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OPINION COMMITTEE

COUNTY AUDITOR

CAMERON COUNTY, TEXAS
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FILE # ML-47361-13
I.D. # 47361

August 8, 2013

RQ-1145-GA

Martha Galarza, CPA
COUNTY AUDITOR

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

Re: Attorney General Opinion Request as authorized by V.T.C.A., Govt.
Code, Sec. 402.042(a)&(b)(8).

Dear General Abbott,

ISSUE

Whether a Texas County may provide voice over IP local and long distance phone service to inmates held in county jails. If a Texas county may provide voice over IP phone service to inmates held in county jails whether any limits will be placed on the ability of a county to profit from the providing of such service or the use of any such profits.

BACKGROUND:

Cameron County wishes to explore the feasibility of providing telephone service for inmates in its county jails via internet based systems (voice over IP). The issues of the ability of a County to act as a Telecommunications Service Provider in the limited geographic and service context of the providing of such service to its inmates and the applicability or exemption of Federal and/or State regulation are areas of inquiry the County desires assistance in analyzing.

Pursuant to authority conferred by section 511.009 of the Government Code, the Texas Commission on Jail Standards has promulgated rules requiring county jails to provide telephone services to county jail inmates. See 37 T.A.C. §§ 259.119, .220, .515, .615, 261.219, 265.7, 291.1. Specifically, a rule of the Texas Commission on Jail Standards on the inmate telephone plan provides the following:

Each facility shall provide for reasonable access, both local and long distance, between an inmate and his or her attorney, family, and friends. This may be on a prepaid or collect basis. The plan shall contain procedures for the handling of emergency calls.

37 T.A.C. § 291.1(2).

The rule was adopted under the commission's authority to adopt reasonable rules establishing minimum standards for the construction, equipment, maintenance, and operation of county jails, and for the custody, care, and treatment of prisoners. Gov't Code § 511.009(a)(1), (2).

The Attorney General's Office has previously addressed whether the Commission on Jail Standards is empowered by rule to make county jail telephone services for inmates part of the jail commissary services provided for in section 351.0415 of the Local Government Code. Based on the reasoning in Attorney General DM-19, the Attorney General's Office concluded that the commission had no such authority:

As indicated in Attorney General Opinion DM-19, it was reasonable to suppose that the legislature, in adopting section 351.0415, did so in the understanding, based on the distinction between telephone and commissary privileges made in commission rules since 1976, that telephone privileges were not part of the commissary scheme it was providing for in that section. . . . Accordingly, the Attorney General's Office concluded that the commission is not authorized now to adopt a rule to include telephone service within the commissary services provided for in section 351.0415.

Letter Opinion No. 96-032 (1996) at 3.

Since the provision of telephone services does not fall within the commonly understood definition of "commissary," the Attorney General concluded that a sheriff has no contracting authority regarding the provision of telephone services to jail inmates. Instead it was concluded that the commissioners court has such authority. *See, e.g., Anderson v. Wood*, 152 S.W.2d 1084 (Tex. 1941); Attorney General Opinion DM-111 (1992).

Cameron County believes that due to Federal Precedent Public Utility Commission rules are not pre-empted by Federal Regulation by the Federal Communications Commission rules (see *Texas Order*, 13 FCC Rcd at 3544 (¶ 179), there is no Federal impediment to the County providing telephone services as contemplated herein. Cameron County also believes that since there is no specific prohibition of the providing of these types of service by a County under the Texas regulatory scheme that therefore a county may so provide. Specifically Chapter 26 of the PUC administrative rules provides that a municipality may not provide phone services. The fact that such prohibition does not extend to a county means that under principles of statutory and regulatory construction, a county is not so prohibited.


If there is no applicable prohibition of a county providing voice over IP local and long distance services to inmates the next area of inquiry is whether Texas law or regulation place any limitations on the ability of a county to profit from the providing of such services or on the use of any such funds generated.

The Attorney General in Letter Opinion No. 97-030 in a relevant matter stated "... neither rule nor statute authorizes the county to profit from providing telephone services to inmates. Attorney General Opinion MW-143 decided that a jail commissary could be operated at a profit if all profits are spent for the "benefit, education, and welfare" of the jail inmates. Attorney General Opinion MW-143 (1980). This conclusion was codified in section 351.0415 of the Local Government Code. Attorney General Opinion DM-19 (1991). The Attorney General's Office stated "We believe that revenues generated by providing access to telephone service, as required by commission rule, should be treated in the same fashion, even in the absence of legislation dictating that result. The provision of jails, in compliance with law, is, moreover, a governmental function, not a proprietary function." *See generally, Miller v. El Paso County*, 150 S.W.2d 1000 (Tex. 1941); Attorney General Opinion WW-192 (1957) (county may not engage in profit-making enterprise). An inmate is entitled to reasonable access to telephone service. If the price of the service is greater than the actual cost of providing the service, then the issue as to the reasonableness of the price could be raised."

Cameron County seeks guidance on the issue of whether such rationale and discussion would limit its ability to profit from and/or use funds generated for the operation of a proprietary voice over IP local and long distance phone system provided for use by inmates of the County's jail, if such a system may be properly operated.

Thank you for your attention to this Request.

Respectfully submitted,


Martha Galarza, CPA, CIO
Cameron County Auditor

CC: Commissioners' Court
Pete Sepulveda, County Administrator