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J.E. "BUSTER" BROWN
STATE SENATOR

August 17, 2000

The Honorable John Cornyn
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

RECEIVED

AUG 31 2000

OPINION COMMISSION

RQ-0277-JC
FILE # ML-41604-00
I.D. # 41604

RE: Request for Attorney General's Opinion Regarding Application of Certain Provisions of Chapter 283 of the Texas Local Government Code to Public Utilities Other than Telecommunication Providers

Dear General Cornyn:

The 76th Legislature adopted an act that codified a new Chapter 283 of the Texas Local Government Code ("Chapter 283"). Entitled "Management of Public Right-of-Way by Telecommunications Provider in Municipality," Chapter 283 establishes the terms and conditions under which (I) certain telecommunications providers can have access to the public right-of-way for their facilities and (II) local governments can regulate the use of the right-of-way by those providers. Chapter 283 substitutes a statewide process managed by the Texas Public Utility Commission for the traditional local franchise in establishing the amount of compensation the telecommunications providers must pay a local government for use of the right-of-way. It also constrains municipalities in their ability to regulate telecommunications companies' use of the right-of-way. The intent of Chapter 283 was to encourage fair competition among telecommunications service providers by making access to rights-of-way possible in a nondiscriminatory and competitive, neutral manner, TEX.LOC.GOV'T CODE ANN. 283.001 (c) (Vernon Supp. 2000).

While Chapter 283 clearly states that it "applies only to municipal regulations and fees imposed on and collected from certificated telecommunications providers," Section 283.004 (emphasis added), assertions of its interpretation by some telecommunications providers have raised a question about whether it exceeds this limitation. For example, Section 283.056(b) allows a municipality to require a telecommunications provider to obtain a construction permit before locating its facilities in the right-of-way, but requires that "the terms of the permit shall be consistent with construction permits issued to other persons excavating in a public right-of-way." Id. 283.056(b). Further, the statute provides that "[a] municipality may exercise those police power-based regulations in the management of the right-of-way that apply to all persons within the municipality." Id. 283.056(c). It has been suggested that this language requires municipalities to insist on identical permits to use municipal right-of-ways regardless of the nature of the utility or other entity utilizing the right-of-way.

Texas municipalities have had a long tradition of regulating access to and use of their rights-of-way through franchises that are the product of negotiation and that represent contractual relationships between the municipalities and the utilities. In some cases, such as Houston's franchise with Houston Lighting & Power Company (now Reliant Energy), the franchise has been approved by the voters of the municipality.

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A variety of affected parties have expressed concern that Chapter 283, if interpreted as some suggest, would require municipalities to depart from their pattern of working with electric, gas and other franchised utilities just to be able to regulate telecommunications providers outside the franchise framework. In addition, some municipalities are concerned that such a strict interpretation of Chapter 283 could affect a municipality's own access to its own streets in its capacity as a water and sewer utility. The interpretation referenced above, if carried to its logical conclusion, may well mean that telecommunication providers, having been legislatively exempted from local control by franchise, may only be regulated by municipalities if municipalities also super-regulate the already regulated franchised utilities.

Based on the foregoing, I respectfully submit the following for your opinion:

Does Chapter 283 of the Texas Local Government Code governing telecommunications utilities require a municipality that adopts an ordinance requiring a permit for excavation in the public right-of-way by a certified telecommunications provider, to apply the ordinance to entities other than those regulated by Chapter 283, such as a utility company that has a franchise with the municipality relating to the utility's use of the right-of-way or to the municipality's own water and sewer operations?

Your prompt opinion on this issue would be greatly appreciated.

Sincerely,

JEB:jl

A handwritten signature in black ink that reads "Amber Moore". The signature is written in a cursive, flowing style.