



General Services Commission

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April 3, 2000

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

RQ-0214-GSC
OPINION COMMITTEE

FILE # ML-41353-00
I.D. # 41353

RE: Request for Opinion related to assessment and collection of certain telecommunications fees from the General Services Commission

Dear General Cornyn:

On behalf of the General Services Commission (GSC), in its role as the lawfully designated telecommunications provider for all state agencies and optionally to political subdivisions, I am writing to request an opinion regarding the legality of assessment and collection of certain telecommunications fees by private telecommunications providers from the GSC and its customers.

GSC respectfully submits the following background information, then will present the questions for which it seeks an opinion.

BACKGROUND:

GSC as Telecommunications Provider for the State of Texas

The Legislature has designated GSC as the state agency responsible for obtaining a statewide system of "telecommunications services," which is defined as inter-city communications facilities and services. See Sections 2170.001 (a)(1) and 2170.002, Texas Gov't Code. This system is known as TEXAN. GSC is authorized to allow other entities to use the system through contracts, including, but not limited to, each house of the legislature, legislative agencies and political subdivisions of the state. Section 2170.004, Texas Gov't Code.

GSC is authorized to provide services to its customers on a cost recovery basis. The Comptroller manages the cash flow supporting the telecommunications system with a revolving fund account. Section 2170.057, Texas Gov't Code.

Telecommunications services are to be provided on a shared or integrated use basis to ensure cost effectiveness of the system. The state telecommunications system is not subject to regulation or reporting under Title 2, Texas Utilities Code. Section 2170.053, Texas Gov't Code.

GSC also operates the Capitol Complex Telephone System (CCTS) for the benefit of the state. Section 2170.09, Texas Gov't Code.

GSC provides these two networks by entering into contracts with private telecommunications providers, after competitive solicitation for such services. In 1992, GSC created the TEXAN III network by contracting to lease the circuits and routers from Southwestern Bell, with GSC operating the equipment. Separate contracts were procured for long distance, international and internet access. Rapid advances in technology and the opening of the telecommunications industry to competition led GSC to issue another procurement effort in late 1998 to move to the next generation of TEXAN, known as TEXAN 2000. The TEXAN 2000 contracts were awarded over the summer and early fall of 1999, and together comprise a new approach to the acquisition and delivery of telecommunications services for the TEXAN network. The backbone transport and user termination will be transitioning from the GSC-operated private network, to the public network owned by AT&T. TEXAN will share the same basic service delivery system enjoyed by most residential customers. GSC made multi-vendor awards for local, long distance, internet access, web hosting and development, calling cards, wireless and other related services, on a requirements contract basis.

The TEXAN customers have choices among various vendors for the provision of these services, while GSC will remain responsible for certain core telecommunications planning and project execution functions, as a value added service. For purposes of this opinion request, the contracts through which the current TEXAN system is operated are known as the "TEXAN III Contracts" and the new network and service offerings are collectively referred to as the "TEXAN 2000 Contracts".

While operating both the TEXAN III and TEXAN 2000 networks, GSC has had the Office of Attorney General (OAG) serve as specialized legal counsel for telecommunications regulatory matters. Over the last decade, the OAG and GSC have developed a close attorney/client relationship formalized through a series of interagency contracts under which the OAG provides the GSC legal services in the area of telecommunications regulation. Specifically, the Public Agency Representation Section (PAR) of the Consumer Protection Division of the OAG consists of a team of attorneys and analytical staff whose mission is to represent the interest of state government as a consumer of utility services, including telecommunications services. In the area of telecommunications regulation, state law requires the OAG to represent the GSC in rate proceedings involving the State. Section 2170.008(b), Tex. Gov't Code. The series of OAG/GSC interagency contracts expand on this statutory mandate in order to protect the State's vital telecommunications resources and infrastructure in an everchanging telecommunications regulatory arena.

Federal Telecommunications Fee Assessments

As a part of the Federal Telecommunications Act of 1996 (FTA), Congress provided for the opening of the local exchange telecommunications market to competition. The Federal Communications Commission (FCC) has the authority to plan and regulate the transition to competition. This process involves many components. For the purpose of this request, however, the following description is limited to the aspects of the transition to competition related to the telecommunications fees that have given rise to the controversy between the GSC and certain telecommunications companies that seek to impose these fees on the State.

Pursuant to the FTA, the FCC was ordered to eliminate implicit subsidies for universal service¹, and establish an explicit subsidy mechanism. The FCC also restructured the access charges that long distance carriers pay local telephone companies for the use of their local networks to originate and terminate long distance calls.² The purpose of the access charge reform was to reduce overall access charges paid by long distance carriers, and replace per-minute variable fees with fixed fees. The ultimate goal was the reduction of overall long distance rates paid by customers. An additional component of implementing the FTA in order to encourage competition was the requirement that all telecommunications carriers have the ability to transfer a customer's telephone number to another carrier when the customer selects local telephone service from a competitor. This is referred to as number portability.

¹ Universal service refers to the public policy of subsidizing local exchange telephone service in high cost areas of the country in order to maintain artificially lower rates in those areas nationwide.

² In telecommunications regulatory jargon, long distance companies are referred to as "interexchange carriers," or "IXCs" and local telephone companies are known as "local exchange companies," or "LECs."

Federal Universal Service Fund (FUSF)

In order to fulfil the public policy underlying universal service, all telecommunications common carriers³ are required to contribute to the federal Universal Service Fund (FUSF) a percentage of their total revenues from local exchange, domestic long distance and international long distance services. The percent assessment is established by the FCC on a quarterly basis.

The FCC has specifically ruled that the FUSF contributions may be recovered by carriers from customers, but they are not mandatory end-user surcharges. Consequently, some carriers have chosen to pass through their FUSF contributions to customers while other carriers have not. Those carriers that have chosen to recover their FUSF contributions do so by including a line item charge on customers' monthly telephone bills. The charge is identified under a variety of names, including, "Universal Service Charge," "Universal Connectivity Charge," "Federally Mandated USF Charge," and "USF Surcharge."

Presubscribed Interexchange Carrier Charge (PICC)

The presubscribed Interexchange Carrier Charge (PICC) is the new fixed access fee created to replace per-minute access fees that long distance carriers previously paid to local exchange companies for the use of their local networks. The PICC is not an additional access charge component. When an end-use customer picks a long distance carrier, that carrier becomes obligated to pay the PICC to the customer's local exchange company. However, if the end-use customer fails to select a long distance carrier, the local exchange company has the right to recover the PICC directly from the customer, assessed as a monthly line item on the customer's telephone bill.

³ The definition of "common carrier" specifically excludes government-run telecommunications networks, such as the TEXAN Network, that aggregate telecommunications purchases for the internal use of government network subscribers.

Number Portability Charge (NPC)

The number portability charge (NPC) also appears as a monthly line item on customers' telephone bills from local exchange companies who chose to recover from their customers the cost of implementing number portability. The FCC allows local exchange companies to recover the NPC through a federally tariffed monthly charge that will apply for 5 years beginning in February 1, 1999. The NPC is not a federally mandatory end-user charge.

Billing by Telecommunications Providers/ PAR's position

Various local exchange and long distance companies from whom GSC receives service are billing GSC for these fees. Based on advice of PAR, GSC has deleted the assessment amounts from its bills and paid to the telecommunications providers a reduced amount.

The PAR's advice is based on several analyses, applicable generally to these fees, which have been rendered in a series of memos to GSC, and TEXAN users. "Exemptions for Telecommunications Fees for Governmental Entities", By Assistant Attorney General Gabriel Garcia (July 16, 1999) is attached hereto as Attachment A. There are three basic arguments advanced by the PAR:

Texas Constitutional Law

Article III, Section 44 of the Texas Constitution provides that only certain types of claims may be paid by state agencies. The Legislature is limited to appropriating funds only for claims recognized by statute as "legal obligations" of the State, citing Texas Public Building Auth. v. Mattox, 686 SW2d 924, 929 (Tex 1985); Austin Nat'l Bank v. Sheppard, 71 SW2d 242, 245 (Tex. 1934); Attorney General Opinion JM-1181 (1990).

Therefore, only mandatory regulatory fees are payable under the Texas Constitution. To pay when no legal obligation exists would violate Article III, Section 44 of the Texas Constitution. In addition paying such claims would be a violation of Article III, Section 51, which prohibits gifts, or donations of public money. State v. City of Austin, 331 SW2d 737, 742 (Tex. 1960).

Based on Article III, Section 44 of the Texas Constitution, the PAR asserts that the GSC, and other state agencies, are prohibited from paying the FUSF, PICC, and the NPC pass through fees, which are not mandatory end-user surcharges. See, FCC Truth In Billing Order, FCC 99-72 (June 25, 1999); FCC Universal Service Order, FCC 97-157, ¶¶ 851 and 855.

TEXAN Is Neither an End User Nor an Interexchange Carrier

An analysis of whether the GSC must pay the PICC to a local exchange company involves an additional level of complexity. The local exchange company is entitled to recover the PICC from either the long distance company or the end-use customer who failed to select a long distance carrier. The question is whether the TEXAN Network is either a long distance carrier, aka interexchange carrier, an end-use customer or some other entity such as an aggregator. The PAR argues that TEXAN is not an interchange carrier because it is not a "common carrier" as that term is defined by the FCC. This assertion is also logical given that private telecommunications end-users are not entitled to use the TEXAN Network. Nor is TEXAN subject to any licensing or regulatory requirements at the federal or state level. As stated above, TEXAN is within the class of governmental entities whose self use of telecommunications services makes them exempt from contribution to the FUSF mechanisms – a fund to which only common carriers contribute. Docket 66-45, FCC 97-157, ¶ 800. TEXAN, therefore, should not be liable for payment of the PICC to local exchange companies as an interexchange carrier.

TEXAN is not an end user either; it merely aggregates governmental needs and buys services in bulk. However, even assuming that TEXAN should be treated as an end user, it has no liability to a local exchange company for the PICC because TEXAN has selected long distance carriers through its TEXAN III or TEXAN 2000 Contracts, and therefore, the payment of the PICC should come directly to the local exchange companies from the designated long distance companies.

TEXAN Fixed-Price Contracts Are a Shield to Assessment

In addition to the constitutional and statutory defenses, the GSC asserts a contractual defense from potential liability for the FUSF, PICC and NPC surcharges. Both the Texan III and the TEXAN 2000 Contracts were bid as fixed-price contracts for a term of years. Most of the fees discussed above were created during the terms of the TEXAN III Contracts. PAR argues that common law contract principles prevent the unilateral amendment of these contracts through action of a telecommunications provider, such as a change to a tariff during the term of a fixed-price contract.

QUESTIONS PRESENTED:

1. As it relates to local exchange companies, are the FUSF and NPC monthly line item charges "mandatory fees" that amount to legal obligations of the State of Texas under Article III, Section 44 of the Texas Constitution, or are they "optional fees" that the GSC is prohibited from paying pursuant to Article III, Sections 44 and 51 of the Texas Constitution?

- 2. As it relates to interexchange carriers, are the FUSF, PICC and NPC monthly line item charges "mandatory fees" that amount to legal obligations of the State of Texas, or are they "optional fees" that the GSC is prohibited from paying pursuant to Article III, Sections 44 and 51 of the Texas Constitution?**
- 3. Is the TEXAN Network an "interexchange carrier" for purposes of liability for payment of the PICC to a local exchange company?**
- 4. Is the TEXAN Network an "end user" for purposes of liability for payment of the PICC to a local exchange company?**
- 5. If the answer to question 4 is yes, has the TEXAN Network designated its interexchange carriers through its TEXAN III and TEXAN 2000 contracts with the interexchange carriers that serve TEXAN customers?**
- 6. If the answer to any of the foregoing questions results in payment liability on the state, GSC would respectfully request your opinion whether the payment of the fees are subject to the Prompt Pay Act, Chapter 2251, Texas Government Code, given the late payment fee exemption provided in Section 55.010, Texas Utilities Code.**

Industry representatives are interested in the outcome of this opinion request.

There are several telecommunications service providers whose legal representatives would be interested in providing briefs to your office on some or all of the issues outlined above, should you deem it appropriate. The listing is attached hereto as Attachment B.

CONCLUSION:

GSC has faithfully followed the legal advice provided by your office on these very complex issues. The position GSC has taken is controversial among the industry representatives.

The Honorable John Cornyn
April 3, 2000
Page 8

The amount of money being billed and unpaid is large and growing monthly. Your earliest attention to this request for opinion would be greatly appreciated. GSC stands ready to provide you with supplemental information as you may need or desire. Please direct operational inquiries to Stephen T. Parker, Director, Telecommunications Services Division at 463-3471. In-house legal advice is provided by Cynthia J. Hill, who may be reached at 463-6422.

Respectfully submitted,


James R. Muse
Executive Director

JM:CJH:rrb

Enclosures



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VIA HAND DELIVERY

FILE # RQ-0214-JC

April 18, 2000

I.D. # 41373

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APR 18 2000

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

**OFFICE OF THE ATTORNEY GENERAL
EXECUTIVE ADMINISTRATION**

RE: Amendment to Request for Opinion No. 0214- JC, related to assessment and collection of certain telecommunications fees from the General Services Commission

Dear General Cornyn:

On behalf of the General Services Commission, I am writing to amend the Opinion Request referenced above.

Opinion Request No. 0214 – JC seeks the guidance of your office with regard to the state’s liability to pay a variety of telecommunications fees, which appear on the billings of vendors of telecommunications services to the state of Texas. At the time of the original opinion request, the General Services Commission did not include within the scope of the opinion a charge called the “Payphone User Charge”. In order to receive the most comprehensive advice on the topic of liability for telecommunications charges, the Commission now respectfully seeks an opinion on whether this charge is payable by state agencies.

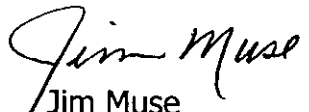
The charge is authorized in section 276 of the Federal Telecommunications Act to ensure fair compensation to payphone providers for all 800 subscriber calls originating from their payphones. The FCC has established a rate of \$0.24 per call. The payphone providers bill the IXC’s, who in turn are billing their long distance customers. The rate was established during the life of the TEX-AN III contracts, which are fixed fee contracts. The Commission has not been paying these charges to date. Attachment A to the original Opinion Request, pages 11 – 12, is a discussion of the PAR position with regard to this issue.

General Cornyn
April 18, 2000
Page Two

The additional question for your consideration is this: **Is the "Payphone User Charge" properly assessed against and due from state agencies under any of the theories outlined on pages 5 – 6 of the original Opinion Request?**

The General Services Commission looks forward to your opinion with regard to these matters.

Respectfully submitted,


Jim Muse
Executive Director

JRM:cjh