

Policy Advisory Request No. 53

RE: Proposed Response to Request for Policy Advisory Request Regarding Scope of Public Works and Telephone Company Exemptions in the Texas Engineering Practice Act (Policy Advisory Opinion Request No. 53)

The Texas Board of Professional Engineers and Land Surveyors Policy Advisory Opinion Committee (Committee) met in public session on November 18, 2020, and approved this draft response for solicitation of public comment through the Texas Register and Board's website to the referenced request to your request, dated December 17, 2019. Any comments on this draft should be submitted to the Board no later than January 18, 2021, via U.S. Mail to Texas Board of Professional Engineers and Land Surveyors, Attn: Michael Sims; 1917 S. Interstate 35; Austin, Texas 78741-3702 or via e-mail to pao@pels.texas.gov

For the record, the request was originally submitted by Mr. David Magaña, P.E., previously employed with the City of Fort Worth.

Scenario:

The requestor seeks guidance on the following issue:

Do the operations of telephone companies who are Certified Telecommunications Providers (CTPs) that are installing fiber optic lines qualify for the exemptions for Public Works or Telephone Companies found in the Texas Engineering Practice Act (Act)?

Response:

The Policy Advisory Opinion process allows the Board to issue interpretations of the Act and Board Rules to address specific questions. The committee reviewed this request and determined that it can be answered by reference to the existing language of the statute and does not need to go through the Policy Advisory process.

Section 1001.003 of the Act defines the "practice of engineering" and the types of actions that fall under that definition. Further, Section 1001.004 of the Act establishes that "the privilege of practicing engineering be entrusted only to a person licensed and practicing under this chapter."

However, Subchapter B of the Act establishes certain exemptions for activities which may normally meet the definition of the practice of engineering. If the terms of an exemption, as laid out in the Act, are met the activity is exempt from having to be signed and sealed by a licensed professional engineer. Two of the exemptions found in Subchapter B deal with Public Works and Telephone Companies.

Specifically, Section 1001.053 discusses the exemption for Public Works, as copied below:

§ 1001.053. PUBLIC WORKS.

The following work is exempt from this chapter:

- (1) a public work that involves electrical or mechanical engineering, if the contemplated expense for the completed project is \$8,000 or less; or**
- (2) a public work that does not involve electrical or mechanical engineering, if the contemplated expense for the completed project is \$20,000 or less; or**
- (3) road maintenance or improvement undertaken by the commissioners court of a county.**

While “public works” is not specifically defined in the Act, the Board interprets “public works” to be consistent with accepted definitions, such as one found in §15.602(11) of the Texas Water Code, which defines a public works as “any project to acquire, construct, improve, repair, or otherwise provide any buildings, structures, facilities, equipment, or other real or personal property or improvements designed for public use, protection, or enjoyment undertaken by a political subdivision and paid for, in whole or in part, out of public funds.” As such, the activities of a privately-owned telephone company would not qualify for a Public Works exemption under the Act.

Section 1001.061 of the Act discusses exemptions for Telephone Companies, as copied below:

§ 1001.061. TELEPHONE COMPANIES.

- (a) An operating telephone company, an affiliate of the company, or an employee of the company or affiliate is exempt from this chapter with respect to any plan, design, specification, or service that relates strictly to the science and art of telephony.**
- (b) This exemption includes the use of a job title or personnel classification by a person included under Subsection (a) if the person does not use:**
 - (1) the title or classification in connection with an offer to the public to perform engineering services; and**
 - (2) a name, title, or word that tends to convey the impression that a person not licensed under this chapter is offering to the public to perform engineering services.**

The Act does not specifically define “plan, design, specification, or service that relates strictly to the science and art of telephony.” However, in your request you declare the company in question is a “certificated telecommunications provider.” Texas Government Code 283.002(2) and 16 Texas Administrative Code §26.461(c)(2) define a certificated telecommunications provider as “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.” Based on this definition, the Board would consider a certificated telecommunication provider to be a “telephone company” under Section 1001.061 of the Act. The Board further recognizes the evolution of telecommunications technology and services and interprets Section 1001.061 of the Act to include fiber optic or other technologies that provide voice transmission. As such, the design of fiber optic cable systems that will provide voice service by a telephone company would fall under the exemption allowed by Section 1001.061.

Requirements for installation and coordination of other utilities within a Right of Way (ROW) managed by the municipality could be added to local ordinances or the franchise agreement between the telecommunications company and the municipality. If the ROW manager requires signed and sealed design documents as part of their codes, ordinances, permitting process, franchise agreement, or other design requirements, then the professional engineer must follow the practice requirements of the Texas Engineering Practice Act and board rules.

However, please keep in mind that if municipalities implement a requirement within their own codes, ordinances, permitting process, franchise agreement, or other design requirements for installation of these systems as ROW managers, they must not be less restrictive than the requirements in the Act or Board rules. As long as these codes, ordinances, or requirements are not less restrictive than the requirements in the Act or Board rules, the Board would have no additional jurisdiction over the content or enforcement of these codes, ordinances, or requirements that regulate installation of the systems.

Conclusion:

No new Policy Advisory Opinion will be developed for this request.