promptly process all valid and administratively complete applications of the holder of a PUCT-issued franchise for a permit, license, or consent to excavate, set poles, locate lines, construct facilities, make repairs, affect traffic flow, or obtain zoning or subdivision regulation approvals or other similar approvals. And a municipality must make every reasonable effort not to delay or unduly burden the provider in the timely conduct of the provider's business.

(d) **Emergency Repairs-**The holder of a PUCT-issued franchise, if there is an emergency necessitating response work or repair, may begin the repair or emergency response work or take any action required under the circumstances without prior approval from the affected municipality, if the holder of a PUCT-issued franchise notifies the municipality as promptly as possible after beginning the work and later obtains any approval required by a municipal ordinance applicable to emergency response work.

(e) **No PUCT Jurisdiction to review police power ordinances- The PUCT has no jurisdiction to review any police power-based regulations and ordinances adopted by a municipality to manage the public rights-of-way.**

Sec. 66.012. INDEMNITY IN CONNECTION WITH RIGHT-OF-WAY; NOTICE LIABILITY. (a) The holder of a PUCT-issued franchise is to indemnify and hold a municipality and its officers and employees harmless against certain actions and certain suits that is found by a court of competent jurisdiction to be caused solely by the negligent acts, error, or omission of the holder of a PUCT-issued franchise or certain persons of the holder of a PUCT-issued franchise or their certain respective personnel, while installing, repairing, or maintaining facilities in a public right-of-way, except it does not apply if the municipality (or its officers, employees or contractors)

is negligent. If the holder of a PUCT-issued franchise and the municipality are found jointly liable by a court of competent jurisdiction, the liability is to be apportioned comparatively in accordance with the laws of this state without, however waiving any governmental immunity available to the municipality under state law and without waiving any defenses of the parties under state law. The indemnity is solely for the benefit of the municipality and the holder of a PUCT-issued franchise and does not create or grant any rights, contractual or otherwise, for or to any other person or entity.¹⁶

(b) The holder of a PUCT-issued franchise and a municipality to promptly advise the other in writing of any known claim or demand related to or arising out of the holder of a PUCT-issued franchise's activities in a public right-of-way.

(c) **No PUCT Jurisdiction to review police power ordinances --The PUCT has no jurisdiction to review such police power-based regulations and ordinances adopted by municipality to manage the public rights -of-way.**

Sec. 66.013. MUNICIPAL AUTHORITY. In addition to a municipality's authority to exercise its nondiscriminatory police power with respect to public rights-of-way under current law, a municipality's authority to regulate the holder of a PUCT-issued franchise is limited to (1) a requirement that the holder of a PUCT-issued franchise who is providing cable service or video service within the municipality register with the municipality and maintain a point of contact;¹⁷ (2) the establishment of reasonable guidelines regarding the use of public, educational, and governmental access channels; and (3) submitting reports within 30 days on the customer service standards referenced in Section 66.008 if the provider is subject to those standards and has continued and unresolved customer service complaints indicating a clear failure on the part of the holder of a PUCT-issued franchise to comply with the standards.

Sec. 66.014. DISCRIMINATION BY A PROVIDER IS PROHIBITED.

¹⁶ Similar to indemnity provisions in Chapter 283, Loc. Gov. Code, sec. 283.057, as to certificated telecommunication providers.

¹⁷ Ordinances requiring the registration of PUCT issued franchises to provided cable or video service have been adopted by some cities.

(a) Discrimination among **potential residential subscribers** is prohibited.

(b) **A cable service provider or video service provider that has been granted a PUCT-issued franchise may not deny access to service to any group of potential residential subscribers because of the income of the residents in the “local area” in which such group resides.¹⁸ While “local area” is not defined in SB 5, issues pertaining to it were discussed on the floor of the Senate and that discussion was included in the Senate Journal as a matter of the legislative record when SB 5 was adopted on August 9, 2005. On that day, the sponsoring Senator (Fraser), in reply to a question from another Senator (West), stated that as a matter of legislative intent that a “potential residential subscriber” did have standing to bring a claim, even if they were outside the applicants designated footprint for service as designated in the application form, per Sec. 66.003 (b) (4).¹⁹ It is unclear how this section prohibiting income discrimination to potential residential subscribers in a local area and the prohibition of any required build-out of Sec. 66.007 will be reconciled. One may suggest the somewhat more specific language of the non-discrimination would prevail over the general language of the no build-out section to the extent income discrimination is proven.**

(c) **Any affected person may seek enforcement of the requirements** described subsection (b) by initiating a proceeding with the PUCT **and a municipality within which the potential residential cable service or video service subscribers referenced in Subsection (b) is an affected person for purposes of this section.**

(d) The holder of a PUCT-issued franchise shall have a reasonable period of time to become capable of providing cable service or video service to all households within the designated franchise area as defined in Section 66.003(b) (4) and the **certificate holder may satisfy the requirements of this section through the use of an alternative technology that provides comparable content, service, and functionality, such as satellite service. In one of the rare delegations of jurisdiction to the PUCT in Chapter 66, section 66.014 (e) (as discussed below)**

¹⁸ This language is meant to track, to the extent practicable, the federal provision in the Cable Act on this point, 47 U.S.C. § 541 (a) (3). “[A] franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.”

¹⁹ Senate Journal, 79th Leg., 2nd Called Session, Tues. Aug. 9, 2005, pages 68-69.

authorizes the PUCT to make a “determination” as to the comparable the technology service provided.

(e) The PUCT has the authority to make the determination regarding the comparability of the alternative technology and the service provided and the PUCT has the authority to monitor the deployment of cable services, video services, or alternative technology.

Sec. 66.015. COMPLIANCE. (a) **If a holder of a PUCT-issued franchise is found by a court of competent jurisdiction to be in noncompliance with the requirements of this chapter, it may order the holder a PUCT-issued franchise, within a specified reasonable period of time, to cure such noncompliance. Failure to comply may subject the holder of the PUCT-issued franchise of franchise authority to penalties as the court shall reasonably impose, up to and including revocation of the PUCT-issued franchise granted under this chapter.**

(b) A municipality within which the provider offers cable service or video service is an appropriate party in any such litigation.

Sec. 66.016. Reservations of Federal and State Rights for Providers and Municipalities --APPLICABILITY OF OTHER LAWS.

(a) “Nothing in this chapter shall be interpreted to prevent a voice provider, cable service provider or video service provider, or municipality from seeking clarification of its rights and obligations under federal law or to exercise any right or authority under federal or state law.”²⁰

“(b)“Nothing in this chapter shall limit the ability of a municipality under existing law to receive compensation for use of the public rights-of-way from entities determined not to be subject to all or part of this chapter, including but not limited to provider of Internet protocol cable or video services, unless such payments are expressly prohibited by federal law.”

Subsection (b) reserves a city’s rights under state and federal law unless expressly preempted by federal law, that a city may franchise and or receive compensation for other services which are delivered via the public rights-of-way, even if not a Title VI service.

²⁰ Essentially no entity is barred from litigating issues addressed by this statute, which should not have been barred even absent this provision.

Sec. 66.017. Joint Leg. Committee and PUCT Study on Municipal Compensation for delivering services via the Public Rights-of-Way. The Telecommunications Competitiveness Legislative Oversight Committee and the PUCT are to conduct a joint interim study regarding certain issues. The Telecommunications Competitiveness Legislative Oversight Committee members are: 1st member-Chair of the Senate Committee on Business and Commerce(at the time of passage, Sen. Troy Fraser); 2nd member-Chair of the House Committee on Regulated Industries (Rep. Phil King); 3rd, 4th and 5th members-Three members of the Senate appointed by the Lieutenant Governor; 6th, 7th and 8th members-Three members of the House, as appointed by the Speaker-Rep. Sylvester Turner, Rep. Joe Crabb and Rep. Will Hartnett); and the 9th member-The Chief Executive of the Office of Public Utility Counsel.

The joint study is to report on the following:

- (1) **appropriate alternative forms of competitively neutral compensation methodology that should flow to municipalities from all sources related to the provision of information services, telecommunication services, cable services, and video services;**
- (2) **right-of-way access and fees;**
- (3) **the transition from local franchise authority to state-issued authority, including methods to maintain current municipal revenue streams, including franchise fees and in-kind contributions; continuation of public, educational, and governmental access channels; and build-out requirements; and**
- (4) **other relevant issues.**

It requires the committee to **report its findings** to certain state elected officials, **no later than December 31, 2006.**

Changes to Chapter 283 and definition of an “access line” to include wireline VoIP (Voice over Internet Protocol) (Section 28 of SB 5)

Section 283.002, Local Government Code, is to be amended in Subdivision (2) on "certificated telecommunications provider" by adding “voice service” and adding a new Subdivision (7), which defines a "voice service." as follows:

"Voice service" means 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).”

Thus any wireline voice service would be included as an “access line” under Chapter 283 for which municipal compensation will be paid-whether or not that voice service provider was certificated by the PUCT. The PUCT has pending a Rulemaking to amend the PUCT Rules to include voice service by uncertificated providers (PUCT Project Number 31973). The proposed rule was approved for publication February 9, 2006 with the last series of reply comments being filed in late April. The final rule is pending going before the full Commission.

As a “base line” for PUCT jurisdiction in this area, several FCC orders provide some guidance. Last year the FCC required all “interconnected VoIP providers” to comply with E911 requirements at the state and local level.²¹ The required E911 filings already identify each Texas city in which a non-certificated entity is providing VoIP service. Additionally, to date there have been three FCC orders which have dealt directly with fact specific VoIP providers. All were in 2004.²² The first, *Pulver*, concerned a “computer-to-computer” VOIP service provider, the second, *AT&T*, a “phone-to-phone” VoIP service provider and the third, *Vonage*, concerned what now may be termed an “interconnected VoIP provider”. A critical aspect of the FCC analysis for purposes of the applicability of certain state (and federal) fees and the extent of state regulation was how the VoIP services were characterized under federal law. If they were an “information service”²³, federal preemption was more likely than if they were a “telecommunications service”.²⁴

²¹ See *In the Matter of IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers, First Report and Order and Notice of Rulemaking*, 20 FCC Rcd 10245, (FCC 05-116, Adopted May 19, 2005, released June 3, 2005) (“*FCC E911 VoIP Service Provider Requirements Order*”). This FCC order deals with state E911 VoIP service provider requirements –not rights-of-way compensation issues. The FCC E911 requirements apply to all “interconnected VoIP service providers”, which “means an interconnected voice over Internet Protocol service that: (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user’s location; (3) requires Internet protocol-compatible customer premises equipment (CPE); and (4) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.” See 47 C.F.R. § 9.3.

²² *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 3307 ([Feb.] 2004) (“*Pulver*”); *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, 19 FCC Rcd 7457 ([April] 2004) (“*AT&T*”); *In the Matter of Vonage Holding Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Memorandum Opinion, and Order* (FCC 04-267, adopted November 9, 2004, released November 12, 2004) (“*Vonage*”).

²³ 47 U.S.C. § 153 (20).

The FCC reached different results in each case as to the characterization of the VoIP service.

In *Pulver* the FCC determined that “peer-to-peer” [computer-to-computer] VoIP service, which did not use the public telephone switched network (“PSTN”), was not a “telecommunications service” but was an interstate “information service” and as such was not subject to state regulation.²⁵ At the November 30, 2005 PUCT workshop it was discussed how the revised definition in SB 5 may apply to “XBOX Live”, where two “gamers” on computers had real time voice connectivity. That would seem to meet the confines of “peer-to-peer” service, like *Pulver*, and be a preempted “voice service”.

In *AT&T*, the FCC determined that “phone-to-phone” service, which used the PSTN, and was linked, in part, via the Internet, was a “telecommunications service” and as such it was subject to interstate access charges.²⁶ The description of “lines to be counted” in the proposed amendment to the P.U.C. Subst. R. § 26.465 (e) (9) is similar to the “phone-to-phone” service, as a “telecommunication service”.

The *Vonage* order, the last of this trio of 2004 FCC Orders on VoIP providers, has been the most discussed of the FCC VoIP Orders. *Vonage* dealt with a particular VoIP provider in Minnesota.²⁷ The Vonage VoIP service was an “application” VoIP service in which Vonage did not own or leased physical lines in the public rights-of-way to provide its type of VoIP service via the Internet, but (unless wholly wireless), Vonage did provide its voice service “through wireline facilities located at least in part in the public right-of-way...”. The Vonage service was called “DigitalVoice”. The end-use customer already possessed some type of Internet connectivity to receive DigitalVoice. Vonage essentially provided only customer premises equipment and software delivered via the Internet to allow completion of DigitalVoice calls. Unlike in *Pulver* or *AT&T*, the FCC does not characterize Vonage’s DigitalVoice service as a “telecommunications service” or an “information service”, but does assert FCC jurisdiction as to providing the service.²⁸ However the

²⁴ 47 U.S.C. § 153 (46).

²⁵ *Pulver*, see ¶ 5, as to a description of “peer-to-peer” service; see ¶ 9-11 as to the classification of the service; and see ¶ 15-25 as to the FCC’s jurisdiction and ste preemption.

²⁶ *AT&T*, see ¶ 7-8, as to a description of “phone-to- phone” service; see ¶ 12 as to the classification of the service; and see ¶ 15-17 as to the application of interstate access charges.

²⁷ *In the Matter of Vonage Holding Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Memorandum Opinion, and Order* (FCC 04-267, adopted November 9, 2004, released November 12, 2004).

²⁸ *Id.* at ¶ 14. “...a [definitional classification] determination we do not reach in this order.”

clear language of the *Vonage* Order limits its application to preempt state regulation only in those instances in which VoIP provision is similar to Vonage and then only to the extent preempted in the *Vonage* Order.

The *Vonage* Order provides further guidance on the parameters of federal law affecting the Commission's SB 5 rules. To view this guidance in context however, it must be noted at this point that as a general proposition, prohibitions against regulation of a service do not usually equate to prohibitions against compensation for use of the public rights-of-way.²⁹ However with the advent of Chapter 283 in 1999, there emerged a "statutorily" created relationship between regulation of a defined services and payment of right-of-way use compensation. The payment of access line fees has been predicated upon Commission certification (regulation). Now, SB 5 amends Chapter 283 to expand the duty to pay compensation in the provision of voice service through a wireline facility located at least in part in the public rights-of-way without any required Commission certification.³⁰

PUCT is also to conduct a study on broadband service (Section 30 of SB 5)

The PUCT is to conduct a study to determine whether Title 2 (Public Utility Regulatory Act), Utilities Code, adequately preserves customer choice in the Internet-enabled applications employed in association with broadband service and to report its conclusions and recommendations to the legislature not later than January 1, 2007. The PUCT is required to consult with and receive comments from all interested parties.

²⁹ For example, Texas cities do not currently regulate telephone service—and have not since the adoption of PURA in 1975. However PURA did not preclude the required payment of compensation to cities for use of the public rights-of-way under Art. 1175, Tex. Civ. Code, or Chapter 283 since 1999.

³⁰Chapter 283, Sec. 283.002 (2) as amended by SB 5 in adding "or voice service" to the definition of a "certificated telecommunications provider".

APPENDIX A.

MUNICIPAL CHECKLIST CONCERNING TRANSITION TO A CHAPTER 66, TEXAS UTILITY CODE, STATE ISSUED CABLE AND VIDEO FRANCHISE (SB 5)

1. **PEG Access Channels Grandfathered (Sec. 66.009. (b))**-All “activated” Public, Educational and Governmental (“PEG”) access channels that are “activated under the incumbent cable service provider's franchise agreement as of September 1, 2005” are grandfathered. The city should document and have it confirmed by the incumbent cable provider (the cable provider with the most number of subscribers in your city) that they agree with the City as to the number of activated PEG channels. The documentation could be a channel line up brochure or from the provider’s web site or a list from the local office requested of them dated August/September 2005. Another alternative is for the City could send the provider a letter from the City stating the City’s count as to the number of activated channels and stating that it will be assumed the count is correct unless the provider documents a different number of activated PEG Channels.
2. **Institutional Network Capacity Grandfathered (Sec. 66.009. (d) (1))**-- Institutional Network Capacity which may be provided under a cable service provider's franchise will continue to be provided until the franchise expires or January 1, 2008, whichever is later. Thereafter, I-Net capacity will be provided at “actual incremental costs” (generally defined as out-of-pocket expense, not market value costs (**Sec. 66.002. (1)**)). That I-Net capacity should be documented as it is now and as it may be modified during the term of the franchise until the franchise expires. This includes both the incumbent cable provider’s franchise and the “under 40%” franchises that were terminated.
3. **“Free” cable drops to Municipal and Educational Public School Buildings Grandfathered (Sec. 66.009. (d)(2))**. Those drops are also grandfathered and continue until the franchise expires or January 1, 2008, whichever is later. Thereafter the cable provider may deduct from your franchise fee the “actual incremental costs” of providing those cable drop services. All of the current drops and the drops that may be added through the years up to the termination date of the franchise should be documented in concert with the cable provider.
4. **Interlocal agreement between the city and the school district**. Additionally, as the local school districts may be operating any educational channels, and currently unilaterally requesting directly from the cable provider new drops and equipment, if the City does not have one, it should adopt an interlocal agreement between the city and the school district on the operation of those channels. Specifically the agreement should provide for a designated City Official’s consent before the school district may request any additional equipment and/or drops. To do otherwise, may arguably allow the school district to unilaterally request equipment and drops, for which the actual incremental cost would be deducted from the City’s franchise fee by the provider after the franchise expires or Jan. 1, 2008, whichever is later. Secondly, the school district should be required to provide written notice to the City by June 30, 2007 or 6 months before the termination date of the current incumbent cable provider’s agreement, whichever is later, as to the number of cable drops they request to be continued, and how those will be funded by the school district.

5. **The “actual incremental cost” (Sec. 66.002. (1))**--The cable provider should be requested to provide what they calculate the actual incremental cost to be on both the I-Net capacity as it currently exists and as to the cable drops as they currently exist. This will allow the city to have some understanding of how the cable provider interprets that definition and allow time to negotiate differences prior to the expiration of the franchise or January 1, 2008, whichever is later.

6. **Public, Educational and Governmental cash capital support and support for Institutional Networks (Sec. 66.006. (a))**– The new state-issued franchise holder “*shall pay a municipality . . . the same cash payments on a per subscriber basis as required by the incumbent cable service provider’s franchise agreement.*” This is only as to cash payments on Public, Educational, or Governmental access channel or I-Net capital support, not as to the cash value of any equipment which may be provided to the city. The city should document what the *cash payments are* and obtain concurrence on that cash sum. It should be in the incumbent cable provider’s interest to make sure those cash payments are not disputed because they would want to ensure that the state-issued franchise holder pays the same amount, proportionately, as they do. (The per subscriber calculation formula calculation is detailed in the text of the summary of the SB 5 at section 66.006.)

Per subscriber basis formula:

Incumbent cable provider cash payments times:

$$\frac{\text{Subscribers served in the City by a holder of PUCT issued franchise}}{\text{Total number of cable service subscribers of the incumbent cable provider in the city}}$$

Example:

Incumbent cable provider has cash payment of \$2,000 per month (or \$0.20 per subscriber) for PEG capital support times:

$$\frac{\text{A PUCT-issued franchisee has 1,000 subscribers}}{\text{Incumbent cable provider has 10,000 subscribers.}}$$

To calculate the per subscriber basis payment, divide 1,000 by 10,000, which equals 1/10 or 10%. 10% of the \$2,000 cash payment of the incumbent is \$200. This \$200 payment by the PUCT-issued franchise also calculates to \$0.20 per subscriber. The PUCT-issued franchisee pays on a per subscriber basis the same as the incumbent provider, as intended by the formula.

When the incumbent cable provider franchise has a set fixed fee per subscriber per month: As the amount of the fee paid on a per subscriber basis is always the same as the incumbent when the incumbent has a fixed per subscriber fee per month in the franchise, there is no reason to go through the calculation exercise, as the fee per subscriber will be the same for all-the incumbent cable provider and the PUCT issued franchisees. Therefore that set per subscriber fee should be paid by all providers, based on the number of subscribers of each.

The per subscriber basis payment is to be paid to the municipality in the same manner as the franchise fee, i.e. quarterly within 45 days after the end of the quarter for the preceding calendar quarter.

7. **Additional 1% fee (Sec. 66.006. (b))** -- Once the franchise expires, all cable and video providers in the city will pay in addition to the 5% franchise fee, and in lieu of any per subscriber PEG fee, they will be paying 1% of gross revenue or, at the city's election, if the incumbent was paying a per subscriber fee, they will be paying the same as the incumbent cable provider was paying. In most instances the City may be better off financially with the 1% PEG Fee, depending on the average cable bill and how much cable services increases over time and the current subscriber fee. (For instance, on an average \$50.00/month bill, the 1% would yield \$0.50 per subscriber.) Each city should compare the financial impact of the 1% with the set subscriber fee at the time of the election (when the franchise expires.) This additional 1% payment is paid to the City by all state-issued franchisees even if the incumbent cable franchise had no such payment.
8. **Impact on Pending Transfers of the Cable Franchise (Sec. 66.004. (a), (d) and (e).)**– In transfers that have occurred or are currently pending, the transferee would still be the “incumbent cable provider” and thus not be eligible for a state issued franchise-but grandfathered for the term of the franchise. The “incumbent cable provider” includes a successor in interest. If there is a transfer it may be prudent to include in the transfer resolution or ordinance a statement as to these “grandfathered” requirements, such as: a) number of activated PEG channels as of September 1, 2005; b) I-Net capacity as it currently exists; c) a list of cable drops to school and city facilities; d) how actual incremental cost is computed; and e) how any Public, Educational or Governmental access channel capital support is paid and how that is computed on a per subscriber basis, and if applicable, describe any per subscriber fee that is required in the franchise.
9. **Cable franchisees with less than 40% penetration may unilaterally terminate. (Sec. 66.004. (b)).** Any cable service providers (except the incumbent with the largest number of subscribers) which have less than a 40% penetration rate among the subscribers in its authorized (not actual) service area were eligible to terminate their franchise by giving notice to the city and apply for a state franchise if they do so by January 1, 2006. However some I-net services “free” cable drops to public buildings would continue even if terminated per Section 66.006 (d) until at least January 1, 2008, and thereafter at “actual incremental cost”, as defined in the Chapter 66.

APPENDIX B.

Summary of SB 5 Lawsuits

1.) Cable Association Grandfathering/Transition Challenge and

2.) Time Warner Cable 1% PEG Fee Challenge.

1. SUMMARY OF TEXAS CABLE & TELECOMMUNICATION ASSOCIATION LAWSUIT CHALLENGING THE GRANDFATHERING/TRANSITION PROVISIONS OF SENATE BILL 5 (as of May 12, 2006)

I. Original lawsuit complaint by the Cable Association.

On September 8, 2005 a lawsuit was filed in Federal District Court in Austin by the Texas Cable and Telecommunications Association (“Cable Association”) challenging the lawfulness of SB 5.³¹ The Cable Association members are primarily, if not exclusively, the incumbent cable providers (such as Time Warner, Comcast, and the like.). The amended complaint names the Public Utility Commissioners as the only named defendants.³² The suit alleges essentially four separate claims (or Counts) that SB 5 is unlawful on its face—not to any specific fact situation. A facial challenge to a statute is the hardest legal challenge to sustain, as it must essentially negate any reasonable lawful application of the law. The primary concern of the Cable Association appears to be that the incumbent cable franchises are grandfathered and they are not eligible for a state-issued franchise until they terminate. The Cable Association wants those franchises terminated immediately with the incumbent cable companies being immediately eligible for a PUCT/state-issued franchise. However to eliminate the grandfathering transitional period as to incumbent cable franchises is a significant problem for cities which rely on some of the negotiated in-kind and I-Net provisions.

II. Intervenor

There are four intervenors. The first intervenor was the Texas Coalition of Cities for Franchise Utility Issues (TCCFUI), representing municipal interest, principally seeking to protect and preserve the transition and grandfathering requirements as to the incumbent cable providers’ franchises in the SB 5. TCCFUI, in representing municipal interest, will make sure the current parties do not leave the cities interest out in any negotiations concerning the lawsuit. The second and third intervenors were Verizon and SBC, representing telecommunications providers that may be providing cable services. Both

³¹ *Texas Cable & Telecommunication Association v. PUCT Commissioners*, U.S. District Court in Austin (Western District of Texas, Case No. 05-CV-721, Judge Lee Yeakel.).

³² In January a separate lawsuit was filed in State District Court as to state claims, which had been barred in federal court by the 11th Amendment to the U.S. Constitution on state immunity, unless the state waived the 11th Amendment, which they did not. *Texas Cable & Telecommunication Association v. PUCT Commissioners*, State District Court in Austin (Travis County, Cause No. ____).

Verizon and SBC have applied for and been granted state-issued franchises, Verizon in the Dallas area and SBC in the San Antonio area. The fourth and most recent intervenor was Grande Communications, an “overbuilder” of cable franchises that also provides telecommunication services.

III. Intervenor’s Motions to Dismiss and Response-Filed in mid-Nov. 2005.

In November all of the intervenors and the state filed motions to dismiss the lawsuit (or for Judgment on the Pleadings). The motions assert that the cable association has failed to assert a legal claim. Each of the four counts and the responses are summarized as follow:

- A. Plaintiffs allege discrimination in violation of U.S. Constitution--1st Amendment, substantive due process and equal protection of the 14th Amendment. The Cable Association asserts** that their First Amendment speech rights are violated by Chapter 66. They assert that by allowing new competitors to enter the market with “different” and less “onerous” requirements, that they will not have as much of an opportunity for free speech because the competition from the competitors will make it more expensive for their speech to be presented vs. the new entrants. The Cable Association asserts that as the requirements for new entrants are less onerous they are competitively disadvantaged. The Cable Association is particularly critical of the exception to grandfathering of those franchisees with less than 40% penetration. **The defendants contend that** the Cable Association free speech rights are not unlawfully affected by Chapter 66 with the additional competition, as Chapter 66 will result in more forums for free speech for the Cable Association and for others, not less. There is no protection from competition with regards to free speech. Further if there are distinctions in the requirements between an incumbent’s cable franchise and a state-issued franchise, then those distinctions have been narrowly tailed to have a “reasonable fit” to that rational basis. That rational basis is to both foster more competition and to allow municipalities a transition period. A “reasonable fit” to that rational basis constitutes the legal standard for review in such a First Amendment challenge that the Cable Association asserts.
- B. Violation of federal Cable Act---“Uniform national regulatory scheme”. (47 USC Sec. 521 (1), (3) and Sec. 556 (c)). The Cable Association asserts** that under federal law, there is a “uniform national regulatory scheme”, which requires that all franchising schemes be the “uniform”. The Cable Association asserts that Chapter 66 has “permanently enshrine[d]” different requirements for new entrants (sub-classifications among providers) which requirements are less onerous than the grandfathered local incumbent franchises in violation of a uniform scheme, which puts them at a competitive disadvantage. **The defendants contend that** there is no such requirement in federal law. Federal law does not require that all franchises be equal or be the same, and there can be variances. That any “sub-classifications” of different requirements to different classes of providers (incumbents vs. new entrants) have a lawful, rational basis, in that they further a legitimate governmental interest, as permitted-that to the extent there are any differences they are for a limited and temporary, transitional period. The Cable Association is incorrect to suggest that the Chapter 66 authorizes the State to “permanently enshrine” the obligations of the incumbents under their local cable franchise. Under Chapter 66, once the

incumbent's franchise expires, they are fully eligible to obtain a state-issued franchise in accordance with Chapter 66, Sec. 66.003.

- C. Violation of federal prohibition of granting exclusive franchises or unreasonably refusal to award an additional franchise. (47 USC Sec. 541 (a) (1)).** The Cable Association asserts that the Public Utility Commission is granting exclusive franchises as Chapter 66 allows the PUC to grant franchises to others but not them, as they are not eligible under Chapter 66 until their franchise expires, which the Cable Association asserts constitutes an unreasonable denial. **The defendants contend there** are no exclusive franchises that are issued by the Public Utility Commission. The Public Utility Commission will grant franchise to all those that are eligible. The incumbent cable providers may apply for a state franchise in all areas of Texas except where they have an unexpired franchise. And if they have an unexpired franchise, they do not need another one to provide cable services. As they already have a franchise they cannot complain.
- D. Violation of federal prohibition of redlining and build-out requirements. (47 USC Sec. 541 (a) (3)).** The Cable Association asserts that the anti-redlining provisions in federal law are inconsistent with the anti-build-out provisions in Chapter 66, so therefore, it is inconsistent with federal law. **The defendants contend that** federal law is tracked with regards to the provisions on prohibition of any discrimination based on income and that as "build-out" is not required by the federal law, its prohibition is not inconsistent. Additionally, as this is a facial challenge to Chapter 66, there has to be no circumstances where it could be lawful. It is noted that if in fact there is a circumstance where there is discrimination, a suit could be brought by a city that has standing under the bill, or by a potential subscriber.
- E. Prayer in Cable Association Suit-No Grandfathering.** The Cable Association essentially seeks to enjoin enforcement of the new state-issued franchise system as it exist and request that they be immediately eligible for a state-issued franchise.

IV. Current Posture.

The Cable Association filed its reply to the motions to dismiss and its own motion for summary judgment (MSJ), on January 16, 2006. The intervenors filed replies in March, with Responses to those in April. A hearing is set in late May 2006. Depending on the ruling on the motions to dismiss and the MSJ, and if there is no discovery beyond affidavits required for the MSJ, it is anticipated that there may be an initial decision by the court by the end of 2006.

2. SUMMARY OF TIME WARNER 1% PEG FEE CHALLENGE (as of May 12, 2006)

Suit in Brief:

In December 2005 Time Warner Cable (TWC), sued the City of West University Place in a Houston U.S. District Court concerning one of the specific provisions that was in SB 5. SB 5, as codified in Chapter 66 of the Utilities Code, provides that when the incumbent cable provider's franchise expires, then the state-issued franchise holders would begin paying the City a 1% public, educational, and governmental capital cost fee ("1% PEG fee").³³

City of West University Place:

West University Place is a small residential city at approximately 12,000. It is surrounded by the City of Houston and has one cable provider, that being Time Warner Cable. The City of West University Place is unique among the over one thousand cities in Texas as to one aspect of SB 5, as it was the only city sued.

It has not been made clear to West University Place, even though inquiries have been made to Time Warner, as to why that suit was brought against West University Place to challenge the 1% PEG fee as opposed to a suit against either the State itself (as was done by the Texas Cable Association's lawsuit in Austin), or against other cities which had expired franchises. In fact, San Antonio's Time Warner franchise had expired the month before, in December, and Round Rock's franchise expired at the same time. Yet for some reason, Time Warner chose to sue West University Place. In order for West University Place to avoid the cost of litigating this matter, as the City does not now receive a PEG Fee, the City has agreed to waive requiring the fee under Chapter 66, except with advance notice. Time Warner has not responded as to whether such a waiver is acceptable to them in order to dismiss the lawsuit.

1 % PEG Fee:

Many provisions in SB 5 were negotiated between the various stakeholders. One of the important provisions for cities was that they would continue to receive support for capital cost from the state-issued franchisees, as allowed by federal law. In a compromise on this particular issue, it was agreed and adopted in Chapter 66 that cities would be paid the 1% PEG fee. The PEG fee is specifically authorized by several provisions of federal law and so long as that PEG fee is restricted by federal law to capital costs, it is not chargeable against the 5% franchise fee.

Legal Basis for the 1% PEG Fee:

In the suit by Time Warner against West University Place, they have asserted that the 1% PEG payment should either not be paid or if it is paid it is simply a credit against the 5% fee. That was not the intent of the federal law-or Chapter 66.

Chapter 66, Sec.66.006 (b) provides:

(b) On the expiration of the incumbent cable service provider's agreement, the **holder of a state-issued certificate of franchise authority shall pay a municipality in which it is offering cable service or video service one percent of the provider's gross revenues**, as defined by this chapter, or at the municipality's election, the per subscriber fee that was paid to the municipality under the expired

³³ Tex, Util. Code, Ch 66, § 66.005 (b). It is also interesting to note that Time Warner Cable already has taken advantage of other parts of Chapter 66. Even before its local franchise expired on January 31, 2006, Time Warner Cable had applied for and was issued a PUCT state-issued cable franchise in early January 2006.

incumbent cable service provider's agreement, in lieu of in-kind compensation and grants. Payments under this subsection shall be paid in the same manner as outlined in Section 66.005(b). (Bold added.)

Time Warner Cable has challenged the 1% PEG Fee on the basis that it exceeds the 5% gross revenue cap of 47 U.S.C. § 542 (b). However, federal law contains several specific provisions authorizing such PEG fees and expressly excludes such authorized PEG Fees from the statutory definition of the 5% franchise fee. 47 U.S.C. § 541 (a) (4) (B), states:

In awarding a franchise, *the franchising authoritymay require* adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or *financial support*.

and 47 U.S.C. § 544 (b) (1) states:

in its request for proposals for a franchise [the franchising authority] may establish requirements for facilities and equipment....

In addition to the specific provisions in federal law allowing PEG Fees, the Cable Act excludes such PEG Fees from the definition of what constitutes a "franchise fee" for computation of amounts subject to the 5% cap under the Cable Act.

the term "franchise fee" **does not include ... capital costs** which are required by the franchise to be incurred by the cable operator **for public, educational, or governmental access facilities** (Bold added).³⁴

In the careful drafting of Chapter 66 the legislature specifically incorporated these federal standards into Chapter 66, in section 66.006 (c), which states:

All fees [the PEG fee] paid to municipalities under this section [66.006] *are paid in accordance with 47 U.S.C. Sections 531 and 541(a)(4)(B) and may be used by the municipality as allowed by federal law*; further, these payments are not chargeable as a credit against the franchise fee payments authorized under this chapter [66].

Thus, by incorporating the requirement that a franchisee and the city it serves must comply with 47 U.S.C. § § 531 and 541(a)(4)(B) and the PEG payment may be used by the municipality as allowed by federal law, Chapter 66 ensures that the 1 % PEG Fee is in accordance with the federal requirements and restrictions.

Percentage PEG fees were also expressly approved by the FCC's Cable Services Bureau in a letter opinion of June 25, 1999. The letter, in pertinent part, stated as follows:

4) Is the 3% PEG access fee permitted under the law or is it considered to be a franchise fee in excess of the 5% cap?

Under the Cable Communications Policy Act of 1984, a franchise fee is "any tax, fee, or assessment of any kind imposed by a franchising authority or other

³⁴ 47 U.S.C. § 542 (g) (2) (C). See also, H.R. REP. No. 98-934, at 65 (1984) reprinted in 1984 U.S.C.C.A.N. 4655, at 4702.

governmental entity on a cable operator or cable subscriber, or both, solely because of their status." 47 U.S.C. § 542(g)(1). However, for franchises granted after October 31, 1984, *a franchise fee does not include "capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities."* 47 U.S.C. § 542(g)(2)(C).

The legislative history explains that "Subsection 622(g)(2)(C) [47 U.S.C. § 542(g)(2)(C)] establishes a specific provision for PEG access in new franchises. In general, this section *defines as a franchise fee only monetary payments made by the cable operator, and does not include as a "fee" any franchise requirements for the provision of services, facilities or equipment. As regards PEG access in new franchises, payment for capital costs required by the franchise to be made by the cable operator are not defined as fees under the provision [47 U.S.C. § 542 (g) (2) (C)]. These requirements may be established by the franchising authority under Section 611(b) [47 U.S.C. § 531(b)] or Section 624(b)(1) [47 U.S.C. § 544(b)]*" See H.R. Rep. No. 98-934 at 65 (1984) reprinted in 1984 U.S.C.C.A.N. 4702; see also 1984 U.S.C.C.A.N. at 4753 (Colloquy between Rep. Wirth and Rep. Bliley).³⁵

TWC suggested that "only true in-kind contributions" fall within the 47 U.S.C. § 542 (g) (2) (C) exclusion from franchise fee. As the FCC noted in the letter opinion, a "franchise fee" only includes "monetary" payments—non-monetary contributions are already excluded, as non-monetary contributions by definition are not "monetary", they cannot be a "franchise fee", as defined, and thus there is no need to further exclude them from the definition.

On the other hand, if there are required "monetary" payments which are restricted to PEG capital cost, whether those payments are paid by the cable operator and the capital items then given to the city or paid directly to a city with the restrictions, both are payments directly incurred by the cable operator. These are exactly the kind of PEG fees which are excluded from the definition of a "franchise fee", similar to the 3% gross revenue PEG Fee as approved in the June 1999 FCC letter opinion. The Chapter 66 1% PEG Fee is restricted in this same manner. Section 66.006 (c) specifically restricts the use of the PEG fee to the use prescribed by federal law. It states, that the PEG Fee "may be used by the municipality as allowed by federal law", i.e. for capital cost. In TWC legal filings they state in an oblique reference to this restriction that it was added "in an apparent effort to steer the 1% fee into this exception". The restrictions were included by the legislature to insure that the 1% PEG Fee met the requirements of federal law. The section was carefully drafted to comply with federal law. It seems that one person's "careful drafting" is another person's "steering". It all depends upon where you stand perhaps—and it is patently obvious where TWC stands, with it's the self-serving "steering" analysis.

The TWC in another oblique reference to the existence of a restriction on the use of the 1% PEG Fee, states that "There is no sign that the 1% fee will ever be used for those [lawful PEG capital cost] purposes". TWC may be unaware that it is commonplace for a city to accept funds with subject to restricted use. Governmental entities, such as municipalities frequently receive payments with restrictions. For a city to not follow the restrictions is a violation of law, and can result in direct monetary sanctions. As examples, cities receive federal funds subject to use restrictions such as Federal Community Development Block Grants. It is not unusual for bond covenants to restrict the expenditure of bond proceeds to the purchase of capital items. If the funds

³⁵ *City of Bowie, Md. c/o David Deutsch*, 14 FCC Rcd 9596, 9597-98 (1999), *clarifying* 14 FCC Rcd 7675, 7677 (1999) (Bold and italics added.)

are not expended properly they may be subject to review and repayment. Cities know how to comply with laws that restrict the use of funds and they do it every day.

Rather than running afoul of the federal law's restrictions on permissible use of the 1% PEG Fee (i.e. for capital costs), Chapter 66 specifically refers to the federal law to make clear why this PEG fee is being paid and that it must be spent in accordance with federal law. Chapter 66 was carefully drafted by the legislature to insure that such restricted PEG payments would be paid in accordance with federal law—and could only be used in accordance with federal law. To insure this Chapter 66, section 66.006 (c) further states “these [PEG] payments are not chargeable as a credit against the franchise fee payments [the 5% fee] under this chapter.” TWC suit tries to undue this compromise by the legislature.

APPENDIX C.

PROPOSED SB 5 PUCT RULE CHANGES (as approved for publication February 9, 2006.)

§26.461. Access Line Categories.

(a)-(b) (No change.)

(c) **Definitions.** The following words and terms when used in this subchapter, shall have the following meaning, unless the context clearly indicates otherwise.

(1) (No change.)

(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)-(5) (No change.)

(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).

(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 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 non-residential voice service.

(3) (No change.)

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

(a)-(b) (No change.)

(c) **Definitions.** The following words and terms when used in this section, shall have the following meaning, unless the context clearly indicates otherwise.

(1) (No change.)

(2) **Transmission path** — A path within the transmission media that allows the delivery of switched local exchange service or provides a voice service.

(A)-(B)(No change.)

(C) Services that constitute vertical features of a switched local exchange service or a voice service, such as call waiting, caller-ID, etc., ~~that do not require a separate switched path~~, do not constitute a transmission path.

(D) (No change.)

(E) Packet voice services, without regard to the delivery technology, switched or not, and including Internet protocol technology, shall constitute a single transmission path.

(3) **Voice service** — voice communications services provided through wireline facilities located at least in part in the public rights-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).

~~(4)~~(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), ~~and (3)~~, and (4) of this subsection, and shall be consistent with subsections (e), (f) and (g) of this section.

(1)-(3) (No change.)

(4) **Voice service.**

(A) The CTP shall count each end-use customer provided voice service as one access line. Services that constitute vertical or optional 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 not able to identify the physical location of the end-use customer, that physical location shall be attributed to the municipality identified by the CTP's billing systems as the end-use customer's billing address.

(e) **Lines to be counted.** A CTP shall count the following access lines:

(1)-(6) (No change.)

(7) any other lines meeting the definition of access line as set forth in §26.461 of this title; ~~and~~

(8) Lifeline lines;:-

(9) all voice service access lines provided to end-use customers that allow such end-use customers to receive calls that originate through or on the public switched telephone network and/or that allow such end-use customers to send calls that terminate on the public switched telephone network; and

(10) all retail pay telephone access lines.

(f) **Lines not to be counted.** A CTP shall not count the following lines:

(1)-(3) (No change.)

(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;

(6) all voice service access lines provided to end-use customers which are offered at no cost or which do not allow such end-use customers to receive calls that originate through or on the public switched telephone network and/or that do not allow such end-use customers to send calls that terminate on the public switched telephone network, such as personal computer-to-personal computer voice connectivity; and

(7) Services that constitute vertical or optional features of a voice service, or are bundled with the voice service.

~~(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.~~

~~(g)(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.

(h)(+) 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.

(i)(+) 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 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.

~~(j)~~ **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.

~~(k)~~ **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 (relating to Rates, Allocation, Compensation, Adjustments, and Reporting) 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.

~~(1)(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 within 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.