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# RAILROAD COMMISSION OF TEXAS

Opinion Committee

CHARLES R. MATTHEWS, CHAIRMAN  
BARRY WILLIAMSON, COMMISSIONER  
CAROLE KEETON RYLANDER, COMMISSIONER

December 19, 1997

**RQ-101**  
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DEC 23 1997

The Honorable Dan Morales  
Attorney General of Texas  
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209 W. 14th, 8th Floor  
Austin, Texas 78701

# ML-39993-97  
I.D. # 39993

**RETURN RECEIPT REQUESTED**

Dear General Morales:

The Railroad Commission of Texas (Commission) requests your opinion pursuant to section 402.042 of the Texas Government Code regarding the following questions:

1. Does the Commission have adequate statutory authority to recognize refund requests for LPG delivery fees paid on imported LPG?
2. If the Commission has adequate statutory authority to recognize these refund requests, does the Commission have discretionary authority as to whether or not to recognize any interest or other expenses in addition to the actual fees paid?
3. If the Commission has adequate statutory authority to recognize these refund requests, may the Commission condition such refunds on the pass through of the refunded fees to LPG end-users?

### Background

Effective August 26, 1991, Chapter 113 of the Natural Resources Code was amended to "impose a fee on the first sale of odorized LPG" by requiring "[e]ach operator of a loading rack on delivery into any cargo container [to] collect from the person who purchases odorized LPG a fee . . . ." TEX. NAT. RES. CODE § 113.244 (Vernon Supp. 1997). In order to administer this LPG delivery fee, the Commission adopted by rule, effective March 18, 1992, a definition of loading rack which included "underground and aboveground bulk storage facilities" and which had the effect of imposing the fee on imported LPG which subsequently was introduced into an underground or aboveground bulk storage facility. 16 TEX. NAT. RES. CODE § 15.1 (West Jan. 1, 1997). In addition, Commission rules required the loading rack operator to "collect a fee on the first sale of said odorized LPG" and made "[t]he loading rack operator . . . responsible for collecting the fee from the first purchaser of the odorized LPG." 16 TEX. ADMIN. CODE § 15.21(a), (b) (West Jan. 1, 1997).

Letter to The Honorable Dan Morales  
December 19, 1997  
Page 2 of 4

In response to a challenge to the Commission's definition of "loading rack operator" lodged by several bulk storage operators, Judge Dietz of the 201<sup>st</sup> Judicial District Court of Travis County rendered a judgment on August 19, 1996, in Cause No. 94-13789, styled *Star-Tex Propane, Inc., et. al v. The Railroad Commission of Texas*, which granted the plaintiffs' Motion for Summary Judgment and made the following finding:

The Commission's rule at 16 TEX. ADMIN. CODE § 15.1, with its definition of the term "loading rack," is invalid as applied to the Plaintiffs and Intervenor because the rule effectively imposes a fee on "imported" odorized liquefied petroleum gas ("LPG") purchased outside the State of Texas by Plaintiffs and Intervenor when the same is delivered into their storage tanks and the point of "first sale" in Texas pursuant to 16 TEX. ADMIN. CODE §§ 15.1 and 15.21 for such imported LPG is at delivery into Plaintiffs and/or Intervenor's storage tank, or is from the bobtail or other transport truck of Plaintiffs and/or Intervenor to the storage tanks of the purchasers. The attempt by the Commission to impose the fee on all such first sales of odorized LPG within the State of Texas is beyond the statutory authority of the Commission because it requires the collection and payment of a fee that is not imposed by the enabling legislation, TEX. NAT. RES. CODE ANN. §§ 113.244 and 113.246.

(See Attachment 1). The Commission appealed this order on September 18, 1996.

The parties to the *Star-Tex* litigation subsequently entered into a settlement agreement reflected in their Joint Motion of All Parties to Dismiss and Vacate District Court Judgment filed with the Third Court of Appeals on April 29, 1997. (See Attachment 2). The Court of Appeals subsequently dismissed the appeal. During the negotiations that led to the settlement, all Category E licensees were notified by letter dated April 4, 1997, that the Commission would not enforce the LPG delivery fee under the Commission's then current rule on gas that is imported and placed directly into a dealer's aboveground bulk-storage facility. (See Attachment 3). On May 31, 1997, Governor Bush signed into law SB 925 (75th Legislature, R.S.) granting the Commission express authority to assess delivery fees on imported LPG effective September 1, 1997.

The Commission has received requests for refunds, from Gillert Gas Co. of Athens, Texas, for \$2300.00 in fees and \$162.50 in penalties for deliveries made between March 1992, and March 1997, and from Mr. A.W. Boles of Center, Texas for a total of \$45,722.50 in fees paid by Boles Gas Sales, Inc. and Shelby Transport Company during the years 1992 - 1994. In response to these requests, the Commission obtained guidance from the Comptroller of Public Accounts. (See Attachment 4). The Commission is favorably disposed to entertain these requests for refunds from monies available for such refunds, but seeks guidance as to which authority upon which it can rely to do so.

The significance of the judgment entered by the District Court with respect to the Commission's obligation to refund certain LPG delivery fees on imported LPG is unclear. Had that judgment not been vacated in the final settlement, it probably would have been given retroactive effect. The Texas Courts have followed the reasoning of the United States Supreme Court in *Chevron Oil Co. v. Huson*, 404 US 97, 106-07 (1971), in determining whether a decision is to be applied prospectively or retroactively. See *State Farm Fire and Casualty Co. v. Gandy*, 925 S.W.2d 696 (Tex. 1996) and *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983). In other words, had the judgment not been vacated, the Court's determination that the Commission could not legally impose a fee on imported LPG would be applied retroactively and would thus obligate the Commission to refund improperly collected fees.

The District Court's judgment, however, was vacated by the Third Court of Appeals pursuant to the Joint Motion of the Parties. As a result, the question arises regarding the Commission's obligation and discretion to make refunds. In this regard, it appears that the Commission could take the position that the August 19, 1996, District Court judgment is of no force and effect and that the Commission is therefore under no legal obligation to refund any monies previously collected. Such action would appear, however, to cut against the Commission's course of dealing and negotiation in settling the litigation and places the Commission in the position of unfairly penalizing those licensees that complied with Commission rules by remitting fees on imported gas.

Irrespective of whether the Commission is legally obligated to refund these fees, it appears that the Commission has the authority to do so. Section 113.246 of the Natural Resources Code gives the Commission the authority to adopt rules for the administration, collection, reporting, and payment of LPG delivery fees. Under this statutory authority, the Commission adopted 16 TEX. ADMIN. CODE § 15.25 which allows refunds of fees "remitted to the Commission in error." It can be credibly argued that the Commission now has determined that its definition of "loading rack" is too broad and that fees paid in accordance with this unduly broad definition were remitted in error.

In addition, section 403.077 of the Government Code authorizes refunds of money collected by mistake of fact or law as follows:

- (a) The comptroller may refund the amount of money collected or received by a state agency through mistake of fact or law and deposited in the state treasury, including money not due the state and money collected or received in excess of the amount required to be collected and received. The agency must make written request to the comptroller for the refund . . . .

Although the judgment was vacated, it is nevertheless clear that the Commission's effort to collect LPG delivery fees on imported gas, as prescribed in its rules, was determined to be contrary to the law.

Letter to The Honorable Dan Morales  
December 19, 1997  
Page 4 of 4

Another question has arisen concerning which entity or person may be eligible to ultimately receive the refund. Section 113.244 of the Natural Resources Code obligates each operator of a loading rack to collect the LPG delivery fee from the person who purchases the odorized LPG. Section 113.245 requires the loading rack operator to then remit the collected fees to the Commission. The fees which are paid by the first purchaser and collected and remitted by the loading rack operator are undoubtedly passed on, as a cost of doing business, to the ultimate consumer through the charges for LPG service. Since the end-user is the entity or person that ultimately pays the LPG delivery fee, may the Commission condition any refund it authorizes on the pass through of the refund to the end-use consumer? Although the Commission has no authority over the rates charged for the ultimate distribution of LPG to end-users, refunding the LPG delivery fees to loading rack operators or first purchasers without a pass through condition would clearly result in a windfall for those entities.

Your assistance on this matter is appreciated. Please contact Lindil Fowler, General Counsel, 463-6715, if you or your staff require further information on this request.

Sincerely,



Charles R. Matthews  
Chairman

cc: Commissioner Barry Williamson  
Commissioner Carole Keeton Rylander  
Lindil C. Fowler, Jr., General Counsel  
Mike Regan, Executive Director