



**Commission on
State Emergency
Communications**

333 Guadalupe Street,
Suite 2-212
Austin, Texas
78701-3942

Phone:
512-305-6911 V/TTY

Fax:
512-305-6937

www.911.state.tx.us

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OPINION COMMITTEE

Via Certified Mail - Return Receipt Requested
The Honorable Greg Abbott
Attorney General of Texas
P. O. Box 12548
Austin, TX 78711-2548

FILE # ML-44364-05

I.D. # 44304

Re: Request for Attorney General Opinion Interpreting Health and Safety
Code Section 771.0711(a)

Dear General Abbott:

As Executive Director of the Commission on State Emergency Communications (Commission), I request an opinion from the Attorney General of Texas as to whether the Commission or the Texas Comptroller of Public Accounts (Comptroller) has primary jurisdiction to determine whether the 9-1-1 emergency service fee imposed on wireless telecommunications connections by Texas Health and Safety Code Section 771.0711 is applicable to a specific service provided by a service provider. The issue arises as a result of claim for refund filed by TracFone, Inc. (TracFone) with both the Commission and the Comptroller. In its claim, TracFone alleges in part that Section 771.0711(a) is inapplicable because TracFone provides wireless services to its customers on a prepaid basis.

The Commission specifically is not asking for an opinion as to whether the statute is applicable to TracFone, but merely which of two state agencies is vested with primary jurisdiction to make such a determination. The necessity of the opinion is to preclude the unnecessary duplication of efforts by sister agencies in addressing TracFone's claim, and to ensure that a decision by either agency is duly respected by the other in this and future proceedings.

On September 1, 1997, Section 771.0711 was added to the Health and Safety Code.¹ Section 771.0711(a) provides in relevant part as follows:

To provide for automatic number identification and automatic location identification of wireless 9-1-1 calls, the commission shall impose on each wireless telecommunications connection a 9-1-1 emergency service fee.²

A wireless telecommunications connection (WTC) is defined as "any wireless communication mobile station assigned a number containing an area code assigned to Texas by the North American Numbering Plan Administrator that

¹ Acts 1997, 75th Leg., ch. 1246, Sec 2, eff. Sept. 1 1997.

² TEX. HEALTH & SAFETY CODE ANN. § 771.0711(a).

connects a wireless service provider to the local exchange provider.”³ A WTC is more commonly known as a cell phone. Wireless service provider is defined in Section 771.001(12), and in lay terms refers to a provider of cellular phone service.⁴ Pursuant to Section 771.0711(b), “a wireless service provider shall collect the fee in an amount equal to 50 cents a month for each wireless telecommunications connection from its subscribers.”⁵

A plain reading of Section 771.0711 would appear to confer primary jurisdiction on the Commission to determine whether a person is a wireless service provider whose customers use WTCs, and to require such a provider to remit the appropriate fees to the Comptroller. However, Tax Code Chapter 111, Collection Procedures, confers authority upon the Comptroller with respect to any fee that it is required to collect under a law not included in the tax code.⁶

Section 771.077, Collection of Fees and Surcharges, was amended in 1999 to give authority to the Comptroller to collect past due fees, including the wireless 9-1-1 fee.⁷ In 2001, Section 771.0711(b) was amended to require wireless service providers to “pay the money collected to the comptroller not later than the 30th day after the last day of the month during which the fees were collected,” and further provided that “the comptroller may establish alternative dates for payment of fees under this section.”⁸ The Commission does not challenge that the wireless 9-1-1 fee is a tax⁹ or fee which the Comptroller is charged with collecting.¹⁰ Accordingly, the Commission does not dispute the general applicability of Tax Code Chapter 111 to the collection and adjudication of claims regarding the wireless 9-1-1 fee.

A possible resolution of the statutory conflict might be found in the Tax

³ *Id.* at § 771.001(13).

⁴ *Id.* at § 771.001(12):

“Wireless service provider” means a provider of commercial mobile service under Section 332(d), Federal Telecommunications Act of 1996 (47 U.S.C. Section 151 et seq.), Federal Communications Commission rules, and the Omnibus Budget Reconciliation Act of 1993 (Pub. L. No. 103-66), and includes a provider of wireless two-way communication service, radio-telephone communications related to cellular telephone service, network radio access lines or the equivalent, and personal communication service. The term does not include a provider of:

(A) a service whose users do not have access to 9-1-1 service;

(B) a communication channel used only for data transmission;

(C) a wireless roaming service or other nonlocal radio access line service; or

(D) a private telecommunications service.

⁵ *Id.* at 771.0711(b).

⁶ TEX. TAX CODE ANN. § 111.0021 (Vernon Supp. 2004).

⁷ Acts 1999, 76th Leg., ch. 1405, Sec. 29, eff. Sept. 1, 1999; See Atty Gen. Op. No. JC-0284 (2000).

⁸ Acts 2001, 77th Leg., ch. 1158, Sec. 81, eff. Jan 1, 2002.

⁹ TEX. TAX CODE ANN. § 101.003(13) (“Tax” means a tax, fee, assessment, charge, or other amount that the comptroller is authorized to administer.”).

¹⁰ TEX. HEALTH & SAFETY CODE ANN. §§ 771.0711(b), (f); 771.073(b-c); and 771.077(a-d).

Code. Tax Code section 111.0022 provides:

This subtitle [Subtitle B] and Subtitle A [General Provisions] of this title apply to the administration, collection, and enforcement of other taxes, fees, and charges, including penalties, or other financial transactions, that the comptroller is required or authorized to collect or administer under other law, to the extent that the other law does not conflict with this subtitle or Subtitle A of this title.

Section 111.0022 would appear to require the application of the Tax Code, including any corresponding jurisdiction conferred therein, except in instances where the law governing the Comptroller's authority is found outside of, and conflicts with, the Tax Code.

In the TracFone matter, such outside law could refer to Section 771.0711(a). Consistent with this interpretation are the sections in the Health and Safety Code that declare that the Commission "is the state's authority on emergency communication,"¹¹ and require each public agency "to cooperate with the commission to the fullest extent possible."¹² Moreover Section 771.077(b) provides that the "comptroller may establish procedures to be used by the commission to notify the comptroller of a service provider's . . . failure to timely deliver the fees."¹³ Taken together these provisions appear to recognize the authority of the Commission to apply Section 771.0711(a), while simultaneously requiring any ruling by the Commission to be submitted to the Comptroller for enforcement.¹⁴

Based on the foregoing, I respectfully request your opinion as to whether the Commission or the Comptroller has primary jurisdiction to determine whether the 9-1-1 emergency service fee imposed on wireless telecommunications connections by Texas Health and Safety Code Section 771.0711(a) is applicable to a specific service provided by a service provider.

Sincerely,



Paul Mallett
Executive Director

cc: Judge Dorothy Morgan
Commission Presiding Officer

Patrick Tyler
Commission General Counsel

¹¹ TEX. HEALTH & SAFETY CODE ANN. § 771.051(a).

¹² *Id.* at § 771.052.

¹³ *Id.* at § 771.077(b).

¹⁴ See Atty Gen. Op. No. JC-0284 (2000).

James Crowson
Office of the Attorney General—Admin. Law Division
P.O. Box 12548
Austin, Texas 78711-2548

Tim Mashburn
Texas Comptroller of Public Accounts
111 E. 17th Street
Austin, Texas 78774

Gilbert Bernal
Stahl, Bernal, & Davies, L.L.P.
7320 N. Mopac, Suite 211
Austin, Texas 78731
(Attorneys for TracFone)