HOUSE RESEARCH ORGANIZATION bill analysis | 5/10/1999 | HB 1777 Wolens, Carter (CSHB 1777 by Wolens)

SUBJECT:	Telecommunication provider compensation for municipal right-of-way use
COMMITTEE:	State Affairs — committee substitute recommended
VOTE:	14 ayes — Wolens, S. Turner, Alvarado, Bailey, Brimer, Counts, Craddick, Danburg, Hilbert, Hunter, Longoria, Marchant, McCall, Merritt 0 nays 1 absent — D. Jones
WITNESSES:	For — Monte Akers, Texas Municipal League Against — None On — David Brown, Southwestern Bell Telephone Company

BACKGROUND: Telecommunications companies must compensate municipalities for using public rights-of-way to provide local exchange services. Telecommunications providers must hold a certificate from the Public Utility Commission (PUC) to use a right-of-way on municipal property. Compensation is determined by franchise agreements negotiated through individual contracts between cities and certificated providers. These franchise fees account for 15 to 30 percent of municipal general fund revenues across the state.

DIGEST: CSHB 1777 would establish a uniform method for compensating municipalities for the use of public rights-of-way by certificated telecommunications providers. These providers would have to carry a certificate for local exchange service and to pay a franchise fee to use a public right-of-way in a municipality.

Base franchise fee. Municipalities would receive as a base franchise fee the total amount of revenue received in 1998 from franchise, license, permit, and application fees from certificated providers. Taxes and special assessments, including pole rental fees, could not be included in the calculation of revenue received. Municipalities with fewer than 75,000 residents could negotiate a larger base amount if the amount did not result in an access-line fee larger than the statewide average fee per line.

Municipalities with fewer than 15,000 residents or that had not had an effective franchise agreement since January 1, 1997, could choose a base fee equal to either the state average rate for access lines or the highest total revenue received by a municipality of similar size in the same or an adjacent county. Municipalities without a franchise agreement on September 1, 1999, but which had such an agreement in 1997 or 1998 would receive a base fee equal to the total amount of revenue received during the 12 months immediately before the expiration of the last agreement. Newly incorporated municipalities that did not have a franchise agreement in 1998 and municipalities that did not have a franchise agreement in 1997 or 1998 would receive a base amount equal to the highest total revenue received by a municipality of similar size in the same or an adjacent county.

Municipalities involved in litigation over franchise fees in 1998 and that voluntarily terminated the litigation would receive a base fee equal to the greater of:

- the total revenue received during any single calendar year from 1990 to 1999, including an amount entitled under a final judgment or settlement of litigation during any part of 1998;
- the state average for access-line rates multiplied by the total number of access lines in the municipality in 1999; or
- 22 percent of the total sales and use tax revenue received by the municipality in 1998.

Determination of franchise fees. The PUC would have to establish categories of access lines considering the type, use, and function of the lines, defined at a minimum by residential, business, and point-to-point services. The PUC would have to establish monthly rates for each line category so that the sum of the rates for each category, multiplied by the number of lines owned by a provider in a municipality in the first month of the agreement, multiplied by 12, roughly equaled the base amount for the municipality's franchise fee as determined under the bill, plus the value of in-kind services. The commission would have to assume that the value of in-kind services was equal to 1 percent of the base amount unless the municipality established that it received a greater amount in 1998.

The PUC would have to ensure that rates among different certificated providers were competitively neutral, did not impair competition, were nondiscriminatory, and complied with state and federal law. The PUC would have to adjust access-line rates annually based on the percentage change in the Consumer Price Index (CPI) and would have to provide each municipality with adjusted monthly rates for each line category on the date of the annual adjustment. A municipality could modify the relationship between fees and access-line categories each year.

Payment of franchise fees. Certificated providers would have to pay franchise fees to municipalities based on the actual number of access lines by the last day of the preceding calendar month. Providers would not have to pay for access lines that were resold or otherwise provided to another certificated provider if the original provider received adequate proof that the secondary provider would pay the franchise fee for those lines.

Providers could reduce the payment every 13 months by an amount equal to the annual statewide average percentage of local service revenues not paid by customers as determined by the PUC, multiplied by the total payments for the previous 12 months. Providers would have to pay the fee for the preceding month not later than noon on the 15th day of the present month in a manner that made the funds available on the day the payment was due.

Providers would have to file a report with each payment showing the number of access lines by category within the municipality at the end of the month. The report would have to include a list of the provider's access lines used by persons other than end-use customers, as well as a certified statement from a representative of the provider that the information in the report was true to the best knowledge of the representative. A municipality could use a provider's reports only for the purposes of verifying the number of access lines owned and operated by the provider.

Certificated providers without a franchise agreement with a municipality involved in litigation against the provider would have to begin to pay franchise fees at the time the PUC determined the amount the municipality was entitled to receive. Providers with an agreement that expired after the PUC determination would have to begin fee payments on the date of the expiration of the agreement as originally drafted or on a date of expiration decided by mutual agreement of both parties, if the latter date was earlier.

New entrants and renewal of agreements. The base franchise fee for a municipality upon the expiration of an agreement or ordinance adopted before January 12, 1999, would be equal to the total revenues received in the 12 months immediately before the agreement or ordinance expired. Providers would continue paying the same rate after an agreement expired until the PUC determined the appropriate rate. If the PUC determined that a provider would have paid more money during that period if the commission had determined the rate on the expiration date, the provider would have to pay the difference between the old and new agreements for the time when neither agreement was in force on or before the 30th day after the PUC made the decision.

A municipality could require new entrants that wanted to build facilities or current providers seeking to renew agreements or ordinances to comply with applicable terms of the most recent agreement or ordinance between the municipality and a certificated provider. A new entrant could choose to pay an additional 1 percent in addition to the agreed franchise fee instead of providing any in-kind services or facilities required by the municipality. The PUC would have to determine the monthly rates for a municipality for the renewal of an agreement within 60 days after the expiration of the previous agreement.

Municipal and provider rights. Municipalities would have the right to exercise any regulations for the right-of-way based on police power that were consistent with state and federal law and that the bill did not preclude specifically. Municipalities could require providers to obtain a permit without cost for locating facilities in or on a public right-of-way and could determine and order the placement, relocation, maintenance, or removal of such facilities. The use of a public right-of-way would be nonexclusive and subject to the rights of the municipality.

Certificated providers could install all necessary equipment and perform all necessary functions to provide telecommunications services in a public right-of-way if they paid franchise fees timely as determined under the bill. Municipalities could sue certificated providers for failure to pay franchise fees.

Indemnification. A municipality would be immune from any legal responsibility resulting from harm caused by the provider or an employee or representative of the provider. A municipality would *not* be immune from legal responsibility for personal or bodily injuries, death, or property damage caused by the municipality or an employee or representative of the municipality. Providers and municipalities found by a court to be jointly liable would have to share the liability comparatively in accordance with the law, without waiving any governmental immunity or defenses available to the parties under state law. A certificated provider would have to provide prompt written notice to the municipality of any claim or demand against either party known to the provider to have resulted from the activities of the provider in a public right-of-way.

Commission review of access lines. The PUC would have to determine by September 1, 2003, and at least once every three years thereafter whether to modify the definition of "access line" used to calculate the amount of revenues received by municipalities. The commission could change the definition to ensure that changes in technology or facilities did not affect the revenues received by municipalities significantly.

CSHB 1777 would apply only to municipal regulations and fees imposed on certificated telecommunications providers. PUC would have to collect and compile information from such providers and from municipalities to determine base franchise fees and would have to keep the information confidential.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. It would not affect the validity of a franchise agreement or right-of-way ordinance executed before January 12, 1999. The PUC would have to establish monthly rates for municipalities with current franchise agreements within 180 days after the effective date.

SUPPORTERS SAY:

CSHB 1777 is the result of lengthy negotiations between cities and telecommunications companies over proper compensation for the use of public rights-of-way. The bill would establish a uniform method for establishing proper compensation that represents the best interests of all Texans.

Changes in technology and in forms of business organization in the telecommunications industry have led cities and telecommunications providers to reconsider the methods for compensating municipalities for public right-of-way use. Providers have advocated a uniform method for establishing franchise fees statewide and in clear and consistent rules for negotiating agreements to promote fair competition among providers. Municipalities have been concerned with maintaining stable and consistent revenue flows from franchise agreements based on the fair-market value of the public land used for rights-of-way. Municipalities also have wanted to keep the authority to negotiate individual contracts with telecommunications providers and to regulate the use of public rights-of-way through ordinances.

Telecommunications providers would benefit under the bill from a standardized method for determining franchise fees based on the maintenance of fee levels from current agreements and clear principles for establishing new agreements. They would benefit from PUC regulation of monthly rates of access-line categories and from PUC oversight to ensure the competitive neutrality of franchise fees. Providers would be exempt from city ordinances related to public rights-of-way and exempt from compensating cities for police power enforcement.

Cities would benefit from the guarantee of minimum fee revenues based on 1998 revenue from certificated providers. Cities would be guaranteed reasonable increases in fee revenue through adjustments linked to the CPI and the addition of new access lines. They also would maintain compensation based on in-kind services provided to certificated providers. Cities would retain important police powers over public rights-of-way and legal indemnity from liability resulting from the actions of telecommunications providers.

The bill is not retroactive in intent. It would not change agreements related to right-of-way use adopted before 1999.

OPPONENTS SAY:

The base levels for franchise fees established in the bill would be based on current agreements that use the gross receipts of certificated providers to determine fees. Gross receipts figures would be an unfair standard for measuring current fee structures because many gross receipt items have nothing to do with the use of public rights-of-way. The state should establish a cost-recovery method for determining franchise fees to ensure that municipalities do not earn a profit from such fees above what it costs to maintain rights-of-way.

OTHER OPPONENTS SAY:

This bill would limit the ability of cities to regulate the use of public rights-of-way through ordinances other than the enforcement of police powers. Cities may have valid concerns for establishing ordinances not related to police powers. At the same time, cities should receive compensation for enforcing their police powers. The bill also would give the PUC too much control over setting monthly rates based on access-line categories. Cities should have greater authority to negotiate such rates based on specific local concerns.

NOTES:

The committee substitute would enact these provisions by amending Local Government Code, chapter 283, whereas the original bill would have amended Transportation Code, chapter 311. The language of the substitute is substantially different in every section from the original bill without altering its intent.